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What's So Bad About Bush v. Gore? An Essay on Our Unsettled Election

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I. INTRODUCTION

I voted for Al Gore. Although I was not an enthusiastic supporter, I thought that he was better than the available alternatives. I was sorry to see him lose.

On the simplest level, then, what's bad about *Bush v. Gore* is that it put in place an administration that is bad for the country—indeed, disastrously bad in my view. Of course, this is not what people usually mean when they claim that the case was wrongly decided. But it turns out that it is harder than one might suppose to figure out what else is bad about *Bush v. Gore*.

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The problem is thrown into sharp relief by focusing on an embarrassing and obvious, if too little remarked upon, feature of the election debacle. Almost without exception, Bush supporters think that the decision was not bad at all. They believe that the recount procedures authorized by the Florida Supreme Court were unfair and illegal and that the United States Supreme Court’s decision halting the recount was wise. Gore supporters, on the

2. For a sampling of conservative legal academics who expressed this view, see Nelson Lund, An Act of Courage, THE WEEKLY STANDARD at 19 (DEC. 25, 2000) (arguing that “Rather than take the easy way out, [the majority] courageously accepted their ‘unsought responsibility’ to require that the Florida court comply with the Constitution”); CHARLES FRIED, AN UNREASONABLE REACTION TO A REASONABLE DECISION IN BUSH v. GORE: THE QUESTION OF LEGITIMACY (Bruce A. Ackerman ed., 2001) (forthcoming) (hereinafter Legitimacy) (arguing that case was correctly decided, although reasonable people might differ about its correctness); Gary C. Leedes, The Presidential Election Case: Remembering Safe Harbor Day, 35 U. RICH. L. REV. 237, 245 (2001) (calling the majority opinion “a fair and balanced assessment of the applicable law”); Richard A. Epstein, “In such Manner as the Legislature Thereof May Direct”: The Outcome in Bush v. Gore Defended, 68 U. CHI. L. REV. 613, 634 (2001) (arguing that “there is ample reason to believe . . . that the Florida Supreme Court adopted, under the guise of interpretation, a scheme for conducting election challenges that deviates markedly from that which the Florida legislature had set out in its statutes”); Richard A. Posner, Bush v. Gore: Prolegomenon to an Assessment, 68 U. CHI. L. REV. 719, 719 (2001) (arguing that there was “no basis in Florida law” for a recount); John C. Yoo, In Defense of the Court’s Legitimacy, 68 U. CHI. L. REV. 775, 776 (2001) (“Rather than acting hypocritically and lawlessly, the Court’s decision to bring the Florida election dispute to a timely, and final, end not only restored stability to the political system but was also consistent with the institutional role the Court has shaped for itself over the last decade.”). For some admirable, if partial, counterexamples of conservative scholars who expressed reservations about the decision, see Steven G. Calabresi, A Political Question (forthcoming) (arguing that the Supreme Court correctly decided the merits, but that the Court should have found that the case posed a political question); Michael W. McConnell, Two-and-a-Half Cheers for Bush v. Gore, 68 U.CHI. L. REV. 657, 660 (2001) (arguing that the Court’s “Fourteenth Amendment holding . . . was both sensible and persuasive,” but that “the decision to halt the recount was incorrect as a matter of law (though the question is closer than the Court’s critics like to think.”).
other hand, are similarly unanimous in believing that the Florida recount was eminently justified and that the Supreme Court’s decision was an outrage.3

Yet the actual issues in dispute, as opposed to the upshot of their resolution, had no obvious ideological valence.4 There is no priori reason why Republicans should in general oppose manual recounts, while Democrats should in general favor them. The

3. For liberal academics taking this view, see Michael Klarman, Bush v. Gore Through the Lens of Constitutional History, 89 CAL. L. REV. 1721, 1725 (2001) ("[T]he Bush outcome was a product of ... partisan political preference for George W. Bush, which ... may have been enhanced by [a] desire to retire from the court while a Republican President is in office ... "); Jed Rubenfeld, Not as Bad as Plessy. Worse, in LEGITIMACY, supra note 2 (forthcoming) ("The breathtaking indefensibility of Bush v. Gore is of an order different from the deep ideological clashes surrounding cases like Plessy and Roe."); Owen Fiss, The Fallibility of Reason, in LEGITIMACY, supra note 2 (forthcoming) ("[The Court's] equal protection holding has no constitutional warrant."); Margaret Jane Radin, Can the Rule of Law Survive Bush v. Gore?, in LEGITIMACY, supra note 2 (forthcoming) ("instead of deciding the case in accordance with pre-existing legal principles, fairly interpreted or even stretched if need be, five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican Party "); David A. Strauss, Bush v. Gore: What Were They Thinking?, 68 U. CHI. L. REV. 737, 737 (2001) ("[S]everal members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore, at least if that ruling significantly enhanced the Vice President's chances of winning the election."); Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 YALE L. J. 1407, 1434 (2001) ("There simply was no lawless court for the U.S. Supreme Court to counteract, just a court that construed its own local law in a way that five Justices did not like."); Cass R. Sunstein, Order without Law, 68 U. CHI. L. REV. 757, 758 (2001) ("[T]he Court's rationale was not only exceedingly ambitious but also embarrassingly weak."). For a notable counterexample of a liberal who argued for a legal outcome that would not have favored Gore, see Neal Katyal, Florida's Election Day Vote Could Be Irrelevant, FindLaw's Legal Commentary, <http://writ.news.findlaw.com/commentary/20001109_katyal.html> (visited Nov. 5, 2001) (arguing that "the Constitution and Congress . . . have given the Florida legislature the task of redressing problems in this hotly-contested election.").

4. I argue below that the decision in fact has a political valence which is somewhat less than obvious. See infra pp. 1013-18.
difference between “hanging” and “pregnant” chads does not connect in any straightforward way with the great issues of our time that divide liberals from conservatives. Indeed, partisans on both sides were required to reverse some of their more accustomed positions—with regard to federalism concerns, judicial “activism,” and the scope of equal protection review, for example—in order to reach the outcomes that coincided with political advantage. 5

Advocates of “neutral principles” often decry the willingness of judges to sacrifice legal for ideological virtue. The argument surrounding the 2000 election indicates that things may be much worse than these advocates suppose. The election debacle suggests an inability to maintain even ideological consistency. Moreover, this contagion of ideological malleability extended far beyond the realm of official advocates and spokespeople for both sides, where tendentious argument is widely assumed to be a distasteful but necessary professional obligation. It also claimed virtually all of the politicians and media commentators who debated the matter endlessly on television and Op Ed pages. Perhaps more surprisingly, many “talking heads” from the academy, who often present themselves as above partisan bickering, were infected. There are some who believe that the malady tainted the decisions of the Florida Supreme Court, whose Democratic majority handed Gore his greatest victories. And, as I shall argue in some detail below, the United States Supreme Court itself fell victim when its contentious five-four decision, precisely tracking the Court’s liberal-conservative fault line, made George W. Bush the President of the United States.

What are we to make of this much-ignored elephant—or should I say donkey?—in the parlor? Are we to think it no more than an astounding coincidence that through disinterested ratiocination, liberals came to one set of conclusions that happened to meet their

5. See Frank I. Michelman, Suspicion, or the New Prince, 68 U. CHI. L. REV. 679, 683 (2001) (arguing that “[t]aking one by one the issues of law that crucially divided the majority from the dissenters in Bush v. Gore, it seems that ideological alignment either doesn’t predict the vote at all or that it predicts the opposite of the votes cast by conservatives”).
political needs, while conservatives came to another set of
conclusions that happened to meet theirs? I, for one, am not quite
cynical enough to think that all the participants in the debates and
judicial decisions surrounding the election consciously misstated
their true beliefs for the sake of political advantage. But neither am
I ingenuous enough to take seriously the "mere coincidence"
explanation. Eliminating these possibilities leaves us with the
disturbing hypothesis that many of our beliefs—including those
expressed in this essay—are the unconscious product of something
other than the reasoned arguments offered on their behalf.\textsuperscript{6} If this
hypothesis is correct, then our very lack of consciousness about the
process, as well as our ability to mask our predispositions with
reasoned argument, raises disturbing questions about theories of
deliberative democracy.\textsuperscript{7}

In this essay, I respond to these worries with the
counterintuitive suggestion that unconsciously tendentious
constitutional argument has the potential to facilitate deliberation.
In order to make sense of this claim, we need to understand
something about the fantasy world inhabited by many academic
constitutional theorists and about what happened to that world on
the evening of December 12, 2000.

\textsuperscript{6} See Michael C. Dorf & Samuel Issacharoff, \textit{Can Process Theory Constrain

Undoubtedly, no academic saw him or herself as claiming the academic
bully pulpit or trading on academic credentials for purely partisan aims.
But as psychological studies going back several decades have shown,
partisans of different camps will integrate identical information in
clearly divergent ways. All too often identical information is analyzed
in distinctly self-interested ways by parties claiming in good faith to be
examining the situation objectively. Anyone too busy to read this
literature need only think about the racially polarized views of the O.J.
Simpson case or, for that matter, about how throughout the Florida
controversy, in viewing identical events, Republicans and Democrats
were each convinced that partisans of the other party were trying to
steal the election.

\textit{Id.}

\textsuperscript{7} For a useful discussion, see Jon Elster, \textit{Alchemy of the Mind:
Transmutation and Misrepresentation}, 3 LEGAL THEORY 133 (1997).
Perhaps it reveals an unfortunate parochialism to focus on the difficulties of legal academics who specialize in constitutional law. Still, their confusion is of some importance because they articulate the “Official Story” of constitutionalism. Even if, as I shall argue below, that story bears little relationship to reality, it is nonetheless of some moment when the story begins to fall apart.

According to the Official Story, constitutional law settles otherwise destabilizing political disputes through reference to a meta-agreement. People disagree about ordinary things, but they agree (or at least ought to agree) about the big things. This agreement, whether embodied in the constitutional text, or in doctrine and tradition that has glossed it, prevents the community from coming unraveled. Sometimes the agreement is substantive, as for example, when the Constitution directly prohibits certain outcomes like laws depriving people of property without just compensation. More often it is procedural, as when the Constitution allocates decision making authority to a branch of the federal government, the states, or the private sphere. Whatever its source, we are supposedly able to reach political settlements by reasoning back down from the meta-agreement so as to settle contested political issues.

For this story to make sense, four preconditions must be satisfied. First, there must be agreement on the metalevel. Second, there must be a discourse capable of mediating between the contested political level and the uncontroversial metalevel. Third, there must be an institution capable of engaging in the discourse. And finally, the institution and the discourse it utilizes must be “neutral” in the sense that they must not themselves be caught up in the very political controversy that they are supposed to settle. Conventionally, it is thought that the Constitution provides the area of agreement, that an arcane and specialized form of reasoning—legal reasoning—provides the mediating discourse, that the Supreme Court is uniquely capable of engaging in this discourse, and that both the Court and the discourse are free from political entanglements. Hence, the widely held view, apparently shared by at least some of the Justices, that only the Supreme Court
could settle our unsettled election. Hence, the belief that the Court’s legitimacy rests upon its use of legal reasoning that is neutral and apolitical. And hence the crisis of conscience when the Court rendered a decision that struck many as unreasoned and blatantly political.  

Not surprisingly, people whose professional lives are invested in the truth of the Official Story have reacted defensively to this assault upon it. The defensive maneuvers fall into three broad categories. First, a few brave souls (almost invariably conservatives and Bush supporters) have undertaken the unenviable task of attempting to demonstrate the legal respectability of the decision. Second, others (mostly moderate Gore supporters) have been skeptical or agnostic about the decision itself, but have nonetheless taken its reasoning seriously. These commentators have suggested interesting avenues of future doctrinal development that the decision supposedly opens. Third, the vast majority of academics (almost invariably liberals and Gore supporters) have reacted with fury at the decision. They claim that it is grossly political and that it therefore foolishly and needlessly squanders the Court’s credibility which, as noted above, rests on its apolitical neutrality. Each of these views is profoundly mistaken. Part One of this

8. See Balkin, supra note 3, at 1407 (“It is no secret that the Supreme Court’s decision . . . has shaken the faith of many legal academics in the Supreme Court and in the system of judicial review.”). Id. at 1408-09 n.3 (citing sources).

9. See sources supra note 2.

10. See, e.g., Samuel Issacharoff, The Court’s Legacy for Voting Rights, N.Y. TIMES, Dec. 14, 2000, at A39 (arguing that the greater import of this case may be a surprising expansion of voting rights); Sunstein, supra note 3, at 758 (arguing that “[o]n its face, [the Court’s] holding has the potential to create the most expansive, and perhaps sensible, protection for voting rights since the Court’s one-person, one-vote decisions of mid-century”).

11. Shortly after the decision, 673 law professors from 137 law schools signed a statement accusing the Court of “suppress[ing] the facts and performing the job of propagandists, not judges.” N. Y. TIMES, Jan. 13, 2001, at A7. For an account of how the statement came about, see Radin, supra note 3 (“The statement was circulated rather haphazardly through email by an accidental activist (me) pushed over the edge by a sense of outrage.”).

12. See supra note 3.
essay explains why. The Court's decision does not pass the "straight face" test when judged according to the aspirations for legal analysis required to make the Official Story plausible. There is no reason to take the decision seriously, and it portends precisely nothing with regard to future doctrinal developments. But it is also wrong to condemn the decision because it is political. There simply was no neutral, apolitical way in which the case could have been decided, as the dissenting justices themselves unwittingly demonstrate.

Nor is there any evidence to suggest that the Court has squandered its credibility or that the community is about to come unstuck because the Court's partisanship has been unmasked. In his dissenting opinion, Justice Stevens lamented the fact that the decision "lend[s] credence to the most cynical appraisal of the work of judges throughout the land."13 Similarly, Justice Breyer darkly warned of a "self-inflicted wound" that might "harm not just the Court, but the Nation."14 Yet despite these dire predictions, life seems to have gone on pretty much as before. In the wake of the Court's decision, there were no tanks in the streets, no raging mobs at the barricades. Public opinion polls suggested that, even though many people (correctly) understood that Bush v. Gore was political,15 the Court paid no price for the decision and may have even benefitted from it.16

14. Id. at 158 (Breyer, J., dissenting).
15. For example, a Gallup poll in the immediate wake of the election found that 51% of those polled agreed with the statement that the U.S. Supreme Court justices were influenced by their personal political views when deciding the case. See Jeffrey M. Jones, Public Willing to Accept Supreme Court as Final Arbiter of Election Dispute, GALLUP NEWS SERVICE, Dec. 12, 2000, at <http://www.gallup.com/poll/releases/pr001212.asp> (visited Nov. 5, 2001). A Newsweek poll conducted by Princeton Research Associates found that 65% of those surveyed thought that politics or partisanship played a major role or somewhat of a role in the Court's decision. See <http://www.pollingreport.com/wh2post.htm> (visited Nov. 5, 2001).
16. A variety of polls found that the Court's standing with the American public changed little after its decision. See, e.g., Charles Lane, Laying Down the Law, Justices Ruled with Confidence, WASH. POST, July 1, 2001, at A6 (finding that [p]ublic approval of the Supreme Court, as measured by polls, was not
All of which suggests that what's gone bad is not the Supreme Court, but instead the Official Story. How is it that the Supreme Court was able to play this role once stripped of the protective covering of legality that mainstream academics have insisted is essential to its legitimacy?

Three possibilities suggest themselves. First, the Court may have prevailed through deception. Perhaps the decision is parasitic on the reputation for legality or integrity that the Court has built up over the years or on the pseudo-religious imagery that it uses to obscure its exercise of power. I do not discount this possibility. The Court's decision had the external trappings of legality, even though it lacked the requisite substance. If people were fooled by these trappings, and if the Court emerges from Bush v. Gore confident in its ability to fool, then the decision will have been an unmitigated disaster.

But it is far too soon to assume that the Court has in fact been successful. Polling data suggests that it did not escape the attention of the American people that the five most conservative justices

dented by the election case and that 72% of those polled expressed a favorable view of the Court; Jeffrey M. Jones, Opinion of U.S. Supreme Court Has Become More Politicized, GALLUP NEWS SERVICE, Jan. 3, 2001, at <http://www.gallup.com/poll/releases/pr010103b.asp> (visited Nov. 5, 2001) (finding that after election 49% of Americans had "either a great deal or quite a lot" of confidence in the U.S. Supreme Court, compared with 47% in a poll taken before the election). Most Americans seem to have been grateful to the Court for ending the controversy. See, e.g., David W. Moore, Eight in Ten Americans to Accept Bush as "Legitimate"President, GALLUP NEWS SERVICE, Dec. 14, 2000, at <http://www.gallup.com/poll/releases/pr001214.asp> (visited Nov. 5, 2001) (finding that 52% of those surveyed agreed with the Court's decision to stop the recount). On the other hand, there is some evidence that the overall statistics mask an increased political polarization about the Court. See, e.g., Herbert M. Kritzer, Into the Election Waters: The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court, 85 JUDICATURE 32 (2001) (finding that the overall approval of the Court may have been unchanged because of cross-cutting shifts, with those approving of the Court's decision increasing their support and those disapproving the decision decreasing their support; Jones, supra (finding that "surface stability [concerning American's opinions about the Supreme Court] masked significant change in the way Republicans and Democrats view [the Court]").
favored the outcome, while their four more liberal colleagues opposed it.\textsuperscript{17} If there was any deception at all, it was likely a kind of self-deception—a willful overlooking of facts that were there for all to see.

A second possibility is that the Supreme Court provided a useful focal point even though its decision was correctly perceived to be partisan rather than legal. Although the country was sharply divided about the election's outcome, there was near unanimity in the desire to get the matter over with.\textsuperscript{18} Even if the Supreme Court was acting nonlegally, it was at least able to settle the issue in a peaceful and orderly fashion.

The trouble with this account is that it fails to explain why people were prepared to endorse settlement by the Supreme Court, rather than another institution. After all, the federal judiciary was not the only possible focal point. The 2000 election might have been settled by the Florida Supreme Court, by the Florida Legislature, or, most plausibly, by the United States Congress.\textsuperscript{19} Yet

\textsuperscript{17} See supra note 15.

\textsuperscript{18} Within a week of the Court's decision, eight in ten Americans were saying that they accepted Bush as the legitimate President. See Moore, supra note 16, at <http://www.gallup.com/poll/releases/pr001214.asp>. The same poll showed that although 42\% of Americans agreed with the Supreme Court's decision, 66\% said that the decision had no effect on their view of the court. Id.

\textsuperscript{19} Some commentators have asserted that if the Court had not intervened, the controversy would have spun out of control. See Richard A. Posner, Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation, 2000 SUP. CT. REV. 1, 45-46 (2000). Cf. Sunstein, supra note 3, at 769 (speculating that a genuine constitutional crisis might have arisen and that although "the nation would have survived, . . . things would have gotten very messy"). Id. Of course, there is no way to be certain what would have happened, but I believe these claims are hyperbolic. The disputed election of 1800 was resolved without judicial intervention even though the country, at that point, had no precedent for a peaceful transfer of power from one party to another and the outgoing administration had incarcerated many of its political opponents. Similarly, the election of 1876 was settled peaceably although the country was still sharply divided by the Civil War, which had ended only eleven years earlier. No doubt, a congressional struggle over the presidency in these calmer times would nonetheless have been bitter and divisive, but I have little doubt that it eventually would have been resolved without resort to force.
for reasons that the Official Story leaves entirely mysterious, the country seemed quite satisfied—indeed, grateful—that nine unelected, politically motivated justices in Washington D.C. settled the matter.

In Part Two of this essay, I explore a third possibility—one that turns the Official Story inside out. There is a chance that Bush v. Gore may begin a process of laying a more attractive and realistic foundation for constitutionalism than the Official Story provides. The very fact that the Court is not politically independent and that it could not settle the matter in a disinterested, apolitical fashion might set us down a path toward a more mature version of constitutional law. The politically tendentious character of the Court's reasoning demonstrates that our core constitutional commitments are subject to political manipulation. Ironically, public understanding of this malleability makes our politics more, rather than less, inclusive. It does so by suggesting that constitutional law, properly understood, does not settle disputes by ruling certain substantive positions out-of-bounds. Thus, losers in our political disputes need not believe that they are outside the boundaries of respectable argument, defined by an exclusionary constitution. Instead, they may come to understand that they too can utilize the magnificently empty rhetoric of constitutional law to achieve their ends. The upshot is continuing and unresolved struggle over the meaning of American democracy. It is this possibility of struggle, rather than a legally definitive resolution, that encourages people with incompatible political views to remain in an ongoing and peaceful dialogue with each other.20

20. For a more general defense of the theoretical position I articulate here, see LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW ARGUMENT FOR CONSTITUTIONALISM AND JUDICIAL REVIEW (2001). This essay is intended as a case study, applying the position I defend in my book-length treatment to a particularly interesting set of facts.
II. THE DECISION

A. Prologue: How the Supreme Court Ran Out the Clock

Any serious discussion of the Supreme Court's decision in *Bush v. Gore* must begin by facing a difficult dilemma. Even the most vigorous attack on the Court's reasoning serves in some measure to normalize the decision. Such an attack implicitly assumes that the Court advanced its reasons in good faith and that its reasoning merits a good faith response. But there is little reason for affording the Court the benefit of this presumption. Any effort to engage with the opinion therefore takes it more seriously than it deserves to be taken. The best evidence for the Court's lack of seriousness derives from its apparently intentional effort to create the very problems that it chastised the state court for failing to resolve. To see how the justices laid a trap for the hapless and unwitting Florida court, we must examine the procedural and temporal context for its holding.

The majority handed George W. Bush the presidency by relying upon the interaction of two legal arguments. First, the Court held that a state wide, manual recount administered under a broad standard requiring discernment of the "intent of the voter" would lead to "arbitrary and disparate" treatment in violation of the equal protection clause. 21 Standing alone, this holding might have required no more than a remand to the Florida Supreme Court for it to fashion uniform substandards to guide decisionmaking. The Court's second holding prevented this outcome. In two short paragraphs at the conclusion of its opinion, the Court found that the Florida Supreme Court had said that the Florida legislature intended the state's election laws to mandate compliance with the "safe harbor" provision contained in 3 U.S.C. § 5. 22 This provision, 23 in turn, had the effect of establishing a December 12

22. See id. at 110-11.
23. 3 U.S.C. § 5 (1994) which provides as follows:
If any State shall have provided . . . for its final determination of any
deadline for the recount’s completion.\textsuperscript{24} By the time the Court rendered its decision, this deadline was only hours away. Because “any recount seeking to meet [this deadline would] be unconstitutional,”\textsuperscript{25} the Court reversed the judgment ordering the recount to proceed.

Assuming a December 12 deadline existed and that a more specific, uniform standard was constitutionally mandated, then the Court correctly held that a recount was impossible by the time it rendered its decision. I challenge these assumptions below. However, even if they are accepted, we need to reckon with the Court’s own responsibility for this unfortunate state of affairs. The Florida Court might have fashioned a uniform standard for a manual recount when ample time still remained to complete the tabulation. However, the state court failed to do so for three reasons, each of which can be laid at the doorstep of the United States Supreme Court.\textsuperscript{26}

First, it is important to understand that the Court’s initial 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 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.

\textsuperscript{24} See Bush, 531 U.S. at 110. December 18 had been established as the date for counting the electoral votes; December 12 had been established for taking advantage of this provision.

\textsuperscript{25} Id.

\textsuperscript{26} It must be noted that a fourth reason is attributable to the Florida Supreme Court. Had the Florida Supreme Court not extended the protest phase in its first decision, \textit{see} Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1226 (Fla. 2000)), there would have been more time to complete the contest phase. In light of the Florida Supreme Court’s subsequent decision mandating de novo review of the “protest” result, \textit{see} Gore v. Harris, 772 So. 2d 1243 (Fla. 2000)), its decision extending this phase, in the teeth of clear statutory language establishing a deadline for completion, is difficult to defend. \textit{But see infra} note 115.
encounter with the equal protection argument came eight days before its ultimate decision. At an earlier stage in the process, the Florida Supreme Court had extended the deadline for completion of the “protest” phase of the recount, and canvassing boards were busily recounting ballots pursuant to this order. George W. Bush filed a petition for a writ of certiorari in the United States Supreme Court challenging this decision. In his petition, Bush raised three issues for review. The first two concerned the legality of the state court’s extension of the statutory deadline for completing the “protest” phase. Bush argued that this decision constituted a judicial rewriting of Florida’s statutory scheme, thereby violating the Article II requirement that the method for choosing electors be determined by the state legislature. Moreover, Bush contended that the Florida Court’s interpretation of its election laws violated 3 U.S.C. § 5, which provided a “safe harbor” for states whose electors were challenged only if the procedures for challenge were in place before election day.

Although both of these questions hold some abstract interest, neither one had much importance by the time the Court decided the case. The court-imposed deadline for the protest was fast approaching and, whether or not the extension was lawful, it was clear that the ultimate resolution of the election would come in the “contest” phase. Nonetheless, to the surprise of many, the Court addressed these questions.

In contrast, the third question raised by the Bush petition pertained to the upcoming “contest” phase as well as the soon-to-be completed “protest” phase. Bush asked the Court to decide

27. See Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1235 (Fla. 2000).
28. See Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, petition for cert. filed, 69 U.S.L.W. 3362 (U.S. Nov. 24, 2000) (No. 00-836). The petition can be found in the U.S. Supreme Court's Records & Briefs, Bush v. Palm Beach County Canvassing Bd., Petition for Writ of Certiorari (No. 00-836).
29. See U.S. Supreme Court Records & Briefs, supra note 28, at i.
30. See id.
31. See id.
"Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses or the First Amendment." In this part of the petition, Bush outlined many of the same complaints about the absence of a uniform standard that the Court ultimately found meritorious eight days later. But at the point when something might actually have been done about the problem, the Court was uninterested in the argument. Although the Court granted certiorari to hear the two questions that barely mattered, it conspicuously refused to grant certiorari to hear the third question.

In light of the determinate weight the Court ultimately gave to this argument, its failure to grant review at this earlier stage is troubling. To be sure, the intersection between facts and law was not identical in the two cases. The equal protection problems posed by a state wide recount were somewhat different from those posed by recounts in selective counties. The fact remains, that, at the very least, the underlying argument that the Court finally accepted would also have brought into question the procedures Bush challenged in his initial petition. If the Court had granted that petition and dealt with these problems at an earlier stage, the Florida Supreme Court could easily have imposed a uniform standard and would have had ample time to complete the recount during the contest phase.

33. U.S. Supreme Court Records & Briefs, supra note 28, at i.
34. See id. at 21-23.
35. See Palm Beach County Canvassing Bd., 531 U.S. at 70, 104 (2000).
36. I do not mean to suggest that the Court deliberately delayed consideration of this question so as to prevent the state supreme court from correcting the problem before the putative December 12 deadline. Still, it is troubling that the Court eventually found dispositive an argument that, a week earlier, it had not even considered worthy of review. The most cynical view of this chronology is that the Court latched onto an argument which the justices themselves thought unworthy of serious consideration, in a desperate attempt to find some ground on which to reverse the Florida court. A less cynical version would attribute incompetence, rather than malevolence, to the justices. Even on
Of course, even in the absence of a United States Supreme Court holding, the Florida Supreme Court might have adopted a uniform standard on its own. However, its failure to do so is also directly attributable to the United States Supreme Court's earlier actions. As already noted, in *Bush v. Palm Beach County Canvassing Board*, the United States Supreme Court granted certiorari to decide whether the Florida court had improperly modified the statutory electoral scheme. Although it failed to resolve this question definitively, the Court vacated the state court's judgment and remanded the case with directions to the Florida court to clarify the basis for its decision.

This action strongly implied that if the state court had changed the statutory scheme, the change would be unlawful. Not surprisingly, then, the Florida court went to great lengths to show that it had taken the hint. In its opinion after the remand, it sought to demonstrate that its original decision constituted no more than an interpretation of an ambiguous statute. More to the point, when the question arose as to the appropriate standard for evaluating ballots during the contest phase, the Florida court was careful to confine itself to the statutory language, which invoked the general "intent of the voter" standard. Given what had come before, the Florida court had good reason to fear that if it attempted to articulate a more specific standard, the United States Supreme Court would have found a violation of Article II. Having bent over backward to avoid this problem, the state court found itself chastised instead for its failure to embroider on the statutory language so as to make it more specific.

Of course, it is theoretically possible that the constitutional

the less cynical view, however, the fact remains that had the Court thought more clearly at the beginning of the process about which issues mattered and which did not, the time problem that ultimately doomed the recount might never have arisen.

38. See id. at 78.
39. See Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1282-89 (Fla. 2000).
40. See Gore v. Harris, 772 So. 2d 1243, 1257, 1262 (Fla. 2000).
problem that ultimately defeated the recount effort was created by the Florida legislature, rather than the Florida court. One might argue that the legislature violated the Equal Protection Clause when it failed to articulate a more specific standard, and that Article II left the Florida court powerless to correct this defect. On this view, the recount was doomed regardless of the state court's actions. The trouble with this approach, though, is that it cannot be reconciled with the United States Supreme Court's opinion. The Court did not hold that the *any* recount conducted pursuant to the Florida statutory scheme was necessarily illegal. Instead, it held that there was insufficient time for the state court to formulate and implement a more specific standard. Yet time ran out only because the very justices who criticized the state court had discouraged it from formulating such a standard when there was still time to implement it.

There is still a third respect in which the Court's earlier actions created the very problem that it found impossible to remedy. Time ran out on the Florida recount in no small measure because the United States Supreme Court *itself* decided to run out the clock. With the state wide recount already underway and significant progress being made, the Court, over a strong dissent by the four justices who ultimately dissented from its judgment on the merits, entered a stay that brought the recount to an abrupt halt. No further progress was made during the agonizing three days it took the Court to hear argument and decide the case.

Had the recount been allowed to proceed while the matter was under review, the difficulties that the Court ultimately discerned might never have materialized. The circuit judge, charged by the Florida Supreme Court with overseeing the recount, might have resolved disputes under a uniform standard. Even if he failed to do so, the canvassing boards conducting the recount might have

41. See *Bush*, 531 U.S. at 110.
42. See *id*.
44. The Florida court's remand order gave the circuit court sweeping powers to administer the statewide recount. See *Gore*, 772 So. 2d at 1262.
determined the number of ballots falling into various categories. Had the United States Supreme Court at that point decided that a uniform standard was constitutionally compelled, the state court could simply have imposed the standard on the already counted ballots.

The Supreme Court offered no reason for the entry of its stay, and it is hard to imagine what threatened, irreparable injury could have justified its action. In a concurring opinion, Justice Scalia offered two suggestions: The counting of votes, he claimed, threatened irreparable injury "by casting a cloud upon what [Bush] claims to be the legitimacy of his election,"45 and by "prevent[ing] an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate."46

If the full Court acted for the reasons Justice Scalia specified, then its decision was plainly wrong. The "cloud" theory ignores the obvious point that for irreparable injury to justify a stay, the injury must stem from the legal wrongdoing alleged by the petitioner. But at no stage in the litigation did anyone suggest a theory under which the mere tabulation of ballots (as opposed to the certification of outcomes) violated the law. Thus, even if counting the ballots threw doubt on the legitimacy of the election, and even if it were appropriate for the Court to protect against public perceptions brought about by illegal conduct, the Court plainly had no business enjoining entirely legal conduct that might bring the election's outcome into disrepute. To claim otherwise would be to suggest that the Court should have intervened to stop Florida's cooperation with the post-election efforts by various news organizations to tabulate the ballots so that the public could judge for itself the election's legitimacy.47

46. Id.
47. Such a holding is implausible even if we put to one side the First Amendment right of newspapers to conduct such a recount. Does anyone suppose that, but for the First Amendment, the Constitution could be read to
To be sure, there might have been a basis for Supreme Court intervention if the putatively illegal recount endangered a subsequent, legally required recount by "degrading" the ballots. But there was never much chance of a subsequent recount. By December 9, when it issued the stay, the Court must have known that there would be no such recount prior to the supposed December 12 deadline. Even if there were no deadline, a new recount would not have been necessary so long as the circuit judge had the opportunity to impose a uniform standard on the ballots that had been categorized by the canvassing boards. And even if there were a new recount, the extent to which ballot degradation would have threatened its integrity is, at best, debatable. Against these speculative risks was the much more likely possibility (it turned out to be a certainty) that the recount would be altogether frustrated not by ballot degradation, but by the Court's own stay. It is surely more than mere hindsight bias to recognize that this second risk greatly outweighed the first. Indeed, Justice Stevens contemporaneously predicted precisely this outcome in his dissent from the granting of the stay.49

B. The Supreme Court's Frantic Search for a Constitutional Problem

As the preceding discussion demonstrates, the Supreme Court's own prior conduct manufactured whatever constitutional problem it set about to resolve in its December 12 opinion. This fact, in turn, creates the suspicion that the Court was engaged in an elaborate game of "gotcha" with the Florida judiciary and reenforces the belief that its ultimate rationale for ending the recount should not be taken seriously. Still, background rules of civility in public debate require that we at least begin by presuming the good faith of those with whom we disagree. In the next Part, I will suggest that this requirement, applied to these facts, produces

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48. See, e.g., Canvassing Board Segregates 'Under Votes,' MIAMI HERALD, Nov. 20, 2000 (debating whether recounting degrades ballots).
49. See Bush, 531 U.S. at 1046. (Stevens, J., dissenting).
a positive payoff. There is a way to understand the Court's conduct as motivated by defensible concerns honestly held. First, however, it is important to establish that the opinions the Justices in the majority produced do nothing to advance that understanding. What these opinions instead demonstrate is that despite the Court's own best efforts to create a constitutional problem, when it finally turned to the task of solving the problem, it found nothing that plausibly required its intervention.

1. The Mythical Equal Protection Problem

The Court's per curiam opinion holds that the recount procedure ordered by the Florida Supreme Court violated the Equal Protection Clause because it did "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right [to vote]." To be sure, the Florida Supreme Court had mandated an "intent of the voter" test to judge the validity of ballots. But while this test was "unobjectionable as an abstract proposition and a starting principle," it was constitutionally inadequate without "specific standards to ensure its equal application." The Court identified several examples of potential arbitrariness that might arise without a more specific rule. The test for accepting and rejecting contested ballots "might vary not only from county to county but indeed within a single county from one recount team to another." Moreover, in some counties, only undervotes were recounted, while in others, the recount extended to all ballots. And in counties where only undervotes were recounted, the system discriminated against individuals who had "mark[ed] two candidates in a way discernable by the machine . . . even if a manual examination of the ballot would reveal the

51. See Gore, 772 So. 2d at 1243.
52. Bush, 531 U.S. at 106.
53. Id.
54. See id. at 107.
requisite indicia of intent." 55

As I have already argued, many of these anomalies might have been resolved if the Supreme Court had only allowed the recount procedure to run its course and the circuit judge to make ultimate findings that might have regularized the process. Suppose we assume arguendo that no such regularization would have occurred. Does the kind of disparate treatment of ballots that the Court describes violate the Equal Protection Clause?

A striking feature of the Court's opinion is its failure to utilize any of the normal machinery of equal protection analysis. There is no discussion of the relevant classes, no articulation of the appropriate level of review, no effort to determine whether a "purpose" or "effects" test is appropriate, no weighing of the countervailing state interest supporting the classification. One must sympathize with the justices, who had to produce their opinions under extraordinary time pressure. Moreover, even when opinions can be written at a more leisurely pace, there are circumstances where analytical casualness can be a virtue. In cases where the Court wishes to appeal to widely recognized moral truths, hypertechnical legal analysis can sometimes be more distracting than illuminating. 56 But on this occasion, something like the opposite problem arises. Although time pressure no doubt made it exceedingly difficult for the Court to come to grips with complex analytical problems, the fact remains that its failure to think

55. Id. at 108.

56. Although reasonable people can certainly disagree, I believe that Romer v. Evans, 517 U.S. 620 (1996), was such a case. In Romer, the Court appealed to "transactions and endeavors that constitute ordinary civic life in a free society," and "our constitutional tradition" to invalidate a provision of the Colorado constitution that prohibited the state or any of its subdivisions from protecting homosexuals against claims of discrimination. Id. at 631, 633. For my somewhat ambivalent defense of the decision, see Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 Sup. Ct. Rev. 67 (1996). That defense was explicitly premised upon a contestable view about the moral status of homosexuality. The defensibility of the analytic casualness of the Bush v. Gore majority is similarly dependent upon contestable political and moral judgments. See infra pp. 1013-18.
carefully about doctrinal structure led it to miss the underlying moral questions it needed to examine.

Consider first the failure to identify the disadvantaged class. Defining such a class turns out to be quite difficult. Perhaps the class consists of voters whose votes were not counted but would have been had canvassing boards utilized a relatively more forgiving standard. For simplicity, I will call voters whose intent was controversial “dimplers.” It might be supposed that dimplers in precincts using the stringent standard were treated unequally when compared to dimplers in precincts utilizing a forgiving standard. Whereas dimplers from forgiving precincts were lumped together with nondimplers, dimplers in stringent precincts were not.

But this definition of the relevant classes turns out to be too imprecise. The dimplers located in the two kinds of precincts can be subdivided into two other, crosscutting classes: Some dimplers meant to cast ballots for President, while others did not. I will call these two groups, “voters” and “abstainers,” respectively. True, dimplers from stringent precincts were disadvantaged if they were also voters, but they were not disadvantaged if they were abstainers. Conversely, dimplers from forgiving precincts were disadvantaged if they were abstainers, but they were not disadvantaged if they were voters.

Suppose we focus on voting dimplers living in stringent precincts. A uniformly applied forgiving standard would indeed remedy their disadvantage. But such a standard would discriminate against all abstaining dimplers, when compared to the class of abstaining nondimplers, who indicated a desire in some other way, for example, by leaving their ballots blank. Conversely, a uniformly applied stringent standard vindicates the right of abstaining dimplers living in forgiving precincts, but only by creating state wide disadvantage for voting dimplers as compared to voting nondimplers.

It turns out then, that any uniform standard creates a class of

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57. I am assuming here that individuals are disadvantaged when their votes are counted for a candidate they did not intend to vote for.
people disadvantaged vis a vis another class. There is no apparent reason to suppose that a uniform standard creates more equality than a nonuniform standard. For example, if we assume that most dimplers are also voters, then a nonuniform standard counting the vote of some dimplers may create more equality than a uniform unforgiving standard failing to count the votes of any dimplers. Conversely, if most dimplers are abstainers, then nonuniformity may create more equality than uniform leniency.

Ordinary equal protection doctrine has resources for dealing with problems of this sort—techniques that the Court might have taken advantage of, if only it had paid some attention to the standard doctrine. There are two possible solutions. Sometimes, the Court avoids the difficulty by insisting upon more finely tuned, less rule-like standards. For example, suppose a state is trying to determine whether teachers who are more than four months pregnant are physically fit to teach. This problem has the same structure as the dimpler dilemma. A uniform rule banning all such teachers will discriminate against those who are fit by lumping them together with the nonfit. In contrast, a uniform rule permitting all pregnant teachers to continue teaching will allow some women, who are physically unfit because of their pregnancy, to continue. This solution therefore discriminates against teachers forced to leave their jobs because of other, nonpregnancy-related disabilities.

One way out of the dilemma is to abandon a uniform rule and to look instead at individual teachers to determine, on the facts of their particular cases, whether they are fit to teach. Similarly, the

58. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979) (requiring individualized judgment about whether unwed father had sufficient connection to child to object to adoption); Vlandis v. Kline, 412 U.S. 441 (1973) (requiring individualized determination of whether student transferring to state university from out of state was a resident of the state).


60. See id. at 644 (invalidating rule requiring maternity leave after fourth
Court might have solved the dimpler problem by insisting that canvassing boards make individualized determinations of whether dimplers intended to vote.

Of course, *Bush v. Gore* not only fails to pursue this solution; the very constitutional defect it identifies is that the Florida Court chose to pursue it. Perhaps the Court was correct to think that the solution was less attractive when dealing with pregnant chads than when dealing with pregnant teachers. The Court had some reason to fear that if left to their own devices, individual canvassing boards, faced with thousands of ballots to examine, would not make individualized judgments about each ballot, but would instead simply apply inconsistent but nonetheless rigid rules. The Court might also have feared that politically motivated canvassing boards might distort the rules to help the candidate they favored.

If these were the Court's concerns, then it was left with the second solution to problems of this sort. This solution involves determining whether a "purpose" or "effects" test should be utilized. When the Court uses a purpose test, then facial uniformity alone usually satisfies equal protection requirements. Even though the statutory classification has the effect of treating some group badly, the classification is usually upheld under "rational basis" review unless the legislature has the purpose of disadvantaging a suspect class. For example, if the Court were to use a "purpose" test in evaluating the pregnant teacher rule, it might hold that the rule is unconstitutional if, but only if, it was enacted "because of" rather than "in spite of" its impact on pregnant women.

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month of pregnancy because "[t]here is no individualized determination by the teacher's doctor—or the school board's [doctor]—as to any particular teacher's ability to continue at her job").


62. Cf. Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that heightened scrutiny appropriate only when a state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). For the Court's application of a similar test in the pregnancy context, see *Geduldig v. Aiello*, 417 U.S. 484 (1974). The case was effectively overruled by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e.
In contrast, when the Court uses an effects test, a uniform standard is subject to heightened review and often invalidated simply because of its adverse impact even in the absence of proof that the standard was meant to disadvantage a suspect class. Thus, under an effects test, the pregnancy rule might be invalid because of its impact on women even if the impact was not the purpose of the rule.\footnote{63. The Court has interpreted some statutory protections of civil rights as embodying an effects test. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that employment practices having a disproportionate racial effect are illegal in absence of a “business necessity”).}

The Court’s prior decisions are not completely clear as to which test is appropriate in the voting context. For example, the Court’s reapportionment decisions adopt an effects test. The Court did not require a showing that legislatures had the purpose of disadvantaging citizens living in underrepresented districts or that the failure to redistrict was directed against a discrete and insular minority. Because voting was deemed a “fundamental right,” the Court strictly scrutinized malapportioned districts simply because they had the effect of making some votes worth less than others.\footnote{64. See, e.g., Avery v. Midland City, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).} Similarly, in cases of absolute deprivation of the right to vote, the Court has not usually required a showing of illicit purpose.\footnote{65. See, e.g., Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).} Denial of this fundamental right is subject to heightened review even when there is no purpose to discriminate against an identifiable group.

In contrast, the Court has insisted on a showing of illicit purpose in gerrymandering, vote dilution, and racial districting cases.\footnote{66. Michael McConnell therefore oversimplifies current doctrine when he asserts that “in cases involving fundamental rights, such as the right to vote, the Court applies strict scrutiny to all disparities, without regard to whether the disparities reflect discrimination against any protected group.” McConnell, \textit{supra} note 2, at 673.} For example, in \textit{Gomillion v. Lightfoot},\footnote{67. 364 U.S. 339 (1960).} the Court
considered the constitutionality of redrawing the boundary lines for Tuskegee, Alabama in a fashion that excluded virtually all African-Americans from the jurisdiction.\(^\text{68}\) Although the opinion is somewhat ambiguous,\(^\text{69}\) subsequent cases have declared this action unconstitutional only because the redrawing purposely deprived African-Americans of the franchise.\(^\text{70}\) Similarly, the Court has on occasion rejected vote-dilution claims despite a showing that an electoral system had the effect of reducing the value of African-American votes.\(^\text{71}\) The Court has insisted that this showing be supplemented by a further demonstration that those who created the scheme intended to produce the effect.\(^\text{72}\) Although it has acknowledged that the requisite purpose will almost always be present, the Court has nonetheless insisted that the desire to reduce the voting power of a political group is also a necessary component of political gerrymandering cases.\(^\text{73}\) Additionally, in its most recent

\(^{68}\) See id. at 340.

\(^{69}\) The Court noted that if the allegations contained in the complaint were true, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters." Id. at 341. This language sounds in purpose. However, in the next paragraph, the Court went on to say that "[i]t is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid." Id. at 342.

\(^{70}\) In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), the Court described Gomillion as a case where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Id. at 266.


\(^{72}\) See, e.g., Lodge, 458 U.S. at 613; Bolden, 446 U.S. at 55; cf. id. at 113 (Marshall, J., dissenting) (arguing that vote dilution cases should be decided under the principle that "[i]f a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution, ... strict judicial scrutiny' is required, ... regardless of whether the infringement was intentional" (citations omitted)).

\(^{73}\) See Davis v. Bandemer, 478 U.S. 109, 127, 129 (1986) ("[T]he order to succeed the Bandemer plaintiffs were required to prove ... intentional discrimination against an identifiable political group.... As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely
racial districting cases, the Court has made clear that an intent to segregate voters by race is crucial to a claimed constitutional violation.\textsuperscript{74}

The Court has never offered a complete theoretical justification for distinguishing between these two lines of authority,\textsuperscript{75} so it is difficult to know whether a purpose or effects test is appropriate on the facts of Bush v. Gore. The important point, though, is that the Court’s ultimate conclusion cannot be justified regardless of the test utilized.

Suppose that the recount procedure authorized by the Florida Supreme Court is analogized to malapportioned legislatures or absolute deprivations of the right to vote. Then, we would ask only whether a particular group of voters were deprived of the franchise and not worry about whether the decision in question was meant to bring about this state of affairs.\textsuperscript{76} But as noted above, under this test, both a stringent uniform rule and a forgiving uniform rule would be unconstitutional unless justified by a compelling state interest, because both rules have the effect of depriving someone of their franchise rights. A uniformly stringent rule prejudices voting dimplers, while a uniformly forgiving rule prejudices abstaining dimplers.\textsuperscript{77}

This problem, in turn, suggests both reasons why a purpose test is sometimes attractive and a way of identifying the sorts of problems for which it is appropriate. When the legislature completely deprives someone of the right to vote, or when it draws district lines that violate the one-person, one-vote requirement, the

\textsuperscript{74} See, e.g., Hunt v. Cromartie, 121 S. Ct. 1452, 1458 (2001) (holding that the issue was whether “the legislature’s motive was predominantly racial, not political”).

\textsuperscript{75} Cf. Bolden, 446 U.S. at 130 (Marshall, J., dissenting) (arguing that “at various times the Court’s decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either alone or in combination, is sufficient to show unconstitutionality”).

\textsuperscript{76} See supra p. 977-78.

\textsuperscript{77} See supra p. 974-75.
problem can be corrected simply by extending the franchise or obeying the population equality requirement. An effects test is therefore appropriate. In contrast, in other circumstances, an effects test can lead to a finding of discrimination against some group regardless of what the government does. For example, Tuskegee had to draw its city boundary lines somewhere. Whatever location it chose, the effect of its decision would be to exclude some group of potential voters: hence, the requirement that those challenging the decision demonstrate a purpose of excluding African-Americans. Similarly, however a legislature draws district lines, the decision will have some effect on the distribution of political power: hence, the requirement that those challenging the lines demonstrate that they were drawn in order to produce this distribution.

If this analysis is correct, then 

*Bush v. Gore* may have been an appropriate case for application of a purpose test because, as already noted, any rule would have disadvantaged some people. But insistence on such a test does not rescue the Court's opinion. On the contrary, a striking fact about the Court's approach is that it engaged in no inquiry into purpose. Perhaps the Court suspected that Democrats were manipulating the rules to favor Al Gore, but the Court never made this claim. There was no showing in the record that the potential inconsistencies the Court discovered were intended to disfranchise one group of voters or another, and the Court insisted upon none. For all that appears, the putative differences in treatment resulted from an entirely good faith effort to make the best decisions possible under extremely trying circumstances.

The upshot, then, is that the opinion will not withstand analysis whichever test one uses. If an effects test is appropriate, then the Court failed to explain why the uniform standard it insisted upon did not have the unconstitutional effect of not respecting the wishes of either the voting or nonvoting dimplers. If a purpose test is

79. See *id*.
appropriate, then the Court failed explain its failure to discern a purpose of disfranchising anyone.

Matters are made worse when one considers the problem of a countervailing state interest. On conventional equal protection analysis, even deprivations of fundamental rights are justified if the countervailing interest is "compelling."\textsuperscript{81} Yet the Bush Court did not pause to consider whether there were such interests at all, much less how strong they were.

Two interests suggest themselves. The first is local control. For better or worse, Florida election administration is decentralized. Different counties use different equipment, have different rules, and have widely differing error rates.\textsuperscript{82} The Florida Supreme Court left this local control intact by refusing to impose a uniform standard and by vesting the task of conducting the recount in local officials.

Of course, an inevitable result of local control is local variation, and variation can always be characterized as discrimination. Is local control a compelling state interest that justifies this sort of discrimination when it differentially affects the right to vote? In other contexts, the Court has placed great emphasis on decentralization. For example, it has held that unequal funding for education is constitutionally permissible when supported by the interest in local control\textsuperscript{83} and that otherwise required desegregation plans cannot be imposed when they might require the breaching of

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that at certain points in pregnancy, a state's "interests become sufficiently compelling to" overcome a woman's fundamental right to an abortion); cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236-37 (1995) (holding that compelling state interest test does not mean that strict scrutiny is necessarily "fatal in fact") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).
\end{enumerate}
\end{footnotesize}
local, jurisdictional boundaries.\textsuperscript{84}

Perhaps voting, unlike education or integration, is sufficiently important to outweigh the arguments for local control, but the Court nowhere suggests that it is. Such a suggestion would have revolutionary implications, requiring the rewriting of election laws throughout the country. More to the point, the Court’s decision in \textit{Bush} itself left in place pre-recount results, certified by local boards using widely different equipment and employing different rules. In contrast, the Florida Court made clear that the state-wide recount procedure would be administered by a single judge, who would have had the task of unifying and rationalizing local recounts if the procedure had been allowed to run its course. Hence, if local control is really not a sufficiently important countervailing state interest to justify nonuniformity, it is hard to understand why it was not the underlying election, rather than the recount procedure, that was unconstitutional.

This difficulty suggests that the Court’s liberal apologists, who have argued that \textit{Bush v. Gore} presages a major constitutional assault on state election laws,\textsuperscript{85} have misinterpreted the decision. Samuel Issacharoff, for example, has argued that the rule established in \textit{Bush v. Gore} obviously cannot be limited to the recount process alone. The court condemns the fact that “standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county.” That criticism would surely apply to the variations in voting machines across Florida, and, for that matter, to similar variations in all other states. The court’s new standard may create a more robust constitutional examination of voting practices.\textsuperscript{86}

Well, maybe. There is no way to know what future courts will

\textsuperscript{85} See Issacharoff, supra note 10.
\textsuperscript{86} Id. (quoting Bush v. Gore, 531 U.S. 98, 106 (2000)).
make of past decisions. One thing we do know, however, is that the Bush majority did everything within its power to avoid a broad interpretation of its decision. The Court is careful to observe that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." This qualification, apparently inserted at the insistence of Justice O'Connor, makes it about as clear as possible that the Court wanted its decision to be treated like a restricted railroad ticket "good for this day and train only."

The Court goes on to note that "[t]he 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." This distinction is incoherent. Surely a state court should be allowed to displace only so much of the statutory scheme as is necessary to provide a remedy. If local control is a sufficiently compelling interest to justify statewide statutes that permit discrimination between residents living in different parts of the state, then a state court is also justified when it leaves this local control intact. But whether the distinction is coherent or not, the Supreme Court obviously takes it seriously. Otherwise, there is no explanation for the Court's decision, which had the effect of restoring the totally decentralized system that produced massive differences in voting procedures and error rates throughout the state.

This problem leads to the second compelling state interest that might have justified the recount—an interest that, ironically, is not

88. See Jeffrey Rosen, A Majority of One, N.Y. TIMES, June 3, 2001, § 6, at 32.
89. Cf. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) ("[T]he instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.").
countervailing at all. It is the very interest that the Court purported to defend: the interest in an equal right to vote. The Florida Court might plausibly have believed that this right was denied by the undercounting of large numbers of ballots. The recount was designed to correct just this inequality. Of course, as indicated above, the recount had the potential to introduce inequality as well. In a perfect world, with infinite time, the Florida court might have fashioned a recount scheme that more closely tracked the intent of each voter. But surely the appropriate comparison is not with a hypothetical perfect world, but with the real world that the United States Supreme Court created by its decision. On that standard, the Florida court plainly did a better job of avoiding the constitutional difficulty identified by the United States Supreme Court than the United States Supreme Court itself did. In order to prevent some disputed ballots from being ignored, the United States Supreme Court required that all be ignored. It thereby achieved an equality of sorts between classes of voters casting “undervotes” or “overvotes,” but only by creating massive inequality between these disfranchised citizens on the one hand and the citizens whose votes counted on the other.

2. The Mythical § 5 Deadline

Neither the Florida court nor the United States Supreme Court would have been put to this hard choice but for the putative December 12 deadline supposedly imposed by 3 U.S.C. § 5.91 But for this deadline, any deficiencies in the Florida recount procedure could have been corrected. It is therefore important to understand that the deadline had no basis in law. It was manufactured out of whole cloth by the Supreme Court itself.

As even the Supreme Court acknowledged, § 5 offers a “safe harbor” rather than requiring Florida to complete the selection process by December 12.92 The statute provides that

If [a] final determination of any controversy or contest concerning the appointment of all or any of the electors of [a] State [is] made at least six days before the time fixed for the meeting of the electors, [it] 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 [the] State is concerned.

This language makes clear that Florida was under no statutory obligation to resolve the dispute by December 12. The statute might nonetheless have provided a strong incentive for Florida to do so. If it were true that Florida might be subject to a federal resolution of a dispute that it would rather settle itself, then the state might have a good reason to incorporate the § 5 deadline into its own law. But it is bizarre for the Court to rely on Florida’s interest in settling its own electoral disputes when it was the United States Supreme Court that displaced Florida’s resolution with the federal resolution that it mandated. Instead of a shield protecting state processes, the Supreme Court turned § 5 into a sword, preventing those processes from running their course. Moreover, it is far from clear that § 5 creates a “safe harbor” or, conversely, that failure to meet the § 5 deadline would permit a federal resolution. First, the entire procedure set forth in Title III is of doubtful constitutionality. By its terms, the Twelfth Amendment

94. Of course, the Florida legislature might have been concerned about a settlement imposed by the Florida courts. But that concern would not have provided a motive for the legislature to adopt the § 5 deadline. As employed by the Supreme Court, the deadline had the effect of transferring the entire controversy to the federal level. It precluded both the state court, and the state legislature, from resolving the dispute.
limits the role of Congress to that of spectator. It requires no more than the “presence” of Representatives and Senators while “the votes shall . . . be counted.” Unlike Article I, Section 5, which makes Congress “the Judge of the Elections, Returns and Qualifications of its own Members,” the Constitution provides no textual support for the notion that Congress has the authority to resolve or cut off a dispute about the legality of a presidential election.

Of course, the necessary and proper clause authorizes Congress to enact legislation “for carrying into Execution [the powers] vested by this Constitution in the Government of the United States.” But the necessary and proper clause is not a warrant for disobeying other sections of the Constitution. To the extent that the § 5 procedure “resolved” a dispute in a fashion that negated the state legislature’s power to “appoint [electors] in such Manner as . . . [it] may direct,” Congress lacks the constitutional authority to give it conclusive force. Thus, as a constitutional matter, it is doubtful that § 5 can insulate a slate of electors against claims that they were selected in a fashion contrary to that specified by the state legislature.

It is possible that the Supreme Court would hold that the constitutionality of § 5 is a nonjusticiable political question. But

96. U.S. CONST. art. II, § 1, cl. 3.
98. U.S. CONST. art. II, § 8, cl. 18.
99. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (observing that implied powers of Congress do not extend to cases where “measures . . . are prohibited by the constitution.”).
100. U.S. CONST. art. II, § 1, cl. 2.
101. See Calabresi, supra note 2 (arguing that the Supreme Court should have left the election controversy to the political branches). As Samuel Issacharoff makes clear, the Electoral Count Act was motivated, at least in part, by the desire to keep the courts out of presidential election disputes. See Samuel Issacharoff, Political Judgments, 68 U. Chi. L. Rev. 637, 652 (2001); cf. Dorf & Issacharoff, supra note 6, at 934 (suggesting that “when--as in Bush v. Gore . . . -- the substantive political payoff of any procedural regime can be clearly predicted, any attempt to ground judicial intervention in legal principle will be read as a
the Court’s willingness to adjudicate the dispute in *Bush v. Gore*\(^{102}\) itself substantially reduces the probability of such a holding. Moreover, the putative nonjusticiability of § 5 actually reduces its effectiveness as a safe harbor. A court that would not adjudicate the constitutionality of § 5 presumably would not enforce it either, thereby leaving to Congress the decision whether to give conclusive weight to a state determination reached before the deadline. If § 5 is unenforceable, then it is hardly a safe harbor. And even if § 5 were constitutional, and even if the Court would enforce its terms, it is doubtful that Congress would be bound by it. Congress cannot prevent itself from repealing its own prior legislation,\(^{103}\) and a Congress that chose not to follow the terms of § 5 could simply put in place another procedure inconsistent with it.

For all these reasons, there was little cause for Florida to be concerned about the § 5 deadline. Still, it is not the function of the Supreme Court to weigh the wisdom of a state legislative decision. If the Florida legislature decided to incorporate the § 5 deadline into its own law, the Supreme Court would be bound by this decision. But the Florida legislature did no such thing. There is *no* language in the Florida code remotely suggesting that election contests had to be completed before December 12. Tellingly, the Supreme Court majority cites no such language. Instead, it relied on a statement made by the Florida Supreme Court.\(^{104}\) According to

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104. The majority does better than Chief Justice Rehnquist, who relies on the United States Supreme Court’s own prior statement. He writes that “[t]he scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the ‘legislative wish’ to take advantage of the safe harbor provided by 3 U.S.C. § 5.” *Id.* at 120–21 (Rehnquist, J., concurring). A casual reader might suppose that the interior quotation comes from the Florida Court’s interpretation of Florida law. Instead, the reference is to the United States Supreme Court’s own prior decision, in *Bush v. Palm Beach County Canvassing Bd.* *See* *Bush*, 531 U.S. at 120–21. The referenced language is worth quoting in its...
the per curiam, "[t]he Supreme Court of Florida has said that the legislature intended the State's electors to 'participate fully in the federal electoral process,' as provided in 3 U.S.C. § 5."

It is important to understand that the Florida court made the statement upon which the United States Supreme Court relied in a radically different context. The Florida court mentioned the § 5 deadline in conjunction with the establishment of a timetable for completion of the protest phase. Until the protest was resolved, the Florida Secretary of State could not certify a winner of the election. Without a certified winner, the names of the winning electors could not be forwarded to Washington. There was therefore some possibility, albeit remote, that the state's electors might be unable to participate. In contrast, the contest phase begins only after the electors are certified. The Florida court never held that the contest phase had to be completed before December 12.

entirety:

The Florida Supreme Court cited 3 U.S.C. §§ 1-10 in a footnote of its opinion . . . but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (emphasis added), rev'g 772 So. 2d 1220 (Fla. 2000). This transmogrification of the United States Supreme Court's groundless speculation about a possible legislative wish relating to a different part of the Florida code into a holding of the Florida Supreme Court is enough to give bootstrapping a bad name.

105. Bush, 531 U.S. at 110 (quoting Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1284 (Fla. 2000)).
106. See Palm Beach County Canvassing Bd., 772 So. 2d at 1289.
107. See id. (delaying certification until completion of protest phase).
108. See 3 U.S.C. § 6 (1994) (providing that the executive of each state shall send certificate of ascertainment of the electors appointed "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment" Id.).
109. See FLA. STAT. ANN. § 102.168 (1) (Supp. 2001) (providing that certification may be contested in Circuit Court).
Indeed, it seems to have said something like the opposite:

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.110

Justice Shaw dissented from this conclusion and agreed with the United States Supreme Court that a statewide recount during the contest phase was unlawful.111 Yet even Justice Shaw could not accept the United States Supreme Court's tendentious reading of Florida law. As he wrote after the United States Supreme Court prohibited the recount:

December 12 was not a “drop dead” date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. December 12 was simply a permissive “safe-harbor” date to which the states could aspire. It certainly was not a mandatory contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned there) or this Court's prior rulings.112

Perhaps a majority of Justice Shaw’s colleagues would have disagreed with him had they been given the chance, although there is nothing in their previous opinions suggesting that they would have done so. In any event, they were never given the chance. Instead of remanding the question for a holding by the Florida

110. Gore v. Harris, 772 So. 2d 1243, 1261 (Fla. 2000) (emphasis added).
111. See id. at 1270-73 (Shaw, J., concurring in dissent by Justice Harding).
112. Gore v. Harris, 773 So. 2d 524, 528-29 (Fla. 2000) (Shaw, J., concurring).
court, the United States Supreme Court simply manufactured such a holding, thereby abruptly prohibiting the recount pursuant to an implausible interpretation of state law never adopted by any court.\(^\text{113}\)

In order to fabricate this statutory requirement in the absence of any statutory language, the Supreme Court resorted to a double standard that can only be described as cynical. It was, after all, the United States Supreme Court that had earlier chastised the Florida court, the United States Supreme Court simply manufactured such a holding, thereby abruptly prohibiting the recount pursuant to an implausible interpretation of state law never adopted by any court.\(^\text{113}\)

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This eccentric reading of the Supreme Court's actions amounts to blaming the victim. Is it conceivable that Lund and other conservative defenders of the Bush position would have adopted the same stance if Vice President Gore had in fact sought a recount in the teeth of the Supreme Court's decision and if the Florida court had ordered one? How plausible is it that the United States Supreme Court would have silently accepted such an action by the Florida court?

Lund derives his conclusion from the fact that the Supreme Court remanded the case "for further proceedings not inconsistent with this opinion," rather than ordering an outright dismissal. Bush v. Gore, 531 U.S. 98, 111 (2000). Unfortunately for Lund's argument, the opinion with which the further proceedings could not be inconsistent was very clear. In his dissenting opinion, Justice Breyer endorsed the possibility of remanding the case to the Florida court to consider conducting a constitutionally permissible recount. See id. at 146. The majority explicitly rejected this possibility:

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, JUSTICE BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by FLA. STAT. ANN. § 102.168(8) (Supp. 2001).

Id. at 111. Surely, a decision on remand that a recount was indeed "part of an 'appropriate' order" would have been "inconsistent with [the Supreme Court's] opinion" and, therefore, in violation of the remand order.
court for going beyond the state statutory framework in violation of Article II.\footnote{114} Perhaps the Florida Court did indeed exceed the normal bounds of statutory construction when it extended the length of the protest period, but at least the Florida court pointed to provisions in the statute that arguably supported its conclusion.\footnote{115} In contrast, the United States Supreme Court gave dispositive weight to an interpretation of state law unsupported by any statutory language contained anywhere in the Florida code. Thus, the Supreme Court’s final decision is in blatant violation of its own interpretation of Article II.

\footnote{114. See supra pp. 967-69.}

\footnote{115. The Florida court held that the provisions of Florida law providing for manual recounts conflicted with the provision establishing a seven-day deadline for election boards to submit their returns to the Elections Canvassing Commission. See Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1285-87 (Fla. 2000). Compare FLA. STAT. ANN. § 102.166 (West 1982 & Supp. 2001) (providing for manual recounts) with id. §§ 102.111-.112 (providing that boards must submit their returns to Elections Canvassing Commission by the seventh day following the election). The Florida court stated:}

\begin{quote}
Although the Code sets no specific deadline by which a manual recount must be completed, the time required to complete a manual recount must be reasonable. Otherwise, the recount provision would be, in effect, meaningless. . . . The recount provision thus conflicts with sections 102.111 and 102.112, which state that the Boards “must” submit their returns to the Elections Canvassing Commission by 5 p.m. of the seventh day following the election or face penalties. . . .
\end{quote}

Manual recounts oftentimes may be incomplete on the seventh day following the election. In such a case, if the seven-day limit were to be strictly enforced, the manual recount provision would be eviscerated and rendered meaningless. The Legislature could not have intended such a result. The seven-day limit thus must be construed in a flexible manner to accommodate the manual recount provision. \textit{Palm Beach County Canvassing Bd.}, 772 So. 2d at 1285-87. Reasonable people might disagree with this interpretation of Florida law, but at least it constitutes an effort to interpret statutory language. In contrast, the United States Supreme Court cited no language in any Florida statute suggesting that Florida meant to incorporate the federal “safe harbor” deadline into its own law.
3. The Mythical Article II Problem

In its first decision, the United States Supreme Court focused on the Florida Court's extension of the statutory deadline for completion of the protest phase. Without quite saying so, the Court implied that this extension might constitute a judicial change of Florida election law, prohibited by Article II, Section 1, Clause 2 and making unavailable the statutory "safe harbor" provision of 3 U.S.C. § 5. Whatever one thought of this argument, it had plainly become moot by the time the Court turned its attention to the controversy for a second time. At this point, the protest phase had ended, the deadline extension was irrelevant, and the issue before the Court was the propriety of a state-wide recount the Florida Supreme Court had ordered pursuant to its broad statutory powers to administer the contest phase.

Undeterred by this embarrassment, Chief Justice Rehnquist, writing for himself, and Justices Scalia and Thomas, set about looking for other instances where the Florida court had misunderstood its own law. One must note at the outset the extraordinary nature of this endeavor. At least since Erie Railroad


117. Some commentators seem not to have understood this point. For example, Richard Epstein devotes a considerable portion of his defense of the United States Supreme Court to an argument that the canvassing boards were not authorized to conduct the hand recounts that Gore requested in his protest and that the Florida Supreme Court erred in ordering an extension of the protest period. See Richard Epstein, "In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended, 68 U. CHI. L. REV. 613, 621-29 (2001). Even if he is correct about both of these points (and it is not clear that he is—see supra note 115), they are irrelevant to the legal issues confronting the Supreme Court in Bush v. Gore, which concerned the contest, rather than the protest procedures. Cf. McConnell, supra note 2, at 666 (arguing that "by the time the case got to the High Court, the new deadline had already passed, Governor Bush had been certified the winner, and the legal conflict had moved on to a new phase, rendering Palm Beach County Canvassing Board v. Harris all but moot").

Co. v. Tompkins,\textsuperscript{119} it has been clear that state court decisions concerning the content of state law are almost always constitutionally binding on federal courts.\textsuperscript{120}

Chief Justice Rehnquist claimed that this general rule was modified by Article II, § 1, which requires that presidential electors be appointed “in such Manner as the [state legislature] may direct.”\textsuperscript{121} In support of this assertion, he relied upon a single, convoluted sentence of dicta in \textit{McPherson v. Blacker},\textsuperscript{122} which suggested that there were federal constitutional limitations on the extent to which states could deprive legislatures of the appointment function.\textsuperscript{123} The sentence, in its entirety, reads as follows: “Hence the insertion of those words [providing for the appointment of electors in the manner that the state legislature may direct], \textit{while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power}, cannot be held to operate as a limitation on that power itself.”\textsuperscript{124}

This reliance is ironic to say the least, since \textit{McPherson} had \textit{upheld} a state court’s interpretation of its own statutory scheme against federal challenge and strongly rejected federal supervision (including federal judicial supervision) of the selection process.\textsuperscript{125}

Moreover, on the facts before the Court, it is hard to see how the “State” was attempting to “circumscribe the legislative power.”\textsuperscript{126} In the Court’s first consideration of the Article II

\begin{footnotesize}
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\item \textsuperscript{119} 304 U.S. 64 (1938).
\item \textsuperscript{120} \textit{See id.}
\item \textsuperscript{121} U.S. CONST. art. II; § 1.
\item \textsuperscript{122} 146 U.S. 1 (1892).
\item \textsuperscript{123} \textit{See id. at 25.}
\item \textsuperscript{124} \textit{Id.} (emphasis added).
\item \textsuperscript{125} At issue was a Michigan statute directing that some electors be chosen by congressional districts, rather than on a state-wide basis. \textit{See id. at 24.} Observing that “[the state] legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed,” \textit{Id. at 25}, the Court rejected a challenge to the statute.
\end{itemize}
\end{footnotesize}
problem, the Justices worried that the Florida court had relied in part on the Florida Constitution.127 Perhaps a state constitutional provision could impermissibly “circumscribe” legislative power with respect to the selection of electors.128 But Justice Rehnquist had no such claim before him in Bush v. Gore. Instead, he was confronted with the Florida court’s interpretation of its own state’s statutes. The Florida legislature specifically authorized the Florida courts to play this role. Unlike the protest procedure, which is administered by state canvassing boards vested with considerable discretion as to how to proceed, the contest procedure is initiated by filing a complaint in the state circuit court.129 The legislature chose to provide the court with exceptionally broad powers to administer the proceedings, including the power to “fashion such orders as [the court] deem[s] necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.”130

Surely, the legislature intended the state courts to engage in the ordinary process of statutory construction in the course of applying the statutory scheme. Of course, Chief Justice Rehnquist claimed that the construction adopted by the Florida court was not

127. See id. (observing that “[t]here are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2 ‘circumscribe the legislative power’”).

128. Although the Court relied upon McPherson v. Blacker in expressing this concern, see Palm Beach County Canvassing Bd., 531 U.S. at 76, there is language in McPherson that cuts the other way. See McPherson, 146 U.S. at 25 (“What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.”).


"ordinary." But rules concerning the appropriate techniques of statutory construction do not make up a "transcendental body of law outside of any particular State" any more than the common law does. What counts as "ordinary" construction is, itself, a matter for state law. In the special context of the selection of electors, Article II vests this lawmaking power in the state legislature, and not in the federal courts.

Perhaps if the state legislature meant to delegate this authority to the federal courts, Article II would require courts to respect this decision. But to the extent that we can infer a legislative intent about this matter at all, it appears far more likely that the Florida legislature intended for Florida courts to have the last word on how state law should be construed. As noted above, the legislature vested the state courts with authority to administer the contest procedures. In contrast, the state legislature made no provision for a United States Supreme Court role and there is no indication whatever that it meant for the federal courts to have the ultimate authority to interpret the state statutes at issue.

Obviously, federal courts do not require state permission to review federal questions arising in state court, and, indeed, any effort to foreclose such review would, itself, have been unconstitutional. Still, the particular federal question at issue here was whether the state court had "circumscribed" state legislative power in violation of Article II. Answering that question, in turn, requires discerning the legislature's intent regarding how disputed questions about the interpretation of the statutory scheme should be resolved. Since the legislature clearly contemplated a state judicial role in the contest procedures and was silent

134. See generally Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that state courts are bound by United States Supreme Court interpretations of federal law).
135. See supra p. 993.
concerning an analogous federal role, it seems plausible to assume that it meant for state, rather than federal judges to have the final word on disputed issues of state law. Hence, there is a good argument that Chief Justice Rehnquist's insistence on the primacy of his reading of Florida law itself amounts to an unconstitutional effort to "circumscribe" state legislative power.

In any event, the particular instances of putative judicial misinterpretation identified by Chief Justice Rehnquist are singularly unconvincing. In Bush v. Palm Beach County Canvassing Board, the Florida court's extension of a clearly articulated seven-day deadline for completion of the protest phase troubled the Supreme Court. To be sure, the state court offered plausible reasons why the legislature could not have intended the deadline to render nugatory the underlying protest right, but one can nevertheless understand the concern triggered when a court ignores the "plain meaning" of statutory language. In contrast, there simply is no such "plain meaning" objection to the state court's interpretation of the contest statute.

Chief Justice Rehnquist identified two problems with the Florida court's interpretation of Florida law. First, he complained that the Florida court "empt[ied] certification of virtually all legal consequence during the contest, [thereby] . . . depart[ing] from the provisions enacted by the Florida Legislature." But it is telling that the Chief Justice cited no specific provision of the code that the state court departed from in its treatment of the contest phase. In fact, there is no such provision.

The code establishes two separate procedures for challenging election results. First, any candidate or elector is entitled to protest the returns to the appropriate canvassing board. In conjunction

139. See id. at 78.
140. See supra note 115.
with this protest, a candidate or political party can request that the canvassing board conduct a manual recount. The canvassing board is given discretion to conduct a test recount. If this recount "indicates an error in the vote tabulation which could affect the outcome of the election," the board is given the option to manually recount all ballots.

Second, after canvassing board has completed its work and the election is certified, the unsuccessful candidate or any elector or taxpayer is authorized to file a contest with the circuit court. The statute lists a number of grounds for contesting the election, including "rejection of a number of legal votes sufficient to change or place in doubt the result of the election" and "[a]ny other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly elected." The circuit judge, in turn, is authorized to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is . . . examined" and to "provide any relief appropriate under such circumstances."

Nothing in this scheme remotely suggests that the circuit court should be bound during the contest phase by canvassing board decisions rendered during the protest phase. On the contrary, the statute provides that the canvassing board is to be named as the defendant in contest actions, with the whole purpose of the contest being to challenge canvassing board decisions. The legislature might have provided that canvassing board decisions should be affirmed unless they were clearly erroneous or

150. Id.
constituted an abuse of discretion. It did not do so.151 Instead, it authorized the circuit judge to determine for herself whether the board had "reject[ed] . . . a number of legal votes sufficient to change or place in doubt the result of the election."154 Chief Justice Rehnquist's reliance on the fact that the code "clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness"155 is therefore misplaced. Canvassing boards are given discretion whether to order recounts156 and are subject to a statutory deadline for completing their work during the protest phase.157 But once that work is completed, the statute also provides a mechanism through which its ultimate decision can be overturned. It clearly grants the circuit court the power to "ensure that each allegation in the complaint is investigated, examined, or checked"158 and to "correct any alleged wrong."159 It is the Chief Justice's refusal to acknowledge these broad powers, rather than the Florida Court's reliance upon them, that distorts the statutory scheme.

Perhaps Chief Justice Rehnquist's refusal to heed the "plain language" of the statute would be defensible if that language

153. The election code provides that "[t]he certificate of election which is issued to any person shall be prima facie evidence of the election of such person." FLA. STAT. ANN. § 102.155 (West Supp. 2001). This provision establishes no more than that a person challenging the certification has the burden of going forward. See BLACK'S LAW DICTIONARY 579 (7th ed. 1999) (defining "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced"). If the drafters had intended the contesting party to establish an abuse of discretion or clear and convincing evidence of a legal error, they surely would not have said that a certificate establishes only prima facie evidence of election.

158. Id.
produced an absurd outcome. Rehnquist hints that this might be his view when he accuses the Florida court of "empt[ying] certification of virtually all legal consequence." What purpose is served by the protest procedure, one might ask, if a court is empowered to review de novo all of the canvassing board decisions?

Given his own criticism of the Florida Supreme Court for ignoring the supposed plain meaning of the statute so as to avoid what it considered an absurd result, Chief Justice Rehnquist's implicit endorsement of this mode of statutory construction might strike some as ironic. In any event, the concept of de novo review is hardly anomalous, and we do not generally regard statutory schemes creating such review as absurd. For example, some states provide for trial of minor offenses before a judge, with an absolute right to retrial de novo before a jury if the defendant is dissatisfied with the outcome. All appellate systems provide for de novo review of legal determinations made by lower courts. Indeed, the United States Supreme Court reviewed de novo the Florida court's interpretation of the Equal Protection Clause. Does that review empty the Florida appellate process "of virtually all legal consequence"?

As a matter of judicial administration, perhaps schemes creating

161. For Supreme Court decisions discussing these schemes, see Blackledge v. Perry, 417 U.S. 21 (1974); Colten v. Kentucky, 407 U.S. 104 (1972).
162. See supra p. 972-73.
163. Richard Epstein is thus mistaken when he asserts that "[i]t makes no sense to read the statute as though the contest phase is wholly unconnected with anything that went on at the protest stage. If so, then there is no need to bother to wait until the protest is over for the contest to begin." Epstein, supra note 117, at 630. As Epstein must surely know, the law sometimes requires parties to exhaust their administrative remedies before seeking legal relief, even in circumstances where judges are permitted to disregard the administrative findings. As noted in the text, resort to administrative remedies may avoid the necessity of litigation by providing the relief that a party seeks or by convincing a party that litigation will be fruitless. Even if judges decide the question de novo, they may make use of fact finding accomplished during the administrative proceeding, or they may, in their discretion, choose to defer to administrative legal determinations.
duplicative procedures are foolish, but they certainly are not absurd. Even though a party has the right to challenge the initial determination, she may choose not to exercise that right, particularly if the facts and arguments developed during the initial determination bring home the reality that success is unlikely. And if the losing party does challenge the determination, work done during the initial phase may assist the factfinder in the later phase. For example, in this very case, the Florida Supreme Court was able to utilize some recount results reached during the protest phase. Moreover, unlike the double trial procedures described above and ordinary appellate review, a litigant does not have an automatic right to utilize the contest procedure. The statute requires a party contesting an election to file a complaint setting forth one or more of five grounds for contesting the election, including “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.” In the vast majority of elections, no party will be able to make plausible allegations to this effect. The contest procedure will therefore be unavailable, and the protest result will be dispositive.

The second problem the Chief Justice discerned related to the Florida court’s interpretation of the term “legal votes.” According to Rehnquist, there was no showing of a “rejection of a number of legal votes sufficient to change or place in doubt the result of the election” because votes are “legal” only when voters have followed posted instructions. When voters fail to follow these instructions (by, for example, failing to remove hanging chads from their ballots) and when the ballots are not counted because the “electronic or electromechanical equipment performs precisely in

164. See Gore v. Harris, 772 So. 2d 1243, 1260 (Fla. 2000) (holding that in contest phase, court can rely upon vote-counting completed during protest phase).


168. Id. at 117 (Rehnquist, C.J., concurring) (quoting FLA. STAT. ANN. § 102.168(3)(c) (West Supp. 2001)).

169. Id. at 119 (Rehnquist, C.J., concurring).
the manner designed,"\textsuperscript{170} legal votes have not been cast.

Once again, the relevant statutes simply will not bear this interpretation. Florida law nowhere explicitly defines the term "legal votes." The Chief Justice derives his definition from the fact that the statute requires voting machines to be "capable of correctly counting votes."\textsuperscript{171} But this derivation rests on an obvious non sequitur. It is, of course, possible that the equipment Florida utilized met the statutory requirement, but the mere existence of the requirement does nothing to prove that it was met. The existence of the requirement does not show that the machines in fact correctly counted all legal votes or that they "perform[ed] precisely in the manner designed."\textsuperscript{172} Indeed, if the requirement itself provided such assurance, it is hard to see why Florida law would provide for manual recounts designed to uncover machine error.\textsuperscript{173}

Chief Justice Rehnquist states that precincts using punch-card ballots posted instructions directing voters to make certain that they cleanly punched their ballots and removed hanging chads.\textsuperscript{174} This statement is demonstrably false. In support of it, he cites to a dissenting opinion by Judge Tjoflat in an earlier case decided by the United States Court of Appeals for the Fifth Circuit.\textsuperscript{175} But the very footnote cited by the Chief Justice makes clear that the quoted

\begin{itemize}
  \item 170. \textit{Id}.
  \item 172. \textit{Bush}, 531 U.S. at 119 (Rehnquist, C.J., concurring).
  \item 173. Judge Posner makes a similar error in his attack on the Florida Supreme Court’s decision. He writes "[t]he machinery for counting punchcard ballots which are the form of ballot used in 40 percent of Florida’s counties, containing 63 percent of the state’s population, was not designed to tabulate dimpled or otherwise unpunched-through ballots; so how could its failure to count such ballots be thought an error in tabulation?" Posner, \textit{supra} note 2, at 726. The undefended premise behind the reasoning is that a putative defect in the vote counting machinery could not possibly be a defect if it was sufficiently widespread.
  \item 174. \textit{See} \textit{Bush}, 531 U.S. at 119 (Rehnquist, C.J., concurring).
  \item 175. \textit{See id.} at 109 (citing \textsc{Touchston v. McDermott}, 234 F.3d 1133, 1141 n.19 (11th Cir. 2000) (Tjoflat, J. dissenting)).
\end{itemize}
instructions were not posted in all counties. Moreover, even if they were, it does not follow that the failure to obey these instructions (not contained in the statutes themselves) makes the vote "illegal." On the contrary, the statutory scheme makes clear that voter intent, rather than voter error, is the touchstone for determining whether and how to count a ballot. Thus, section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." The Chief Justice dismissed this provision as "entirely irrelevant," apparently because it is contained within a section dealing with "damaged or defective" ballots. He seems to have assumed that the section concerns only ballots that are "damaged or defective" for reasons other than voter error. But the section itself states explicitly that it applies to any ballot that "cannot properly be counted by the automatic tabulating equipment." Moreover, the section clearly contemplates voter error. Thus, section 101.5614(6) provides that "[i]f an elector marks more names than there are persons to be elected to an office or if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office." The clear implication of this language is that if there are voter errors other than marking more names than there are persons to be elected and if it is possible to determine the elector's choice, the ballot shall be counted.

176. The footnote reads as follows:
Instructions to voters in Palm Beach County, a county that uses punch card technology, read: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." The instructions in Broward County, also a punch card county, read: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice."


180. Id.
Finally, even if the Chief Justice is correct and this section is irrelevant, the statutory recount procedure, which plainly is relevant, makes clear that the legislature meant to utilize a voter intent criterion. Section 102.166(7)(b) provides that "[i]f a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent." Why bother with such a referral if the only appropriate question is whether a voter marked the ballot in a fashion that could be read by the machine?

The Chief Justice chastises the Florida Court for ignoring the Secretary of State’s contrary opinion because, he claims, the Secretary “is authorized by law to issue binding interpretations of the Election Code.” At very best, this claim is misleading. In support of it, the Chief Justice cites sections 97.012 and 106.23 of the Florida code. But section 97.012, which contains a long list of the Secretary of State’s duties, says not one word about her authority to issue binding opinions. Section 106.23 does speak of

183. See McConnell, supra note 2, at 664.
185. The section reads, in its entirety, as follows:
The Secretary of State is the chief election officer of the state, and it is his or her responsibility to:
(1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.
(2) Provide uniform standards for the proper and equitable implementation of the registration laws.
(3) Actively seek out and collect the data and statistics necessary to knowledgeably scrutinize the effectiveness of election laws.
(4) Provide technical assistance to the supervisors of elections on voter education and election personnel training services.
(5) Provide technical assistance to the supervisors of elections on voting systems.
(6) Provide voter education assistance to the public.
(7) Coordinate the state’s responsibilities under the National Voter Registration Act of 1993.
(8) Provide training to all affected state agencies on the necessary procedures for proper implementation of this chapter.
(9) Ensure that all registration applications and forms prescribed or
binding opinions, but makes clear that the opinions are binding only on the person who seeks the opinion or with reference to whom the opinion is sought. It nowhere states that the Florida Supreme Court must accept the opinion. Chief Justice Rehnquist cites Krivanek v. Take Back Tampa Political Committee for the proposition that "the Florida Supreme Court ... must defer to the Secretary's interpretations." This citation is remarkable. On the very page to which the Chief Justice refers, the Krivanek court specifically states that although such interpretations are "persuasive authority and, if ... reasonable ... are entitled to great weight" they are "not binding judicial precedent." Just who, one must ask, is guilty of distorting Florida law?

approved by the department are in compliance with the Voting Rights Act of 1965.

(10) Coordinate with the United States Department of Defense so that armed forces recruitment offices administer voter registration in a manner consistent with the procedures set forth in this code for voter registration agencies.

(11) Create and maintain a central voter file.

(12) Maintain a voter fraud hotline and provide election fraud education to the public.


186. See FLA. STAT. ANN. § 106.23 (West Supp. 2001).

187. The statute authorizes the Division of Elections to provide advisory opinions when requested by various persons. It then states:

Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

FLA. STAT. ANN. § 106.23 (West Supp. 2001).

188. 625 So. 2d 840 (Fla. 1993).


190. Krivanek, 625 So. 2d at 844.

191. Id.
III. THE DEEP POLITICS OF BUSH v. GORE

I hope I have said enough to demonstrate that the majority and concurring opinions in Bush v. Gore should not be taken seriously. Why, then, did the Court reach the conclusion that it did? The most obvious explanation is that the Court acted from narrowly partisan motives. An extreme version of this theory holds that the Court set out to make George Bush the President come what may, and that it simply did what needed to be done in order to accomplish this goal. A slightly less extreme version holds that the justices’ political bias caused them to view the Florida court decisions that disadvantaged Bush with profound and unjustified suspicion. Determined to fight fire with fire, they adopted a partisan stance of their own so as to counteract what they honestly, but erroneously, thought were outrageous decisions.

There is no way to disprove these hypotheses, and there is some evidence supporting them. After all, if the Court had more defensible reasons for the outcome it reached, why did it fail to present them in its opinions? Nonetheless, I believe that it is worth exploring more respectable, if unarticulated, arguments that support the Court’s decision. If these arguments in fact motivated the Justices, they save the Court from the charge of overt partisanship. Unfortunately, however, they also lead to troubling contradictions that reach far beyond this particular case. In short, they help us to see what really is bad—not just about Bush v. Gore, but also about the Court’s approach to constitutional adjudication more generally.

A. In Partial Defense of a Political Decision

Surprisingly, the best entry into these alternative rationales is provided by Justice Ginsburg’s dissenting opinion. Justice Ginsburg reacted strongly to Chief Justice Rehnquist’s concurring opinion, where he observed that although federal courts “generally defer to state courts on the interpretation of state law... there are... areas in which the Constitution requires this Court to undertake an
independent, if still deferential, analysis of state law. 192

In support of this proposition, the Chief Justice cited NAACP v. Alabama ex rel. Patterson, 193 and Bouie v. City of Columbia. 194 The first case grew out of a concerted and outrageous effort by Alabama officials to drive the NAACP from the state. 195 After a state court enjoined the NAACP from functioning, Alabama attempted to argue that a putative procedural error by the NAACP deprived the United States Supreme Court of jurisdiction to review the judgment. 196 The Supreme Court held that the state’s interpretation of its own laws was so novel that the NAACP could not be bound by it. 197

The second case, Bouie, dealt with criminal convictions against sit-in demonstrators who were protesting racial segregation in the South. 198 The Supreme Court reversed the convictions, holding that a state court had impermissibly broadened the scope of its own trespass statute beyond what a fair reading provided. 199

Justice Ginsburg reacted to the Chief Justice’s “casual citation” 200 of these cases with something close to cold fury. Bouie and Patterson she argued, were “embedded in historical contexts hardly comparable to the situation here.” 201 Patterson was “a case decided three months after Cooper v. Aaron, . . . in the face of Southern resistance to the civil rights movement.” 202 Bouie, too, was decided “at the height of the civil rights movement.” 203 The Florida Supreme Court, she insisted, “surely should not be bracketed with

195. See Patterson, 357 U.S. at 451.
196. See id. at 454-58.
197. See id. at 457-58.
198. See Bouie, 378 U.S. at 348-49.
199. Id. at 362-63.
201. Id.
202. Id.
203. Id.
state high courts of the Jim Crow South.  

Justice Ginsburg is right to claim that these cases must be read in their historical context. \[^{205}\] \[^{204}\] \[^{206}\] \[^{207}\] \[^{208}\] \[^{209}\] \[^{210}\] \[^{211}\] \[^{212}\] \[^{213}\] \[^{214}\] \[^{215}\] \[^{216}\] \[^{217}\] \[^{218}\] \[^{219}\] \[^{220}\] \[^{221}\] \[^{222}\] \[^{223}\] \[^{224}\] \[^{225}\] \[^{226}\] \[^{227}\] \[^{228}\] \[^{229}\] \[^{230}\] \[^{231}\] \[^{232}\] \[^{233}\] \[^{234}\] \[^{235}\] \[^{236}\] \[^{237}\] \[^{238}\] \[^{239}\] \[^{240}\] \[^{241}\] \[^{242}\] \[^{243}\] \[^{244}\] \[^{245}\] \[^{246}\] \[^{247}\] \[^{248}\] \[^{249}\] \[^{250}\] \[^{251}\] \[^{252}\] \[^{253}\] \[^{254}\] \[^{255}\] \[^{256}\] \[^{257}\] \[^{258}\] \[^{259}\] \[^{260}\] \[^{261}\] \[^{262}\] \[^{263}\] \[^{264}\] \[^{265}\] \[^{266}\] \[^{267}\] \[^{268}\] \[^{269}\] \[^{270}\] \[^{271}\] \[^{272}\] \[^{273}\] \[^{274}\] \[^{275}\] \[^{276}\] \[^{277}\] \[^{278}\] \[^{279}\] \[^{280}\] \[^{281}\] \[^{282}\] \[^{283}\] \[^{284}\] \[^{285}\] \[^{286}\] \[^{287}\] \[^{288}\] \[^{289}\] \[^{290}\] \[^{291}\] \[^{292}\] \[^{293}\] \[^{294}\] \[^{295}\] \[^{296}\] \[^{297}\] \[^{298}\] \[^{299}\] \[^{300}\] \[^{301}\] \[^{302}\] \[^{303}\] \[^{304}\] \[^{305}\] \[^{306}\] \[^{307}\] \[^{308}\] \[^{309}\] \[^{310}\] \[^{311}\] \[^{312}\] \[^{313}\] \[^{314}\] \[^{315}\] \[^{316}\] \[^{317}\] \[^{318}\] \[^{319}\] \[^{320}\] \[^{321}\] \[^{322}\] \[^{323}\] \[^{324}\] \[^{325}\] \[^{326}\] \[^{327}\] \[^{328}\] \[^{329}\] \[^{330}\] \[^{331}\] \[^{332}\] \[^{333}\] \[^{334}\] \[^{335}\] \[^{336}\] \[^{337}\] \[^{338}\] \[^{339}\] \[^{340}\] \[^{341}\] \[^{342}\] \[^{343}\] \[^{344}\] \[^{345}\] \[^{346}\] \[^{347}\] \[^{348}\] \[^{349}\] \[^{350}\] \[^{351}\] \[^{352}\] \[^{353}\] \[^{354}\] \[^{355}\] \[^{356}\] \[^{357}\] \[^{358}\] \[^{359}\] \[^{360}\] \[^{361}\] \[^{362}\] \[^{363}\] \[^{364}\] \[^{365}\] \[^{366}\] \[^{367}\] \[^{368}\] \[^{369}\] \[^{370}\] \[^{371}\] \[^{372}\] \[^{373}\] \[^{374}\] \[^{375}\] \[^{376}\] \[^{377}\] \[^{378}\] \[^{379}\] \[^{380}\] \[^{381}\] \[^{382}\] \[^{383}\] \[^{384}\] \[^{385}\] \[^{386}\] \[^{387}\] \[^{388}\] \[^{389}\] \[^{390}\] \[^{391}\] \[^{392}\] \[^{393}\] \[^{394}\] \[^{395}\] \[^{396}\] \[^{397}\] \[^{398}\] \[^{399}\] \[^{400}\] \[^{401}\] \[^{402}\] \[^{403}\] \[^{404}\] \[^{405}\] \[^{406}\] \[^{407}\] \[^{408}\] \[^{409}\] \[^{410}\] \[^{411}\] \[^{412}\] \[^{413}\] \[^{414}\] \[^{415}\] \[^{416}\] \[^{417}\] \[^{418}\] \[^{419}\] \[^{420}\] \[^{421}\] \[^{422}\] \[^{423}\] \[^{424}\] \[^{425}\] \[^{426}\] \[^{427}\] \[^{428}\] \[^{429}\] \[^{430}\] \[^{431}\] \[^{432}\] \[^{433}\] \[^{434}\] \[^{435}\] \[^{436}\] \[^{437}\] \[^{438}\] \[^{439}\] \[^{440}\] \[^{441}\] \[^{442}\] \[^{443}\] \[^{444}\] \[^{445}\] \[^{446}\] \[^{447}\] \[^{448}\] \[^{449}\] \[^{450}\] \[^{451}\] \[^{452}\] \[^{453}\] \[^{454}\] \[^{455}\] \[^{456}\] \[^{457}\] \[^{458}\] \[^{459}\] \[^{460}\] \[^{461}\] \[^{462}\] \[^{463}\] \[^{464}\] \[^{465}\] \[^{466}\] \[^{467}\] \[^{468}\] \[^{469}\] \[^{470}\] \[^{471}\] \[^{472}\] \[^{473}\] \[^{474}\] \[^{475}\] \[^{476}\] \[^{477}\] \[^{478}\] \[^{479}\] \[^{480}\] \[^{481}\] \[^{482}\] \[^{483}\] \[^{484}\] \[^{485}\] \[^{486}\] \[^{487}\] \[^{488}\] \[^{489}\] \[^{490}\] \[^{491}\] \[^{492}\] \[^{493}\] \[^{494}\] \[^{495}\] \[^{496}\] \[^{497}\] \[^{498}\] \[^{499}\] \[^{500}\] \[^{501}\] \[^{502}\] \[^{503}\] \[^{504}\] \[^{505}\] \[^{506}\] \[^{507}\] \[^{508}\] \[^{509}\] \[^{510}\] \[^{511}\] \[^{512}\] \[^{513}\] \[^{514}\] \[^{515}\] \[^{516}\] \[^{517}\] \[^{518}\] \[^{519}\] \[^{520}\] \[^{521}\] \[^{522}\] \[^{523}\] \[^{524}\] \[^{525}\] \[^{526}\] \[^{527}\] \[^{528}\] \[^{529}\] \[^{530}\] \[^{531}\] \[^{532}\] \[^{533}\] \[^{534}\] \[^{535}\] \[^{536}\] \[^{537}\] \[^{538}\] \[^{539}\}
Ultimately, Clark was persuaded to withdraw his dissent.\(^{210}\)

Similarly, *Bouie* was one of a large number of cases reaching the Court involving the eruption of sit-in demonstrations against Southern segregation.\(^{211}\) As David Currie observes, the criminal convictions of the demonstrators led the Court into "a long series of guerrilla skirmishes to prevent [their] punishment."\(^{212}\) The Court "found one excuse after another"\(^{213}\) to reverse all the convictions on a wide variety of theories of varying plausibility.\(^{214}\) As a contemporary critic complained, "It would be helpful if these and other similar cases could be labeled 'good for use in sit-in cases only.'"\(^{215}\) There is no doubt that at least some members of the Court understood that a decision upholding the convictions might have an adverse impact on the Civil Rights Bill then pending in Congress and were motivated in part by the desire not to derail the legislation.\(^{216}\) When the Court seemed on the verge of affirming one

\(^{210}\) See id.


\(^{212}\) Id.

\(^{213}\) Id. at 422.

\(^{214}\) For contemporary accounts of the Court's frantic attempt to find plausible grounds for reversal in each of the cases, see Monrad G. Paulsen, The Sit-in Cases of 1964: "But Answer Came There None," 1964 SUP. CT. REV. 137; Thomas P. Lewis, The Sit in Cases: Great Expectations, 1963 SUP. CT. REV. 101.


\(^{216}\) For example, according to Del Dickson, Justice Goldberg made the following statement to the conference:

[If we allow public discrimination in public places, I am convinced that we will set back legislation indefinitely. . . . It would be a great disservice to the nation to decide this issue 5-4. There is legislation pending. The federal government's argument is not implausible. Rather than handing down a 5-4 decision Black's way [affirming the convictions], I think that it is better to put these cases off on the ground urged by the United States, reversing them narrowly and not reaching the broad ground.]

of the convictions, in *Bell v. Maryland,* Justice Brennan circulated a draft dissent, observing that "[w]e of this Court . . . are not so removed from the world around us that we can ignore the current debate over the constitutionality of [the Civil Rights Act] if enacted [and that] we cannot be blind to the fact that today's opposing opinions . . . will inevitably enter into and perhaps confuse that debate."

Lucas A. Powe, one of the most astute observers of the Warren Court, details what happened next:

[J]ustice Brennan] searched for a vote to flip the result. . . . [H]e concocted a reason to avoid the merits. He argued that the case should be sent back to the Maryland courts for them to consider the effect of a Baltimore ordinance and a state law each prohibiting discrimination in Baltimore restaurants. Both laws had been adopted after the Maryland court of appeals had affirmed Bell's conviction. . . .

Normally an intervening state law, at best, would cause the Court to vacate rather than reverse convictions, but Brennan wanted a reversal, and he convinced Clark . . . 'to desert.' . . .

Brennan had won because he had refused to lose; *Bell* did not derail Congress; and sit-ins as a legal issue was behind the Court because henceforth there was a federal statutory prohibition against discrimination in places of public accommodation.

There is a sense, then, in which Justice Ginsburg is on target when

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she says that these cases must be read in context. But there is a more important sense in which the cases undercut her position. The cases show that at least some members of the Warren Court perceived themselves as bending ordinary principles of constitutional law when doing so was necessitated by countervailing moral and political imperatives. Nor were these the only instances where the Warren Court was guilty of this sin, if sin it be. The most famous example is *Brown v. Board of Education*. Here is how Powe, a strong defender of the result in *Brown*, describes the opinion:

Where, using appropriate legal sources, is there justification for holding the Equal Protection Clause is violated by separate but equal? It couldn't be the text of the Fourteenth Amendment without more—because while the text might easily be construed to say no discrimination, it would take some interpretation to move from no discrimination to treating separate but equal as discrimination. The next most likely source of reasoning would be to ask what those who created and adopted the Fourteenth Amendment thought they were doing. The history didn't show that [the Fourteenth Amendment was intended to bar segregation], and attempts to force it to do so would not persuade.

If the history of the Fourteenth Amendment was to be ignored, then the next best approach would be to rely on precedent. Since *Plessy* was obviously the dominant precedent, the Court would have to demonstrate either that *Plessy* was wrong when decided or that subsequent judicial


221. As Michael Klarman puts it "[T]he only legal principle that *Bouie* stands for is that sometimes the Supreme Court, for political reasons, will decide cases in a lawless fashion. In one sense, then, though not the one the conservative Justices intended, *Bouie* was the perfect case for them to cite in *Bush.*" Klarman, *supra* note 2, at 1741.

developments had undermined its authority. In fact, the Court’s decisions could support both these methods of attack, yet Warren eschewed both.\textsuperscript{223}

Of course, these criticisms of \textit{Brown} are controversial.\textsuperscript{224} But what really matters is not that some academics find them persuasive. The important point is that distinguished members of the Court, who voted for \textit{Brown}, were also persuaded. At least Justice Jackson and probably Justice Frankfurter believed that \textit{Brown} was indefensible as a matter of constitutional law, but voted for the result anyway because of their strong belief that an end to legally enforced segregation was a political and moral imperative.\textsuperscript{225}

\begin{verbatim}
\textsuperscript{223} POWE, supra note 219, at 40-41.
\textsuperscript{224} For two notable attempts to defend \textit{Brown} on grounds other than those offered by the Court, see Charles L. Black, Jr., \textit{The Lawfulness of the Segregation Decisions}, 69 \textit{YALE L.J.} 421 (1960); Michael W. McConnell, \textit{Originalism and the Desegregation Decisions}, 81 \textit{VA. L. REV.} 947 (1995).
\textsuperscript{225} Jackson was explicit on the point. Here is how Del Dickson recounts his conference statement when the Court first considered the desegregation cases:

This is a political question. To me personally, this is not a problem. But it is difficult to make this other than a political decision . . . . The problem is to make a judicial basis for a congenial political conclusion . . . . As a political decision, I can go along with it—but with a protest that it is politics.

Conference of December 12, 1954, in The SUPREME COURT IN CONFERENCE (1940-1985), supra note 216, at 654, 658. After the case was reargued, and when it was clear that a majority of the Court would vote to overturn segregation, Jackson prepared a draft which, according to Mark Tushnet, stated that he “simply [could not] find in the conventional material of constitutional interpretation any justification for saying” that segregated education violated the Fourteenth Amendment,” but nonetheless argued that “the erroneous ‘factual assumption’ that ‘there were differences between the Negro and white races, viewed as a whole’ justified the ending of legal segregation. TUSHNET, supra note 206, at 212-13. Justice Frankfurter’s position was somewhat more ambiguous. At the initial conference on the desegregation cases, Dickson quotes Frankfurter as follows:

I have read all of [the history of the Fourteenth Amendment] and I can’t say that it meant to abolish segregation . . . . I don’t see anything in the United States Code or in the equal protection clause on the basis of which such a decision could be made . . . .
\end{verbatim}
Thus, when Justice Ginsburg uses Warren Court jurisprudence to attack the Bush majority for mixing politics with law, she is playing with fire. The Warren Court regularly mixed law with politics, and the Justices who served almost a half century ago would surely have understood, even if they might not have publicly admitted, that there are times when law must be subservient to politics. Although some academics purport to be shocked - shocked - by this assertion, it should surprise no one. Even when legal

[I] can't say that it is unconstitutional to treat a Negro differently than a white, but I would put all of these cases down for reargument. Conference of December 13, 1952, in The SUPREME COURT IN CONFERENCE (1940-1985), supra note 216, at 646, 651. It is possible, of course, that for these reasons Frankfurter would have voted to uphold segregation at this point, but changed his mind after reargument. But this hypothesis ignores Frankfurter's own assertion that he was prepared to strike down legal segregation after the first argument. See TUSKNET, supra note 206, at 194 (quoting letter from Frankfurter to Reed written three days after Brown was decided, stating "that if the cases had been decided during the 1952 Term, 'there would have been four dissenters—Vinson, Reed, Jackson and Clark'" Frankfurter pushed for reargument in Brown "for fear that the case would be decided the other way under Vinson."). Moreover, it is doubtful that anything happened between the first argument and the ultimate decision to change his mind. See Michael J. Klarman, Civil Rights Law: Who Made It and How Much Did It Matter, 83 GEO. L. J. 433, 437 (1994) (expressing doubt that the focus on remedy or new research on original understanding of Fourteenth Amendment changed Frankfurter's views).

Finally, there is some evidence that, even on the eve of the Court's decision in Brown, Frankfurter was still expressing the view that the decision could not be justified on constitutional grounds. According to Justice Douglas' conference notes, at the conference on December 12, 1953, Frankfurter said the following: As a pure matter of history, in 1867, the Fourteenth Amendment did not have as its purpose to abolish segregation. The due process and equal protection clauses certainly did not abolish segregation when the Fourteenth Amendment was adopted. The most that the history shows is that the matter was inconclusive. A host of legislation passed by Congress presupposes that segregation is valid. A host of legislation and history in Congress and in this Court indicates that Plessy was right. Conference of December 12, 1952 in THE SUPREME COURT IN CONFERENCE (1940-1985), supra note 216, at 657. But cf. TUSKNET, supra note 206, at 211 (questioning whether Douglas quoted Frankfurter correctly).
principles are completely determinate, before one enforces them there is always an anterior question about whether one ought to do so. Law does not establish its own morality, and, although we would sometimes like to deny it, we always have the option to play the game by different rules. What else could Justice Jackson have meant when, in one of the most famous and revered Supreme Court opinions ever written, he stated that sometimes the result in a constitutional case should “depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law”?226 Indeed, what else could Justice Scalia have meant when he confessed to being a “faint-hearted originalist”227 and admitted that he could not “imagine [him]self, any more than any other federal judge, upholding a statute that imposes the punishment of flogging” even if there were no constitutional warrant for striking it down?228

Of course, the fact that there may be political reasons supporting the result in Bush v. Gore does not mean that there are good political reasons. Apart from raw partisanship, what nonlegal reasons might support the outcome? I can think of three interlocking arguments, each rooted in contemporary conservative thought, and each with some plausibility.

First, there is the argument from formalism. Formalism emphasizes the virtue of rule-following, especially when the rules provide closure for a dispute that might otherwise go on indefinitely.229 Some liberal perfectionists want to root out every injustice by ignoring the rules whenever they fail to produce just outcomes. Conservatives appropriately remind us that traveling down this road risks chaos. This is true in part because even bad

228. Id.
rules provide predictability, efficiency, and order. It is true as well because, in the absence of rules, individual discretion leads inevitably to abuse.\(^{230}\)

Thus, many conservatives favor contraction of habeas corpus rights for convicted prisoners because they understand that endless review will never wring out all errors from the criminal justice system and may introduce new ones.\(^{231}\) At some point the process must come to an end, especially in cases where the defendant has had a fair chance to raise his claims and has failed to do so because of inattention to the rules.

Similarly, they oppose statistical readjustments of raw census data because even an arbitrary process is better than one that can be manipulated for political purposes.\(^{232}\) Perhaps statistical readjustments would lead to a marginal improvement in accuracy, but once we allow any departure from the textually specified process, we run the risk of politically motivated departures.\(^{233}\)

And so, too, they opposed recounts in Florida because, in an

\(^{230}\) I do not mean to suggest that liberals never see the virtues of formalism. Under the right conditions, liberals can be formalistic as well. For example, an earlier generation of liberals often defended free speech and fourth amendment rights by relying on formalism. For a discussion of the indeterminate political valence of formalism, see Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22 (1992). Still, in our present political culture, worries about the evils of unchecked discretion that might exist if rules could be ignored seem more associated with conservative thought.

\(^{231}\) For the classic statement of this position, see Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441 (1963).

\(^{232}\) See, e.g., L. Lynn Hogue, One for the Constitution: Census Move Right Under Law, WASH. TIMES, Mar. 13, 2001, at A17 (quoting then Secretary of Commerce Robert Mosbacher as rejecting statistical adjustment of census because of "overriding concerns" about the "slippery slope" problem and the "potential for partisan manipulation").

\(^{233}\) It is not obvious why statistical adjustments, a fairly mechanical process, should be thought more susceptible to manipulation than in-person efforts, which inevitably involve some discretion. Still, I take conservatives to be expressing a good-faith concern when they complain that once we depart from the seemingly bright-line requirement of an "actual enumeration," the risks of discretionary political decisions is unacceptable.
election as close as this one, we could recount endlessly without ever removing all doubt, because the quixotic effort to do so is bound to introduce more doubt than it removes, and because such an effort is open to abuse and political manipulation. The televised pictures of politically appointed election officials holding individual ballots to the light perfectly captured these concerns.

These worries, in turn, overlap with a second strand of conservative thought—the argument for personal responsibility. Once the rules are in place, on this view, people who fare poorly have no one to blame but themselves. This position is reflected in the defense of “meritocracy,” in the resistance of “effects” tests in equal protection jurisprudence, and in opposition to affirmative action and, more generally, to most forms of redistribution. If formalism reflects the view that even bad rules are better than no

234. See, e.g., Calabresi, supra note 2 (arguing that “the presidential election of 2000 was a tie” and that “[i]n politics, as in all walks of life, it is sometimes necessary to have rules for breaking ties”).

235. See, e.g., Andrew Ferguson, Who Are You Calling Angry?, TIME, Dec. 18, 2000 (“Count the totals 10 times, and you will get 10 different results—first one winner, then another, and then the first one again.”).

236. See, e.g., McConnell, supra note 2, at 662-63 (arguing that “[t]he officials counting dimpled chads . . . knew precisely which candidate would be advantaged . . . [and] changed standards until they found the one that would produce the desired results” and that therefore there was a “federal interest in ensuring that state executive and judicial branches adhered to the rules for selecting electors established by the legislature, and do not use their interpretive and enforcement powers to change the rules after the fact”).


rules at all, the personal responsibility argument captures the intuition that, in any event, the rules are not so bad. The people who are on top in some sense deserve to be on top. They are, after all, the ones who played by the rules and won “fair and square.” People who are not on top could be if only they used the same rules to their advantage. Hence, bending of the rules for the sake of sentimental liberal conceptions of social justice provides perverse incentives that reward sloth, a culture of victimization, and interest group politics. 241

This view is also right beneath the surface in Bush v. Gore. As Chief Justice Rehnquist pointed out, the rules for marking ballots were prominently posted. 242 What he did not say, but might have, is that anyone not intelligent enough to be able to follow these simple directives is also not intelligent enough to vote responsibly. 243 Perhaps these people should not be formally disfranchised, but neither should we distort the system to accommodate them. Hence, people who mismarked their ballots or left hanging chads, hardly deserve our sympathy, much less the dismantling of the entire system to meet their needs.

Finally, both these concerns are linked to a third conservative position—the argument from judicial supremacy. It may seem odd


242. As noted above, however, he apparently exaggerated the extent to which this was true. See supra pp. 1001-02.

243. This view is reflected in Justice O’Connor’s evident annoyance when counsel for Vice President Gore attempted to explain the mistakes that voters had made:

MR. BOIES: Another, another thing that they counted was he said they discerned what voters sometimes did was instead of properly putting the ballot in where it was supposed to be, they laid it on top, and then what you would do is you would find the punches went not through the so-called chad, but through the number.

QUESTION: Well, why isn’t the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn’t be clearer. I mean, why don’t we go to that standard?

to identify this as a conservative position. At least in the recent past, conservatives have attempted to assume the mantle of judicial restraint.\(^{244}\) Even now, conservatives have appropriated the rhetoric of judicial restraint, but if one looks to actions rather than words, Rehnquist Court decisions are better explained by an older conservative tradition that sees courts as the primary bulwark against the unprincipled disorder that is the hallmark of the political process. According to this older view, democratic politics is the locus for the unprincipled exercise of power. Courts, in contrast, enforce the rules that protect individuals from government encroachment. This attitude is reflected in current conservative enthusiasm for judicial protection of property rights,\(^{245}\) the equal protection rights of white men,\(^{246}\) and free speech rights.\(^{247}\) It has become especially salient in the Court's new federalism jurisprudence, which has totally abandoned the practice of judicial deference towards congressional judgments and replaced it with pervasive disdain for political outcomes.\(^{248}\)

Notwithstanding the Court's transparently disingenuous claim that it was forced into the dispute, the assertion of judicial supremacy is also at the heart of \textit{Bush v. Gore}. The Court might have allowed the political process to run its course. We can only speculate why it chose not to do so, but one reason may have been the same concerns that explain its intervention elsewhere. Any political resolution of the 2000 election would have been disorderly, protracted, and unprincipled. Far better, the justices


might have thought, to resolve the matter cleanly through legal processes that are governed by reason rather than power.249

Are these good reasons that justify the result that the Court reached? I certainly don't think so, but I must admit that my views about them reflect no more than my own political commitments. I have tried to be concise in setting forth these reasons, and I worry that I may have presented caricatured versions of them. Let me be clear, then, that I do not mean to be dismissive. Although I believe these arguments to be seriously flawed, they are not outside the bounds of rational discourse. They reflect a widely held set of views defended by sensible people who are neither monsters nor lunatics. That is, after all, about the most that we can expect opponents of the Warren Court to concede about the political judgments that motivated it. As a (sometime) defender of the Warren Court, it ill behooves me to insist on higher standards for the Rehnquist Court.

Thus if we are looking for an apolitical answer to our question "what's so bad about Bush v. Gore," it cannot be that the decision was motivated by these reasons, anymore than it makes sense to claim that the decision is wrong because it led to a Republican administration. From a particular political perspective, the case seems wrongly decided, but from a different political perspective, which cannot be dismissed out of hand, the result is eminently sensible.

Still, it might be claimed that what's bad about Bush v. Gore is not the reasons themselves, but the Court's disingenuousness about its reasons. If the Justices really were motivated by a set of defensible concerns, why did they fail to articulate them? The answer, I think, is that a candid assertion of these reasons in the context of Bush v. Gore would have laid bare a contradiction.

Formalism, personal responsibility, and judicial supremacy are all efforts to make sense of the Official Story. They all express the ideal of an apolitical settlement of the questions that divide us. But the Official Story cannot, in turn make sense of Bush v. Gore. The

problem is that in the name of formal rule-following, the Court itself broke the rules. As I have argued above, the Court’s decision is simply indefensible in terms of the standard rules of constitutional interpretation. A commitment to formal rule-following therefore cannot justify the outcome. Moreover, if the rules were broken, then it cannot be, as the personal responsibility argument claims, that people who obeyed the rules deserved what they got. And since the argument from judicial supremacy rests on the supposed willingness of courts to obey the rules, this position collapses as well. Put differently, the most plausible defense of Bush v. Gore is that the Court appropriately relied upon political, rather than legal judgments. But this defense will not work if, as I believe, the political judgments were, themselves, grounded in assertions about the importance of legality. What’s bad about Bush v. Gore, then, is not that the decision is either “law” or “politics,” but that the Court tried to have it both ways. The political judgments providing best defense of the decision argue for the exclusion of political judgments.

B. Toward an Unsettled Constitution

The only way out of this contradiction is to abandon the Official Story. Recall that standard constitutionalism rests on the assumption that there is a single agreement or settlement on the metalevel and that courts are able to reason from this agreement to settle disagreements on the ordinary, political level. Because the Court embraced this assumption, it was led to the logical contradictions set out above. Bush v. Gore demonstrates that the Official Story cannot work because disagreements on the metalevel replicate disagreements on the political level. To be sure, if everyone agreed on a particular constitutional methodology—say, some version of nonpolitical, constitutional originalism—and if this sort of originalism led to determinate outcomes, we might use this agreement to settle our disputes. But Bush v. Gore demonstrates that, whatever they claim, not even the justices, much less every one else, agree on originalism or on any other nonpolitical
methodology. Whatever the justices said, the result in *Bush v. Gore* is explicable only on the basis of plausible, but eminently contestable, political commitments to formalism, personal responsibility, and judicial supremacy.

The Court's belief in a settlement theory, in turn, leads to the disingenuousness that is the least attractive feature of the majority and concurring opinions. Because the justices believe that they act legitimately only when they rely on apolitical principles, they have to pretend that such principles uncontroversially resolve the case. Because they think that their role is to settle the election, they have to insist that constitutional morality obligates the losers to accept their defeat.250

But there is an alternative to settlement theory and to the transparently make-believe world that it generates. The beginning of wisdom is to accept some obvious truths: of course, the outcome in *Bush v. Gore* is political. It is not the merest coincidence that in this, and countless other cases, Justice Scalia, a conservative Republican, finds principles congenial to the Republican party embedded in the Constitution, while Justice Ginsburg, a liberal Democrat, finds Democratic principles embedded in the same document. And of course, for this very reason, we cannot expect the Court's decision to settle the argument about the election. Constitutional law replicates, rather than settles, our disagreements.

One might suppose that the recognition of these facts should cause the Court to defer to the political branches. If judicial decisions are inevitably political, then why should unelected judges be involved at all?251 Perhaps they should not be. There is no doubt that judicial review has some legitimating tendencies, and, there are disturbing indications that the Court may have succeeded in using the veneer of legal neutrality to legitimate the outcome of the election of 2000. Although some celebrate this fact, for reasons

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250. Cf. Michelman, *supra* note 5, at 692 (arguing that the Court's assumption that obedience to its orders "depends on the country's belief that whatever the Court rules, it rules for reasons of law" might have led it "to act for reasons other than the very ones it announces.")

argued below, I believe that this ability to settle appropriately contestable political disputes makes judicial intervention profoundly problematic.

Still, there are two responses to the seemingly attractive argument for judicial restraint. First, the argument oversimplifies the dilemma that the Court faced. Perhaps it would be better, as Mark Tushnet has recently argued, if the Court routinely remitted important constitutional questions to the political branches. In a culture where there was a long standing expectation that courts would rarely or never involve themselves in political disputes, the possibility of abstention might be meaningful. But, for better or worse, that is not our culture. In a country like ours, where judicial review is already a prominent feature of our politics, deference will seem like only one of several possibilities.

As soon as this is true, the decision to defer is, itself, a kind of intervention. In a world where judicial intervention is a real option, a decision to remain passive is, itself, a choice that has politically predictable consequences and that requires defense. Once the decision is seen in this way, then the Court is again confronted with the problem of reasonable political disagreement.

For example, Professor Tushnet makes no secret of the fact that his opposition to judicial power is linked to a series of substantive political commitments. A person with different political commitments, or a different view about how favorably a court will view those commitments, might have a different position about judicial intervention. Similarly, people with different political commitments disagreed about whether the 2000 election should be settled by the political branches. Moreover, even if we restrict our attention to those who favored such a settlement, these people were, themselves, divided between those favoring a settlement by the Florida legislature and those favoring a settlement by the United States Congress. The meaning of democracy, itself, is contested in our political culture. Therefore, even a Court

253. See id. at 129-153.
committed to respect for democracy would have to decide which democratic outcome merited respect. The Court had to do something when confronted with these disagreements, and anything it did, including doing nothing at all, would reflect a contestable, political judgment.

There is a sense, then, in which judicial power is defensible simply because it is inevitable, at least in a political culture where judicial review is already well established. Given this inevitability, we are forced to confront the question of how to make the best of what judges do. Here, we come to a second argument for judicial intervention—an argument that tries to imagine how the use of judicial power might promote a true community based upon reasonable consent.

As already noted, the Official Story assumes that such a community can be fashioned on the basis of a politically neutral constitutional settlement, which all reasonable people can be expected to endorse. Suppose instead we conceptualize constitutional law as a means of unsettling political resolutions. After all, in a diverse culture where agreement on constitutional methodology continues to elude us, constitutional settlements are inevitably exclusionary. They produce losers whose loss is experienced as something more than a mere political setback. Instead, a constitutional loss is said to be rooted in the constitutive principles of the community. Settlements of this kind are bound to leave losers nursing serious grievances, and such grievances make difficult the kind of consent upon which a just community must be founded.

None of this is to say that we don’t require settlements of some sort. No one claims that it would be good for the country for two people to hold competing inaugural parades on January 20. But precisely because most of us understand that settlement is good for the country, we can usually rely on ordinary political processes to bring it about. The appropriate role for constitutional law is not to settle disputes, but to systematically unsettle political outcomes by providing losers with rhetorical resources that they can utilize to attack settlements on the one hand while evincing their
commitment to core community values on the other.

Constitutional rhetoric is both indeterminate, and uniquely powerful in our culture. This combination allows everyone to use it to advance their position. Critics of liberal constitutionalism have long attacked it for this reason, but in fact, the combination of indeterminacy and power is liberal constitutionalism’s greatest strength. This is so because if we are to expect losers to accept their loss while remaining within the community, then we need to provide them with a way of continuing the argument. Conceptualized in this fashion, constitutional law allows dissenters to dispute political outcomes from within the community, rather than attacking it from without.

Thus, judicial intervention is justifiable to the extent that courts use the rhetoric of liberal constitutionalism in a fashion that opens up political argument. To be sure, a court that understood constitutional law in this way would resolve the dispute before it and would do so utilizing the standard tools of constitutional argument, including text, tradition, precedent, moral reasoning, and policy analysis. But it would do so while also candidly acknowledging that a different court, with different background political commitments, could use the same tools to reach a different outcome. Such an acknowledgment would invite losers to participate in continued dialogue, even as the case is decided against them. It builds community by acknowledging that the entailments of even our deepest commitments are appropriately and radically contestable.

What’s bad about *Bush v. Gore*, then, is that none of the justices wrote an opinion that remotely approaches these requirements. Both the majority and the dissenting justices made the mistake of supposing that the Court’s legitimacy stemmed from its ability to articulate a set of apolitical principles to which all Americans owe allegiance. The majority thought (or at least pretended to think) that these principles gave it the right to settle the election, while the dissent thought that the majority’s abuse of the principles squandered its legitimacy. Both sides are sadly mistaken. The Supreme Court has no warrant to shut down political disputes.
Constitutional law best serves the ends of community when it opens up, rather than closes down, political argument. Nor should the Supreme Court's prestige depend upon its political neutrality. Instead, it earns that prestige when it utilizes concepts and a vocabulary that are sufficiently open-textured to allow the losers, using the same concepts and vocabulary, to claim that the Court's decision is wrong.

I wish that the justices understood all of this and stopped pretending that only their disinterested statesmanship stands between the country as we know it and a war of all against all. To the extent that the Court has persuaded the country that this is true, its decision provides a powerful argument for those who oppose judicial review.

Suppose, though that we want to make the best, rather than the worst, of Bush v. Gore. Oddly, the strength of the unsettled constitution is apparent even when the Court abuses its powers. The beauty of unsettlement theory is that it works, at least to some extent, even when the justices are trying to prevent it from working.

Thus, it remains unclear whether the Court has succeeded in shutting down debate about the election. True, George Bush is now the President and many Americans seem eager to move on. But given the constellation of political forces in Congress and the Florida legislature (not to mention the results on the ground in Florida), a Bush presidency was the likely outcome in any event. Moreover, if unsettlement theory is to work at all, it cannot work on the level of the individual case. Whenever the Court makes a decision, there is a sense in which it settles the case before it. If it functions at all, unsettlement theory, works on a broader canvass. Often it unsettles entire areas of law, like the appropriate division between public and private spheres, but it can also function in the context of more discrete disputes, like the election of 2000. In this context, it allows losers to continue the war despite losing a battle. True, there is no prospect of disposing George Bush as President in the same sense that there is a prospect of, say, overruling Roe v.
Still, when the Supreme Court made George Bush President, it handed his opponents a set of potent rhetorical tools that have the potential to make his victory seem illegitimate and so weaken him politically. Because of the Supreme Court, Gore's defeat has become something more than a mere political setback. Instead, it can be portrayed as a constitutional outrage. This is so because liberal constitutionalism has an existence that is independent of the Supreme Court. The Court has had its say, and now it is the turn of Bush's opponents to have theirs. They, too, can invoke the empty claims of constitutional neutrality to attack the Court and the outcome that it produced.

Moreover, on a broader scale, Bush v. Gore has the potential to change the Official Story. At least for a time, it is going to be difficult for most Americans to take seriously the Court's defenders when they speak with pompous sanctimony about neutral constitutionalism and the rule of law. Even if nothing else is accomplished, temporary freedom from pompous sanctimony is no small benefit. The risk, of course, is that sanctimony will be replaced by cynicism. But although this outcome is certainly possible, it is not inevitable. Instead of bemoaning the politicization of constitutional law, we might come to celebrate the open texture of a set of commitments that allows people motivated by contradictory and irreconcilable substantive views to speak a common language. Indeed, perhaps even the justices themselves will come to see that they can be authoritative without being authoritarian and that the best version of judicial review promotes, rather than settles, political argument.

Is this optimism warranted? An unsettled constitution provides tools that political actors can utilize, but it provides no guarantee of success. Perhaps in the long run the Court's decision will be seen as wise and the Bush administration as wholly legitimate. Perhaps the Court will manage to hold onto its Olympian position as the neutral expositor of supreme law. But there are also other

255. I make no claim here as to how effective his opponents have been in using those tools.
possibilities. It is important that, within days of the Court's decision, the "Reelect Gore" bumper stickers began to appear, that within weeks, newly energized interest groups began attempting to guarantee access to the ballot and preparing for the next Supreme Court confirmation fight, and that within months the Senate began hearings on the appropriate consideration of ideology in the appointment of Supreme Court Justices.

So what's so bad about *Bush v. Gore*? Just maybe it's not so bad, after all. Even as the Court settled the election, it provided tools that we can use to unsettle the country. It remains to be seen whether we will seize this opportunity, but for those of us who were defeated in the disputed election of 2000, things surely could have been worse.