

Bush v. Gore Through the Lens of Constitutional History

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On December 12, 2000, the United States Supreme Court, for the first time in its history, picked a president.¹ By shutting down the state-wide manual recount that had been ordered just days earlier by the Florida Supreme Court, the High Court Justices ensured that George W. Bush would become the forty-third president of the United States.

In this essay, I shall speculate on the long-term implications of this controversial ruling for the Court's institutional standing and legitimacy. My strategy will be to canvas some of the landmark decisions in American constitutional history—*Dred Scott v. Sandford*,² *Brown v. Board of Education*,³ *Furman v. Georgia*,⁴ *Roe v. Wade*,⁵ and others—with the aim of deriving a list of factors that predict how particular rulings will affect the Court's reputation. Then I shall consider how those variables apply to *Bush v. Gore* and predict that decision's long-term consequences.

1 Bush v. Gore, 121 S. Ct. 525 (2000).

2 60 U.S. (19 How.) 393 (1857).

3 347 U.S. 483 (1954).

4 408 U.S. 238 (1972).

5 410 U.S. 13 (1973).

The premise of this Article is that history's verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the Court's opinion. I do not intend to defend that premise here, other than to say that history's judgment on *Brown v. Board of Education*—the ultimate feather in the Court's constitutional cap—seems to confirm its plausibility. The legal reasoning in *Brown* was widely ridiculed at the time, both by white southerners distraught over the threat posed by the decision to their cherished “way of life”⁶ and by elite legal academics and judges deeply invested in the enterprise of “reasoned elaboration.”⁷ The *Brown* Court's dubious rendition of the original understanding of the Fourteenth Amendment, its willingness to overturn decades' worth of precedent sustaining the constitutionality of racial segregation, and its unprecedented invocation of sociological data in support of its legal conclusion rendered the decision susceptible to criticism, both from defenders and supporters of racial segregation.⁸ Yet, over the course of ensuing decades, *Brown* became a cultural icon, and the Court's vanguard role in the civil rights movement (at least relative to that of other governmental institutions) has enormously enhanced its prestige among the American people.⁹ This conversion of *Brown* from a target of vituperative legal and sociopolitical criticism into a cultural icon may suggest that the Court's long-term standing depends more on getting its decisions right—by which I mean ruling in a manner consonant with long-term public opinion—than on the quality of its legal reasoning.

Of course, this premise may be mistaken. The Justices themselves, for example, seem convinced of the opposite view—that the Court's legitimacy depends on its ability to convince observers that its rulings are based on sound legal principle, rather than political calculation or personal preference. Thus, in reaffirming the vitality of the

⁶ See, e.g., Tom Brady, *Black Monday* (1955); James J. Kilpatrick, *The Southern Case for School Segregation* (1962).

⁷ See, e.g., Learned Hand, *The Bill of Rights* 55 (1958) (“I have never been able to understand on what basis it [Brown] does or can rest except as a coup de main.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 32-34 (1959) (criticizing the Court in *Brown* for its failure to justify its result on any “neutral principle”).

⁸ See, e.g., sources cited *supra* notes 6-7; Edmond Cahn, *Jurisprudence*, 30 *N.Y.U. L. Rev.* 150 (1955). See also Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 *Va. L. Rev.* 1881, 1931 (1995) (noting that in 1954 *Brown* “was not seen to be so obviously correct”).

⁹ See, e.g., John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 330 (1994) (stating that *Brown* “is universally approved as both right and necessary[;] . . . [m]ore powerful by far than any academic theory of constitutional interpretation is the legend of *Brown*”). For other similar statements, see the sources cited in Klarman, *supra* note ___, at 1928 n. 125.

Court's landmark abortion rights decision, *Roe v. Wade*, the plurality opinion in *Planned Parenthood v. Casey* declared that "the underlying substance of [the Court's] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws."¹⁰ Further, the plurality stated, "a decision without principled justification would be no judicial act at all" and "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures. . . ."¹¹ Likewise, the plurality opinion in *Bowers v. Hardwick* observed that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."¹²

For the sake of the Court's legitimacy, one must hope that the Justices are wrong about this, for it will be difficult to find reputable lawyers who believe that *Bush v. Gore* was "grounded truly in principle" or "in the language or design of the Constitution," rather than in the conservative Justices' partisan preference for George W. Bush in the 2000 presidential election.¹³

In the first part of this Article, I shall try to demonstrate that the *Bush* result can be explained only in terms of the conservative majority's partisan political preferences. Part II will consider the likely impact of this ruling on the Court's long-term institutional standing.

¹⁰ 505 U.S. 833, 865 (1992).

¹¹ *Id.*

¹² 478 U.S. 186, 194 (1986) (plurality opinion).

¹³ For some representative critiques of *Bush*, see Ronald Dworkin, "A Badly Flawed Election," *New York Review of Books*, Jan. 11, 2001, at 53 (calling *Bush* "one of the least persuasive Supreme Court opinions that I have ever read"); Jeffrey Rosen, "Disgrace," *New Republic*, Dec. 25, 2000, 18 (noting that the Justices, "by not even bothering to cloak their willfulness in legal arguments intelligible to people of good faith who do not share their views, . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law. . ."); Anthony Lewis, "A Failure of Reason: The Supreme Court's Ruling isn't Convincing," *Pittsburgh Post-Gazette*, Dec. 18, 2000, A-13 (judging the decision "a dismal failure," judged by the standard of providing "reasoned arguments," and concluding that it "invites people to treat the court's aura of reason as an illusion"); Neal Katyal, "Politics over Principle," *Washington Post*, Dec. 14, 2000, A35 (calling decision "lawless and unprecedented"); J. Dionne Jr., "So Much for States' Rights," *Washington Post*, Dec. 14, 2000, A35 (accusing the majority of "contort[ing] their own principles and creat[ing] new law"); Scott Turow, "No Turning Back neFrom the Dart the Court has Thrown," *Washington Post*, Dec. 17, 2000, B1 (quoting Dean Terry Sandalow to the effect that the decision was "incomprehensible" and "an unmistakably partisan decision without any foundation in law").

I. *BUSH V. GORE*: LAW OR POLITICS?

Just one day after the Court rendered its decision in *Bush v. Gore*, Justice Clarence Thomas appealed to a group of high school students visiting the Court not to attribute the ruling to the Justices' partisan preferences: "I have yet to hear any discussion, in nine years, of partisan politics among members of the court."¹⁴⁴ Chief Justice Rehnquist, asked by the press to comment on Thomas's remarks, agreed "absolutely" with his brethren's statement.¹⁵⁵ It is an interesting question whether these two Justices genuinely believe their pretensions to nonpartisan decisionmaking. Court watchers, possibly less in need of self-delusion, are likely to regard such claims as preposterous.

As a preliminary matter, it is helpful to identify precisely what distinguishes *Bush v. Gore* from other cases of constitutional interpretation. Any serious student of constitutional law appreciates that political ideology necessarily influences constitutional interpretation. The text of the Constitution is so open-ended, and the debate over permissible sources of interpretation so inconclusive, that it is virtually impossible for a judge not to be influenced by political ideology when construing the Constitution.¹⁶ Thus, we should not be (and most of us are not) surprised when the Justices divide, along predictable political lines, when adjudicating the constitutionality of abortion restrictions, school prayer, gay rights, affirmative action, minority voting districts, and a wide variety of federalism issues—just to name some of the more prominent constitutional disputes adjudicated by the Rehnquist Court.¹⁷

Yet, *Bush v. Gore* is importantly different from these other constitutional cases. It is one thing to say that a judge's *political ideology* influences her constitutional interpretations. It is quite another to say that her *partisan political preferences* do. The *Bush* outcome was not a product of the conservative Justices' political ideologies. As we shall see, these Justices' oft-professed commitment to federalism and to judicial restraint logically should have led them to the opposite result.

14 Robert G. Kaiser, "Opinion is Sharply Divided on Ruling's Consequences," Washington Post, Dec. 14, 2000, A25.

15 Id.

16 See, e.g., Michael J. Klarman, Fidelity, Indeterminacy, and the Problem of Constitutional Evil, 65 Fordham L. Rev. 1740 (1997).

17 See cases cited *infra* notes ____.

Rather, the *Bush* outcome was a product of these Justices' partisan political preference for George W. Bush, which, for at least a couple of them, may have been enhanced by their desire to retire from the Court while a Republican President is in office to pick their replacements. Another way of stating the point is this: Had all the other facts in the Florida election imbroglio remained the same, but the situation of the two presidential candidates been reversed, does anyone seriously believe that the conservative Justices would have reached the same result?¹⁸ It is telling how even Republican commentators defending *Bush* generally have refrained from arguing for this conclusion.¹⁹

This means that the result in *Bush v. Gore* depended on the order in which the parties' names appeared on the case caption. This is extraordinary. Every first year law student is taught that a minimum requirement of the rule of law is that the outcome of cases ought not to vary simply as a result of reversing the parties to the litigation. It may simply be a failure of imagination, but I cannot think of another Supreme Court decision about which one can say with equal confidence that switching the parties to the litigation, and nothing else, would have changed the result.

18 Republican defenders of *Bush* probably would respond that the liberal Justices likewise voted their partisan political preferences. Yet, it is not so clear that this is true. First, two of the *Bush* dissenters, Justices Souter and Stevens, were Republicans for most of their adult lives, and for all we know still consider themselves to be such. While both of these Justices do evince liberal voting patterns in constitutional cases, it seems unjustified to assume that either or both of them necessarily supported the Democratic presidential candidate in the 2000 election. More importantly, it is unfair to the four dissenters to assume that they would have voted the opposite way had the parties been reversed. The majority and dissenting opinions are similar in that each set of Justices reached results that seem consistent with their partisan political preferences (on the dubious assumption, questioned above, that Souter and Stevens preferred Gore to Bush). The two sets of opinions are dissimilar, as I hope to show, in that the dissenters followed existing law, while the majority made up new (bad) law. Under these circumstances, it seems a compelling inference that the Justices in the majority allowed their political preferences to trump the law. It is far more dubious to infer that the dissenters followed their political preferences rather than the existing law.

19 Republican commentators defending the Court's ruling have tended to emphasize that the Court saved the country from a constitutional crisis, or that it was Gore who initially invited judicial resolution of the election controversy (and thus scarcely can be heard to complain when the Supreme Court provided that resolution), or that Democrats are hypocritical to complain of judicial activism, which they invented. See, e.g., Paul A. Gigot, "Liberals Discover the Tyranny of the Courts," *Wall Street Journal*, Dec. 15, 2000 (noting that "having turned the Supreme Court into a superlegislature, the left is now horrified to see what it's created" and defending the decision on the ground that "it saved the country another month of fighting before reaching the same result"); Charles Krauthammer, "Defenders of the Law . . .," *Washington Post*, Dec. 15, 2000, A41 (defending *Bush* on the ground that Democrats "turned this into a lawyers' contest" and that the Court averted "a true constitutional crisis"); David G. Savage & Henry Weinstein, "'Right to Vote led Justices to Ruling,'" *Los Angeles Times*, Dec. 14, 2000 (reporting the views of lawyer Carter Phillips, who defended the result but not the reasoning of *Bush*, and of law professor John Yoo, who agreed with the result but was "surprised" by the equal protection rationale subscribed to by the five conservative Justices); Fred Barbash, "A Brand New Game," *Washington Post*, Dec. 17, 2000, B1 (conceding that the decision may have been "poorly reasoned" or attributable to "partisan motives," but denying that this makes it "illegitimate," and noting that Democrats frequently have embraced judicial activism).

Few conservative commentators have undertaken the onerous burden of defending *Bush* on its merits.

See, e.g., Michael W. McConnell, Two-and-a-Half Cheers for *Bush v. Gore*, U. Chi. L. Rev. (forthcoming 2001).

If we broaden our perspective beyond constitutional *litigation*, however, an analogous instance does come to mind—the recent Clinton impeachment episode. Many observers plausibly concluded that the two parties’ positions on the substantive standard for impeachment, as well as on related procedural issues, were entirely a product of their partisan commitments. That is, had it been a Republican president being impeached for identical behavior, the Democrats would have insisted on a lower threshold standard for impeachment, the desirability/necessity of the Senate pursuing an impeachment trial to its bitter end, and so forth.

I think this is the right way to understand the Clinton impeachment,²⁰ yet that still leaves one crucial distinction between that constitutional controversy and *Bush v. Gore*. The constitutional law of impeachment is highly indeterminate. The constitutional text is spare, the original intent evidence is conflicting and inconclusive, and precedents on impeachment are few and far between.²¹ Given this degree of constitutional indeterminacy, it was inevitable that partisan preferences would drive post hoc constitutional interpretations regarding Clinton’s impeachment. *Bush v. Gore* was importantly different, because the constitutional law relevant to adjudicating that dispute was reasonably clear; the majority simply chose not to follow it. While the Clinton impeachment controversy illustrates partisan preferences dictating the resolution of constitutional indeterminacy, *Bush v. Gore* reveals partisan preferences *trumping* law.

This is a strong claim, though I believe it is one that virtually all Democratic lawyers, and a fair number of Republican ones, will agree with. Let us now take a close look at the reasoning of the majority and concurring opinions in *Bush* to see if this serious charge is a fair one.

The per curiam opinion, representing the views of the five conservative Justices, relies on two bases for its reversal of the Florida Supreme Court’s decision ordering a state-wide manual recount of presidential undervotes—those ballots for which the voting machines could not ascertain the voter’s intention, but a manual inspection might. First, the majority rules that a manual recount of improperly-

20 See Michael J. Klarman, Constitutional Fetishism and the Clinton Impeachment Debate, 85 Va. L. Rev. 631, 654-55 (1999) (arguing that, in light of the “legal indeterminacy” surrounding impeachment, “it is natural and perhaps inevitable that the personal values of the interpreters will determine legal outcomes”).

21 See id. at 631-50.

-marked ballots, if conducted pursuant to standards no more precise than ascertaining the “intent of the voter,” would violate the Equal Protection Clause of the Fourteenth Amendment. This is, primarily, because of the risk that identical ballots—from different counties or even from the same county—might be evaluated differently.²² Specifically, punch card ballots with partially detached chads or indented chads might be counted by one counting team based on its interpretation of the “intent of the voter” standard, but not by another applying a disparate interpretation. Second, the majority ruled that a remand to the Florida Supreme Court for an opportunity to devise more precise, uniform standards to guide the manual recount, which might alleviate any equal protection concerns, was impossible because of looming time constraints. Specifically, *Bush v. Gore* was handed down roughly two hours before midnight on December 12—the day on which resolution of the election contest had to be completed, if Florida’s slate of presidential electors was to enjoy the “safe harbor” from congressional challenge afforded by federal statute. Neither aspect of the majority opinion is persuasive.

The majority’s equal protection rationale creates entirely new law.²³ Never before had the Supreme Court (and perhaps not any other court either) intimated that application of a vague statutory standard like “intent of the voter” in a manual recount (or any other vote count, for that matter) violated the Equal Protection Clause because of the risk that identically-marked ballots might be counted differently.²⁴ Of course, to say that *Bush v. Gore* creates new equal protection law is not to say that it is wrong (except, of course, for Justice Scalia, who is on record as rejecting novel constitutional inter-

22 *Bush v. Gore*, slip opinion at 8-9. This was not the only equality concern the majority raised. The majority also suggested that limiting a manual recount to undervotes (and excluding overvotes) and using untrained personnel as vote counters raised equal protection concerns.

23 The plethora of states employing the “intent of the voter” standard in a wide variety of contexts, including manual recounts and the counting of write-in and absentee ballots, no doubt were surprised to learn that they have been acting unconstitutionally all along. For these state laws, see *Bush*, slip opinion at 3 n.2 (Stevens, J., dissenting). See also Brief of Respondents, *Bush v. Gore*, at 36 (noting that before voting machines were invented, the “intent of the voter” standard was universally employed).

24 See Brief of Respondent, *Bush v. Gore*, at 44-45 (noting the prevalence of the “intent of the voter” standard and listing numerous judicial decisions applying it). It is worth pointing out that had the Florida Supreme Court prescribed a more specific formula for ascertaining the “intent of the voter,” the conservative Justices probably would have ruled that the state court was changing state law and thus violating Article II. See *Bush v. Gore*, slip opinion at 7 (refusing to decide whether the state supreme court had authority under state statute to prescribe a more specific standard for manually counting votes); see also *Gore v. Harris*, 2000 WL 1867628 (Fla. 2000) (per curiam) (noting that a more expansive definition “would have raised an issue as to whether this Court would be substantially rewriting the Code after the election”).

pretations that forbid longstanding practices).²⁵ The Supreme Court often is called upon to resolve novel constitutional controversies, and inevitably on such occasions it creates new law.

The majority's equal protection rationale is objectionable not because it represents new law, but rather because it represents bad law—and law that the conservative Justices almost certainly would have rejected in any other setting. If it violates the Equal Protection Clause to conduct a manual recount under a vague standard that might result in identical ballots being counted differently, then certainly it should be unconstitutional to use different ballot designs or different ballot-reading technologies, if these yield substantially different likelihoods of a particular vote being counted.²⁶ Studies have shown that undervotes were five times more likely in Florida counties using punch-card ballots than in those using more modern, optical-scan ballots.²⁷ Similarly, a potentially confusing “butterfly” ballot employed by Palm Beach County led to a much higher-than-normal rate of presidential overvotes, as did ballots in other counties

25 See, e.g., *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

26 Justice Souter, who disagreed with most aspects of the majority and concurring opinions, agreed that standardless manual recounts were “wholly arbitrary,” and thus unconstitutional. *Bush*, slip opinion at 7 (Souter, J., dissenting). Unlike the majority, Souter did proffer an explanation for why standardless recounts were constitutionally distinct from the use of disparate voting mechanisms likely to yield different rates of nonvotes. Souter argued that local variety in the use of voting technology could be justified on the grounds of cost concerns, the desire for experimentation, and so forth. Standardless manual recounts, on the other hand, were simply arbitrary. While Souter purports to find the Florida manual recount unconstitutional on the basis of a minimum rationality standard, this is not the way that standard generally has been applied by the Court. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). It is not hard to conjure possible explanations for a court (or legislature) to decline to specify standards more specific than “the intent of the voter” to guide a manual recount. First, the same value in experimentation that Souter identifies with regard to voting machines seems to apply in the context of vote tabulation standards. The best way to decide upon the optimal standard might be for different counties to experiment with different standards and then compare notes. Second, “local variety” also might justify leaving it to county canvassing boards to use their discretion in defining more precise standards. It is easy to imagine the desirability of applying a different standard in evaluating ballot markings in precincts with lots of elderly voters, who might experience greater difficulty punching out chads. This sort of imagined justification is all that minimum rationality review generally requires. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (“A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”). Finally, the Florida *courts*’ refusal to prescribe a more specific standard is compellingly justified by its desire not to transgress on the state legislature’s prerogatives with regard to the selection of presidential electors. For the state courts to have prescribed a standard more specific than the legislature’s “intent of the voter” would have invited Supreme Court reversal on Article II grounds. Under these circumstances, it was not “wholly arbitrary” for the Florida Supreme Court to refrain from prescribing more specific standards.

27 See Ford Fessenden, “Contesting the Vote: The Voting Machines,” *New York Times*, Dec. 1, 2000, A29. See also *Bush*, slip opinion at 4 (Breyer, J., dissenting) (noting that voters in counties with different voting machines arrived at the polls “with an unequal chance that their votes will be counted”); *id.* at 4 n.4 (Stevens, J., dissenting) (noting that the percentage of nonvotes—undervotes and overvotes together—in Florida counties using punch card ballots was 3.92%, while the same rate in counties using optical scan systems was only 1.43%).

that listed presidential candidates on two separate pages.²⁸ Moreover, these county-to-county disparities in presidential undervotes and overvotes were correlated with race; heavily black precincts across Florida were more likely to use antiquated voting equipment, which substantially increased the chances of ballots failing to register a vote in the presidential election.²⁹ One principal objective of the court-ordered manual recount in Florida was the amelioration of these other inequalities that resulted from the use of disparate voting technologies in different counties.³⁰ Yet, the *Bush* majority does not deign to explain why these other ostensible equal protection problems do not invalidate the entire Florida presidential election vote (or, for that matter, the entire nationwide presidential election, given that other states exhibit the same lack of uniformity in the way they conduct presidential elections).³¹ All the majority says with regard to these seemingly analogous equal protection difficulties is that its holding is limited to “the special instance of a statewide recount under the authority of a single state judicial officer”³² and 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.”³³ Why was that question not before the Court? Well, because “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”³⁴ So much for the requirement that courts engage in “reasoned elaboration.”³⁵ No interpretation of the Equal Protection

28 See, e.g., Dan Keating, “Democrats Had Most Voided Votes in Fla.,” *Washington Post*, Jan. 27, 2001, A1; Theodore M. Porter, “It’s Not in the Numbers,” *Washington Post*, Nov. 26, 2000, B1. See also Jeffrey Rosen, “Speed Kills Misjudge,” *New Republic*, Nov. 27, 2000, 17 (noting that Bush’s equal protection argument would render the butterfly ballot unconstitutional).

29 See John Mintz, “Florida Ballot Spoilage Likelier for Blacks,” *Washington Post*, Dec. 3, 2000, A1; David Montgomery, “Simmering Election Anger Incites Rights Leaders,” *Washington Post*, Jan. 5, 2001, A10; see also Keating, *supra* note __ (noting that Republican-leaning counties were more likely to use modern vote-counting technology that reduces the likelihood of overvotes by alerting voters of the problem before they have left the voting booth).

30 See *Bush*, slip opinion at 3-4 (Breyer, J., dissenting); see also Rosen, *supra* note __ (“By preventing states from correcting the counting errors that result from different voting technologies, the conservatives have precipitated a violation of equal treatment far larger than the one they claim to avoid.”)

31 See, e.g., Savage & Weinstein, *supra* note __ (quoting law professor David Cole to the effect that the majority’s equal protection rationale means that “every state electoral system in the country is in violation,” and reporting law professor Pamela Karlan making a similar point).

32 *Bush*, slip opinion at 10.

33 *Id.* at 11.

34 *Bush*, slip opinion at 10-11.

35 For this notion, see, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and*

Clause that makes it impossible to conduct elections can be a sensible one; the majority's rationale in *Bush* does just that.

The Court's equal protection rationale was so novel and far-fetched that Bush's lawyers came exceedingly close not even bothering to raise it.³⁶ When they did, moreover, it was treated very much as an afterthought, receiving less than two sentences of attention at the very end of a forty-five page brief in the Florida Supreme Court.³³⁷⁷ I do not mean to suggest that a lawyer's failure to raise a particular legal argument, or her decision to raise it almost as an afterthought, proves that the argument is a bad one. Lawyers, like everyone else, sometimes make mistakes and miscalculations. Still, there is a sense in which the ex ante calculation of lawyers as to what qualifies as a good legal argument is more revealing than the Court's post hoc determination. The Supreme Court enjoys such immense prestige that the conclusion by a majority of Justices that "x" is a good legal argument almost conclusively proves it to be so.³⁸ Yet, unless we are to stipulate that the Court is not only "final" but also "infallible,"³³⁹⁹ it must be that the Justices occasionally vindicate bad legal arguments. Because of this tendency of Supreme Court decisions retrospectively to validate the arguments upon which they are based, the ex ante judgments of lawyers—at least highly proficient ones, possessed of adequate incentives to raise all credible arguments—may be more reliable indicia of what counted as a good legal argument at a particular point in time than are the Court's post hoc determinations. In this same sense, the nearly-universal conclusion of legal academics and political pundits, before the Supreme Court granted review on the second go-round in *Bush*, that no serious federal question existed indicates how far-fetched the ultimately victorious equal protection

Application of Law 164-70 (tentative ed. 1958); Wechsler, *supra* note ___, at 11-12, 15-17.

36 See James V. Grimaldi & Roberto Suro, "Risky Bush Legal Strategy Paid Off," *Washington Post*, Dec. 17, 2000, A32 (noting that the equal protection argument was "initially thought so weak" that Bush's lawyers thought it did not raise a substantial federal question). See also David Von Drehle, "In Florida, Drawing the Battle Lines," *Washington Post*, Jan. 29, 2001, A1 (noting serious divisions within the Bush camp and among Republican lawyers more generally as to whether the equal protection argument was even worth raising).

37 See Amended Brief of Appellees, *Gore v. Harris* (Supreme Court of Florida, Case No. SC00-2431), p. 45. See also Brief of Respondents, *Bush v. Gore*, 35 (noting that petitioners raised their equal protection challenge to standardless recounts in just "one throwaway line" in the state supreme court).

38 See, e.g., Michael Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551, 566 (1985) ("[J]ust about any choice a majority of the Supreme Court is likely to make would probably fall within [the] boundary [set by] accepted canons of judicial behavior, even in conjunction with the constitutional text.").

39 See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

argument was.⁴⁰ Given the skepticism that these same conservative Justices elsewhere have evinced toward equal protection challenges to state political processes,⁴¹ their willingness to intervene in *Bush* would not have been easy to predict.

Even after the majority identified an equal protection problem with the “standardless” recount, however, the ordinary remedy would have been to remand the case to the Florida Supreme Court, to afford it an opportunity to cure the problem. Instead, the per curiam opinion concluded that such a remedy would be pointless, since the December 12 “deadline” for resolving Florida’s election contest was immediately at hand.⁴² The Court manufactured this deadline out of thin air. The federal statute identifying December 12 as a relevant date in the presidential election process plainly is a “safe harbor” provision, to be utilized or ignored by the states at their discretion; it operates as an instruction to Congress, when that institution counts the states’ electoral votes, not as a command to the states, to be enforced by the federal courts.⁴³ Nothing in federal law requires that a state’s presidential electors be appointed until the date set for the electors to meet and cast their votes (December 18, on the 2000 election calendar). The majority opinion does not dispute this point. Rather, it reads the Florida Supreme Court decision under review as declaring the state legislature’s intention to take advantage of this federal safe harbor provision. Thus to remand *Bush* to the state court would have been pointless, according to the majority, since under

40 See, e.g., William Kristol & Jeffrey Ball, “Against Judicial Supremacy,” *Weekly Standard*, Dec. 4, 2000, 10 (noting that “[i]t would . . . be a mistake . . . for Bush to put too much hope in the federal courts” because “[m]ost GOP-appointed judges will vote as federalists, for the right of states to prevail on election law,” and thus will reject the equal protection argument); Charles Lane, “Bush’s Appeal to High Court Raises Issue of Fairness,” *Washington Post*, Nov. 23, 2000 (“Even Republican lawyers who sympathize with Bush’s case express doubt about the Bush campaign’s [equal protection] claim.”); Editorial, “The Election Road Narrows,” *New York Times*, A28 (noting, after the initial Supreme Court remand, that once the Florida Supreme Court revised its ruling to address the Court’s Article II concern, “there is unlikely to be any federal issue that would warrant further review by the United States Supreme Court”); Charles Lane, “Territory is Uncharted for Court Action,” *Washington Post*, Nov. 10, 2000, A1 (describing the various state law disputes generated by the election and then noting that “[f]ederal law generally leaves the administration of elections for federal office up to the states, so the matter is likely to be settled in Florida’s courts, with no ultimate appeal to the U.S. Supreme Court.”). See also Scott Turow, “No Turning Back From the Dart the Court has Thrown,” *Washington Post*, Dec. 17, 2000, B1 (noting that constitutional scholars “of all stripes” had predicted that the Supreme Court would not get involved in the case).

41 See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 143, 145, 158, 161 (1986) (O’Connor, J., with Rehnquist, J., dissenting) (warning against “the federal judiciary” becoming involved in “the most heated partisan issues,” denying that the Equal Protection Clause provides “a judicially manageable standard” for adjudicating political gerrymandering claims, and denying that “mainstream political parties” require federal judicial protection).

42 *Bush*, slip opinion at 12.

43 See *Bush*, slip opinion at 5 (Stevens, J., dissenting); *id.* at 2 (Souter, J., dissenting).

the Florida Supreme Court's own interpretation of state law any manual recount had to be completed by the December 12 deadline.⁴⁴

One can only marvel at the disingenuousness of this conclusion. First, there is enormous irony in the *Bush* majority's eagerness to defer entirely to the Florida court's supposed conclusion regarding the significance of the December 12 safe harbor deadline under state election law. Three members of that majority could identify no other aspect of the state court's interpretation of state election law that warranted similar deference. The majority's posture on this issue is especially remarkable in light of the concurring Justices' statement that, in light of Article II concerns, "the *text* of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."⁴⁵ The text of Florida election law does not say a word about the federal safe harbor provision.

Second, to the extent that the Florida Supreme Court did emphasize in its opinion the significance of the December 12 deadline,⁴⁴⁶⁶ it plainly was responding to the Supreme Court's earlier intervention in *Bush v. Palm Beach County Canvassing Board*,⁴⁷ which essentially had coerced the Florida court, upon threat of reversal, to acknowledge the importance of the safe harbor provision.⁴⁸ Thus, the Supreme Court first forced the Florida jurists to acknowledge the significance of the December 12 deadline, and then insisted that its own hands were tied with regard to permitting the manual recount to continue, given the Florida court's interpretation of the significance of the December 12 deadline. This is a nifty trick. Third and most importantly, nothing in the Florida Supreme Court opinion, and no sensible reading of state law, treated the December 12 safe harbor deadline as dispositive, regardless of any competing considerations.⁴⁹ It is one

44 *Id.* at 12. The concurring opinion makes this same point, emphasizing the "wish" of the state legislature to take advantage of the federal safe harbor provision—a wish that appeared nowhere in the statute, but only in the state supreme court opinion. *Id.* at 11-12 (concurring opinion).

45 *Bush*, slip opinion at 2 (concurring opinion) (emphasis added).

46 See *Gore v. Harris*, slip opinion at 5 (per curiam).

47 121 S.Ct. 471 (2000).

48 *Id.* at 474 (noting that "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"). Nothing in the Florida election code expresses such a "wish," and even if it did, it is hard to fathom which statutory interpretations this insight would "counsel against," given that state courts engaging in statutory interpretation presumably always are trying correctly to identify the legislature's intention.

49 See, e.g., *Gore v. Harris*, 2000 WL 1867628 (Fla. 2000) (Shaw, J., concurring) ("[I]n my opinion, December 12 was not

thing to say that the Florida legislature would have wished, all things being equal, to take advantage of the federal safe harbor provision. It is another thing entirely to say that the legislature would have wanted the availability of the safe harbor provision to trump any and all competing considerations, such as ensuring that every vote be counted.⁵⁰ The outcome of the 2000 presidential election quite possibly turned on this aspect of the *Bush* decision—a rationale that is, to put it bluntly, a complete fabrication.

A separate concurring opinion joined by the Court's three most conservative members (Chief Justice Rehnquist, and Justices Scalia and Thomas)—an opinion that commentators plausibly have suggested was originally designed as the majority opinion⁵¹—emphasizes a different rationale for reversing the Florida Supreme Court and terminating the manual recount.⁵² According to these Justices, Article II of the Constitution, which provides that state *legislatures* shall determine the manner of selecting presidential electors, forbids any state court interpretation of state election law that would represent a departure from the legislative design. Chief Justice Rehnquist identifies several ways in which (he says) the Florida Supreme Court's decision ordering a state-wide manual recount impermissibly distorts state election law.⁵³

The concurring opinion charts new territory, since this provision in Article II has generated only one prior Supreme Court interpretation—and that decision was not directly relevant to *Bush*.⁵⁴ To say that the concurring opinion adopts a novel construction of Article II is, again, not necessarily to suggest that there is anything wrong with that interpretation. The relevant question is whether the interpretation (and its application) is persuasive, not whether it is novel. It is also relevant whether the interpretive principles employed in that construction are reconcilable with the general jurisprudential commitments of the Justices who endorsed it. On neither of these scores does the concurring opinion pass muster.

a 'drop-dead' date under Florida law.”).

50 See *Bush*, slip opinion at 5-6 (Breyer, J. dissenting).

51 See, e.g., David G. Savage & Henry Weinstein, “‘Right to Vote’ Led Justices to 5-4 Ruling,” *Los Angeles Times*, Dec. 14, 2000, A1.

52 *Bush*, slip opinion at 2.

53 See *infra* text accompanying notes ____.

54 See *McPherson v. Blacker*, 146 U.S. 1 (1892).

The persuasiveness of the concurring opinion's finding of an Article II violation depends on the answer to two questions. First, should the standard by which federal courts review state court interpretations of state law be more aggressive than usual in the context of resolving presidential election contests? Second, how unreasonable were the Florida Supreme Court's interpretations of state election law in *Bush*? The stronger the case for aggressive review and the more unreasonable the state court's interpretations, the more persuasive is the concurring opinion's determination that Article II was violated.

As to the standard of review, Chief Justice Rehnquist begins by conceding that, "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."⁵⁵ He goes on to observe, however, that because Article II explicitly empowers the state legislature to select the manner of appointing electors and because the federal safe harbor provision applies only when the state election law was in place on the day of the election, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."⁵⁶ Rehnquist does not go so far as to suggest that federal courts should engage in *de novo* interpretation of state election law in the context of a presidential election contest. Indeed, it would be hard to imagine Rehnquist, Scalia, and Thomas—Justices in the vanguard of the 1990s renaissance in constitutional federalism⁵⁷—subscribing to the proposition that federal courts owe no deference whatsoever to state court interpretations of state law, regardless of the context. Instead, the concurring opinion argues for reduced deference.

This is an odd interpretation of Article II. These conservative Justices ordinarily profess a commitment to an originalist methodology of constitutional interpretation.⁵⁸ Yet, they provide no evidence

⁵⁵ *Bush*, slip opinion at 2 (Rehnquist, C.J., concurring). This principle is about as well-established as any can be. See, e.g., *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). See also *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("the state's highest court is the best authority on its own law").

⁵⁶ *Id.* at 3.

⁵⁷ See, e.g., *United States v. Morrison*, 120 S. Ct. ___ (2000) (restrictive reading of commerce clause power); *Alden v. Maine*, 527 U.S. 706 (1999) (state immunity from suit in state court); *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) (restrictive reading of Section 5 power); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (state immunity from suit in federal court under Eleventh Amendment); *Printz v. United States*, 117 S.Ct. 2365 (1997) (tenth amendment prohibition on federal commandeering of state executive officials).

⁵⁸ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370-71 (1995) (Thomas, J., concurring); *id.* at 372 (Scalia, J., dissenting).

that the Framers of Article II intended to bolster the role of state legislatures in the selection of presidential electors by forbidding state courts adjudicating contests arising from presidential elections from employing ordinary techniques of statutory interpretation to elicit the meaning of state election law. Nor does the federal statute implementing Article II (and the Twelfth Amendment), enacted after the 1876 election fiasco, indicate any congressional desire to have presidential election contests adjudicated under rules different from those employed in ordinary state election contests.⁵⁹ Neither does the concurring opinion offer any functional justification for affording state legislatures federal judicial protection from their own state judiciaries. Even were Article II sensibly interpreted to offer such protection, the Florida legislature has indicated no desire to take advantage of it. That legislature adopted a unitary election code, generally applying the same election contest rules to state and federal elections.⁶⁰ Indeed, the Florida legislature has shown itself perfectly capable of indicating a preference, when it has one, to avoid judicial resolution of election contests; under Florida's election code, disputes involving the election of state legislators are to be handled exclusively by the respective houses of the state legislature, not the courts.⁶¹ It is plausible to draw the negative inference that the Florida legislature intended contests involving presidential elections to be adjudicated in the state courts according to the same rules that govern state election disputes (excepting those involving state legislators). In other settings, these same Justices have emphasized the importance of freeing states from federal command with regard to the structuring of their own governmental processes.⁶² Thus, it seems strange that the concurring opinion would not require a clearer statement from the constitutional text or the Framers' original understanding before inferring a constitutional command to federalize the allocation of state decisionmaking authority in the context of selecting presidential electors.

59 Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §5 (providing a safe harbor from congressional challenge where a "state shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . [electors] . . . by *judicial* or other methods") (emphasis added).

60 See *Bush*, slip opinion at 2 (Stevens, J., dissenting).

61 See Fla. Stat. §102.168.

62 Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring an "unmistakably clear" statement by Congress before construing a federal anti-discrimination law to apply to a state's judiciary because it is "[t]hrough the structure of its government . . . [that] a State defines itself as a sovereign").

Offering neither originalist nor functionalist support for their interpretation, the concurring Justices rely entirely on the text of Article II—specifically, its reference to state “legislatures” directing the manner of choosing presidential electors. This spare textual reference simply does not bear the weight the concurrence ascribes to it. Article I of the Constitution declares that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁶³ Yet nobody has ever suggested that this language precludes judicial interpretation of congressional statutes. Indeed, since 1935 the Court never has held that this constitutional mandate that Congress exercise “[a]ll legislative power” precludes Congress from enacting vague (meaningless) statutes that essentially delegate the lawmaking power to administrative agencies and to courts.⁶⁴ Indeed, some members of the conservative plurality are among the biggest proponents of the *Chevron* doctrine,⁶⁵ which requires federal courts to defer to “reasonable” agency interpretations of statutes, notwithstanding the Article I injunction that Congress “legislat[e].”⁶⁶ In *Bush*, Chief Justice Rehnquist does not explain why broad-ranging judicial and administrative interpretation of federal statutes is permissible in spite of Article I’s requirement that “[a]ll legislative powers” be vested in “Congress,” but Article II’s injunction that state “[l]egislatures” direct the manner of appointing presidential electors forbids state courts from engaging in ordinary statutory interpretation of state election law. Thus, not only does the plurality offer no originalist or functionalist justification for its Article II argument, but its bare textualist claim is almost laughable. It appears likely that nobody in the first two hundred years of the Republic ever dreamed of this interpretation of Article II.

Chief Justice Rehnquist seeks to bolster the flimsy Article II argument by observing that there are other “areas in which the Constitution requires this Court to undertake an independent, if still de-

63 U.S. Const., Art. I, §1.

64 The last Supreme Court decisions invalidating federal legislation on nondelegation grounds were *Panama Refining Co. v. Ryan*, 293 U.S. 288 (1935) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). For a modern illustration of how defunct the nondelegation doctrine is, see *Mistretta v. United States*, 488 U.S. 361 (1989). In all fairness, at least the Chief Justice is on record as favoring a reinvigoration of this doctrine. See, e.g., *Industrial Union Dep’t v. American Petroleum Institute*, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring).

65 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see also Laurence H. Tribe, *American Constitutional Law* 994 n.52 (3d ed. 2000) (collecting *Chevron* cases).

66 See, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring, with Rehnquist, C.J.); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-55 (1987) (Scalia, J., concurring).

ferential, analysis of state law.”⁶⁷ The Chief Justice plainly is correct about the existence of instances in which the Supreme Court has rejected state court interpretations of state law. Federal rights often become entwined with questions of state law, and state judiciaries would be able to obstruct implementation of those rights if their own interpretations of state law were immune from federal review.⁶⁸ Consider a few examples. State law determines whether a contract exists, which is a necessary predicate for a violation of Article I, section 10, which forbids state impairment of the obligation of contract.⁶⁹ Similarly, state law determines whether a property right exists, which is a necessary predicate for the finding of an uncompensated taking, in violation of the Fifth and Fourteenth Amendments.⁷⁰ Whether retroactive criminal punishment has been imposed, in violation of the Ex Post Facto or Due Process Clauses, depends on whether state criminal law has changed since the defendant committed the alleged transgression, which turns partly on a determination of what state law was before the defendant acted.⁷¹ Finally, because the Supreme Court will not decide a federal question when “adequate and independent” state grounds exist to sustain a state court ruling, vindication of federal rights that are raised in state court proceedings depends on compliance with state procedural law.⁷² The adequacy of the state ground of decision depends partly on its not having been invented post hoc to defeat the posited federal right.⁷³

67 Id. at 4-5 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Fairfax’s Devisee v. Hunter’s Lessee*, 7 Cranch 603 (1813)).

68 See, e.g., Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 82 (4th ed. 1998) (“[i]f there were no limits on the freedom of state courts to determine whether a contract had been created and the nature of its obligations, the federal limitation might be easily evaded”).

69 See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (“On such a question [of whether there is a contract], one primarily of state law, we accord respectful consideration and great weight to the views of the State’s highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.”).

70 See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (noting that the Court will defer only to “an *objectively reasonable application* of relevant precedents” defining the property right) (emphasis in original).

71 See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

72 See, e.g., *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

73 See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See generally *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930) (“[I]f there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its view of what should be deemed the better rule, for that of the state court.”) (citations omitted).

Thus, the concurring opinion is correct that the Supreme Court occasionally has rejected state court interpretations of state law in order to protect federal rights. Yet the rule generated by these cases seems to be one requiring evidence of bad faith by the state courts in their interpretation of state law. All three of the Supreme Court precedents cited by the concurring opinion on this score involved situations where state courts had manifested, beyond a shadow of a doubt, the willingness to defy federal law.⁷⁴ A closer look at the two modern cases invoked by the concurring opinion reveals how little support they provide for federal court intervention in *Bush v. Gore*.⁷⁵

In *NAACP v. Alabama*,⁷⁶ the Supreme Court ruled that the NAACP had a first amendment right to refuse to disclose its membership lists to Alabama authorities. Before reaching the merits of the case, though, the Justices first had to decide whether the federal constitutional claim was procedurally barred. The Alabama Supreme Court had refused to consider the first amendment claim on its merits, because of the Association's failure to follow the correct procedural path for securing state supreme court review of its contempt citation for refusing to disclose its membership lists. Specifically, the state court ruled that the NAACP should have sought a writ of prohibition rather than a writ of mandamus. It is inconceivable that the Justices' view of the case—both on the merits and on the alleged state procedural default—was uninfluenced by their knowledge that the state of Alabama, including its jurists, were engaged in a project of massive resistance toward *Brown v. Board of Education*,⁷⁷ a fundamental part of which involved shutting down the NAACP's operations in the state.⁷⁸ Yet even setting aside this extrinsic basis for questioning the good fai-

74 See *Bush*, slip opinion at 5 (Ginsburg, J., dissenting) (noting that the three cases invoked by the concurring opinion were “embedded in historical contexts”).

75 The third case, as Justice Ginsburg notes in dissent, involved the Revolutionary era conflict between southern state legislation confiscating Tory lands and federal treaties seeking to curtail confiscation. That conflict led southern state courts to engage in efforts at nullification no more subtle than those undertaken by their counterparts in the civil rights era. See *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813); *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); *Bush*, slip op. at 5 (Ginsburg, J., dissenting).

76 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

77 See generally Numan Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950s* (1969).

78 See generally Walter Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 *Western Pol. Q.* (1959). On background to *NAACP v. Alabama*, see Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, at 284-89 (1994); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 *Tenn. L. Rev.* 869, 887-900 (1994).

th of the state court justices in *NAACP*,⁷⁹ the Supreme Court was able to identify no fewer than a half dozen prior Alabama Supreme Court decisions that had rejected precisely the procedural distinction relied upon by that court in *NAACP* to justify its refusal to reach the merits of the first amendment claim.⁸⁰ Incredibly, the state supreme court at an earlier stage of *these same proceedings* had directed the NAACP's lawyers to seek appellate review via the very procedural route (a writ of mandamus) that the state justices later determined to constitute a procedural default.⁸¹ In other civil rights era cases where the Supreme Court likewise declined to permit state procedural defaults to block federal review of constitutional claims, the Justices also were able to point to earlier state precedents that directly contravened the state court's finding of a procedural default in the case under review.⁸² Notwithstanding Chief Justice Rehnquist's claim that precedents like *NAACP v. Alabama* were "precisely parallel" to *Bush*,⁸³ he failed to identify anything even remotely similar in Florida case law that would warrant the conclusion that the Florida Supreme Court was departing from established precedent. Without expressly saying so, the conservative Justices implied that the Florida Supreme Court's statutory interpretations in *Bush* were entitled to no greater deference in federal court than those of renegade white supremacist nullifiers during the civil rights era.⁸⁴ One might have expected that these Justices would offer some factual predicate to justify this extraordinary (albeit implicit) aspersion on the integrity of state court jurists,⁸⁵ but they did not.

79 Most of the other leading cases rejecting the adequacy of state procedural grounds for denying federal rights also involve southern states obstructing the civil rights movement. See, e.g., *Barr v. City of Columbia*, 378 U.S. 146 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Shuttlesworth v. City of Alabama*, 376 U.S. 339 (1964); *Wright v. Georgia*, 373 U.S. 284 (1963). See also Low & Jeffries, *supra* note __, at 109 ("It is no coincidence that many such cases arose in the civil rights litigation in the 1960s."); Glennon, *supra* note __, at 887-900.

80 357 U.S. at 456 (concluding that "[w]e are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings").

81 *Id.* at 458.

82 See, e.g., *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297-300 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). See also *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105-07 (1938) (rejecting a state court's determination of whether a contract existed because it conflicted with numerous earlier decisions of that court).

83 *Bush*, slip opinion at 4 (concurring opinion).

84 See *Bush*, slip opinion at 7 (Stevens, J., dissenting) (noting that what must underlie the concurring Justices' unwillingness to defer to the state court's interpretation of state law "is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed").

85 See *id.*, slip opinion at 6 (Ginsburg, J., dissenting) (objecting that the Florida Supreme Court ought not be "be bracketed with state high courts of the Jim Crow South").

The other civil rights era decision invoked as precedent in *Bush* for upsetting a state court's interpretation of state law was *Bouie v. City of Columbia*.⁸⁶ That case is equally weak support for the Article II rationale in *Bush*, but for a different reason. In *Bouie*, the question was whether it violated the Due Process Clause to convict sit-in demonstrators under a criminal trespass statute that barred "entry on lands of another after notice prohibiting same"⁸⁷ when the protestors had been commanded to depart, but not warned against entering in the first place. The Supreme Court ruled that for the state supreme court to interpret this statute to cover refusals to leave as well as forbidden entries "unforseeably and retroactively expanded" its meaning.⁸⁸ In the process of so ruling, the Court had to reject the state court's determination that the criminal trespass statute always had been construed this way. The Justices were able to cite only dicta, not actual holdings, in support of their refutation of the state court's interpretation of state law.

The *Bouie* Court's extraordinarily stringent interpretation of the notice requirement imposed by the Due Process Clause,⁸⁹ and its unwillingness to defer to a state court's ostensibly sensible construction of a state statute, can be understood only in the context of the times. Between 1960 and 1964, the Supreme Court confronted dozens of cases in which sit-in demonstrators were prosecuted for breach of the peace, trespass, and sundry other offenses.⁹⁰ The Justices were disinclined to affirm the criminal convictions of persons with whose racial protest they generally sympathized. Yet, they also were unwilling to vindicate the protesters' principal legal claim that the state action necessary for an equal protection violation was present when the state simply was enforcing background common law property rules.⁹¹ Instead, the Justices identified a wide range of imaginative (specious) grounds for reversing the convictions without

⁸⁶ 378 U.S. 347 (1964).

⁸⁷ *Id.* at 349 n.1 (reproducing statute).

⁸⁸ *Id.* at 352.

⁸⁹ See, e.g., *Bouie*, 378 U.S. at 363, 367 (Black, J., dissenting) (noting that nobody could have been misled by this construction of the statute).

⁹⁰ See, e.g., Thomas P. Lewis, The Sit-in Cases: Great Expectations, 1963 Sup. Ct. Rev. 101; Monrad G. Paulsen, The Sit-in Cases of 1964: "But Answer Came There None," 1964 Sup. Ct. Rev. 137.

⁹¹ I have described some of the internal deliberations in the sit-in cases, with citations to the original documents, in Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 272-76 (1991).

reaching the fundamental constitutional question.⁹² By the time *Bouie* arrived on the Court's docket, the 1964 Civil Rights Act—which would moot the state action issue by creating a federal statutory prohibition on race discrimination in places of public accommodation—was finally nearing passage, after the longest filibuster in the history of the United States Senate.⁹³ In that setting, the Justices understandably were reluctant to affirm, for the very first time, the conviction of a sit-in demonstrator. Thus the Court “invented” a due process objection to *Bouie*'s conviction, rejecting the state court's view that the state criminal trespass statute always had forbidden refusals to depart after notice to leave, and holding that to interpret the provision this way now represented an unforeseeable expansion of the statute, in violation of the Due Process Clause. Nobody who teaches criminal law would recognize this conception of what due process notice requires.⁹⁴ Leading criminal law casebooks treat *Bouie* as bad law—a case that can be accounted for only by the Justices' political sympathies for the civil rights movement.⁹⁵ Thus, the only legal principle that *Bouie* genuinely 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*.

After laying the groundwork for reducing the deference owed to the state court's interpretations of Florida law, the concurring opinion proceeds to enumerate several ways in which that court's interpretations (were said to have) violated the legislature's design. The concurring Justices raised the following objections to the state supreme court decision in *Bush*⁹⁶: it deprived the secretary of state's certifi-

92 See, e.g., *Griffin v. Maryland*, 378 U.S. 130 (1964) (reversing trespass conviction on ground that arrest by park employee who had been deputized as a sheriff constituted state action); *Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing disturbing-the-peace conviction on due process ground of total absence of evidence).

93 See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972*, at 151 (1990).

94 See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 211 (1985) (arguing that the “core concept of notice as a requirement of fairness to individuals” focuses on “whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law”).

95 See, e.g., Peter Low, et al., *Criminal Law: Cases and Materials* 100 (2d ed. 1986) (speculating that “the Court's application of [fair notice] principles to the *Bouie* facts was somewhat more rigid than would have been the case if a more ordinary trespass was involved” and noting that “the Supreme Court itself understands the context of *Bouie* as qualifying its message, . . . [since] . . . *Bouie* has not become a substantial constraint on the interpretation of ambiguities in subsequently construed federal criminal statutes”).

96 *Bush*, slip opinion at 7-12.

cation of the election results of “virtually all legal consequence,”⁹⁷ it engaged in de novo review of the local canvassing boards’ decisions whether to conduct manual recounts after the certification deadline; by ordering the inclusion in the certification of all recounts completed during the contest phase, it eliminated the statutory grant of discretion to the Secretary of State with regard to waiving the certification deadline; it unreasonably construed the contest provision requiring that “legal votes” not be rejected to require the counting of “improperly marked ballots”; it refused to defer to the Secretary of State’s reasonable interpretations of state election law, as required by statute; and it unreasonably construed the statutory grant to state courts of the power to issue “appropriate relief” in contest actions to include a state-wide manual recount that could not possibly be completed in time to realize the state legislature’s “wish” to take advantage of the federal safe harbor provision.

It is fair to say that the protest and contest provisions of Florida election law are characterized by significant ambiguity, which for the most part never has been clarified by the Florida courts—unsurprisingly, since the contest provisions were substantially overhauled in 1999.⁹⁸ On many of the statutory interpretation issues raised in *Bush*, reasonable people surely might differ.⁹⁹ Yet none of the Florida court’s interpretations are particularly “peculiar,”¹⁰⁰ and certainly none of them qualifies as “absurd,”¹⁰¹ which is how the concurring opinion characterizes them. Florida election law clearly contemplates a contest to certified election results. The substantive standard that must be established for the contest to proceed is, in relevant part, the “rejection of a number of legal votes sufficient to change or place in doubt the result of the election.”¹⁰² Given the closeness of the certified presidential election result in Florida—a margin of 537 votes for Bush—there is no doubt that the number of undervotes (esti-

⁹⁷ *Id.* at 8

⁹⁸ On the contrast between the new and the old contest provisions, see *Gore v. Harris*, slip opinion at 9 n.9

⁹⁹ The dissenting opinions of Justices Souter and Breyer ably demonstrate how the Florida court’s interpretation of all the relevant statutory ambiguities were at least reasonable. See *Bush*, slip opinion at 2-6 (Souter, J., dissenting); *id.* at 6-8 (Breyer, J., dissenting). Several of the points made in this and the following paragraphs are also made in those dissenting opinions.

¹⁰⁰ *Id.* at 9 (concurring opinion).

¹⁰¹ *Id.*

¹⁰² Fla. Stat. §102.168(3)(c) (2000).

mated at 60,000) was sufficient to “place in doubt” the election result. The only question was whether undervotes qualify as “legal votes.” This was a question of first impression for the Florida Supreme Court. The state jurists determined that ballots that clearly express the intent of a voter, but that were marked in such a way that the voting machines could not read them, qualify as “legal.”¹⁰³ The concurring opinion calls this conclusion “absurd,” yet it is consistent with the way Florida courts historically have defined legal votes,¹⁰⁴ with explicit language in the Florida election code requiring that the “intent of the voter” be ascertained with regard to damaged and defective ballots,¹⁰⁵ and with the interpretation of numerous other state supreme courts.¹⁰⁶ Nor is it clear that the Florida Supreme Court owed any articular deference to the Secretary of State’s contrary interpretation, given the political nature of her position, the absence of any obvious agency “expertise” that would entitle her interpretation to deference, the fact that her interpretation was post hoc rather than a product of ex ante rulemaking, and the generally uncertain standard of judicial deference to agency legal interpretations called for by Florida administrative law.¹⁰⁷

103 See *Gore v. Harris*, slip opinion at 23-25.

104 See, e.g., *Boardman v. Esteve*, 323 So. 2d 259, 267 (Fla. 1975) (denying, in the context of a challenge to absentee ballots, that there is any “magic in the statutory requirements,” and insisting that the “important” question is whether “the will of the people was effected”); *State ex rel. Carpenter v. Barber*, 198 So. 49, 50-51 (Fla. 1940) (concluding that a ballot shall be counted “if the will and intention of the voter can be determined,” even if the voter did not follow the instructions for marking the ballot”); *Wiggins v. State ex rel. Drane*, 144 So. 2d 62, 63 (Fla. 1932) (holding that ballots that “clearly indicate the choice of the voter” must be counted, even if “irregular”); *Darby v. State ex rel. McCollough*, 75 So. 411, 412 (Fla. 1917) (per curiam) (“Where a ballot is so marked as to plainly indicate the voter’s choice and intent in placing his marks thereon, it should be counted as marked unless some positive provision of law would be thereby violated”). But see *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (Fla. 1944).

105 Fla. Stat. §101.5614 (5) (providing that no ballot shall be disregarded “if there is a clear indication of the intent of the voter as determined by a canvassing board”); see also *id.* §102.166 (7).

106 See, e.g., *In re Election of U.S. Representative for Second Congressional Dist.*, 653 A. 2d 79, 90-91 (Ct. 1994) (rejecting the view that legal votes are only those complying strictly with the ballot instructions and instead counting all ballots upon which “the intent of the voter” is apparent “in light of all the available evidence disclosed by the ballot”); *Duffy v. Mortensen*, 497 N.W. 2d 437, 439 (S.D. 1993) (holding that a punch card ballot with two corners of the chad detached must be counted, since the voter’s intent could be discerned, and “the policy of the state is to count each person’s vote in an effort to determine the true and actual intent of the voters”); *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (Ill. 1990) (holding that “voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot”); *Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987) (holding that punch card ballots marked entirely in pen and pencil are legal votes, “because they provided clear evidence of the voters’ intent”); *Wright v. Gettinger*, 428 N.E. 2d 1212, 1225 (Ind. 1981) (affirming trial court’s judgment that ballots with “hanging chads” could be counted, since “the intention of the voter could be clearly discerned”); *McCavitt v. Registrar of Voters of Brockton*, 434 N.E. 2d 620, 624-25 (Mass. 1982) (holding that the court must ascertain the intent of the voters with regard to punch card ballots that have not been punched through sufficiently for the machine to count them); *Escalante v. City of Hermosa Beach*, 241 Cal. Rptr. 199, 201-03 (Cal. App. 1987).

107 For a concise summary of the conflicting approaches that Florida courts have taken on the question of how much

The contest provisions of the Florida election code do not disclose what level of deference is owed to the Secretary of State's certification of the election results or to local canvassing boards' decisions not to conduct manual recounts. Since the very purpose of an election contest is to challenge the certification, it makes no sense to have a contest provision while deferring entirely to the certification. The statutory standard for a contest to proceed—"rejection of a number of legal votes sufficient to change or place in doubt the results of the election"—does not indicate that any deference at all is owed to the decisions of administrative officials. Perhaps *de novo* review is not the most sensible way of structuring an election contest scheme, but it is perfectly consistent with the statutory language, which the concurring opinion emphasizes is entitled to special weight in light of Article II concerns.¹⁰⁸ Nor does it contravene any Florida Supreme Court precedent, since that court never before had interpreted the amended contest provisions. A Florida appellate court, construing the old contest provision, had ruled that the same deference explicitly granted by statute to local canvassing boards with regard to conducting manual recounts during the protest phase should apply during the contest phase,¹⁰⁹ but that ruling is not precedent for the state supreme court. Moreover, to overrule in the contest phase of the proceedings a local canvassing board's discretionary judgment during the protest phase not to conduct a manual recount does not nullify the statutory grant of discretion; rather, it restricts its force to elections

deference courts owe to agency legal interpretations, see David M. Greenbaum & Lawrence E. Sellers, Jr., 1999 Amendments to the Florida Administrative Procedure Act: *Phantom Menace* or *Much Ado About Nothing?*, 27 Fla. St. L. Rev. 499, 522-24 (2000). Compare also *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) ("although not binding judicial precedent, advisory opinions of affected agency heads are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency of government"); *State Dep't of Health & Rehabilitative Servs. v. Framat Realty, Inc.*, 407 So. 2d 238, 242 (Fla. App. 1981) (according a "most weighty presumption of validity" to agency rulemaking) with *Tampa Electric Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000); *Legal Environmental Assistance Foundation v. Board of County Commissioners*, 642 So. 2d 1081, 1083-84 (Fla. 1994) (refusing to defer to an "unreasonable" interpretation); see also *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917) (showing no deference to local election officials' interpretation of what counts as a legal vote). For the rule that only interpretations implicating an agency's expertise warrant deference, see, e.g., *Zopf v. Singletary*, 686 So. 2d 680, 682 (Fla. App. 1996); *Board of Trustees v. Department of Management Servs.*, 651 So. 2d 170, 173 (Fla. App. 1995). For the rulemaking requirement, see Fla. Stat. §120.54. For the willingness of Florida courts to show greater deference to agency legal interpretations that flow from rulemaking, as opposed to post hoc adjudication, see, e.g., *Florida Cities Water Co. v. Florida Pub. Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980); *Anheuser-Busch, Inc. v. Dep't of Business Regulation*, 393 So. 1177, 1182 (Fla. App. 1981). I am grateful to Jim Rossi for directing me to relevant sources and for helping to clarify Florida administrative law for me.

¹⁰⁸ It is ironic, given the concurring opinion's emphasis on the text of the Florida election code, that it was the Bush camp arguing against a literal, and in favor of a holistic, reading of the statute.

¹⁰⁹ *Broward County Canvassing Board v. Hogan*, 607 So.2d 508 (Fla. Ct. App. 1992) (*per curiam*).

that are not so close at the state level as to raise a doubt whether uncounted lawful votes might change the election outcome.¹¹⁰ Thus, the Florida Supreme Court's decision to engage in *de novo* review of Vice-President Gore's request for manual recounts is consistent with the statutory contest language, not inconsistent with any binding Florida precedent, and reconcilable with a statutory grant of discretion to local canvassing boards not to conduct manual recounts at the *protest* phase of election proceedings. In what alternate universe does such an interpretation of Florida election law qualify as "absurd"?

Having found the statutory contest standard satisfied, the Florida Supreme Court ordered a state-wide manual recount, notwithstanding the shortness of time. The court relied on the statutory provision authorizing courts to order "any relief appropriate,"¹¹¹ once the threshold requirement for an election contest had been satisfied. The concurring opinion states that this reading of "appropriate relief" cannot be reconciled with the legislature's "wish" to take advantage of the federal safe harbor provision. Yet, as we have seen, the legislature expressed no such wish, and even if it had, reading Florida election law to elevate that wish over all competing considerations would be nonsensical.¹¹² The Florida Supreme Court ordered the statewide manual recount on December 8. In all likelihood, that recount would have been completed by December 12, had the Supreme Court not stayed it the morning it began (December 9). The recount almost certainly would have been completed by December 18—the date by which Florida electors had to be appointed in order to participate in the electoral college balloting. There is nothing odd about construing "any relief appropriate" to include a statewide manual recount that probably could have been completed in time to avoid jeopardizing Florida's participation in the electoral college vote.¹¹³

Finally, the Gore team not only had the plain meaning of the

110 See *Gore v. Harris*, slip opinion at 61 (Harding, J., dissenting) (noting that the "abuse of discretion" standard applicable at the protest phase does not apply during the contest phase); *Bush*, slip opinion at 8 (Breyer, J., dissenting).

111 Fla. Stat. §102.168(8).

112 See *supra* ____.

113 The concurring opinion notes that even if the manual recount could have been completed by December 12, "the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court could not possibly be completed by that date." *Bush*, slip opinion at 11 (concurring opinion). It is not obvious this is true, especially since the relevant date is December 18, not December 12. But even if it were true, it is not obvious why a completed manual recount with uncompleted judicial challenges ought not to be preferred to a machine count that clearly missed thousands of ballots on which the voters' intention could be discerned.

statute on its side, but also the plain tenor of Florida election law precedent. While the specific statutory interpretation questions raised by the election contest were not resolved by prior precedent, the one clear principle to be derived from Florida election cases is that safeguarding the right to vote and ascertaining the will of the voter trump more technical questions of compliance with legal formality. Numerous Florida court decisions have embraced this proposition.¹¹⁴ In light of this background interpretive principle, plainly established by Florida precedent, the Florida Supreme Court's ruling that presidential undervotes must be examined to ascertain, wherever possible, the actual intent of the voters was entirely unexceptionable. The barrage of criticism leveled by Republican politicians against manual recounts—which was slyly endorsed by the concurring opinion¹¹⁵—was in fact a lawless refusal to abide by either explicit statutory language authorizing such recounts¹¹⁶ or by abundant Florida precedent endorsing the principle that ascertaining the actual intent of voters was the paramount objective of courts adjudicating election controversies.¹¹⁷

Reasonable people certainly can disagree where to draw the line between a merely mistaken interpretation and a manifestly unreasonable one. Moreover, degrees of unreasonableness are notoriously difficult to quantify or otherwise measure objectively. Perhaps, in light of these considerations, it was inevitable that Republican Justices, like so many Republican politicians and voters, would conclude that the Florida Supreme Court was “stealing” the election from George W. Bush,¹¹⁸ and thus that its statutory interpretations were entitled

114 See, e.g., *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 845 (Fla. 1993) (“election laws should generally be liberally construed in favor of an elector”); *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (noting that “the object of holding an election” is “the electorate’s effecting its will through its balloting, not the hyper-technical compliance with statutes”); *Boardman v. Esteva*, 323 So. 2d 259, 263, 269 (Fla. 1975) (noting that “the right of a citizen to vote” is more important than “unyielding adherence to statutory scripture” and “that the primary consideration in an election contest is whether the will of the people has been effected”); *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) (“It is the intention of the law to obtain an honest expression of the will or desire of the voter.”).

115 *Bush*, slip opinion at 11 (concurring opinion) (noting that the manual recount of undervotes was “a search for elusive—perhaps delusive—certainty”).

116 Fla. Stat. §102.166 (4)(c); §101.166(5).

117 See *supra* note ____.

118 See, e.g., David Tell, “The Bush Victory,” *Weekly Standard*, Dec. 25, 2000, p. 9 (criticizing the Florida Supreme Court decision as “ridiculous” and “ghastly”); Nelson Lund, “An Act of Courage,” *Weekly Standard*, Dec. 25, 2000, at 19 (accusing the Florida Supreme Court of “violat[ing] the Constitution” and blaming it for forcing the Supreme Court to intervene); Robert F. Nagel, “From U.S. v. Nixon to Bush v. Gore,” *Weekly Standard*, Dec. 25, 2000, at 20 (calling the Florida Supreme Court decision “stunning” and a product of “intellectual anarchy”); Michael S. Greve, “The Real Division in the Court,” *Weekly Standard*, Dec. 25, 2000, at 28 (noting some doubt whether “repeated judicial attempts to stack the deck in a presidential election do not compare to the moral scandal of Jim Crow”); Kristol & Bell, *supra* note ____ (arguing that the

to no more deference than those of the Jim Crow state courts that had manifested a willingness to lie and cheat in order to nullify *Brown* and obstruct the civil rights movement. It is impossible to disprove conclusively these Republican accusations, especially since the genuine indeterminacy of Florida election law probably made it inevitable that the partisan preferences of the Florida court's Democratic justices would influence their statutory interpretations (in favor of Al Gore).¹¹⁹ Yet, permitting partisan considerations to influence the resolution of genuine legal ambiguity is not equivalent to "stealing" an election. It is almost impossible to imagine Rehnquist, Scalia and Thomas concluding that these particular state court interpretations of state law were "absurd" in any context other than the one in which George W. Bush's election to the presidency hung in the balance.¹²⁰ Indeed, in other settings, these three Justices have insisted that federal courts should defer even to state court interpretations of *federal* law unless "patently unreasonable."¹²¹ It takes little imagination to picture the impassioned (indeed, characteristically vitriolic) assault on judicial activism and federal overreaching that Justice Scalia might have penned had the candidates been reversed and it was Al Gore asking the United States Supreme Court to resolve a presidential election contest by repudiating a state court's interpretation of state law.¹²²

"injustice being done by the Florida Supreme Court" is helping Gore to "steal" the election); Krauthammer, *supra* note ____ (blaming a "rogue state supreme court," which in "an astonishing burst of willfulness," created a "constitutional crisis" because of its "mission" to defeat George W. Bush); Matthew Vita & Juliet Eilperin, "Congress Braces for Battle over Electoral Votes," *Washington Post*, Nov. 22, 2000, A19 (quoting House Majority Whip Tom DeLay accusing the Democratic Party of "prosecuting a war to reverse the results of a fair, free election by any means necessary" and calling the Florida Supreme Court decision "a blatant and extraordinary abuse of judicial power"); Eiric Pianin & Helen Dewar, "Congress Sits on Political Powder Keg," *Washington Post*, Dec. 10, 2000, A31 (noting that DeLay and other congressional Republicans have accused Democrats and Florida's Supreme Court of an effort to "steal" the election from Bush). Indeed, the conservative Justices defended their involvement by implicitly blaming Gore for turning to the courts in the first place. *Bush*, 121 S. Ct. at 533 ("None are more conscious of the vital limits on judicial authority than are the members of this Court. . . . When contending parties invoke the process of the Court, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

119 On the other hand, in defense of the state supreme court, Florida precedents really do emphasize the importance of effectuating the will of the voters in election controversies. See *supra* ____.

120 *Bush*, slip opinion at 8 (Ginsburg, J., dissenting) ("Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.")

121 *Wright v. West*, 505 U.S. 277, 291 (1992) (Thomas, J., plurality op.) (habeas proceeding); *id.* at 371 (Scalia, J., dissenting). See also *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (Thomas, J.) (under *Teague*, federal courts on habeas review must defer to state courts' "reasonable, good-faith interpretations" of federal court precedent). See also Sandra D. O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 *Wm & Mary L. Rev.* 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

122 Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 995-1002 (1992) (Scalia, J. dissenting) (analogizing *Casey* to *Dred Scott*,

II. LONG TERM CONSEQUENCES

I already have expressed doubt whether the Supreme Court's institutional stature and legitimacy depend much, in the long term, on the quality of the legal reasoning of its opinions.¹²³ Rather, the judgment of history seems to depend more on whether the Court generally reaches the "right" results—meaning simply that its decisions prove consonant with long-term popular opinion. Of course, measuring the Court's relative institutional stature at any particular point in time is difficult. Identifying with any degree of precision the factors that contribute to or detract from that stature is virtually impossible. Necessarily, then, much of what follows is impressionistic.

A quick canvass of American constitutional history identifies several factors that may influence the way in which particular Supreme Court decisions influence the public's estimation of the Court. First, I shall try to identify the relevant variables. Then, I will illustrate their application with concrete examples from American constitutional history. Finally, I shall consider how these variables apply in the context of *Bush v. Gore*. My goal is to shed light on how that ruling is likely to impact the Court's long-term standing.

My basic premise, to repeat, is that the Court's institutional standing ultimately depends on producing decisions that garner the long-term approval of the American public. Thus, the principal variable influencing the Court's reputation is how popular or unpopular its decisions are. Second, in addition to the *amount* of support and opposition to particular decisions, the *intensity* of that sentiment—how strongly supporters and opponents feel about the underlying issue—influences the Court's standing. Third and relatedly, intensity of opposition is a function not only of how strongly people feel about an issue, but also how convinced they are that the Court decision resolving that issue will be implemented, rather than evaded or even nullified. Court rulings that are adverse to a constituency's treasured interests, but that are unlikely to prove efficacious, probably will not generate tremendous resistance. Fourth, how powerful are the constituencies that support and oppose the Court's rulings? Decisions

lambasting the notion that the Court can settle great national controversies through constitutional adjudication, and lauding the idea of local rather than national solutions).

¹²³ See supra ____.

that alienate relatively powerful interest groups are more likely to affect adversely the Court's stature. Fifth, some constitutional issues linger, while others fade away. Controversial decisions on topics that quickly become obsolete are unlikely to do the Court much long-term harm. Sixth, public opinion changes—often quite dramatically—on some constitutional issues but not others. Court decisions that initially prove controversial later may be regarded as great moral victories. Conversely, some rulings initially are approved, yet subsequently are deemed moral disasters. Seventh, on some occasions but not others, the Justices enjoy subsequent opportunities to adjust their original decision, thus modulating results that initially proved controversial. Eighth, contentious constitutional decisions sometimes come in packages. A ruling that might not have significantly impaired the Court's standing had it been an isolated event, may weaken an institution already under siege owing to contemporaneous decisions.

It may be helpful to flesh out these variables with some concrete illustrations from American constitutional history. It stands to reason that unpopular decisions will threaten the Court's long-term standing, especially given the tenuous legitimacy of ostensibly counter-majoritarian judicial review in a democratic system.¹²⁴ Historically, the Justices, apparently comprehending this risk, generally have used the Constitution to suppress outlier state practices. Such decisions are, almost by definition, likely to generate support among national majorities. Some people are surprised to discover how many of the Court's notable constitutional rulings fit this suppression-of-outliers description. By no means an exhaustive list includes *Troxel v. Granville*¹²⁵ (parental rights); *Romer v. Evans*¹²⁶ (gay rights); *United States v. Virginia*¹²⁷ (sex discrimination in public universities); *Plyler v. Doe*¹²⁸ (right of children of illegal aliens to free public education); *Moore v. City of East Cleveland*¹²⁹ (familial relationships); *Coker v. Georgia*¹³⁰ (proportionality review in connection with the death penalty); *Harper v. Vir-*

124 See, e.g., Alexander Bickel, *The Least Dangerous Branch* 16-23 (1962).

125 530 U.S. 57 (2000).

126 517 U.S. 620 (1996).

127 518 U.S. 515 (1996).

128 457 U.S. 202 (1982).

129 431 U.S. 494 (1977).

130 433 U.S. 584 (1977).

*ginia Board of Elections*¹³¹ (poll tax); *Griswold v. Connecticut*¹³² (right to use contraceptives); *Brown v. Mississippi*¹³³ (coerced confessions); and *Nixon v. Herndon*¹³⁴ (white primary). On all these occasions, judicial invalidation of state legislation was relatively uncontroversial because national majorities agreed with the results of the Court's constitutional interpretations. Small wonder that an institution that is able generally to mirror national opinion, while simultaneously perpetuating the noble myth that it heroically defends minority rights from majoritarian oppression, remains so popular with the American public.¹³⁵

Of course, some of the Court's most famous constitutional rulings do not fit this paradigm. On these other, more exceptional occasions, roughly half the country agrees with the Court's decision, while the other half disagrees. I believe this is a generally accurate description of *Prigg v. Pennsylvania*¹³⁶ (fugitive slave renditions); *Dred Scott v. Sandford*¹³⁷ (slavery in the territories); *Brown v. Board of Education*¹³⁸ (school desegregation); *Furman v. Georgia*¹³⁹ (death penalty); *Roe v. Wade*¹⁴⁰ (abortion); and *Regents of the University of California v. Bakke*¹⁴¹ (affirmative action). While such decisions are certain to prove more controversial than the suppression-of-outliers variety, at least the Justices can count on the support of roughly fifty percent of the nation.

On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation. This rather small category includes decisions invalidating

131 383 U.S. 663 (1966).

132 381 U.S. 479 (1965).

133 297 U.S. 278 (1936).

134 273 U.S. 536 (1927). I provide support for the claim that these decisions involved suppression of outlier state practices in Michael J. Klarman, Rethinking the History of American Freedom, 42 Wm. & Mary L. Rev. 265, 279 nns.60-65 (2000) (book review).

135 Statements subscribing to this myth are collected in Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 1-3 & nns. 1-14 (1996). For speculation on why the myth continues to hold sway, see *id.* at 18-31.

136 41 U.S. (16 Pet.) 539 (1842).

137 60 U.S. (19 How.) 393 (1857).

138 347 U.S. 483 (1954).

139 408 U.S. 238 (1972).

140 410 U.S. 113 (1973).

141 438 U.S. 265 (1978).

school prayer¹⁴² and criminal bans on flag burning,¹⁴³ as well as safeguarding the rights of criminal defendants, such as *Miranda v. Arizona*.¹⁴⁴ Even on these exceptional occasions, though, it would be mistaken to suppose that *overwhelming* popular majorities oppose the Court. The Justices invalidated school prayer and Bible reading only after the relative demise of the nation's unofficial Protestant establishment.¹⁴⁵ Likewise, the Warren Court's criminal procedure revolution was rendered possible only by shifting public attitudes toward race, poverty, and totalitarian law enforcement practices.¹⁴⁶ Thus, while national majorities have opposed the Court decisions in this category, a solid thirty-to-forty percent of the American public has sided with the Justices.¹⁴⁷

The number of times that an overwhelming majority of Americans has opposed the Court's constitutional interpretations probably can be counted on one hand. *Chisholm v. Georgia*,¹⁴⁸ ruling nonconsenting states suable in federal court under Article III, clearly is such an instance. *Morehead v. New York ex rel. Tipaldo*,¹⁴⁹ invalidating New York's minimum wage law in the midst of the Great Depression, may well be another. Significantly, both of these decisions *did* harm the Court's standing. *Chisholm* was the Supreme Court's first significant constitutional decision, and the Justices got it so wrong (in the sense of contravening public opinion) that Congress immediately slapped them down, passing the Eleventh Amendment by majorities of nine-to-one in the House and eleven-to-one in the Senate.¹⁵⁰ Chief Justice Jay concluded, as a result of this episode, that the Supreme Court never would achieve equal standing with the other branches of the national government; he resigned soon afterwards to become governor of New York. Similarly, *Tipaldo* was the straw that broke

¹⁴² See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁴³ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

¹⁴⁴ 384 U.S. 436 (1966).

¹⁴⁵ See Klarman, *Civil Rights*, at 46-62.

¹⁴⁶ See *id.* at 62-66.

¹⁴⁷ For the polls on flag burning and school prayer, see Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. rev. 577, 606 & n.142, 607 & n.148 (1993).

¹⁴⁸ 2 U.S. (2 Dall.) 419 (1793).

¹⁴⁹ 298 U.S. 587 (1936).

¹⁵⁰ See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 200 (1995); 1 Charles Warren, *The Supreme Court in United States History* 101 (1926). On hostile public reaction to *Chisholm*, see *id.* at 96-101.

the camel's back during the New Deal constitutional crisis.¹⁵¹ While President Roosevelt and other Democrats had criticized earlier rulings striking down New Deal measures such as the National Industrial Recovery Act¹⁵² and the Agricultural Adjustment Act,¹⁵³ those statutes were sufficiently unpopular that the Court decisions invalidating them commanded something close to majority support in the nation.¹⁵⁴ By 1936, however, both Democrats and Republicans endorsed state minimum wage legislation, and thus *Tipaldo* incited a firestorm of criticism. That ruling was the proximate cause of Roosevelt's Court-packing plan—a scheme that certainly would have damaged the Court's stature had it been enacted. Thus, constitutional rulings that contravene overwhelming public opinion—at least on salient issues—do jeopardize the Court's standing. No doubt cognizant of this reality, the Justices rarely have tempted fate by frustrating the wishes of dominant majorities.

Whether other rulings harm the Court's reputation is partly a product of the intensity of preference manifested by opponents of the Court's decisions. Thus, for example, *Brown v. Board of Education* generated furious resistance among southern whites—opposition that succeeded at blocking implementation of the Court's edict for an entire decade.¹⁵⁵ The Court's standing among southern whites was severely impaired as a result of *Brown* and other Warren Court rulings.¹⁵⁶ (The Court's standing recovered as national—including southern—opinion changed dramatically on the race issue as a result of the 1960s' civil rights movement.¹⁵⁷) Similarly, *Dred Scott v. Sandford*,

151 See William Leuchtenburg, The Origins of FDR's Court-Packing Plan, 1966 S. Ct. Rev. 347, 376-77

152 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

153 Carter v. Carter Coal Co., 298 U.S. 238 (1936).

154 See Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 34-35 (1998); Leuchtenburg, *supra* note ___, at 368.

155 See generally Numan Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950s (1969); Neil R. McMillen, The Citizens' Council: Organized Resistance to the Second Reconstruction, 1954-64 (1971); Benjamin Muse, Ten Years of Prelude: The Story of Integration Since the Supreme Court's 1954 Decision (1964).

156 See, e.g., C. Herman Pritchett, Congress Versus the Supreme Court 1957-1960, at 18 (1961) (noting attacks on the Court by southerners that "were vituperative in the extreme, calling into question not only the ability but also the motives and the patriotism of the justices"); Walter F. Murphy, Congress and the Court: A Case Study in the American Political Process 264-65 (1962) (noting polls revealing a rise in the Supreme Court's unfavorable ratings among white southerners after *Brown*). Brady, *supra* note ___, conveys a vivid sense of how whites in the deep South felt about the Supreme Court as a result of *Brown*.

157 See, e.g., Matthew David Lassiter, The Rise of the Suburban South: The "Silent Majority" and the Politics of Education, 1945-75 (Ph.D., University of Virginia 1999), Part IV: The Suburbanization of Southern Politics: The Silent Majority and the Fate of the Sunbelt, 34 (noting a Gallup Poll released in May 1970 which revealed that only 16 percent

which undercut the very legitimacy of the Republican Party, predictably produced ferocious opposition among the party faithful.¹⁵⁸ During the Civil War and Reconstruction, as many more Americans rallied to the Republican banner and concluded that *Dred Scott* had been an egregious mistake, the Court's standing probably did suffer, at least for a short period of time.¹⁵⁹ Conversely, while a majority of Americans opposed the Court's flag burning decisions of 1989-1990,¹⁶⁰ that opposition does not appear to have been intensely committed, judging by the relative rapidity with which the flag-burning issue has died away.¹⁶¹ Similarly, one reason that the Court's school prayer decisions have not significantly impaired its stature, notwithstanding opposition from sixty-to-seventy percent of the American public, may be that critics are not intensely committed to the sort of watered-down, nondenominational prayer that was at issue in *Engel v. Vitale* and that likely would be reinstated were that decision ever to be overturned.¹⁶²

Intensity of opposition is partly a product of how efficacious the Court's rulings are deemed likely to be. When the Supreme Court invalidated residential segregation ordinances in *Buchanan v. Warley*¹⁶³ in 1917, the white South received the news calmly, secure in the knowledge that residential segregation could be maintained without formal legal sanction.¹⁶⁴ Similarly, when the Court in *Norris v.*

of southern whites opposed sending their children to school with any blacks, as compared with 61 percent in 1963).

158 See, e.g., Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and History* 423-27 (1978); 2 Charles Warren, *The Supreme Court in United States History* 302-09 (1926?); Stanley I. Kutler, ed., *The Dred Scott Decision: Law or Politics?* 46-50, 56-63 (1967) (reproducing Republican editorial and political criticism).

159 See, e.g., Walker Lewis, *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* 423 (1965) (*Dred Scott* "impaired the prestige of the Court for years to come"); id. at 470-71 (noting ferocious Republican attacks on Chief Justice Taney after his death in 1864); Charles Evans Hughes, *The Supreme Court of the United States, its Foundation, Methods and Achievements: An Interpretation* 51 (1928) ("It was many years before the Court, even under new judges, was able to retrieve its reputation"); Edwin Corwin, *The Dred Scott Decision, in Light of Contemporary Legal Doctrines*, 17 *Am. Hist. Rev.* 52, 68-69 (1911) (concluding that the process of "recuperating its shattered reputation" was "so slow and laborious" that the Court did not "play anything like its due role of supervision" during the Civil War and Reconstruction). But see Fehrenbacher, *supra* note __, at 579 ("[T]he notion that the Supreme Court, owing to its association with the *Dred Scott* decision, was in mortal danger during the Civil War, is largely fiction"); Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 7-11 (1968) (distinguishing between criticism of *Dred Scott* and criticism of the Court as an institution, and denying that *Dred Scott* significantly impaired the Court's national standing).

160 See *supra* note __.

161 See Robert Justin Goldstein, *Flag Burning and Free Speech: The Case of Texas v. Johnson* 226 (2000).

162 See *Engel*, 370 U.S. at 422.

163 245 U.S. 60 (1917).

164 *Richmond News Leader*, Nov. 6, 1917, pp. 4-5; Wesley G. Marshall, "The Dawn is Breaking: *Buchanan v. Warley* and the Fight Against Residential Segregation" 99 (M.A. thesis, University of Virginia 1985).

*Alabama*¹⁶⁵ in 1935 overturned the second round of convictions of the Scottsboro Boys on the ground that blacks had been systematically excluded from the juries that indicted and convicted them, southern white reaction was muted, not because opposition to black jury service had significantly eroded, but rather because of confidence that the ruling easily could be circumvented.¹⁶⁶ One reason that the Warren Court's criminal procedure revolution has not significantly impaired the Court's standing may be that legislatures have successfully blunted its impact by refusing adequately to fund counsel for indigent defendants, thus disabling them from taking full advantage of the panoply of constitutional rights identified by the Court.¹⁶⁷ Conversely, one reason *Brown* aroused a firestorm of resistance among white southerners is that, by 1954, they doubted their ability to control the decision's impact, given the increased assertiveness of southern blacks inspired by World War II, the diminished availability of violence as a method of ensuring racial subordination, and the heightened attentiveness of the federal executive to civil rights issues.¹⁶⁸ Similarly, opposition to *Roe v. Wade* has been intense partly because the decision has proven difficult to nullify, given the market incentives it created for abortion suppliers.¹⁶⁹

Another factor influencing whether controversial constitutional decisions adversely affect the Court's standing is the relative power wielded by supporters and critics. Not all constituencies affected by Court decisions exercise the same clout. For example, Court rulings from the late nineteenth and early twentieth centuries invalidating the progressive income tax, and striking down minimum wage, maximum hour, and protective union legislation, were intensely controversial.¹⁷⁰ Yet opponents of these decisions, on average, lacked the economic and political resources of supporters. Similarly, more

165 294 U.S. 587 (1935).

166 See sources cited in Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 90 Mich. L. Rev. ??, ?? (2000).

167 See William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997).

168 See generally Michael J. Klarman, *Neither Hero, Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century*, ch. 4: *The World War II Era* (forthcoming, Oxford University Press).

169 See Rosenberg, *Hollow Hope*, at 195-201.

170 The leading cases included *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (pro-union legislation); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hour law); *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601 (1895) (income tax). For the controversy generated by such decisions, see generally William Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994).

recent controversial decisions such as *Roe v. Wade* and *Engel v. Vitale* generally have won the endorsement of the nation's cultural elite, which tends to be both better educated and more socioeconomically advantaged than the average American.¹⁷¹ Thus, while nearly half the country has criticized the abortion decision and more than half has opposed the school prayer ruling, the Court's defenders exercise relatively greater economic, political, and cultural clout, thus reducing the likelihood that these rulings will diminish the Court's stature. Even more dramatically, opponents of *Plessy v. Ferguson*,¹⁷² the Court's first decision rejecting an equality-based challenge to racial segregation, exercised almost no power at all. Whites overwhelmingly endorsed *Plessy*, and African Americans at the turn of the last century were politically disfranchised and economically marginal.¹⁷³ Conversely, an important component of the opposition to *Reynolds v. Sims*,¹⁷⁴ the reapportionment decision, consisted of politicians, who wield enormous political power. (Overrepresented rural dwellers also opposed *Reynolds*, though such groups were, by definition, a minority of the population.) These politically influential critics of *Reynolds* nearly were able to secure a constitutional amendment overturning the decision.¹⁷⁵ Yet, once that effort had failed, *Reynolds* quickly generated its own powerful constituency of supporters: Politicians elected under the one-person-one-vote regime of *Reynolds* had a vested interest in defending that decision.¹⁷⁶

Some constitutional issues fade away and others linger. The Court's prestige is not jeopardized by controversial or even unpopular rulings on issues that quickly lose their saliency. For example, the public controversy over *Dred Scott*, which was intense in the late 1850s,¹⁷⁷ dissipated rapidly once the Civil War and post-war constitutional amendments had abolished slavery and guaranteed black

171 On this culturally elite bias of judicial review, see Michael J. Klarman, What's So Great About Constitutionalism?, 93 Nw. U. L. Rev. 145, 188-92 (1998).

172 163 U.S. 537 (1896).

173 See generally Michael J. Klarman, The *Plessy* Era, 1998 Sup. Ct. Rev. 303.

174 377 U.S. 533 (1964).

175 David Kyvig, Explicit and Authentic Acts: Amending the United States Constitution, 1776-1995, at 374-76 (1996).

176 John Hart Ely, Democracy and Distrust 121 (1980) ("[T]he incentive of elected representatives is not necessarily toward malapportionment but rather toward maintaining whatever apportionment, good or bad, it is that got and keeps them where they are.").

177 See supra note ____.

citizenship, thus rendering *Dred Scott* obsolete. The Court's rulings invalidating New Deal legislation in 1935 and 1936 suffered a similar fate.¹⁷⁸ The immediate effect of these decisions was to produce a confrontation with the president that threatened the Court's standing; Roosevelt's Court-packing plan had the potential to destroy the Court as we know it.¹⁷⁹ Yet once the Justices shifted constitutional gears—constitutional historians continue to debate precisely when and why that shift occurred¹⁸⁰—economic legislation quickly became immune from constitutional challenge.¹⁸¹ The issue that had provoked the Court-packing episode was obsolete within just a couple of years.¹⁸² Likewise, the decision in *Korematsu v. United States*,¹⁸³ sustaining the war-time internment of Japanese-Americans, already was generating considerable criticism by the end of the war,¹⁸⁴ and soon would come to be regarded as a quintessential failure of judicial nerve.¹⁸⁵ Yet, since the underlying issue simply was not relevant to peacetime America, the decision did little lasting damage to the Court's reputation. Other issues that generate Court decisions refuse to go away. Abortion and school prayer have remained at the center of public controversy for well over a quarter of a century since the Court first put them on its constitutional agenda.¹⁸⁶ Whether or not *Roe* and *Engel* have damaged the Court's standing, it seems clear that controversial rulings on issues that have staying power pose a relatively greater threat to the Court's reputation.

¹⁷⁸ See supra notes ____.

¹⁷⁹ See Cushman, supra note ___, at 13-14 (reporting statements by opponents of the plan); Joseph Alsop & Turner Catledge, *The 168 Days* 107, 114-15 (1938) (same).

¹⁸⁰ Compare Cushman, supra note __ (denying that any fundamental shift occurred in 1937) with Bruce Ackerman, *We the People: Transformations* 366-68 (1998) (arguing there was a revolution in 1937). See also Friedman, supra note ___, at 1982 (denying any "revolution" but conceding greater significance to *Jones & Laughlin Steel* than does Cushman).

¹⁸¹ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

¹⁸² See generally Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 *Yale L.J.* 1319, 1340-41 & n.82 (1941) (collecting cases).

¹⁸³ 323 U.S. 214 (1944).

¹⁸⁴ See, e.g., Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L. J.* 489 (1945); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 *Colum. L. Rev.* 175 (1945).

¹⁸⁵ See, e.g., Judith A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* 113, 149 (1983) (calling *Korematsu* "racist" and a "disgrace"); Michael Perry, *The Constitution in the Courts: Law or Politics?* 145 (1994) (calling the decision "almost universally discredited"); Laurence H. Tribe, *In What Vision of the Constitution Must the Law be Color-Blind?*, 20 *J. Marshall L. Rev.* 201, 202 (1986) (calling it "infamous").

¹⁸⁶ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

Just as the diminishing salience of an issue may affect the Court's ability to weather a storm of public controversy, significant shifts in public opinion on issues that retain their salience may impact the Court's standing. *Brown v. Board of Education* was intensely controversial in 1954, but was much less so by 1964, and by 1974 enjoyed the overwhelming approval of Americans, black and white, North and South.¹⁸⁷ *Roe v. Wade*, on the other hand, is nearly as controversial today as it was in 1973. Thus, the Court's reputation may depend, to a significant degree, on the Justices' skill at predicting the future. *Brown* is the greatest judicial prognostication of all time. The Justices rightly understood that a fundamental shift in race relations was in the offing.¹⁸⁸ By acting as part of the vanguard of the civil rights movement, the Justices garnered substantial (indeed, somewhat exaggerated) credit for the transformation in race relations that ensued.¹⁸⁹ Yet, public opinion does not always shift with the Court; it can move in the opposite direction as well. Thus, a Court decision that is initially popular or that generates a mixed response can later become so universally criticized as to subject the Court to popular vilification. *Dred Scott* and *Plessy* surely illustrate this phenomenon, and *Korematsu* may as well.¹⁹⁰ Fortunately for the Court, dramatic shifts in public opinion that render the Court a target of public vituperation frequently occur on issues that the passage of time has rendered largely obsolete. On such occasions, even nearly-universal public condemnation of its rulings seems to take little toll on the Court's standing. Within a decade or two of the

187 See supra note _____. See also Muse, supra note ___, at 211 (noting a dramatic increase by the early 1960s in the percentage of southerners who believed school desegregation was inevitable); *id.* at 270-71 (noting a dramatic shift in national opinion on race by 1963).

188 For the Justices' perception that racial change was in the offing, see the statements quoted in Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 Geo. L.J. 433, 458 (1994) (book review). For the extralegal causes of this change, see Michael J. Klarman, *Brown*, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 13-75 (1994).

189 For the debate over how much credit the Court deserves, compare Gerald N. Rosenberg, *Brown Is Dead! Long Live Brown!*: The Endless Attempt to Canonize a Case, 80 Va. L. Rev. 161 (1994) (almost no credit) with David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 Va. L. Rev. 151 (1994) (tremendous credit) and Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 Va. L. Rev. 185 (1994) (indirect and moderate credit).

190 *Dred Scott* probably enjoyed majority support in the nation when decided. See Fehrenbacher, supra note ___, at 565-66 (noting that *Dred Scott* seemed, if anything, to help northern Democrats in the 1857 state elections). *Plessy* was so consonant with public opinion that it went virtually unnoticed. See, e.g., Charles A. Lofgren, *The Plessy Case: A Legal-Historical* 197 (1987); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 Colum. L. Rev. 444, 469 (1982). *Korematsu* was exactly what most Americans demanded during the war. See Peter Irons, *Justice at War* (1983), ch.3. For subsequent vilification of these decisions, see the statements quoted in Klarman, *Civil Rights*, 25, 28.

decisions, few Americans were prepared to defend *Dred Scott* or (to a lesser extent) *Korematsu*.¹⁹¹ Yet, since the issues adjudicated in these cases had been rendered largely obsolete, the rulings became curiosities rather than irritants. If this observation is correct, there may be a one-way ratchet of sorts at work with regard to controversial Court decisions on issues where a dramatic shift in public opinion subsequently occurs. Apparently, the Justices receive enormous credit for correctly predicting the future, but not much blame for incorrectly predicting it, at least when the underlying issue quickly loses its salience. Concretely, the Court's heroic decision in *Brown* seems, in the public mind, vastly to outweigh ignoble judicial deeds such as *Dred Scott*, *Plessy*, *Korematsu*, and the like.¹⁹²

On other issues, public opinion changes, while the salience of the issue remains high. In this category of cases, significantly, the Justices generally enjoy second chances to get their decisions right—that is, opportunities to reconsider their initial ruling, and if necessary, to revise or retract it, in light of hostile public opinion. *Furman v. Georgia* may be the best exemplar of this phenomenon. In 1972, Supreme Court Justices read the tea leaves of public opinion as indicating that capital punishment in the United States was on the road to extinction.¹⁹³ Opinion polls in the mid-1960s revealed, for the first and (thus far) only time in American history, national pluralities opposed to capital punishment.¹⁹⁴ A majority of the Justices decided to give the death penalty a nudge toward constitutional oblivion.¹⁹⁵ Yet, public opinion on the death penalty shifted dramatically in the

191 On *Korematsu*, see, e.g., The Autobiography of William O. Douglas: The Court Years, 1939-1975, at 280 (1980) (recanting his vote in *Korematsu*); Irons, *supra* note __, at 362 (noting a 1983 report to Congress by the Commission on Wartime Relocation, which concluded that the internment of Japanese-Americans was a “grave injustice” resulting from “race prejudice”). On *Dred Scott*, see Fehrenbacher, *supra* note __, at 573 (“as time passed, it [*Dred Scott*] was an embarrassment—the Court’s highly visible skeleton in a transparent closet”); Downes v. Bidwell, 182 U.S. 244, 273-74 (1901) (noting that the Civil War had “produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of that case”).

192 Apparently, the myth of the Court as countermajoritarian hero is just too attractive to resist. See Klarman, *Civil Rights*, at 19-23.

193 See Delavan Dickson, The Supreme Court in Conference: 1940-1985, at ?? (2001) (conference notes from *Furman v. Georgia*: Justice Brennan noting that support for abolition of the death penalty has increased during the twentieth century; Justice Stewart predicting that “[s]omeday the Court will hold that death sentence is unconstitutional”). See also *Furman*, 408 U.S. 238, 313 (1972) (White, J., concurring) (observing that the death penalty “has for all practical purposes run its course”); Jeffries, *supra* note __, at 413-14.

194 See Jeffries, *supra* note __, at 406; Carole S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 410 & n.273 (noting that in 1966 a Gallup poll, for the first time ever, revealed more Americans opposing than favoring the death penalty).

195 See Jeffries, *supra* note __, at 413.

mid-1970s, perhaps partly in reaction to the Court's ruling.¹⁹⁶ Within four years of *Furman*, thirty-five state legislatures had manifested their desire to retain the death penalty, by revising their statutes to take account of the objections raised in *Furman*.¹⁹⁷ The Justices, plainly influenced by this resounding popular endorsement of the death penalty,¹⁹⁸ switched gears in 1976, sustaining the constitutionality of the death penalty, so long as administered in a suitably constrained manner.¹⁹⁹ We know from subsequent experience in California that determined judicial resistance to implementation of the death penalty in the face of overwhelming popular approval can injure a court's stature.²⁰⁰ The United States Supreme Court avoided incurring the public's wrath because it took advantage of post-*Furman* opportunities to align its death penalty jurisprudence with national opinion.

The so-called "switch in time" of 1937 likewise illustrates how the iterative quality of constitutional interpretation affords the Court opportunities to conserve its institutional prestige by adjusting or even retracting initially controversial decisions. President Roosevelt threatened to destroy the Court in response to its 1936 decisions invalidating the Bituminous Coal Conservation Act, the Agricultural Adjustment Act, and the New York minimum wage.²⁰¹ The very next year, the Justices took advantage of opportunities to reconsider their position, and by doing so, helped ensure the defeat of Roosevelt's Court-packing plan.²⁰² Many commentators have interpreted *Terry*

196 See Jeffries, *supra* note __, at 414 (reporting Gallup polls and concluding that the increase in public support for the death penalty after *Furman* was "so sharp that it seems almost certain to have been a negative reaction to the Court's decision"); Steiker & Steiker, *supra* note __, at 411-12 ("it seems fair to say that *Furman* galvanized political opposition to abolition").

197 *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (plurality opinion); Jeffries, *supra* note __, at 414; Steiker & Steiker, *supra* note __, at 40.

198 See Dickson, *supra* note __, at ?? (conference notes in *Gregg v. Georgia*: Justice Stewart noting that thirty-five legislatures have revised their death penalty statutes since 1972, thus indicating that "evolving standards of common decency" continue to support the death penalty; Justice Powell emphasizing the recent state statutes).

199 See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

200 See, e.g., Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. Cal. L. Rev. 809 (1986).

201 See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

202 The relevant decisions are *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). For the impact of these decisions on the Court-packing plan, see Cushman, *supra* note __, at 18-23; Alsop & Catledge, *supra* note __, at 144-47. Cushman, of course, denies that these decisions represented, in any strong sense, "reconsideration" of the decisions from the preceding term.

v. Ohio,²⁰³ which sustained police stop-and-frisk tactics even in the absence of probable cause, as a judicial (and judicious) concession to public opinion, which had been agitated by the Court's decision in *Miranda v. Arizona* two years earlier.²⁰⁴ The apparent shift in the Court's attitude toward time release programs for religious observance in public schools between 1948 and 1952²⁰⁵ and toward legislative investigation of alleged communists between 1957 and 1959²⁰⁶ likewise may reflect the Justices' recognition of the wisdom of making occasional concessions to adverse public opinion.

Finally, the Court's standing and legitimacy are most at risk when it renders unpopular or controversial decisions in bunches, rather than individually. The Court came under severe attack in the late 1950s—from Congress, the American Bar Association, the Conference of State Chief Justices, and legal academics—because it took on so many controversial causes simultaneously.²⁰⁷ Still reeling from the white South's assault upon *Brown*, the Justices tempted fate by taking on the professional anti-Communists with its famous Red Monday decisions of 1957,²⁰⁸ the law enforcement lobby with some forerunners of the 1960s criminal procedure revolution,²⁰⁹ and federalism afficionados with the beginnings of the habeas revolution.²¹⁰ This was too many powerful constituencies to offend at once, and the Court was forced to backtrack in the late 1950s, rejecting the broadest implications of its Red Monday decisions in 1959²¹¹ and generally absenting

203 392 U.S. 1 (1978).

204 See, e.g., Tracy Maclin, *Terry v. Ohio's* Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John's L. Rev. 1271, 1317-18 (1998).

205 Compare *McCullum v. Board of Education*, 333 U.S. 203 (1948) (invalidating time release program) with *Zorach v. Clauson*, 343 U.S. 306 (1952) (sustaining a slightly different time release program). See, e.g., C. Herman Pritchett, *Civil Liberties and the Vinson Court* 11-14 (1954) (attributing the shift to the Court's "dispos[ition] to use any available method to quiet the storm caused by the McCollum decision"); Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953*, at 236 (1997).

206 Compare *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Watkins v. United States*, 354 U.S. 178 (1957) (placing constitutional limits on legislative investigations) with *Uphaus v. Wyman*, 360 U.S. 72 (1959) and *Barenblatt v. United States*, 360 U.S. 109 (1959) (narrowly construing those limits). Murphy identifies a "tactical withdrawal." Murphy, *supra* note ___, at 246.

207 See generally Murphy, *supra* note ___, at 266 (arguing that the Warren Court made the mistake of taking on "too many powerful enemies at one time").

208 See *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Yates v. United States*, 354 U.S. 298 (1957). These are discussed in Murphy, *supra* note ___, at 100-06.

209 See, e.g., *Mallory v. United States*, 354 U.S. 449 (1957); *Jencks v. United States*, 353 U.S. 657 (1957).

210 See *Brown v. Allen*, 334 U.S. 443 (1953).

211 See *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959). These are discussed in Murphy, *supra* note ___, at 229-31.

itself from the school desegregation controversy until after the civil rights movement had caught the country up with the Court.²¹² Likewise, the New Deal Court got itself into trouble by invalidating a dozen federal statutes in no less than eighteen months. Finally, a series of Marshall Court decisions between 1816 and 1824²¹³ made the Court so unpopular in so many states that a genuine risk of congressional retaliation arose, either in the form of a statute curtailing the Court's appellate jurisdiction or a constitutional amendment fundamentally altering the judicial review power.²¹⁴ Most scholars believe that the Marshall Court engaged in a strategic retreat during its final decade, in order to blunt these retaliatory efforts.²¹⁵

These seem to me the most important factors influencing how particular decisions impact the Court's long term standing. Evaluating the likely significance of *Bush v. Gore* according to these variables is straightforward, though necessarily no less impressionistic than identifying the relevant factors in the first place.

Half the country—the half that voted for Al Gore—thinks the result in *Bush v. Gore* was wrong; many think it was egregiously so.²¹⁶ Some Republicans acknowledge (especially in private) that the Court's decision was bad law, but generally they are not unhappy with the result.²¹⁷ Thus, if I am right that the Court's long-term legitimacy depends more on whether people approve its results than on the quality of its legal reasoning, roughly half the country will approve and

212 On the Court's absenting itself from the school desegregation controversy, see, e.g., J. Harvie Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration 1954-1978* (1979), ch.5. The Court did intervene, but only in extreme circumstances. See *Cooper v. Aaron*, 358 U.S. 1 (1958) (defiance of *Brown*, followed by school closures); *Bush v. Orleans Parish Sch. Bd.*, 365 U.S. 569 (1961) (summarily affirming invalidation of state statute authorizing closure of any school ordered to integrate). The Court only reentered the fray as the civil rights movement reached its pinnacle. See *Goss v. Board of Education*, 373 U.S. 683 (1963) (invalidating minority-to-majority student transfer policy); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (invalidating school closures).

213 See, e.g., *Osborn v. Bank of United States*, 22 U.S. 738 (1824); *Green v. Biddle*, 21 U.S. 1 (1823); *Cohens v. Virginia*, 19 U.S. 264 (1821); *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

214 See, e.g., Warren, *supra* note ___, ch. 17; Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict 1809-1835*, ch. 5 (1987).

215 See, e.g., Jessup, *supra* note ___, chs. 6-7; R. Kent Newmyer, *The Supreme Court Under Marshall and Taney* 84-88 (1968). The leading cases in support of the retreat hypothesis are *Hawkins v. Barney's Lessee*, 30 U.S. (5 Peters) 457 (1831); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

216 See Richard Morin & Claudia Deane, "Public Backs Uniform U.S. Voting Rules," *Washington Post*, Dec. 18, 2000, A1 (reporting an opinion poll revealing that fifty percent of the public approved of the Supreme Court decision and forty-eight percent disapproved); Montgomery, *supra* note ___.

217 See sources cited *supra* note ___.

roughly half will condemn *Bush*.²¹⁸ Yet, while nearly all Democrats criticize *Bush*, it is not clear how intense their opposition is. Surely most Americans are more energized by presidential elections than by flag burning. On the other hand, relatively few Gore supporters seem to have manifested an intensity of commitment for their candidate approaching that displayed by right-to-lifers in opposition to *Roe v. Wade*. Indeed, a principal reason that Gore found himself in the Florida predicament that he did—recall that all the political scientists’ models predicted a relatively comfortable victory for him²¹⁹—was the relative lack of enthusiasm evinced by many Democrats for their party’s candidate.²²⁰ Thus, one might surmise that many Democrats’ opposition to *Bush v. Gore* will be lukewarm at best. My guess, though, is that this supposition is mistaken. The commitment of many Democrats to contesting the Florida election results was less a product of their enthusiasm for their candidate than a reaction against what they regarded as the egregious misbehavior of Republicans during the election controversy.²²¹ Once the Supreme Court defied the pundits’ predictions by involving itself in the election controversy,²²² Democratic resentment toward Republican politicians and Bush campaign operatives easily was transferred to a conservative Supreme Court majority that appeared bent on doing the G.O.P.’s bidding. My hunch is that even lukewarm Gore supporters were outraged by the result in *Bush v. Gore*. Moreover, *Bush* proved to be one of the most

218 See Kaiser, *supra* note __ (quoting legal historian Lawrence Friedman to the effect that “[t]he country is split 50-50 politically, and they’re probably split 50-50 on this [*Bush v. Gore*]”); *ibid.* (quoting legal historian Howard Gillman to the effect that “[w]hat the court did was align itself with half the country against the other half”).

219 See Robert G. Kaiser, “Academics Say It’s Elementary,” *Washington Post*, Aug. 31, 2000, p.A12 (noting that six of seven political scientists predicted Gore to win percentages ranging from 52.4% to 55.4% of the vote for the two major parties, and the seventh predicted him to win 60.3%). I guess the political scientists have some remodeling to do before the next election.

220 See, e.g., Terry M. Neal, “Some Black Voters View Gore as the Lesser of Two Evils,” *Washington Post*, Oct. 29, 2000, A4 (noting doubts as to “whether Gore has generated the enthusiasm he needs among the Democrats’ most loyal constituency [African-Americans]”).

221 See, e.g., Naftali Bendavid & Michael Tackett, “Democratic Leaders Certify their Support for Gore,” *Chicago Tribune*, Nov. 28, 2000, p. 1 (noting Democratic anger over the tactics of Republicans in Florida and quoting one Democratic congressman observing that “[t]he actions of some of our more Republican partisans over the past few days have stiffened and strengthened the resolve of the Democrats”).

222 See *supra* note __; Larry Lipman & Kathy Pruitt, “U.S. Supreme Court,” *Atlanta Journal and Constitution*, Nov. 25, 2000, 7A (noting that “[t]he Supreme Court’s decision to hear Bush’s appeal came as a surprise”); Joan Biskupic, “Courts can’t Unravel all Election Snags,” *USA Today*, Nov. 17, 2000, 1A (predicting that “the black-robed nine in Washington will beg off”); David G. Savage & Henry Weinstein, “American Waits,” *Los Angeles Times*, Nov. 23, 2000, A24 (“Most legal experts agreed that there were long odds against Bush’s actually winning in the Supreme Court . . .”). But see Einer Elhauge, “*Bush v. Florida*,” *New York Times*, Nov. 20, 2000, A27 (stating that if the Florida Supreme Court orders a manual recount, “no one should be surprised if the U.S. Supreme Court steps in”).

efficacious decisions in the Court's history. The conservative majority ruled that the Florida manual recount must stop; Al Gore conceded the election within twenty-four hours.²²³ This efficacious a ruling, on this divisive an issue, is certain to generate tremendous resentment toward the Court.

As to the relative power of the constituencies impacted by the Court's decision, both Democrats and Republicans have plenty of political and economic clout in American society. Thus, *Bush v. Gore* is not a case where the Court's critics are relatively disadvantaged in the public relations battle that follows the ruling. On the other hand, it is hard to think of a constitutional issue that is more destined to become obsolete. George W. Bush will be president, possibly as a result of the Supreme Court's ruling, for four years. (If he serves eight years, an intervening independent cause—a second electoral victory—will greatly reduce the Court's responsibility for the second term.) There is unlikely to be another presidential election like this past one during the lifetime of anyone now living. Moreover, the Supreme Court's ruling in *Bush*, by design, will have implications for no other constitutional issue, but rather is destined to be treated by the Court as a decision "good for this day and train only."²²⁴ Memories of what most Democrats will regard as the judicial theft of a presidential election will survive, but they will be just that—memories. Bush's presence in the White House for four years will constitute a short term reminder of the Court's decision. But this is not like the abortion issue, which just won't go away, and thus serves as a constant reminder to right-to-lifers of Supreme Court decisions like *Roe* and *Casey*.

On the other hand, unlike with regard to an issue like racial segregation, where public opinion transformed over time, popular attitudes toward *Bush v. Gore* probably never will change very much. Democrats are likely always to believe that the Supreme Court intervened in the 2000 presidential election because the conservative Justices

223 One can only marvel at the enormous prestige of an institution that could command such total obedience to such a lawless decision. Imagine how different the reaction of the Jeffersonians would have been two hundred years earlier had counterfactual litigation resulted in a Federalist Supreme Court awarding victory to John Adams (or Aaron Burr) in the disputed presidential election of 1800. The Marshall Court was too intimidated by the Jefferson administration even to order the Secretary of State to deliver commissions to justices of the peace appointed by outgoing President Adams. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The idea of that Court attempting to adjudicate the results of a presidential election—and having anyone pay attention to its determination, should it dare to do so—is simply incomprehensible.

224 *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

preferred George W. Bush for president.²²⁵ Perhaps some attitudes will change if Bush proves to be a particularly good or bad president,²²⁶ but I doubt it. Moreover, unlike with regard to issues like the death penalty, the Supreme Court almost certainly will enjoy no future opportunities to revisit the issue in *Bush*, as it did in *Furman*, and thus to fix its “mistake.” Once elected president, Bush cannot be “unelected.”

Finally, from the “basket of issues” perspective, the Rehnquist Court might survive *Bush v. Gore* reasonably unscathed, because the remainder of the Court’s constitutional jurisprudence has been such a political grab bag of results. *Bush* might have enraged Democrats even more had the conservative majority that ensured Bush’s election been consistently writing conservative values into the Constitution. But it hasn’t. While the Rehnquist Court arguably has been the most activist in history, its activism does not manifest a consistent political valence. In recent years, liberals generally have won on issues involving abortion, school prayer, gender discrimination, and freedom of speech.²²⁷ Conservatives, on the other hand, have triumphed on issues such as affirmative action, minority voting districts, public aid to parochial schools, federalism, the death penalty, and (usually) criminal procedure.²²⁸ Indeed, in the term that immediately preceded *Bush*, the Court issued a series of important constitutional rulings that were noteworthy mainly for the political evenhandedness of the results.²²⁹ Liberals won on abortion rights, access to abortion clinics, school prayer, and the continued vitality of *Miranda*.²³⁰ Conservatives

225 See, e.g., Michael W. McConnell, “A Muddled Ruling,” *Wall Street Journal*, Dec. 14, 2000, A26 (“Many of the vice-president’s supporters will continue to believe—probably to their graves—that their man would have won if only they had been given more time.”).

226 See, e.g., Kaiser, *supra* note __ (reporting former White House counsel A.B. Culvahouse’s view that if Bush is a successful president, “lots of people” may end up approving the Court’s ruling).

227 See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion); *Lee v. Weisman*, 505 U.S. 577 (1992) (school prayer); *United States v. Virginia*, 518 U.S. 515 (1996) (exclusion of women from Virginia Military Institute); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

228 See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affirmative action); *Shaw v. Reno*, 509 U.S. 630 (1993) (minority voting districts); *Agostini v. Felton*, 521 U.S. 203 (1997) (public aid to parochial schools); *United States v. Lopez*, 514 U.S. 549 (1995) (federalism); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (death penalty); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints permissible under the fourth amendment).

229 See, e.g., Edward Walsh, “An Activist Court Mixes its High-Profile Message,” *Washington Post*, July 2, 2000, A6; Kathleen M. Sullivan, “A Court Not Easy to Classify,” *New York Times*, June 29, 2000, A31 (“[I]n the rich and important term that just finished today, the justices defied any simple political typecasting”).

230 *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *Hill v. Colorado*, 530 U.S. 703 (2000) (abortion clinics); *United States v. Dickerson*, 530 U.S. 428 (affirming *Miranda*); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (school prayer);

won on several important federalism issues, public aid to parochial schools, and the first amendment rights of organizations that discriminate against gays.²³¹ Perhaps Democratic ire over *Bush v. Gore* is somewhat ameliorated by the Rehnquist Court's continuing propensity to distribute a substantial share of constitutional victories to liberals. Imagine how differently conservatives might have reacted to a counterfactual Warren Court ruling in 1968 handing the presidential election to Hubert Humphrey.

Where does consideration of these various factors leave us in evaluating the likely impact of *Bush v. Gore* on the Court's long term legitimacy? Roughly half the nation probably will believe for the indefinite future that the Supreme Court stole a presidential election from their candidate. Yet, after a brief four years has passed, *Bush v. Gore* will become an unhappy memory rather than a constant irritant. Thus, *Bush* seems unlikely to harm the Court's standing very much, especially if the Justices' constitutional jurisprudence continues to manifest the uneven political valence that it has in recent years.

The one confident prediction that can be made is that the Senate confirmation hearings of future Supreme Court nominees are likely to resemble a war zone.²³² This already has been true much of the time since the late 1960s; consider the fierce battles over the nominations of Justice Abe Fortas (for promotion to Chief Justice), Judge Clement Haynesworth and Harold Carswell, Judge Robert Bork, and Justice Clarence Thomas.²³³ And, really, why should we not expect it to be so, as the Supreme Court increasingly has asserted jurisdiction over the issues that comprise today's culture wars? Now that the Justices not only make national policy on abortion, school prayer, and affirmative action, but they also pick presidents, the stakes of

231 *Mitchell v. Helms*, 530 U.S. 793 (2000) (public aid to parochial schools); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (first amendment right to exclude gays). *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating Violence Against Women Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (invalidating congressional imposition of damages liability upon states under the Age Discrimination in Employment Act).

232 See, e.g., Kaiser, *supra* note — (reporting legal historian Howard Gillman's view that *Bush* is likely to affect the appointments process for Supreme Court Justices); Stephen Fidler, "U.S. Election: The Final Chapter," *Financial Times* (London), Dec. 14, 2000, p.12 (reporting similar views of Professors A.E. Dick Howard and Stephen Wermeil); Scot Lehigh, "So, Class, What Have We Learned? Were the Bush-Gore Lessons Lasting or was it Just Another Battle?," *Boston Globe*, Dec. 17, 2000, C1 (quoting political scientist Nelson Polsby predicting a "terrible confirmation battle" over Bush's first Supreme Court nomination).

233 See Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989); John Paul Frank, *Clement Haynesworth, the Senate, and the Supreme Court* (1991); Laura Kalman, *Abe Fortas: A Biography* (1990); Jane Mayer & Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* (1994).

a Supreme Court appointment—especially on this evenly-divided Court—will be ratcheted that much higher. This battlefield scenario is especially likely to unfold when President George W. Bush makes his first nomination to the Court. Since most Democrats believe that the Court’s intervention to make Bush president was illegitimate, they are sure to scrutinize with exacting care his efforts to reshape the Court in his political image. While Democrats proved powerless to prevent the Court from picking the president, they may have greater success, especially in this evenly-divided Senate, at preventing the president from picking the Court.❖