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Symposium: Federal Courts and Electoral Politics

**WHEN COURTS DECIDE ELECTIONS:
THE CONSTITUTIONALITY OF *BUSH V. GORE****
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INTRODUCTION: OF HARD BALL AND BASEBALL 610
I. THE IRRELEVANCE OF BOTH *BAKER V. CARR* AND THE "PASSIVE VIRTUES" 621
II. ELECTING WITHOUT AN ELECTION 627
III. THE CONSTITUTIONAL LIMITS OF JUDICIAL POWER TO DECIDE ELECTIONS . . . 635
IV. CONSTITUTIONALLY REQUIRED REMEDIES 640
V. THE CONSTITUTIONAL LIMITS OF SUPREME COURT POWER TO
DECIDE PRESIDENTIAL ELECTIONS 657
VI. THE STAKES
661
CONCLUSION
664

The election [of the President] must be made either by some existing authority . . . or by the people themselves.—The two Existing authorities under the National Constitution would be the Legislative & Judiciary. The latter [I presume is] out of the question.
—James Madison¹

(2002) 82 B.U. L.Rev. 610 [I] would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men. . . .
—George Mason²

[T]his Court should resist the temptation unnecessarily to resolve tangential legal

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1. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966) (1840), at 363 (Jul. 25, 1787) (referring to his own remarks).

2. *Id.* at 586 (Sept. 5, 1787).

disputes, where doing so threatens to determine the outcome of [an] election.
—Stephen Breyer³

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

—*Bush v. Gore*⁴

By successive usurpations of power, the Shogun or Tycoon had become the real ruler of Japan, though nominally the subject of the Mikado, and acting in his name.
—*Oxford English Dictionary*⁵

INTRODUCTION: OF HARD BALL AND BASEBALL

One might suppose that there is little either new or important to say about *Bush v. Gore*,⁶ the case that decided the presidential election of 2000. And **(2002) 82 B.U. L.Rev. 611** after the September 11 attack on America, the election of 2000 seems overtaken by events.⁷ But there does remain something new, and, as I believe, important, to say about *Bush v. Gore*. The case

3. *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting).

4. *Id.* at 111 (per curiam).

5. 15 OXFORD ENGLISH DICTIONARY 303 (2d ed. 1989) (defining "Shogun").

6. *Bush v. Gore*, 531 U.S. at 110-11 (Dec. 12, 2000) (holding, under the Equal Protection Clause, that Florida's court-ordered statewide manual recount of so-called "undervotes" could not proceed under the unelaborated state statutory standard of "clear intent of the voter;" also suggesting that the Constitution might require the same recount of "overvotes," *id.* at 107; construing state law as permitting too little time for a constitutional count to proceed on remand, and thus, in effect, handing the presidency to George W. Bush). "Undervotes" were ballots that had been mechanically rejected as recording no vote for the Presidency; "overvotes" were ballots mechanically rejected as recording more than one choice. And see the crucial stay order, *Bush v. Gore*, 531 U.S. 1046, 1046-47 (Dec. 9, 2000) (granting Bush's motion for a stay of the recount, also treating the motion as a petition for certiorari; granting certiorari and ordering accelerated briefs and argument). See also *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (Dec. 4, 2000) (per curiam) (vacating the Florida Supreme Court's judgment and remanding for clarification on the question whether the Florida court had considered the bearings of certain federal provisions, constitutional and statutory, pertaining to presidential elections), see *infra* notes 72-80, 95-97 and accompanying text.

7. The manager of Al Gore's 2000 presidential campaign, Donna Brazile, reportedly has put aside her bitterness over the election "because it look[s] quite trivial when put next to Sept. 11.... I still believe Al Gore won the election,... but it doesn't matter any more," as reported in Kevin Sack, *Blacks Who Voted Against Bush Offer Support to Him in Wartime*, N.Y. TIMES, Dec. 25, 2001, at A1. See also Richard L. Berke, *Aftermath: It's Not a Time for Party, But for How Long?*, N.Y. TIMES, Sept. 23, 2001 (Week in Review), at 3 (reporting that a consortium of newspapers led by the *Times* had completed an independent recount of the Florida vote, but that release of the results had been "put on hold indefinitely").

raises serious constitutional questions that have simply not been addressed. I mean at least to open theoretical inquiry into the constitutionality of *Bush v. Gore*—as an *event*. It is the fact that the Supreme Court decided the election that concerns me, not the way that they did it. Assuming for the sake of argument that *Bush v. Gore* was correct on the merits, there are good reasons nevertheless for understanding the Court's preemption of the election of 2000 as an "unconstitutional assumption of power."⁸

A study of how *Bush v. Gore* fits within the constitutional order seems overdue. For all the controversy over the case, the only moral of the story, whether for Congress or the press, has seemed to be that we should upgrade voting machines in poor neighborhoods.⁹ Commentators, for their part, have concluded that the case either damaged the Court's legitimacy or did not. They have found the Court's reasoning plausible or implausible. They have considered the likely constitutional consequences of what the Court said, but not what the Court did. We are seeing allegations that the Court overstepped the bounds of the rule of law, but scant analysis of how that might be so. Nor, to my knowledge, has any commentator sought to discern the principles that ought to guide the Court if it is again called upon to decide the outcome of a (2002) 82 B.U. L.Rev. 612 presidential election—or indeed, any election.

Part of the explanation for this want of a deeper analysis may lie in a phenomenon many have observed and that I think of as "academic shock." We are raised on judicial review as we are on baseball. When the greatest judicial umpire of them all makes a call—however bad—we submit. Those are the rules. But among some, and certainly among some law professors, there remains something of the shock first felt when, with the rest of the world, they saw the "conservative" Justices of the Rehnquist Court, over the protests of the "liberal" Justices, throw the Presidency of the United States to George W. Bush. *Bush v. Gore* simply exploded the foundations of their intellectual universe.

This shock in academia¹⁰ was *not* about the outcome of the election.¹¹ (2002) 82 B.U.

8. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (characterizing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

9. See, e.g. Katherine Q. Seelye, *Democratic Election Study Calls for National Standards*, N.Y. TIMES, Aug. 20, 2001, at A12 (reporting that members of Congress were considering legislation to provide federal funding to states that would conform to new federal standards and upgrade their electoral equipment and procedures). See also, e.g., Editorial, *The Time for Ballot Reform*, N.Y. TIMES, Nov. 12, 2001, at A18 (arguing that existing voting technologies are in violation of the equal protection standards asserted in *Bush v. Gore*). But see, e.g. David S. Broder, *An Opportunity Lost*, WASH. POST, Apr. 30-May 6, 2001 (nat'l weekly ed.), at 13 ("Last fall, electoral reform was all the rage; now, partisan tensions are delaying it").

10. Over 550 professors of law signed a letter published in a full-page advertisement in *The New York Times* criticizing the *Bush v. Gore* majority at the time of the stay order as acting as "political partisans." N.Y. TIMES, Jan. 13, 2001, at A7; see also Dave Zweifel, *Court Decision Still Rankles Law Profs*, CAPITAL TIMES, Jan. 24, 2001, at 6A (reprinting the text of the professors' letter). Later signatories joined the ranks of the outraged professoriate at its web site, <http://www.the-rule-of-law.com>, where the professors' letter and related materials could still be found as late as February, 2002. See *Law Professors for the Rule of Law*, at <http://www.the-rule-of-law.com> (last visited Feb. 26, 2002) (claiming support from 673 professors at 137 American law schools). The academic reaction to *Bush v. Gore* is also the point of departure of my colleagues' excellent, far-ranging article, Jack M. Balkin & Sanford Levinson, *Legal Historicism And Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173 (2001).

L.Rev. 613 Although a good many legal academics voted for Al Gore, the only consequence of the fact that it was "their Gore getting oxed"¹² was to make them less receptive, in the aftermath, to extenuations and explanations than those who voted for Bush. Gore himself inspired no such devotion as could explain the proliferation of list-serves,¹³ websites,¹⁴ and other public correspondence—the outpouring of books¹⁵ and articles¹⁶—in which academic **(2002) 82 B.U.**

11. We can never know who "won" Florida; however, we now have the results of a comprehensive study by *The New York Times* of Florida's surviving ballots. See Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1 (reporting statisticians' conclusions that if the Supreme Court had not halted the statewide recount of votes actually ordered by the Florida Supreme Court, Bush would have "won by" 493 votes). The *Times* study further concluded that Bush would have won the limited recount originally demanded by Gore. If, on the contrary, a statewide count of all machine-rejected ballots had been performed in Florida, Gore might have "won" by a narrow margin. *id.* See also MARTIN MERZER, *THE MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE 9-11* (2001) (reporting conclusions of the *Miami Herald's* post-election analysis that Gore would have won a statewide recount of the undervotes under the statutory "intent of the voter" standard and Bush would have won under more detailed standards). But see Editorial, *Florida's Unchanging Lessons*, N.Y. TIMES, Apr. 6, 2001, at A20 (pointing out the guesswork involved in such assessments and noting the lack of a firm basis for them, since "most Florida counties could [no longer] find all the undervote ballots" and that since the election "hundreds" of ballots were missing); Jonathan Chait, *Count Down: Why the Recount Isn't Good News for Bush v. Gore*, NEW REPUBLIC, Nov. 26, 2001, at 12, 13 (referring to a report in the *Orlando Sentinel* that under the Florida Supreme Court's statewide recount order, several counties had been counting "overvotes" as well as "undervotes"); Seelye, *Democrats' Study*, *supra* note 9, at A12 (reporting a study by Democratic members of the House Judiciary Committee concluding that but for illegal or fraudulent absentee ballots George W. Bush would have lost the election); see also *Absentee Ballots: A Catalog of Flaws*, N.Y. TIMES, Jul. 15, 2001 (nat'l ed.), at 16 (reporting that "far more" illegal ballots were counted in counties won by Bush than in counties won by Gore).

12. Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 689 (2001). I wonder, however, whether Justice Souter, and perhaps Justice Stevens, might plausibly be supposed to have voted for George W. Bush, the "compassionate conservative." For the argument that in fact there is no equivalence between the dissenters and the majority in *Bush v. Gore*, or between the Supreme Court's activism and the activism of the Florida Supreme Court below, see *infra* notes 100-106 and accompanying text.

13. See, e.g. the email lists judicial.indepen@ix.netcom.com; lawprofsROL-owner@yahoo.com.

14. See, e.g. <http://www.the-rule-of-law.com> (last visited Feb. 26, 2002). Outside the legal academy, see, for example, <http://www.democraticunderground.com> (last visited Jan. 12, 2002); <http://www.bush-impeachment.com> (last visited Jan. 12, 2002). Before September 11, and picking up again briefly after Fessenden & Broder, *Times Study*, *supra* note 11, from November 11, 2001 through Christmas 2001, there was substantial general news coverage of *Bush v. Gore* exhibiting continuing public concern over the election of 2000 on Yahoo's full-coverage site at http://www.fullcoverage.yahoo.com/fc/us/presidential_Election_2000 (last visited Jan. 12, 2002). When revisited on January 12, 2002, there had been no further coverage of the election at the Yahoo site.

15. Defending the Court, see, e.g. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). Attacking the Court, see, e.g. VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT* (2001); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); DOUGLAS KELLNER, *GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION* (2001); CHARLES LEWIS, *THE BUYING OF THE PRESIDENT 2000* (2001); JOHN NICHOLS, *JEWELRY FOR BUCHANAN: DID YOU HEAR THE ONE ABOUT THE THEFT OF THE AMERICAN PRESIDENCY?* (2001); HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* (2001). For investigative reporting, see, e.g. *THE NEW YORK TIMES*, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); MARTIN MERZER, *THE MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE* (2001). For other background, see, e.g. JAMES W. CEASER & ANDREW E. BUSCH, *THE PERFECT TIE: THE TRUE STORY OF THE 2000 PRESIDENTIAL ELECTION* (2001); ABNER

L.Rev. 614 shock continued to be registered long after the election. And the reaction was by no means limited to liberals.¹⁷ No, this shock was about the Supreme Court and only the Supreme Court.¹⁸

For those experiencing this shock, *Bush v. Gore* had the heart-stopping quality of a fix¹⁹—a fix of something sacred. Consider, analogously, how hard **(2002) 82 B.U. L.Rev. 615** it was to

GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001); ROBERT M. JARVIS ET AL., *BUSH V. GORE, THE FIGHT FOR FLORIDA'S VOTE* (2001); DAVID A. KAPLAN, THE ACCIDENTAL PRESIDENT: HOW 413 LAWYERS, 9 SUPREME COURT JUSTICES, AND 5,963,110 (GIVE OR TAKE A FEW) FLORIDIANS LANDED GEORGE W. BUSH IN THE WHITE HOUSE (2001); JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001); TIMOTHY MONTROSE, DEMOCRACY'S BIGGEST TEST: THE 2000 PRESIDENTIAL ELECTION AND THE THIRTY-SIX DAYS THAT FOLLOWED (2001).

16. See, e.g. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Kim Lane Scheppelle, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); Laurence H. Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001). But see, e.g. Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) (taking the view that, notwithstanding the partisanship of the decision, *Bush v. Gore* will have only minimal impact on public respect for the Court). And see generally the fine articles in Symposium: *Bush v. Gore*, 68 U. CHI. L. REV. 613 (2001), reprinted in CASS R. SUNSTEIN & RICHARD A. EPSTEIN, THE VOTE: BUSH, GORE & THE SUPREME COURT (2001).

17. See, e.g. Terrance Sandalow, Letter to the Editor, N.Y. TIMES, Nov. 13, 2001, at A16 (commenting on Fessenden & Broder, *Times Study*, supra note 11).

The conclusion that George W. Bush might have won the Florida vote even if the Supreme Court had not intervened... does nothing to remove the stain placed upon the integrity of the court by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.

By their votes, all demonstrated that they placed loyalty to party above faithfulness to the law they were sworn to uphold.

Id. See also Vincent T. Bugliosi, *None Dare Call It Treason*, THE NATION, Feb. 5, 2001, at 15 (reporting that "Terrance Sandalow, former dean of the University of Michigan Law School, a judicial conservative who opposed *Roe v. Wade* and supported the nomination to the Court of right-wing icon Robert Bork," had found "the balance of harms so unmistakably ... on the side of Gore" that in his view the Court's granting of the stay was "incomprehensible ... an unmistakably partisan decision without any foundation in law"); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 659 (2001) (fearing that "*Bush v. Gore* may exacerbate the already corrosive cynicism about public institutions and undermine public faith in the rule of law itself"). But see *id.*, infra note 27.

18. See, e.g. Jeffrey Rosen, *Disgrace: The Supreme Court commits suicide*, NEW REPUBLIC, Dec. 25, 2000, at 18 (fearing that *Bush v. Gore* damaged the country's faith in the Court and in the rule of law); Richard Briles Moriarty, *Law Avoiding Reality: Journey Through the Void to the Real*, 50 DEPAUL L. REV. 1103, 1104 (2001) ("The [*Bush v. Gore*] majority... drained the Court's deep reservoir of public respect"). For one of the few—albeit unexplored—recognitions that in *Bush v. Gore* the Court might have exceeded at least one constitutional limit on judicial power, see Renata Adler, *Irreparable Harm: The Unexpected Origins of the Supreme Court's Worst Decision*, NEW REPUBLIC, July 30, 2001, at 29, 34 (reviewing *Bush v. Gore: The Court Cases and the Commentary* (E. J. Dionne, Jr. & William Kristol eds., 2001)) ("The election of Bush was never the real problem. The assertion of power—in a matter in which the Court is morally and constitutionally precluded from playing any part—is").

19. This perception was not confined to academia. See, e.g. Daniel Schorr, Editorial, *The Supreme Fix Was In*, CHRISTIAN SCI. MONITOR, Dec. 15, 2000, at 11.

bear (and for some still is) that a great national institution like baseball's World Series could be fixed. It happened. In 1919, the Chicago White Sox threw the World Series to the Cincinnati Reds. Baseball fans still remember the little boy who cried out to his hero (the White Sox's "Shoeless Joe" Jackson), "Say it ain't so, Joe!" But it was.²⁰ For many in the legal academy *Bush v. Gore* carried just this kind of shock, enormously magnified.

Some have been quick to suppose that the election of 2000, like the 1919 World Series, was thrown for a consideration. It is said that Chief Justice Rehnquist or Justice O'Connor was anxious to resign,²¹ and that Justice Scalia or Justice Kennedy²² wanted to be Chief Justice. Ironically, it is hard to imagine any of these little dreams coming true now, in the aftermath of what to some seems an incomprehensible historic blunder. Like a widow in an old novel, who wishes to remarry but cannot be seen to do so during the expected period of mourning, Chief Justice Rehnquist cannot resign. Perhaps next year, perhaps in President Bush's second term, but not now. Justice O'Connor, who expressed her now-notorious dismay on election night at the possibility that a Gore victory would prevent her from resigning,²³ now has publicly committed herself to continued service²⁴—one can imagine with what fatigue. Can George W. Bush really, with propriety, now reward Justice Kennedy or Justice Scalia with the Chief Justiceship?²⁵ Accusations of self-dealing²⁶ seem **(2002) 82 B.U. L.Rev. 616** sufficiently plausible that even if the majority Justices in *Bush v. Gore* were wholly uninfluenced by their own desires they ought

20. See *Shoeless Joe Jackson's Virtual Hall of Fame: The Official Website of the Shoeless Joe Jackson Society*, at <http://www.blackbetsy.com> (last visited Feb. 26, 2002) (conceding that Jackson "had guilty knowledge of the fix," but maintaining that he played to win); see also HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 310-22 (1971) (discussing the 1919 "Black Sox" scandal); ELIOT ASINOF, *EIGHT MEN OUT* (1963) (portraying the players who were brought to trial for throwing the 1919 World Series).

21. See Schorr, *The Supreme Fix Was In*, *supra* note 19, at 11 (stating that the Chief Justice and Justice O'Connor "would like to retire under Bush to ensure being succeeded by conservatives"); see also, e.g., DERSHOWITZ, *SUPREME INJUSTICE*, *supra* note 15, at 156 (suggesting that Justice O'Connor wanted to retire, but would have liked a Bush victory to ensure that her replacement would be a conservative).

22. See DERSHOWITZ, *SUPREME INJUSTICE*, *supra* note 15, at 170.

23. Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, *NEWSWEEK*, Dec. 25, 2000-Jan. 1, 2001, at 46 (reporting information from two witnesses that Justice O'Connor had exclaimed, "This is terrible," and that her husband had explained that "his wife was upset because they wanted to retire to Arizona, and a Gore win meant they'd have to wait another four years").

24. See Charles Lane, *O'Connor Denies Plans to Leave Supreme Court*, *WASH. POST*, May 2, 2001, at A9.

25. On January 11, 2002, however, President Bush made a recess appointment of Justice Scalia's son, Eugene Scalia, to serve as solicitor in the Department of Labor. Christopher Marquis, *Bush Bypasses Senate on 2 More Nominees*, *N.Y. TIMES*, Jan. 12, 2002, at A10.

26. See *supra* notes 21-25 and accompanying text; see also, e.g., NICHOLS, *JEWS FOR BUCHANAN*, *supra* note 15, at 205-10 (arguing, in a chapter entitled, "The Court Was, to Say the Least, Extremely Conflicted," that Justice Scalia should have recused himself, given that two of his sons were working for firms representing the Bush campaign). Nichols also thinks it relevant that all five majority Justices owed their appointments to administrations in which George Bush, senior, was President or Vice President. *Id.* at 205; see also *id.* at 208 (referring to Justice Scalia's pronouncement, in *Liteky v. United States*, 501 U.S. 540, 548 (1994), that recusal is required whenever "impartiality might reasonably be questioned").

to have understood the need to avoid any appearance of impropriety.

Even without the alleged conflicts of interest, the five-four political division in the Court, it is widely felt, should have sounded a sufficient alarm to have alerted the conservative wing to the danger.²⁷ So also should the difficulty of squaring the opinion with the principles previously professed by the Rehnquist Court majority—certainly its customary concern for state autonomy as against federal interference.²⁸ The *Bush v. Gore* Court went so far as to remind Florida of a state legislature's power to take a presidential election away from the electorate,²⁹ virtually inviting a replication of the election of 1876, when each of three states wound up with two sets of electors.³⁰ In sum, there was an **(2002) 82 B.U. L.Rev. 617** appearance of partisanship,³¹

27. See, e.g. McConnell, *Two-and-a-Half Cheers*, *supra* note 17 at 658- 60 (acknowledging that "[a]nger at the Court was fueled by the apparently partisan breakdown of the vote regarding the proper remedy," but concluding that the willingness of Justices Breyer and Souter to agree with the Court's equal protection argument demonstrated that the Court's judgment "cannot plausibly be attributed to base partisan motives"). I do not read the laconic mention of an equal protection problem by two of the less-conservative Justices as an agreement with the majority. Their lukewarm, unargued remarks on this point could be taken, perhaps, as statesmanly. On the equal protection rationale of *Bush v. Gore*, see *infra* notes 88, 178-185 and accompanying text.

28. In a brilliant and soothing apologia, Professor Pildes argues that *Bush v. Gore* is consistent with the Court's *political* cases, which he reads as emphasizing stability over chaos. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714-15 (2001). Professor Pildes' assignment of *Bush v. Gore* to the "order" and "stability" side of the ledger seems problematic to me on at least two counts: First, the procedures prescribed for political resolution of the election, however chaotic, were the procedures prescribed. Second, if anything threatened the constitutional "order" it was not the counting of votes, but rather the Court's deciding a presidential election. In any event, it is doubtful that the Court has a coherent political theory. See, e.g. Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 245 (David K. Ryden ed., 2000) (arguing that the Supreme Court, collectively, does not have a single theory of electoral politics, and that no single theory could decide elections cases).

29. See *Bush v. Gore*, 531 U.S. at 104 (per curiam) ("[T]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors" (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892))).

30. Although an Oregon elector was also challenged, the three crucial states were Florida, Louisiana, and South Carolina. Their combined nineteen electors were sufficient to change the result, and allegations of fraud and racial conspiracy with respect to those states prompted Congress to appoint the commission that ultimately handed the election to Rutherford B. Hayes. For background, see generally C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951); PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* (1906). See also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1989), at 575-87. More generally, see, e.g. MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* (1992).

31. See, e.g. *Bush v. Gore*, 531 U.S. at 128-129 (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law") (purportedly referring to the Court's view of the judges appointed to tally the Florida votes, but managing, characteristically, to convey another meaning); see also *id.* at 157 (Breyer, J., dissenting) ("And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself"). Subsequently, one of the Justices has felt a need to defend the case against the charge of partisanship, and has been seconded in this strange avowal by the Chief Justice. See Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1, reporting on an address to high school students at which Justice Thomas remarked, "I have yet to hear any discussion, in nine years [on the Court], of partisan politics. . . . The last political act we engage in is confirmation." Asked whether Thomas's remarks had been appropriate, Chief Justice Rehnquist reportedly

compounded by an appearance of insensitivity to the appearance—a kind of recklessness, a rush to disgrace. There was an appearance of violation of the judicial oath to decide without respect to persons.³² So obvious were these risks, so blind were the five majority Justices to clear warnings, that only partisan passion seems to account for the case. American civil society must sustain a blow when such a thing happens at all. A *Bush v. Gore*, as the Court itself might have put it, can change our vision of who we are.³³

But my point is that these painful aspects of *Bush v. Gore* are only the **(2002) 82 B.U. L.Rev. 618** superficial problems the case presents. *Bush v. Gore* challenges the constitutional order at a far deeper level than these embarrassments suggest. The felt shock, rather, was that of an exercise of inauthentic power.

Some on the right, believing that the Court got it right, do not understand the outrage of their colleagues. Others on the right acknowledge that the Court absorbed a blow to its legitimacy, but argue that the Court did so commendably, to save the country from the perceived partisanship of the Florida Supreme Court,³⁴ or from a chaotic end-game.³⁵ On the left, some have launched bitter polemics.³⁶ Others argue that the right thing now is to guard the sputtering

replied, "Absolutely." See Neil A. Lewis, *Justice Thomas Speaks Out on a Timely Topic, Several of Them, in Fact*, N.Y. TIMES, Dec. 14, 2000, at A23. Justice Thomas was equally defensive when addressing a conference of judges and lawyers in July 2001: "I think one of the ways our process is cheapened and trivialized is when it's suggested we have a way to make decisions that have more to do with politics." *Oregon Democrats Seek to Oust Justices*, N.Y. TIMES, Jul. 23, 2001, at A15. Outright accusations of partisanship are leveled in, e.g., *Klarman, Constitutional History*, *supra* note 16, at 1723-24; David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 738 (2001). See also the remarks of Dean Sandalow and Professor McConnell, *supra* note 17.

32. See Judiciary Act of 1789 § 8, 1 Stat. 73, 76 (codified as amended at 28 U.S.C. § 453 (1994)).

33. Cf. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 868 (1992) (joint op) ("If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals"); see also, e.g., Eric Turkewitz, Letter to the Editor, *Lost Honor on Voting*, N.Y. TIMES, Sept. 1, 2001, at A22 ("At the moment the Supreme Court suspended democracy by stopping the Florida vote count, we lost the moral authority to monitor vote counting anywhere in the world").

34. See, e.g. Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 635 (2001) (concluding that the Florida Supreme Court's conduct in *Bush v. Gore* counted "as an abuse of discretion for partisan political ends," and that "if it abused its discretion, then the United States Supreme Court did not abuse its"). But see, e.g. Strauss, *What Were They Thinking?*, *supra* note 31, at 756 (concluding that "the best that can be said is that the Court trumped the supposed lawlessness of the Florida Supreme Court with lawlessness of its own").

35. See, e.g., POSNER, *BREAKING THE DEADLOCK*, *supra* note 15, at 138-39 (describing a chaotic scenario in which Lawrence Summers, the then Secretary of the Treasury, becomes the first Jewish president of the United States); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 772 (2001) (stating that "the Court brought a chaotic situation to an abrupt end"); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001) (arguing that *Bush v. Gore* "restored stability"). Cf. *Bush v. Gore*, 531 U.S. at 127 (Stevens, J., dissenting) ("In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters"); *id.* at 158 (Breyer, J., dissenting) ("I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary 'check upon our own exercise of power,' 'our own sense of self-restraint.'" (citation omitted)).

36. For quite good early books in the polemical mode, see, e.g. BUGLIOSI, *THE BETRAYAL OF AMERICA*, *supra*

flame of faith in the Court.³⁷ What has been missing is an inquiry into how the event rather than the rationale of *Bush v. Gore* squares with our constitutional understandings.

Beyond the phenomenon of academic shock, there is another reason, a technical one, why constitutional analysis has not been a feature of the critique of *Bush v. Gore*. Any doubt of the Court's sheer power to do what it did has seemed to be forestalled by *Baker v. Carr*.³⁸ That case held that an equal protection challenge to the suffrage was justiciable—that such a case does not (2002) 82 B.U. L.Rev. 619 present a nonjusticiable "political question."³⁹ In the aftermath of that watershed case, and under the Voting Rights Act of 1965,⁴⁰ we have had a long history of judicial intervention in the electoral process. In a proper case no one doubts that an injunction can upset the results of an election. Against this background, commentators have not sought specifically to explore the constitutionality of the Court's intervention⁴¹ in the presidential election of 2000. The case has not been held up to that kind of light. This is not to say that the "political questions" bar to justiciability identified in *Marbury v. Madison*⁴² and saved and

note 15; DERSHOWITZ, SUPREME INJUSTICE, *supra* note 15; for the more recent wave of rather good polemics, *see, e.g.* KELLNER, *supra* note 15; LEWIS, THE BUYING OF THE PRESIDENT, *supra* note 15; NICHOLS, JEWS FOR BUCHANAN, *supra* note 15.

37. *E.g.*, Tribe, *Hall of Mirrors*, *supra* note 16, at 302: "The impulse to overreact to legal moments like *Bush v. Gore* is strong—but the best interests of the people and their constitutional institutions demand a longer perspective."

38. 369 U.S. 186, 188 (1962) (holding justiciable under the Equal Protection Clause a challenge to the apportionment of a state legislature); *id.* at 226-28 (distinguishing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), as decided under the Guaranty Clause).

39. *Baker*, 369 U.S. at 197.

40. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § § 1971, 1973 to 1973bb-1 (1994)).

41. That the Constitution controls the judiciary can hardly be a novel proposition. The Due Process Clauses explicitly and directly address the judiciaries of nation and state, even in civil cases in which both parties are private. *See, e.g.* *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 733 (1877) (holding, in an action between private parties, that the Due Process Clause of the Fourteenth Amendment is violated when a state court takes extraterritorial jurisdiction). Article III directly limits the jurisdiction of the federal judiciary. U.S. CONST. art. III, § 2. Moreover, whether or not we are comfortable with the idea, courts have been understood to be government actors within the meaning of substantive constitutional and statutory civil rights law since judicial application of state substantive law came under Fourteenth Amendment surveillance in such cases as, for example, *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (holding that courts may not constitutionally enforce racially restrictive covenants), and *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964) (holding, in a libel suit between private parties, that courts violate the First Amendment if they apply a rule of law that insufficiently accommodates it; ruling that a public figure suing a newspaper has the burden of proving actual malice). The general understanding of judicial action as governmental action can be seen in *Bush v. Gore* itself, in which an order of the Florida Supreme Court was declared unconstitutional. 531 U.S. 98, 110 (2000). In all of these cases the parties themselves are private; it is a court that is the source of unconstitutional governmental action. Nor is it a novel proposition that the Supreme Court itself, the font of constitutional law, can violate the constitutional order. In *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), for example, the Court struck down "the course pursued" by itself as well as other federal courts under the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

42. 5 U.S. (1 Cranch) 137, 170 (1803).

spelled out in *Baker v. Carr*,⁴³ could help us see what was wrong with *Bush v. Gore*. *Bush v. Gore* presents constitutional problems that arise in clarified form only after its justiciability is acknowledged. *Baker v. Carr* therefore has less to say about the problems posed by *Bush v. Gore* than might have been hoped.⁴⁴ Some critics of *Bush v. Gore*, beguiled (2002) 82 B.U. L.Rev. 620 notwithstanding *Baker v. Carr* by the utility of threshold rules in preventing judicial overreaching, have tried to make a prudential case for some form of abstention from critical elections cases. I disagree that abstention in any form would be appropriate, because I believe that the rule of law in accessible courts should not be a luxury in elections cases. Other critics of *Bush v. Gore*, deflected by *Baker* from constitutional analysis, have focused their attention on the shadow the case casts on the "legitimacy" of the Supreme Court. But shadows need something substantial to give them shape. The "legitimacy" debate has been insufficiently grounded in constitutional analysis.

The argument of this paper begins with the proposition that there was no valid completed election of which George W. Bush could have become the winner when the Supreme Court aborted the electoral process and handed the presidency to him. In the absence of a completed election the Court's action was obviously incompatible, on two independent grounds, with the Constitution of the United States. The argument proceeds with the further proposition that the Supreme Court cannot unilaterally name the President. The Court's having done so was obviously incompatible, on two further grounds, with the Constitution. This paper, then, is an inquiry into the constitutionality of unilateral judicial determination of an election's *outcome* (as opposed to judicial *regulation* of the electoral *process*).⁴⁵

When we say "election" we usually are thinking of a ritual coming together of citizens to exercise a cherished right, to perform a public duty, to express their political will, and to exhibit reverence for the blessings of liberty. But an "election" comes in stages, and might with greater accuracy be considered an "electoral process." Candidates must seek access to the ballot through primary elections, or conventions, or the gathering of signatures, or other nominating mechanisms. Voters typically must be registered and then checked against registration lists. They vote. Their ballots must be tallied. A winner will be certified. Each of these steps in an election in theory is governed by statutes, regulations, cases. There might be a challenge to the ongoing process at any of these stages. After the election the loser might challenge the result. When the outcome is in doubt, there are prescribed procedures for determining the winner—

43. 369 U.S. 186, 209 (1962) (distinguishing *Luther* and other earlier cases as decided under the Guaranty Clause); *id.* at 221 (enumerating factors distinguishing *Luther*, a nonjusticiable "political question," from *Baker*, a justiciable case). For an extended policy analysis of the political questions doctrine, see Louise Weinberg, *Political Questions and the Guaranty Clause*, 65 U. COLO. L. REV. 887, 887-920 (1994).

44. *But see, e.g.* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639-41 (2001) (finding in *Baker* a "two-part template" by which courts can avoid entering the "political thicket" in cases like *Bush v. Gore*). I will return to this class of questions *infra* Part I.

45. *See, e.g.* Moore v. Ogilvie, 394 U.S. 814, 818-19 (1969); Reynolds v. Sims, 377 U.S. 533, 586 (1964); Gray v. Sanders, 372 U.S. 368 (1963). I do not read 3 U.S.C. § 5, in its acknowledgment of "judicial... methods" for resolution of a presidential election within the state, as authorizing unilateral judicial determination of the outcome detached from the electoral process, but rather as acknowledging the role of ongoing judicial review of stages in the electoral process including the outcome.

again, often subject to ongoing judicial review. The outcome of any election within the state is fixed when the electoral process has run its course and stands free of challenge.

I will be dealing here with only a small part of election litigation. I will not **(2002) 82 B.U. L.Rev. 621** be talking about the typical voters' rights or redistricting litigation with which we have become familiar under the Voting Rights Act, nor about constitutional attacks on the apportionment of legislatures, seen in such cases as *Baker v. Carr*. My subject is election contest litigation, cases configured more like *Bush v. Gore*. Typically a losing candidate contests the election by challenging the legality or constitutionality of some feature of the electoral process, or the accuracy or fairness of the count.

In Part I, below, I dismiss the argument that *Bush v. Gore* was not justiciable. In Part II, I proceed to argue that the election of 2000 was and remained unresolved when the Court interrupted it and handed down its fateful decision. Based on this analysis, I identify two distinct clusters of constitutional problems uniquely raised by unilateral judicial determination of election outcomes. Each of these emerges from quite distinct sets of policy concerns. Each rests on independent constitutional arguments, grounded in particular constitutional understandings, and each is ultimately rooted in different elements of constitutional text or structure.

In the first category (Parts III and IV) are constitutional problems raised by any court's determination of any election's outcome prior to the completion, or in disregard of, the electoral process. We can straightforwardly identify the obvious democratic/republican understandings offended by such cases, and anchor them in the Constitution. In this general category, *Bush v. Gore* is a special case.

In the second category (Parts V and VI) are constitutional difficulties raised by the special case *only* of a presidential election, *only* when the election within a state will determine the presidency of the United States—and *only* when the *Supreme Court* halts the electoral process and itself determines the outcome. We can identify fundamental structural understandings, also anchored in the Constitution, which are offended in such a case. In this category, *Bush v. Gore* is the only case.

Considered in light of either or both of these constitutional arguments, *Bush v. Gore* emerges, and should be understood, as an unconstitutional political act.

I. THE IRRELEVANCE OF BOTH *BAKER V. CARR* AND THE "PASSIVE VIRTUES"

Of course the Supreme Court could *adjudicate Bush v. Gore*.⁴⁶ So could the courts below. It cannot seriously be contended, after *Baker v. Carr*,⁴⁷ that courts may not adjudicate election controversies. There is no need to entangle ourselves in the intricacies of the "political question"

46. *But see, e.g.* Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001).

47. 369 U.S. at 237 (holding that inequitable apportionment of the suffrage is actionable under the Equal Protection Clause, and does not present a nonjusticiable "political question").

doctrine, or the further **(2002) 82 B.U. L.Rev. 622** trepidations courts express as problems of equity.⁴⁸ It is clear enough after *Baker* that courts can and do adjudicate election controversies. And nothing in *Baker v. Carr* limits this understanding to equal protection cases. Even if the Court had decided *Bush v. Gore* on the Article II grounds advanced in Chief Justice Rehnquist's concurring opinion,⁴⁹ rather than on the Court's equal protection theory,⁵⁰ *Bush v. Gore* still would have been justiciable. No problem in *Bush v. Gore* attached in any court to the mere taking of jurisdiction, certainly not in the Supreme Court.

This is true whether one is thinking about "political questions" or "standing" or any other technicality of justiciability theory. Concededly, George W. Bush's petition to the Supreme Court raised the rights of third parties, Florida voters.⁵¹ But if a litigant has standing in the Supreme Court in her own right, she ought to be allowed to raise the relevant rights of third parties.⁵² And as to **(2002) 82 B.U. L.Rev. 623** Bush's own standing, if we step back from the tangle of jurisprudence obscuring the question, and try to see Bush's petition to the Supreme Court simply for what it was, no problem of "standing" is discernible in it. A presidential candidate with a certified state election in his favor surely is an individual with rights and standing to assert them.⁵³ Petitioner Bush was first cousin to our old friend, Marbury. Like the

48. See, e.g., the egregious voters' rights case of *Giles v. Harris*, 189 U.S. 475, 487-88 (1903) (Holmes, J.) (explaining, in an action for an injunction against arbitrary refusal to register the black plaintiffs as voters, that the judiciary is helpless to right "a great political wrong"). I discussed *Giles* in Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 710-12 (1997); Weinberg, *Political Questions*, *supra* note 43, at 906-910, 934-35; Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737, 754-57 (1991).

49. 531 U.S. at 114 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (arguing that U.S. CONST. art. II, § 1, cl. 2, together with 3 U.S.C. § 5, precludes substantial state judicial reinterpretation of state election law after an election has been held: "Isolated sections of the [state election] code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation..."). Article II, § 1, cl. 2, provides that each state shall appoint electors for President "in such Manner as the Legislature thereof may direct." Title 3 U.S.C. § 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. The Court had signaled its interest in these materials in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam).

50. *Bush v. Gore*, 531 U.S. at 106 (per curiam) (holding the statutory standard of "intent of the voter" inadequate to determine the intent of the voter, since unaccompanied by subsidiary standards to guide the determination). The piecemeal order of the Florida Supreme Court, dealing only with the "undervotes," also troubled the Court. *Id.* at 107-08.

51. Brief for Petitioners at 40-44, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (equal protection argument), available at 2000 WL 1810102, at *40-45. For the differences between candidates' rights and voters' rights see *Griffin v. Burns*, 570 F.2d 1065, 1071-72 (1st Cir. 1978) (Campbell, Cir. J.); see also *In re Republican Primary Election for Mayor*, 498 A.2d 60, 60 (Pa. Commw. Ct. 1985) (holding, based on a "critical" distinction between candidates' and voters' rights, that the losing candidate was not entitled to a recount of the dispositive single vote).

52. The standard reference, albeit in a different context, is probably *Singleton v. Wulff*, 428 U.S. 106, 112, 123 (1976), in which the Court permitted physicians with a money interest to raise the rights of patients.

53. See Justice Scalia's concurrence in the stay order of December 9, 2000, *Bush v. Gore*, 531 U.S. at 1046-47 (noting the potential harm to Bush if the recount were permitted to continue). The likelihood of irreparable harm to a petitioner is a legitimate concern of equity; and, notwithstanding a common perception that Justice Scalia failed to

plaintiff in *Marbury v. Madison*,⁵⁴ Bush was an office seeker with a piece of paper. He had a certified state election, which—like Marbury's sealed commission—entitled him, if it was valid, to public office. And, as Chief Justice Marshall would have insisted, the government (the Supreme Court of Florida, in Bush's petition) should not be permitted to "sport away" his "vested rights."⁵⁵

Peace to the purse-lipped prudentialists of the past—James Bradley Thayer, Felix Frankfurter, Alexander Bickel—but courts should not shrink from adjudicating anything as important as an unfair election. One marvels that the prudentialists could have been so blind to the obvious. Courts cannot win legitimacy points by denying access to meritorious claims. Rather, in shying away from controversy courts are rightly perceived as shirking a duty.⁵⁶ Moreover, since to decline jurisdiction persistently⁵⁷ is to favor defendants persistently,⁵⁸ courts faithfully exercising "the passive virtues"⁵⁹ are rightly (2002) 82 B.U. L.Rev. 624 seen as actively unfair.⁶⁰ No doubt judicial intervention in a contested election invites the opprobrium of the political faction on the losing side. But the possible wrath of the loser does not justify a court in refusing to perform its judicial duty. It should be clear, then, that I certainly do not mean to deflect this discussion to the "counter-majoritarian difficulty" of which we have all grown weary—and wary—as an objection to judicial review. If there are any questions from which

balance the equities, he apparently did so. *See id.* (rejecting the possibility of harm to Gore). But equity also considers the public interest, here including the constitutionalized national interest in ensuring that every legal vote is counted. Justice Scalia dealt with this by a narrow definition of a "legal vote" that did not conform to Florida's. The national interest in a completed election was not directly before the Court at the time of the stay order.

54. 5 U.S. (1 Cranch) 137, 152 (1803).

55. *Id.* at 166 (Marshall, C.J.).

56. On the "pusillanimity" of strategic Supreme Court withdrawals from sensitive cases, *see also* Weinberg, *Political Questions*, *supra* note 43, at 909. For a notorious refusal on prudential grounds to consider a challenge to racial discrimination in the electoral process in the South, *see Giles v. Harris*, 189 U.S. 475 (1903) (Holmes, J.). I commented on *Giles* in the articles cited *supra* note 48.

57. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-19, 729-30 (1996) (explaining the jurisprudence of federal abstention as a feature of equity, federal jurisdiction being discretionary except in actions at law for damages); *see, e.g. Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (holding discretionary federal jurisdiction over actions for declaratory judgments). *See also* the chronic dismissals of federal cases as *forum non conveniens* under *Pipe Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *But see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (Brennan, J.) (referring in dictum to the "unflagging obligation of the federal courts to exercise the jurisdiction given them").

58. For extended discussion see Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

59. The familiar term, of course, is from ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (2d ed. 1986). *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 124-25 (1964) (criticizing Bickel).

60. *See* the recent discussion in LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* 39-66 (2001) (criticizing prudential obstacles to adjudication of environmental claims); *id.* at 67-93 (claims of racial discrimination).

courts should distance themselves, the question *who is the winner of a contested election* is surely one of them. But the purpose of this understanding is not to limit the essential judicial power of striking down the unconstitutional commands of majorities. I would argue, rather, that we want courts to be very careful what they do by way of *remedy*.⁶¹ We do not want courts, whatever their rulings on the merits, to abort or displace the exercise of the suffrage. It is the voters, not the courts, who are supposed to decide elections. If you like, you could say that I am shifting the "political question" doctrine to the rear of the case, away from the threshold issue of "justiciability," past the merits, and injecting it into the problem of "remedy." But as to "justiciability," *Baker v. Carr* joins *Powell v. McCormack*⁶² and *Marbury v. Madison*⁶³ in recognizing the judicial power and duty to adjudicate cases—including elections cases—and to bring the Constitution to bear upon them.⁶⁴

(2002) 82 B.U. L.Rev. 625 Peace also to the Justices who concurred separately in *Bush v. Gore*, but there was very little merit in their argument that the Florida Supreme Court could not interpret Florida election law *in medias res*.⁶⁵ Not only must courts have the power—and, some would say, after Chief Justice Marshall, the duty—to exercise a granted jurisdiction over elections cases, but also they must have the substantive power and duty to interpret, reconcile,⁶⁶ stay the effect of, or strike down the laws governing, elections and post-election contests within their jurisdiction.⁶⁷ Nothing in the Constitution requires a state election code or its administration to be unmediated in these usual ways by courts. All of this should have been

61. The problem of remedies in election contest cases is discussed *infra* Part IV.

62. 395 U.S. 486, 549 (1969) (Warren, C.J.) (holding that courts are not barred by the political questions doctrine from interpreting the Constitution: "For, as we noted in *Baker v. Carr*, it is the responsibility of this Court to act as the ultimate interpreter of the Constitution" [citing *Marbury*]). For discussion of *Powell* as an elections case, see *infra* notes 116-124 and accompanying text. For discussion of the political questions doctrine as emerging, in the main, from elections cases, see generally Weinberg, *Political Questions*, *supra* note 43.

63. *Marbury*, 5 U.S. (1 Cranch) at 170 (Marshall, C.J.) ("The province of the court is, solely, to decide on the rights of individuals.... Questions in their nature political,... can never be made in this court.") As I have argued elsewhere, since all cases under the Constitution are claims of individual right, Marshall was saying only that no challenge to governmental conduct is actionable if based on disagreement with governmental policy, not that an *unconstitutional* policy can escape judicial oversight. See Weinberg, *Political Questions*, *supra* note 43, at 913-20.

64. Nothing in *Nixon v. United States*, 506 U.S. 224 (1993), changes this understanding. On the contrary, the *Nixon* Court agreed that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Id.* at 237-38. I do not see any important distinction for this purpose between identified textual and identified non-textual limits.

65. 531 U.S. at 113 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (arguing, based on a novel interpretation of federal election law, that the Florida Supreme Court lacked power to make novel post-election interpretations of state election law).

66. For a typical example, see, e.g. *Reed v. Brown*, 706 S.W.2d 866 (Mo. 1986) (holding that a statute providing for resolution of deadlocked elections by a vote of the city council had been implicitly repealed by enactment of a special run-off statute).

67. See, e.g., *Taylor v. Monroe County Board of Supervisors*, 421 F.2d 1038, 1041 (5th Cir. 1970) (holding in an elections case that courts have power to set aside statutes to afford adequate relief: "Where it is necessary to override specific provisions of state law to afford adequate relief, the state statutes must yield").

clear in *Bush v. Gore*, when Chief Justice Rehnquist, concurring,⁶⁸ complained that the Florida Supreme Court offended the Constitution,⁶⁹ or an Act of Congress,⁷⁰ and acted in derogation of Florida's prescribed political process when it used extraordinary equitable power to set aside statutory as well as administrative features of that process and reshape it.⁷¹ Chief Justice Rehnquist took the position that federal law fixed state electoral legislation and shielded it from creative judicial interpretation. **(2002) 82 B.U. L.Rev. 626** Justices Kennedy and O'Connor rightly rejected this additional rationale.⁷² To have adopted it would have been to deny to the Florida Supreme Court the very power the Court itself was asserting: the power to make a novel post-election construction of forum election law. Moreover, it would have been to deny to the Florida Supreme Court a particular power the Court was also asserting, but with far less authority: the power of construing Florida's law.⁷³ Nevertheless defenders of *Bush v. Gore*, understanding the implausibility of the Court's unprecedented equal protection argument,⁷⁴ have pitched on Chief Justice Rehnquist's equally unprecedented concurrence⁷⁵ as better supporting

68. *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (arguing that both the Constitution and the federal election code prohibited the Florida Supreme Court from interpreting Florida's election laws).

69. U.S. CONST. art. II, § 1, cl. 2. This clause provides, in pertinent part, that each state shall appoint electors for President "in such Manner as the Legislature thereof may direct." For further discussion see *infra* notes 72-80, 95-97, and accompanying text.

70. 3 U.S.C. § 5. This statute, enacted in the wake of the Hayes/Tilden controversy of 1877, provides that the State's selection of electors "shall be conclusive" in the counting of electoral votes, if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. For further discussion see *infra* notes 72-80, 94-97 and accompanying text.

71. It seems fair to say that the Florida Supreme Court's order, *sua sponte*, mandating a partial statewide recount, was an activist one. As I recall Bernard Kalb of CNN putting this, in reporting the Florida court's order of Dec. 8, 2000, "Is this in your face, or what?"

72. *But see, e.g.* Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, FED. LAW., Mar.-Apr. 2001 (arguing that Chief Justice Rehnquist's Article II rationale was the implicit basis of the Supreme Court's per curiam opinion).

73. *Bush v. Gore*, 531 U.S. at 111 (per curiam):

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, ... remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18 [would contemplate] action in violation of the Florida Election Code, and hence could not be part of an 'appropriate' order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

Id.

74. *See, e.g.* Epstein, *In Such Manner, supra* note 34, at 614-18 (defending *Bush v. Gore*, but refusing to defend the Court's equal protection rationale: "Quite simply, I regard that [equal protection] argument as a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it"); Michelman, *Suspicion, supra* note 12, at 684 (noting the widely-observed fact that in no previous case had the Court ever found an equal protection violation absent an *ex ante* discriminatory classification). For the key element of discriminatory intent, missing in *Bush v. Gore*, a requirement of elections cases ever since *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), see *infra* notes 178-185 and accompanying text.

75. The Chief Justice relied on *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), for the proposition that the state

the result.⁷⁶ But the limits they see on the Florida Supreme Court's interpretive power are inferences from federal law which, however plausible in the (2002) 82 B.U. L.Rev. 627 abstract, do not jibe with our traditions of the rule of law in courts,⁷⁷ or, for that matter, with Florida's tradition of election contest litigation.⁷⁸ If special statutory jurisdiction has been granted, the judiciary must be part of the electoral process. I would go further, and argue—although this is not generally understood—that even in the absence of special statutory jurisdiction, unless the courts of general jurisdiction have held themselves ousted,⁷⁹ election contest cases, like other cases, are always subject to the Constitution and the rule of law in courts. In our constitutional understandings, judicial review goes with the territory. Indeed, the act of Congress on which the Rehnquist concurrence relied, enacted after the Hayes-Tilden election controversy of 1876, properly read, explicitly contemplates judicial review when state law does.⁸⁰

Just as courts must be able to adjudicate elections cases, then, they must also be able to interpret, reconcile, and apply or strike down the laws applicable in those cases. The only power that the Constitution or laws of the United States would deny to courts in elections cases is the

legislatures have plenary authority to determine the manner of naming presidential electors. But even that antique opinion understood that "[w]hat is forbidden or required to be done by a State" in that connection "is forbidden or required of the legislative power *under state constitutions as they exist*." *Id.* (emphasis added).

76. See, e.g. Epstein, *In Such Manner*, *supra* note 34 at 618 (arguing that the Court's Article II theory was free of the difficulties plaguing the Court's equal protection theory); *id.* at 619-35 (arguing that the Florida Supreme Court did sufficient violence to Florida's statutory scheme to bring Article II into play). But see, e.g. Amar & Brownstein, *Bush v. Gore and Article II*, *supra* note 72, at 27 (2001) (criticizing Chief Justice Rehnquist's Article II rationale: "The bottom line is that neither text nor structure, nor history nor precedent—properly understood—compel the reading of Article II implicitly adopted by the conservative majority of the U.S. Supreme Court"); see also, e.g., Klarman, *Constitutional History*, *supra* note 16, at 1734-36 (noting that Chief Justice Rehnquist's Article II rationale is "odd" because "not only does the plurality offer no originalist or functionalist justification for its Article II argument, but its bare textualist claim is almost laughable").

77. For the rule applicable in congressional elections, see *Roudebush v. Hartke*, 405 U.S. 15, 26 (1972) (Stewart, J.) (reversing the court below; holding that the provision of Article I that each house shall be the sole judge of the elections of its own members does not authorize a federal court to enjoin a state from conducting a recount of ballots in a senatorial election). Of course, once Congress seats a candidate, it would be nugatory to continue to count ballots. See, e.g. *McIntyre v. Fallahay*, 766 F.2d 1078, 1087 (7th Cir. 1985) (affirming that a recount dispute was not justiciable after Congress had seated a candidate).

78. See FLA. STAT. ANN. § 102.168 (West Supp. 2002); see also, e.g., *In re The Protest of Election Returns and Absentee Ballots*, 707 So.2d 1170, 1174-1175 (Fla. Dist. Ct. App. 1998) (mayoral election); *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984) (school board election); *Burke v. Beasley*, 75 So.2d 7 (Fla. 1954) (primary); *State ex rel. Peacock v. Latham*, 170 So. 469 (Fla. 1936) (same); *County Canvassing Bd. of Primary Elections of Hillsborough County v. Lester*, 118 So. 201 (Fla. 1928) (same); *D'Alemberte v. State*, 47 So. 489 (Fla. 1908) (same).

79. See, e.g. *Hitt v. Tressler*, 455 N.E.2d 667, 668 (Oh. 1983) ("Neither the trial court nor this court has the legislative authority to order an election in a situation such as presented by this case"); *Witten v. Sternberg*, 475 S.W.2d 496, 497 (Ky. 1971) (interpreting a provision that the state legislature shall be the "sole judge" of the qualifications of representatives).

80. Title 3 U.S.C. § 5 provides that the state's determination of its electors is binding on Congress if in place by December 12, and acknowledges that resolution of this issue may be effected through "judicial or other methods." See *infra* note 95.

power of election itself.

II. ELECTING WITHOUT AN ELECTION

In its final decision of December 12, 2000, the United States Supreme Court purported to remand *Bush v. Gore* to the Florida Supreme Court.⁸¹ But, at the same time, the Court declared that to permit any further counting of Florida (2002) 82 B.U. L.Rev. 628 votes would be an improper interpretation of Florida law.⁸² In this high-handed way the Court rendered the remand a hollow formality and took the election unto itself. In effectively making permanent its stay of the electoral process, the Supreme Court handed the election to the certified winner, George W. Bush. But this was to pronounce a result in a challenged election without permitting the prescribed resolution, or any resolution, of the challenge.

It is useful here to recall the precise posture of the case. Florida's Secretary of State, Kathy Harris, had certified George W. Bush the winner of the election in Florida. Al Gore had challenged the certification. The Florida trial court had thrown out Gore's challenge, but the Florida Supreme Court had reinstated it and ordered a limited statewide recount. Bush then sought review in the United States Supreme Court, complaining that that remedy was unconstitutional. Bush did not ask the United States Supreme Court to rule on the merits of Gore's underlying challenge, and the Court did not do so. The Court did not rule that Gore's challenge was unadjudicable, or unauthorized, or otherwise bad in law. Rather, the Court held only that the particular *remedy* devised by the Florida Supreme Court was unconstitutional.⁸³ There is no dispute about this. This is the way the Court saw what it was doing, and this is the way the dissents saw what the Court was doing.⁸⁴ Bush's certification by Florida's Secretary of State, then, was still under challenge when *Bush v. Gore* was handed down.

The Supreme Court could not reach the merits even of the remedy demanded by *Gore*. The Florida Supreme Court had substituted a different recount for the one Gore demanded. But even if we are prepared to say that the remedy originally sought by Gore was implicitly and necessarily invalidated in *Bush v. Gore*, we could not say that the Court had ruled on the merits of Gore's underlying challenge. Gore's challenge would still have remained good in law, and unresolved. To be sure, the Florida district court had reached the merits of Gore's claim, and had ruled against Gore. But the Florida Supreme Court had reversed on the merits and reinstated Gore's case. And the United States Supreme Court never reached that issue. Although the Supreme Court did reach the merits of Bush's attack on the Florida Supreme Court, the Supreme

81. 531 U.S. at 111 (per curiam). For their part, the concurring Justices declared, without any mention of remand, "[W]e would reverse." *Id.* at 122.

82. *Id.* at 111. See *supra* note 72.

83. *Bush v. Gore*, 531 U.S. at 111.

84. Although the four dissenting Justices—I read this as more or less true of all four, rather than two—were willing to acknowledge the possible existence of a constitutional problem, they dissented strongly from the majority's failure to remand to the Florida Supreme Court. *Id.* at 126-27 (Stevens, J.); *id.* at 134-35 (Souter, J.); *id.* at 143 (Ginsberg, J.); *id.* at 146 (Breyer, J.).

Court could not reach the merits of Gore's challenge to the certification. Even indulging the argument of the Chief Justice's concurrence, that state electoral codes somehow become federalized in a national election,⁸⁵ **(2002) 82 B.U. L.Rev. 629** it would have been very hard for the Supreme Court to have held that Florida had offended any national policy in adjudicating Gore's demand for a manual recount. Gore had a statutory right to request a manual recount,⁸⁶ even in a presidential election. Given the Court's rejection of Chief Justice Rehnquist's novel argument that the Florida courts could not mediate a presidential election contest in Florida,⁸⁷ the most the Court could do to reverse the Florida Supreme Court was to rule on the fairness of Florida's court-ordered remedy, and it did so.

George W. Bush, then, was a judgment winner *on a point unrelated to the merits of Al Gore's challenge to the election*. Bush was a judgment winner, but not an election winner—even under the Court's judgment. Kathy Harris's certification of Bush remained under challenge. There was no completed electoral process of which George W. Bush had come out the winner. There was no *resolved* default position to which the election could revert. The Court named to the most powerful position on earth a candidate who had never been elected. The Court acted freestandingly. Unilaterally. *In vacuo*.

To understand this, one does not have to notice, although it is probably true, that there was no *constitutional* election of which George W. Bush had come out the winner. Under the Court's own equal protection reasoning, the election of 2000 was very likely unconstitutional in the

85. Chief Justice Rehnquist, concurring, described the phenomenon, explaining,

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.... But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President.... Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

Bush v. Gore, 531 U.S. at 112-13 (Rehnquist, C.J., concurring).

86. See Fla. Stat. Ann. § 102.166(4)(a), (5) (West 1982). Although the details of the applicable Florida law have changed, the basic right to request a recount is preserved. See Fla. Stat. Ann. § 102.166(2)(a)-(b) (West Supp. 2002).

87. As Chief Justice Rehnquist argued,

In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court.

531 U.S. at 114-15 (Rehnquist, C.J.). See, on the novelty of this argument, Klarman, *Constitutional History*, *supra* note 16, at 1734-36.

majority of states.⁸⁸ Nor does (2002) 82 B.U. L.Rev. 630 one have to notice, although it is certainly true, that under the Court's ruling, some unknown large quantity of concededly legal votes in Florida would never be counted, to protect George W. Bush from the counting of some unknown lesser quantity of disputable votes⁸⁹—the baby thrown out on a suspicion of the bathwater. It is enough to see that because the Court halted the electoral process, holding part of that process to be constitutionally defective, and then (2002) 82 B.U. L.Rev. 631 failed to permit the state to correct the constitutional defect, the election in Florida was never resolved. The election was stopped and then never resumed. This is the raw reality the polemicists have glimpsed when they have seemed so intemperately to accuse the Court of a palace *coup*, of a judicial *coup d'état*, or of "hijacking" the election.⁹⁰

88. The consequence of the Court's new equal protection theory has been widespread collateral damage to election laws and practices. See, e.g. Editorial, *The Time for Ballot Reform*, N.Y. TIMES, Nov. 12, 2001 at A22 (arguing that existing voting technologies are in violation of the equal protection standards asserted in *Bush v. Gore*); Seelye, *Democrats' Study*, *supra* note 9, at A12 (referring to a report by Democratic members of the House Judiciary Committee concluding that in 38 states the rules for manual recounts are unconstitutional under the standards of *Bush v. Gore*); see also *Bush v. Gore*, 531 U.S. at 123, 124 n.2 (Stevens, J., dissenting) (pointing out that Florida's "intent of the voter" standard was also the standard recount rule in 14 states including George W. Bush's home state of Texas, and that in twenty states a similar standard applied, that votes should be "counted unless impossible to determine the electors' [or voter's] choice," and that two states applied both). It is possible that only the extreme remedy of a fresh election nationwide under new guidelines could have cured the ills over which the Court imagined itself enraged. Ironically, the "intent of the voter" standard seems unambiguous enough when flouted. See, for a troubling disregard of this standard, *Marsh v. Overland*, 905 P.2d 1088, 1093-94 (Mont. 1995) (holding, over dissent, that the district court and recount board had discretion to disregard write-in ballots containing only the surname of a candidate, and that the "winner" ordered certified by the district court was even entitled to attorney's fees). I should mention here, as has been widely observed, that the Florida Supreme Court's failure to supply subsidiary standards for assessing the "intent of the voter" must be laid in part at the door of the Supreme Court. There was an implicit but spurious message in the Court's December 4 mandate to the Florida court that any fuller exegesis of Florida law might violate the United States Constitution or federal law. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam). This was the trap that the concurring Justices in *Bush v. Gore* would have sprung.

Interestingly, widely varying standards of measurement do not matter very much. Because in a presidential election we take fifty separate measures, rather than one measure, of the will of the electorate, the harm of divergent and inaccurate methods of discerning the will of the electorate is much mitigated, and can become statistically insignificant. This is so not only because, as to the whole, any single state's substandard or inaccurate measure of the intent of its voters can make only a small difference. Idiosyncratic and inaccurate measures will not much matter even when all states are guilty of them. Although intuition might suggest that such errors can be cumulative or even compounded, statisticians tell us that as the number of samples of a defined group increases, the accuracy of a total measurement of the group increases, notwithstanding significant errors in each sample. Instead of mounting up, the errors tend to cancel each other out. The rule obviously would also apply to widely varying standards from county to county within a state. (I should caution, however, that an intentional manipulation following the same pattern in all states would not have the quality of randomness upon which the statistical rule depends. In such a case, whether or not the errors mounted up, they would certainly not cancel out.) For a standard textbook treatment of the rule, see GUNNAR BLOM, *PROBABILITY AND STATISTICS* 119-22 (1989).

89. The point is made in Justice Stevens' dissent in *Bush v. Gore*, 531 U.S. at 127.

90. See, e.g. DERSHOWITZ, *SUPREME INJUSTICE*, *supra* note 15 (subtitled, "HOW THE HIGH COURT HIJACKED ELECTION 2000"); Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. OF BOOKS, Feb. 8, 2001, at 5. But see, e.g. Epstein, *In Such Manner*, *supra* note 34, at 613-14 (protesting such rhetoric as "overheated").

In regulating elections courts can—and occasionally do—declare a winner. But on those rare occasions, they do so by counting, not by refusing to count, votes; by consulting, not displacing, the electorate; by utilizing, not aborting, the process prescribed for resolving the contest. In *Bush v. Gore*, when the Supreme Court for better or worse reached and decided the merits of Bush's equal protection argument, the logical and necessary remedy, as the dissenters and most writers have seen, was a remand requiring the Florida Supreme Court to repair its defective court order.⁹¹ The logistical and temporal difficulties of a constitutional recount were matters for the Florida courts. The Supreme Court itself could have furnished the needed guidelines for the Florida Supreme Court to incorporate into a new injunction on remand. The one option the Court ought not to have exercised, and could not constitutionally exercise, was the one it chose.

If anything in the Constitution was offended by the occurrence of a *Bush v. Gore*, the offense arose, as we are seeing more clearly, not in the grant of review, but in administration and remediation of the case.⁹² The offense began to take shape when the Supreme Court earlier stayed the Florida recount.⁹³ (2002) 82 B.U. L.Rev. 632 The outcome of continued counting could not have been predicted. Continuing the counting might have caused some additional chads to separate from some of the ballots, but there was no reason to suppose that this random deterioration would have favored either of the candidates; and thus, even allowing for ballot deterioration, continuing the counting could not have prejudiced a future recount under clarified standards. It should be obvious that once a court has interrupted the processing of an election, that court comes under a constitutional obligation, after making its ruling, to return the case to the electoral process.

What was the Court's explanation for its failure to do so in *Bush v. Gore*? How did the Court justify handing the presidency to a candidate in the absence of an election? We have only the Court's assertion that *time had run out*. This, in turn, was based on the Court's further assertion that the state, by its laws, would have intended the election to be completed in time to

91. See McConnell, *Two and a Half Cheers*, *supra* note 17, at 675: "Having rested the decision on the standardless character of the recount ordered by the state court, the logical outcome was to remand under proper constitutional standards."

92. This point seems to have been missed by those commentators who have argued that the Court should have abstained, or that the case was nonjusticiable. *E.g.*, Chemerinsky, *Bush v. Gore Was Not Justiciable*, *supra* note 46, at 1107; Issacharoff, *Political Judgments*, *supra* note 44, at 637; Michelman, *Suspicion*, *supra* note 12, at 683; Gary Rosen, *Reconsidering Bush v. Gore*, COMMENTARY, Nov. 2001, at 35, 41 ("[T]hey [the Supreme Court majority] might have passed.").

93. *Bush v. Gore*, 531 U.S. 1046 (2000) (order staying recount). See E. J. Dionne, Jr., *Let the Voters Decide*, WASH. POST, Dec. 10, 2000, at B7:

[T]he court's decision to stop all counting until it hears the case tomorrow will forever be seen as blatant political interference on the side of George W. Bush—and, yes, the heavy-handed use of federal power against a state court that was trying to ensure an honest election....

Unless one of the five justices who stopped the recounts yesterday has the prudence to switch sides in the final decision, we will face the spectacle of a narrow conservative majority on the Supreme Court allying itself with a political campaign to stop the people from knowing how the voters of Florida really cast their ballots.

obtain the benefit of the so-called "safe harbor" provision of federal law. As the per curiam opinion put this, "Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the [equal protection] reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed."⁹⁴

This reference to December 12 as a safe harbor is a reference to an obscure section of the United States Code, Title 3, Section 5. In effect, Section 5 provides that if a presidential election must go to Congress, and a state has chosen its slate of electors in an election fully resolved and completed within the state by December 12, those electors shall be deemed the state's electors conclusively.⁹⁵ Nothing in Section 5 would *require* a state to resolve its **(2002) 82 B.U. L.Rev. 633** election by December 12. Nothing in Section 5 would prohibit a state that has yet to resolve its election from proceeding in due course with a constitutional recount *after* December 12. Absent a controversy to be resolved by Congress, as long as Florida's electors were chosen by December 18—the date set for convening the electoral college in 2000—the votes of Florida's electors would be counted. Because that is so, it was senseless for the Supreme Court to assume that the Florida Supreme Court would hold that the election must never be resolved if it could not be resolved by December 12. But if, indeed, the "safe harbor" provision presented such an insurmountable obstacle to a recount, surely the Supreme Court itself could have stayed the provision's effect, in order to give Florida a chance to complete its election by December 18—and should have done so, since, with its earlier stay order, the Court itself had caused the perceived problem.

Let us freely concede that the Court may interpret state law when state law is entangled in some way with the federal question before it. Let us even assume—although the assumption is unwarranted in this case—that the Court was right about Florida law. But by this

94. It is worth setting out this conclusion in full:

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So. 2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1237 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Bush v. Gore, 531 U.S. at 110 (per curiam).

95. The statute provides, in its entirety:

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

3 U.S.C. § 5 (2000).

pronouncement, that a recount could not take place, the Court was acknowledging, at the very moment that it was falling into the abyss, that the electoral process in Florida was *unresolved*. Indeed, the election could not be resolved by aborting Florida's attempt to resolve it. The emperor had no clothes. It was only a challenged election, not a completed election, that was left sitting in the "default" chair when the music stopped.

There should be no confusion about this. In an excellent recent article, Professor Klarman argues, in criticism of *Bush v. Gore*, that "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."⁹⁶ This is a good point, but it can lead the careless reader to assume that when the music stopped, it was the "machine count," *with* its "uncompleted challenges," that was sitting in the only chair. But no such default position was available precisely because the "machine count" was still under an active unresolved challenge.

The language of the "safe harbor" provision itself usefully clarifies what a completed presidential election is. The statute speaks of a "final determination of any controversy or contest concerning the appointment of all or any of the electors of [a] State, by judicial or other methods or procedures."⁹⁷ If the alleged wish of the Florida legislature to complete the election by December 12 **(2002) 82 B.U. L.Rev. 634** could not be satisfied, the need for Florida to complete the election thereafter should have been obvious. In our democracy, there was no alternative to a remand to wind up the election.⁹⁸

That never happened. It is a triumph, more for our civil society than for the Court, that the Court put this over—and got away with it. Although history will not be kind to the Court that decided *Bush v. Gore*, we the People effected an orderly, peaceful transfer of power. There was no rioting in the streets. On September 20, 2001, George W. Bush astonished the world by assuming the mantle of world leadership in defense of the West against Islamic terror. He has won the admiration and support of much of the country, and in so doing has legitimized a *de facto* presidency. But in law Bush's presidency can become legitimate only if he is returned to office in 2004.

One often hears the sardonic remark that George W. Bush "won" his election five to four. But *even a unanimous court* could not have conferred legitimacy on a judicial *coup d'état*, achieved by stopping and displacing an election.⁹⁹ Unanimity might have masked, but could not have averted the resulting shock to the constitutional order.

96. Klarman, *Constitutional History*, *supra* note 16, at 1745 n.121.

97. 3 U.S.C. § 5 (2000).

98. The constitutional analysis is set out *infra* in Parts III-VI.

99. *But see, e.g.* Sunstein, *Order Without Law*, *supra* note 35, at 772 (concluding that unanimity would have gone "a long way" toward legitimizing the opinion; suggesting that in any case the Court needed a more well-reasoned opinion grounded in law).

Some writers have tried to distance themselves from the perceived one-sidedness of the attack on *Bush v. Gore*. Why, they ask, do critics of the Court fail to point the same accusing finger at the liberal dissenters in *Bush v. Gore* as at the conservative majority? Why do critics of the Court fail to heap the same scorn on the Florida Supreme Court as on the United States Supreme Court? Professor Michelman wittily remarks of the dissenters in *Bush v. Gore* that, after all, "it was their Gore getting oxed."¹⁰⁰ But the joke, though very good, is off target. The four dissenters in *Bush v. Gore* were not urging an outcome that would throw the election to "their Gore." Rather, they were urging that the Florida recount should be allowed to proceed whatever the outcome. Thus, there is no equivalence—moral, legal, or constitutional—between the two positions.¹⁰¹

(2002) 82 B.U. L.Rev. 635 There is also no equivalence between the respective activisms of the Supreme Court and the Florida Supreme Court below. I pass over the fact that three of the seven Florida judges, including Florida's chief justice—all of whom had been appointed by Democrats—dissented, notwithstanding the probability that they were "oxing their own Gore."¹⁰² My point is that the Florida Supreme Court's order of a statewide recount of machine-rejected "undervotes,"¹⁰³ stunning though it was, did not, and could not, determine in advance who the winner would be.¹⁰⁴ In its anxiety, the Supreme Court's conservative majority may have foreseen in Florida's recount an inevitable Gore victory, but in fact no result could have been predicted. Indeed, it is now believed that, under the specific terms of Florida's court-ordered recount, Bush most probably would have won.¹⁰⁵ But it does not matter. What matters is that

100. Michelman, *Suspicion*, *supra* note 12, at 689.

101. Nor does it help very much that Justices Breyer and Souter assented in some degree to the Court's equal protection position. Their concession, if it was a concession, seems at most an exercise in statesmanship:

The majority's third concern does implicate principles of fundamental fairness.... I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

Bush v. Gore, 531 U.S. at 145-46 (Breyer, J., dissenting, joined by Souter, J., as to this Part). This expression of a possible doubt about widespread American electoral practice did enable journalists to say, if not that seven Justices found a violation of the Equal Protection Clause, at least that seven Justices saw a possible equal protection problem.

102. *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000); *id.* at 1262, 1270, 1273 (Wells, C.J., Harding and Shaw, JJ., dissenting). It is possible, of course, that most of the Florida Supreme Court judges could have been Democrats and still ideologically split, just as in the United States Supreme Court most were Republicans and still ideologically split. I am indebted to my editor, Chris Mooradian, on this point.

103. *Id.* at 1262.

104. The winner on these terms very probably would have been George W. Bush. See Fessenden & Broder, *Times Study*, *supra* note 11, at A16 (reporting that if the Supreme Court had not halted the statewide recount of the "undervotes" ordered by the Florida Supreme Court, George W. Bush would have "won" Florida by 493 votes).

105. *Id.*

the Supreme Court stopped the counting of votes, while the Florida Supreme Court referred the case *back* to the counting of votes. The Supreme Court handed the presidency to Bush; the Florida Supreme Court handed the presidency to nobody.¹⁰⁶

The frightening thing is that when the Supreme Court handed the presidency to George W. Bush, it did so in the absence of a completed election.

III. THE CONSTITUTIONAL LIMITS OF JUDICIAL POWER TO DECIDE ELECTIONS

Two separate and distinct clusters of constitutional difficulty are implicated by the happening of a *Bush v. Gore*. We can uncover the relevant principles by very straightforward constitutional analysis. Let me try to identify and lay on the table, at least for discussion and further refinement, each of these separate clusters of concerns. My aim is to shed light on the deep compound (2002) 82 B.U. L.Rev. 636 problems *Bush v. Gore* poses for the constitutional order.

Preliminarily, I should acknowledge that the case also implicates the concerns with which other commentators have been preoccupied, concerns about the Court's legitimacy.¹⁰⁷ Because these concerns are about *the Court's* (as opposed to *the election's* or *the case's*) legitimacy, they have a character more prudential than constitutional. But the specific constitutional problems I will be raising in the remainder of this paper are relevant to the prudentialists' position, and prudential arguments are helpful to an understanding of the constitutional difficulties facing the courts in election contest litigation.

I turn first to the constitutional problems raised generally by freestanding judicial determination of election outcomes, in all courts, in all election contest cases. Now that we understand that the election of 2000 was never completed, it becomes transparent to us that the general policy concerns implicated by the Supreme Court's preemption of the presidential election, and indeed by any court's unilateral award of an electoral office unsupported by an election, are of the most fundamental character, basic to the very concept of a democracy within a republic. Of necessity these policies are rooted in the Constitution. I think of these policies as comprising in part a democratic imperative, and in part a republican imperative.

It is in the very nature of the American experiment that the Constitution contemplates democracy within a republic—that is, free elections. Article I as amended, and Article II as amended,¹⁰⁸ in directly addressing the manner of elections to federal office, and the manner of

106. Only the vote-counting process provided by Florida law, as interpreted by its highest court, could determine the outcome of the Florida election—subject, apparently, to extraordinary intervention by the legislature. See *Bush v. Gore*, 531 U.S. at 104 (per curiam) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors" (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892))).

107. See, e.g. Balkin, *Law and Politics*, *supra* note 16, at 1407.

108. Cf. U.S. CONST. amends. XII, XV, XVII, XIX, XXII, XXIII, XXIV, XXVI, XXVII.

ultimate resolution of those elections, make the assumption, long acknowledged in the traditions of a free people, that elections are obligatory with respect both to seats in Congress and to the Presidency. From the beginning every state has similarly included democracy within its republican form of government.¹⁰⁹

(2002) 82 B.U. L.Rev. 637 The fundamental right to vote, although not explicitly given in the Constitution, is part of these general understandings. It undergirds the text of amendments setting limits on state power over the suffrage, since the right to vote is now given in every state, and, once given, cannot be denied on grounds of race,¹¹⁰ sex,¹¹¹ or minority after the age of

109. In this Article, I do not rely upon the Guaranty Clause, U.S. CONST. art. IV, § 4, in considering the constitutionality of *Bush v. Gore*. But I pause to note the outlines of a possible such argument. Under the Guaranty Clause, the United States guarantees to each state a republican form of government:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4. *See generally* Weinberg, *Political Questions*, *supra* note 43. At first blush, the Clause may seem too open ended to ground analysis. *See, e.g.* *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), in which *both parties* relied on the Guaranty Clause. But the Guaranty Clause does suggest that the policies of democracy within a republic are so fundamental that state as well as federal government must be built upon them. It is true that the guarantee is not explicitly directed to a state's democracy, *but seems* limited to state republicanism—that is, state government free of imposed, possibly hereditary, rulers. Yet such a ruler in her very nature governs without the consent of the governed—in other words, such a ruler is unelected. Thus, republicanism implies democracy. Further, the guarantee is made by the nation, not Congress. The Clause would seem to be dishonored on its face by any federal judicial displacement of an election within the state.

State courts may also be limited to some extent in this way, since, under the explicit terms of the Guaranty Clause, a state court's displacement of one or more elections could in theory oblige the nation to come to the rescue. For example, if a state high court halted a gubernatorial election and put a governor of its choice in office, the state legislature could request federal intervention. And, of course, the guarantee must limit courts in disputed elections for federal as well as state office, because the Constitution, within limits, confides to the states the basic electoral process vis-à-vis national office. U.S. CONST. art. I, § 4, 5 (as amended); art. II, § 1 (as amended). The conduct of elections to state office necessarily resides in the states as well.

The shared understandings of the constitutional requirement of a republican form of government must, then, at a minimum, require any court, state or federal, to leave any election, state or federal, to the electorate, and—subject to the ultimate authority of Congress in national elections—to the processes prescribed for resolving an election contest within the state.

It is true that, after *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849), the Guaranty Clause has been considered nonjusticiable. But *Luther* did not hold that the Clause was without effect. The Clause governs the conduct of the nation's political actors, and not only in theory. As already mentioned, the concluding portion of the Clause explicitly authorizes the dispatch of national forces to assist a requesting state. Nor need we suppose that Article IV exhausts the national powers that might have to be exercised in response to a crisis of governance within a state, or somehow prevents the nation from acting even when the state fails to request relief. A governor elected through a judicial *coup d'état* would not make the request, and the state legislature might be too self-interested, politicized, or intimidated to do so. Consider Justice Clark's view, concurring in an analogous situation in *Baker v. Carr*, that some judicial remedy is required when the state's entrenched legislature leaves the people of the state "stymied." 369 U.S. at 259 (Clark, J., concurring).

110. U.S. CONST. amend. XV.

eighteen,¹¹² or indeed even diluted, on any theory that would ground a claim under the Equal Protection Clause.¹¹³ Barely acknowledged in *Bush v. Gore*,¹¹⁴ the fundamental right to **(2002) 82 B.U. L.Rev. 638** vote inhabits whole chapters of Supreme Court jurisprudence.¹¹⁵ This basic right is violated when any court displaces the electorate by halting any election and deciding the outcome itself. That is because there is a difference between the winner of an election and the winner of a judgment. The difference should be obvious in an election contest case in which the electoral process has been stayed: the difference is a completed election.

The principle of *Powell v. McCormack*¹¹⁶ has special resonance here. There Chief Justice Warren told the story of John Wilkes,¹¹⁷ to make the point—and this was his ultimate concern in *Powell*—that an election must not be taken from the voters. John Wilkes was a hero to the American public; children were named for him. In a debate of 1781 in the House of Commons, a member argued that the expulsion of Wilkes from Parliament was "one of the great causes which had separated . . . [England] from America."¹¹⁸ In Wilkes' "long and bitter struggle" to be seated in Parliament, he took his stand on the principle embraced by Chief Justice Warren in *Powell*, that the electorate is entitled "to be represented by men of their own choice."¹¹⁹ (Readers of English history will also be reminded of the later struggle of Charles Bradlaugh, another duly elected representative, to take his seat and to vote in Parliament without having to take the prescribed oath.)¹²⁰

111. U.S. CONST. amend. XIX.

112. U.S. CONST. amend. XXVI.

113. *Baker v. Carr*, 369 U.S. 186 (1962) (holding justiciable under the Equal Protection Clause a challenge to the apportionment of a state legislature, where rural voters were afforded disproportionate strength in the legislature).

114. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College." *Bush v. Gore*, 531 U.S. at 104 (per curiam).

115. For classic statements from the modern era, see, e.g. *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) ("[W]ealth... is... an insufficient basis on which to restrict a citizen's fundamental right to vote."); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("By denying some citizens the right to vote, such laws deprive them of 'a fundamental political right,... preservative of all rights.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." (referring to *Reynolds* at 561-62)); *Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidates of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

116. 395 U.S. 486 (1969).

117. *Id.* at 527-30.

118. 22 PARLIAMENTARY HISTORY OF ENGLAND 100-01 (1781), quoted in *Powell*, 395 U.S. at 531 n.60.

119. *Powell*, 395 U.S. at 528.

120. See, for a tangential glimpse of the struggle, *Bradlaugh v. Clarke*, 8 L.R. 354, 385 (H.L. 1883) (denying recovery to an informer against Bradlaugh under the Parliamentary Oaths Act of 1866).

The substantive principle of *Powell*, then, is that the electorate is entitled to representation by the person it has elected.¹²¹ Chief Justice Warren quoted Alexander Hamilton for the fundamental principle of our representative democracy "that the people should choose whom they please to govern them."¹²² The Chief Justice held for the *Powell* Court, in his last great (2002) 82 B.U. L.Rev. 639 opinion,¹²³ that only the explicit constitutional grounds that would permit the House to prevent an elected member from taking his seat could justify the House's attempt to exclude Representative Adam Clayton Powell, Jr., since he was the elected choice of the voters.¹²⁴ Neither *Baker v. Carr* nor *Marbury v. Madison*, in permitting judicial review, authorizes courts to take the decision of an election from the electorate. But *Powell v. McCormack* would seem positively to forbid it.

Much of this thinking is reflected in our understandings of the separateness of the judicial from the political powers, traced out by John Marshall in *Marbury*.¹²⁵ Those understandings are basic in state as well as federal courts.¹²⁶ An election is a political act, and political actors—the states, and sometimes Congress—are charged with administering and resolving elections. The judiciary, although a legitimate part of the process, enters it as a judicial, not a political actor. Given the Constitution's contemplation of free elections, courts qua courts can have no other role in an election than the purely judicial role of dispute resolution, in the usual modes of fact-finding and interpretation of law. While a court may validate a completed election, and make the judgment winner also the election winner, a court may not make a judgment winner also an election winner in the *absence* of a completed election.

We are looking at some of our most fundamental constitutional understandings. We can distil from the Constitution's provisions for exercise of the suffrage, from the Court's jurisprudence concerning the fundamental right to vote, from the principle of *Powell v. McCormack*, and from the limits of the judicial function, the principle that no court can take an election from the electorate. This is a prime directive. When the will of the electorate is unclear, the same prime directive requires that no court take an election from the processes established by the political branches, as mediated by the judiciary, to discern that will. Courts may regulate

121. *Powell*, 395 U.S. at 528.

122. *Id.* at 547 (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876)).

123. Only three later cases by Chief Justice Warren are reported. *Powell* was the last great case.

124. *Powell*, 395 U.S. at 550.

125. *Marbury*, 5 U.S. (1 Cranch) at 170 (Marshall, C.J.): "The province of the court is, solely, to decide on the rights of individuals.... Questions in their nature political.... can never be made in this court."

126. I pass over the argument from federalism that suggests itself here with respect to *federal* courts, largely because the argument has been offered as one among the many prudential arguments to be found in numerous commentaries on *Bush v. Gore*. But of course it matters. Because all elections are held in the first instance within the several states, when any federal court, including the Supreme Court, halts a state's electoral processes for unilateral judicial decision of the outcome it is a matter not only of prudential, but of constitutional concern. Not only is the democratic imperative offended, but, at the same time, the structural constitutional values of federalism.

elections. But courts may not displace elections without violence to the Constitution.¹²⁷

(2002) 82 B.U. L.REV. 640 IV. CONSTITUTIONALLY REQUIRED REMEDIES¹²⁸

Unconstitutional judgment is a special risk of election contest litigation in its very nature. In ordinary public-law litigation, courts must, and do, seek to protect an individual from the will of the majority. But in election contest litigation, courts must, and do, feel it wrong to protect a losing candidate from the will of the majority. Majority rule is the *point* of elections. A court cannot put itself in the position of protecting a candidate from the electorate¹²⁹—as the Supreme Court did in *Bush v. Gore*. Although courts will protect the rights of a candidate challenging an election, courts cannot remedy electoral wrongs by displacing the voters. Courts tinkering with the electoral process, once their tinkering is done, must restore an election to that process.

There is nothing circular about this proposition. It does not beg the question of the validity of the electoral process. The argument that there might be no valid process to which a court could restore an election contest case is nonsense. The court itself will either have held that the process is valid or it will have held that the process is invalid and must be corrected. Once a court has stopped an election and ruled it invalid, it can have no option of making the judgment winner the election winner without first allowing the election—under a corrected process—to reach completion.

Here I must highlight the interesting feature of *Bush v. Gore* and apparently of election contest cases generally, that the constitutional understandings we have been discussing seem to come into play not at the threshold of an election contest case, or on the merits, but as part of the law of courts, or, more specifically, the law of remedies.¹³⁰

It is in the nature of judicial remedies that there is no bright line between things judges can and cannot do to shape and administer either litigation or relief. To complicate matters, remedies that used to be "as the distant poles," (2002) 82 B.U. L.Rev. 641 those that were required and

127. It is a familiar principle that courts are state actors, capable of violating the Constitution even in cases between private parties; *see supra* note 41. The principle is exhibited in the Supreme Court's own theory of *Bush v. Gore*—that the Florida Supreme Court issued an unconstitutional order.

128. The use of a number of recent state cases in the footnotes to this and other sections is explained by three general features of election contest litigation: (1) These cases are not Voting Rights Act cases, but contest cases brought by losing candidates. They tend to be brought under local statutory and constitutional provisions. (2) Although the Equal Protection Clause is available, the losing candidate will often raise the federal right in state court because federal courts tend to abstain from intervention in local election contests. (3) Supreme Court cases reviewing local election contests do not occur with frequency, notwithstanding that fraudulent elections are an old story in this country, *e.g.*, *Mackin v. United States*, 117 U.S. 348 (1886) (criminal case involving alteration of the results of a Chicago election). Thus, such federal cases as I do note tend to be Circuit Court of Appeals cases.

129. *Cf. Bush v. Gore*, 531 U.S. 1046, 1046-47 (Scalia, J., concurring) (expressing concern that continuing to count votes legal under Florida law might irreparably harm George W. Bush).

130. For general background on judicial remedies in election contest cases, see the still useful *Developments in the Law: Elections*, 88 HARV. L. REV. 1114, 1298 (1975).

those that were forbidden, have somehow collapsed together, like the "distant Poles" that, in Marvell, become "cramp'd into a *Planisphere*."¹³¹ As the redistricting cases and other cases on affirmative action suggest, approved court-ordered remedies of the past have become rather hard to distinguish from the kind of remediation a state may attempt, only to find the attempt unconstitutional.¹³² But even so, there should be some clear cases in which we can say that a particular judicial remedy is constitutionally required. In a case like *Bush v. Gore*, in which the alternative was the preemption of an election, a meaningful remand moving the election instead toward completion would seem to have been constitutionally required.

A skeptic might argue, to the contrary, that if there is any rule of judicial deference to the electoral process, *Bush v. Gore* should head the list of *exceptions* to it. After all, appellate courts must have power to control arbitrariness or intransigence in courts below¹³³—the hallmarks of corruption, fear, or other systemic infection. The Court in *Bush v. Gore* clearly was outraged by the Florida Supreme Court's action, which it apparently perceived as partisan.¹³⁴ An appellate

131. As Marvell wittily complained to his mistress about the decrees of Fate:

*And therefore her Decrees of Steel
Us as the distant Poles have plac'd,
(Though Loves whole World on us doth wheel)
Not by themselves to be embrac'd*

*Unless the giddy Heaven fall,
And Earth some new Convulsion tear;
And, us to joyn, the World should all
Be cramp'd into a Planisphere.*

Andrew Marvell, *The Definition of Love*, in THE OXFORD BOOK OF ENGLISH VERSE 333 (Christopher Ricks ed., 1999).

132. The *locus classicus* of the affirmative action problem is *Bakke v. California*, 438 U.S. 265, 299 (1978) (holding that a state university may not admit students solely on the basis of race, although race may be taken into account). Yet of course, assignment of students to public schools on the basis of race was a judicially approved remedy at the time *Bakke* was decided. See *id.* at 300 (attempting to distinguish race-based judicial remedies as grounded in judicial findings of constitutional violation).

133. See, e.g. *United States v. Bowden*, 166 F.2d 701, 702 (9th Cir. 1948) (reversing and remanding for trial the district court's arbitrary dismissal of a claim of election irregularity; if proved, it would have required ouster of much of the government of Alaska).

134. There is no direct support for this speculation in any of the *Bush v. Gore* opinions, although Justice Stevens suggested that the Court was distrustful of the judges Florida would appoint to do the counting. See *Bush v. Gore*, 531 U.S. 98, 128 (Stevens, J., dissenting). Bush's initial brief in the United States Supreme Court characterized the Florida decision, very much as I have characterized the Supreme Court's, as an "unconstitutional arrogation of power." Brief for Petitioner, at 48, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836) available at 2000 WL 1761134 at *48; see also *Bush v. Gore*, 531 U.S. at 136 (Ginsburg, J., dissenting) ("There is no cause here to believe that the members of Florida's high court have done less than their mortal best to discharge their oath of office...." (internal quotation marks omitted)). But the widely shared perception among conservatives was that the Florida court was attempting to steal the election from George W. Bush. See, e.g. Eric Pianin & Helen Dewar, *Congress Sits on Political Powder Keg*, WASH. POST, Dec. 10, 2000, at A31 (reporting that congressional Republicans have accused Florida's Supreme Court "of an effort to 'steal' the election from Bush"). See also, e.g., Nelson Lund, *An Act of Courage*, WKLY. STANDARD, Dec. 25, 2000, at 19 (criticizing the Florida decision as so unconstitutional as to compel the Supreme Court to intervene); Michael S.

court could find itself confronted with a case (2002) 82 B.U. L.Rev. 642 coming up from such a court, a case in which remand is likely to be "futile"—somewhat in the sense federal courts speak of "futility of remand" in removed cases.¹³⁵ In such a case the appellate court may *need* the power of reversal without remand. Especially for cases coming to the Supreme Court from state courts,¹³⁶ the Supreme Court's power of reversal without remand can be essential to the rule of law. The Court may also need recourse to powers of executable judgment or final injunction.

The great case of *Martin v. Hunter's Lessee*¹³⁷ might seem to furnish a distinguished provenance for the Supreme Court's disposition in *Bush v. Gore*. In *Martin*, the Supreme Court short-circuited the recalcitrant Virginia Court of Appeals below—with which it had been at odds throughout the Marshall Court period—and reversed without remanding. This technically was not an executable judgment, since the Court purported to affirm the judgment of the trial court.¹³⁸ Nevertheless the effect in *Martin* was as if the Court had entered judgment on the cause rather than the appeal. Title to vast lands in Virginia eerily changed hands up there on the Court's Olympic heights.

*Moving of th' earth brings harmes and feares;
Men reckon what it did, and meant. . . .*¹³⁹

(2002) 82 B.U. L.Rev. 643 That is why *Bush v. Gore* puts one in mind of *Martin v. Hunter's Lessee*. In *Bush*, the world's most powerful office eerily was allotted far above the electoral turmoil roiling Florida. And I have no doubt that, in *Martin*, had there been no judgment below that the Court could have purported to affirm, the Supreme Court would have had power even to enter an executable judgment.¹⁴⁰

Greve, *The Real Division in the Court*, WKLY. STANDARD, Dec. 25, 2000, at 28, 30 (accusing the Florida court of stacking the deck in a presidential election and of a "moral scandal"); Charles Krauthammer, Editorial, *Defenders of the Law*, WASH. POST, Dec. 15, 2000, at A41 (characterizing the Florida court as "a rogue" court embarked "on a mission" to defeat George W. Bush); and see the remarks of Majority Whip Tom Delay, in Matthew Vita & Juliet Eilperin, *Congress Braces for Battle over Electoral Votes*, WASH. POST, Nov. 22, 2000, at A19 (accusing the Florida Supreme Court of "a blatant and extraordinary abuse of judicial power").

135. See, for example, the discussion in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 88-89 (1991) (rejecting the government's argument that remand would be futile).

136. The phenomenon of the arbitrary or intransigent appellate court below should be infrequent in federal cases coming to the Supreme Court. While the federal circuit judges, although recruited from a region rather than a state, are not immune from regional ideological idiosyncrasy, arguably they would be less likely than the district judges to be drawn into local state politics, at least with respect to the states within their jurisdiction in which they do not reside.

137. 14 U.S. (1 Wheat.) 304 (1816).

138. *Martin*, 14 U.S. (1 Wheat.) at 381-82.

139. John Donne, *A Valediction: Forbidding Mourning*, in DONNE: POETICAL WORKS 45 (Herbert Grierson, ed. 1968) (1633).

140. Although the Judiciary Act of 1789, § 25, 1 Stat. 73, 85-87, originally gave the Supreme Court power to enter judgment without a remand, that power was conditioned on the Court's already having remanded the case once previously. The condition was omitted in an amendment of 1867, 14 Stat. 385, 386. The current statute dealing

There are other illustrious examples of the use of and need for reversal without remand. The Warren Court's struggle with the state courts over civil rights is within living memory. We are mindful, for example, of the famous case of *NAACP v. Alabama*,¹⁴¹ in which reversal of Alabama's disingenuous judgment, without remand, was the strong but appropriate remedy. Ironically, both *Martin* and *NAACP v. Alabama* were relied on in *Bush v. Gore*, but only in Chief Justice Rehnquist's concurring opinion, and then only to make the quite different point that the Supreme Court must sometimes interpret state law for itself in deciding a federal question.¹⁴²

(2002) 82 B.U. L.Rev. 644 All this may leave our hypothetically enraged appellate court in a quandary. Assuming that the power of final disposition must be available to a high court, and can be essential to the rule of law even in elections cases, but assuming also that the Constitution may require meaningful remand in a proper case, how is the appellate court to know what to do? How distinguish between the case crying out for final disposition, like *Martin v. Hunter's Lessee* or *NAACP v. Alabama*, and the case requiring remand, like *Bush v. Gore*?¹⁴³ How can a court draw that distinction at the very moment the political instincts of the judges are urging them to take hold of the accursed case and decide it for themselves?

In such a case *Bush v. Gore* should perform an invaluable service—not as a precedent, but for the lessons we take from it. It seems a sure guide to what to avoid. On the other hand, *NAACP v. Alabama* and *Martin v. Hunter's Lessee* share features that, even in an elections case,

with the Supreme Court's appellate remedial powers contains no specific reference to a power of executable judgment, but does make remand discretionary after reversal. In its current form, the statute provides:

The Supreme Court... may affirm, modify, vacate, set aside or reverse any judgment... of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just....

28 U.S.C § 2106 (1994). Nevertheless, Supreme Court power to enter an executable judgment, at least in a case that has been previously remanded, seems to have been assumed. *See, e.g.* *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253, 293 (1873) (speaking of rendering "such decree in the case as the Supreme Court of the State should have rendered"). In *Tyler* (as in *Bush* and *Martin*) there had been a previous remand. Justice Story, in *Martin*, hinted that either the Supreme Court or the courts below could, in effect, secure execution of the judgment:

[By the Court's] inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the habeas corpus ad subjiciendum, I flatter myself that the full extent of the constitutional revising power may be secured to the United States....

Martin, 14 U.S. (1 Wheat.) at 381-82.

141. 360 U.S. 240 (1959) (reversing the state court's judgment and entering judgment without remand in a civil rights case in which the state court, on previous remand, had defied the Supreme Court by applying a new procedural stricture, to secure the result the Supreme Court had already reversed).

142. *Bush v. Gore*, 531 U.S. at 114-15 (Rehnquist, C.J., concurring). But note that Justice Ginsburg, apparently unmindful of the majority's anger at the Florida Supreme Court, distinguished those cases as requiring strong-arm tactics in the "historical context." *Id.* at 140 (Ginsburg, J., dissenting).

143. I offer *Martin* and *NAACP* for want of illustrious examples in election contest cases.

might suggest the appropriateness of a naked reversal.

Caveat: It needs to be remembered that in an election contest case, even a case that would otherwise seem to warrant reversal without remand, the appellate court can make a final disposition only if, in reversing, it is reinstating a valid, completed election. If, after judgment on the merits of a case, an election remains under challenge, the special features of *NAACP* and *Martin* still might justify a high court in taking the election in hand. The court below might be engaging in transparently invidious discrimination, like the Alabama court in *NAACP*, or might be locked in an ongoing struggle with the higher court, a feature of both *NAACP* and *Martin*. The elections case requiring the enraged appellate court to stifle its wrath and remand for further proceedings would not share these special features of *NAACP* and *Martin*. Where an election is incomplete, yet the case bears the indicia of invidious discrimination and intransigence, the appellate court would be justified in overseeing the completion of the election itself,¹⁴⁴ or, even better, in (2002) 82 B.U. L.Rev. 645 appointing nonpartisan independent masters to supervise the completion of the election directly under the appellate court's wing, in effect displacing the courts below. These remedies look to the completion of the electoral process. If the Supreme Court majority lacked confidence in the Florida court, it could have taken the election in hand itself and appointed bipartisan masters to supervise its completion under constitutional standards.

Since the Constitution requires a remedy that moves toward completion rather than preemption of an uncompleted election, additional support for such a remedy should not be needed. But of course a court can find additional support from the number and kinds of features the particular case shares with *Bush v. Gore*. We are supposing a case in which an unresolved election contest is pending. To that, add one or more of the following features of *Bush v. Gore*: The appellate court itself has been responsible for halting the prescribed process for completing the election. There is a risk that the appellate court could determine the outcome of the election before it has run its course. There is an appearance of conflict of interest in some of the judges who want to short-circuit the electoral process. The court is sharply divided along wholly political lines. There is a felt need for new forms of legal reasoning to deal with the alleged constitutional wrong. The court's opinion will be inconsistent with prior case law, the majority's own well-known positions, long tradition, or widespread practice. The court is contemplating

144. When, as in *Bush v. Gore*, a higher court does anticipate intransigence or at least an unchanged result in the court below, courts typically find remedial alternatives to deciding the outcome of an election for themselves. A state appellate court confronted with an intransigent or politicized court below might have more effective ways of commanding those courts than remand. Mandamus might be effectual. Or the appellate court could disqualify the trial judge and appoint another to administer proceedings on remand. A federal court of appeals would have access to both expedients in dealing with a difficult federal district judge. All courts have powers in a proper case to count votes themselves and ought to appoint masters or auditors to do it. Suppose, for example, that an intransigent lower court has arbitrarily confirmed the results of a bad election—let us say in the teeth of overwhelming evidence of fraud. In such a case, notwithstanding the uselessness of remand, the appellate court can distance itself from the election. If the expedients of disqualification of the court below or of effectual mandamus are unavailable, the appellate court can order the remedy itself, and if the court fears that the political problem is systemic, it can appoint bipartisan auditors or masters or receivers to count the votes. Cf. *Gore v. Harris*, 772 So.2d 1243, 1262 (Fla. 2000) (ordering the circuit court itself to commence forthwith upon a statewide manual recount of all Florida "undervotes" in the presidential election of 2000; pointing out that the circuit court has statutory authority to require manual recounts from electoral officials in counties not having yet provided them and to obtain the assistance of a particular county Supervisor of Elections or his sworn designees).

novel interpretations of state or federal election statutes. The court is not balancing the equities. There is a felt need to confine the case to its facts. There is a felt need to rule *per curiam*.¹⁴⁵ Any of these manifold embarrassments of *Bush v. Gore* should at least trip the alarm. If what the judges want to do bears any of these stigmata they had better not do it. A solidly reasoned, well-founded opinion, in which the judges are substantially unanimous, or at any rate not split on political lines, will ground a decision in an elections case, but only if the court is working *toward*, rather than *away* from, the will of the voters. Such an opinion will even ground a determination of the outcome—making the judgment winner the election winner—if, but only if, the court is ruling upon an election it holds to be complete and free of challenge.

In *Bush v. Gore*, on the contrary, the Court actively prevented the completion of a halted state recount, never having ruled on the merits either of the challenge or the election and never having adjudicated the validity of **(2002) 82 B.U. L.Rev. 646** Bush's certification or Gore's request for a recount. Instead, the Court selected the next President of the United States in the absence of a completed election—the ultimate political act.¹⁴⁶ A meaningful remand in *Bush v. Gore*, or completing the election under the Court's own supervision, would have preserved the Constitution from this assault.

Apart from all this, there is a vital prudential consideration. Either of these remedies would have had the incidental but very great benefit of distancing the Court from the election's outcome. Precisely because our constitutional understandings are at stake when judges decide election outcomes, courts properly fall under special obligation to distance themselves from an election's outcome. Judges may experience this as a felt need for political cover—for some legitimizing feature. The important thing, a court might say, is for the courts to demonstrate that their judgments are "worthy of the confidence of the electorate."¹⁴⁷

It is worth pausing for a moment to consider this prudential problem, this perceived need of political cover. One senses it in the bulk of elections cases one comes upon in the reports. I believe it will be present whether the judges are elected or appointed, and whether they vote unanimously or along political lines. In part the phenomenon must reflect the fragility of constitutional faith,¹⁴⁸ and, more broadly, of faith in the rule of law. Because election contest

145. See also, e.g., *Eubanks v. Hale*, 752 So.2d 1113, 1119 (Ala. 1999), discussed *infra* notes 165-75 and accompanying text.

146. It is interesting that the Supreme Court could bring itself to decide, in effect, which of two alleged Presidents was the legitimate President, when the Court had once famously held itself helpless to determine the "political question" which of two alleged Governors of Rhode Island was the legitimate Governor. That case, of course, was *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), a case specifically distinguished and saved in *Baker v. Carr*, 369 U.S. 186, 217-23 (1962). For the view that *Luther* was an elections case quite similar to *Baker v. Carr*, see Weinberg, *Political Questions*, *supra* note 43, at 931, 935.

147. *Marks v. Stinson*, 19 F.3d 873, 889 n.14 (3d Cir. 1994) (Stapleton, Cir. J.). For the typical effort to distance a court from an election's outcome, see, e.g. *Testa v. Ravitz*, 644 N.E.2d 1348, 1350 (N.Y. 1994) (holding that although the court below could not determine the winner in an election contest, the board of elections could, and the court below could order it to do so).

148. I take the phrase from the title of my colleague's fine book, SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988), which in turn was an admiring reference to another colleague's fine book, PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

cases directly and immediately involve transfers of political power, public confidence in the rule of law in courts is always at stake in them. Just as the risk of an unconstitutional decision exerts pressure on a court to avoid the appearance of partisanship, so also does the risk of damage to public confidence. The upshot is that judges seem to feel strongly that they cannot put themselves in the position of taking an election away from the electorate.

The question, then, becomes how courts can deal with the range of cases in which appellate courts will be unable to avoid deciding election outcomes. And there would seem to be an extensive range of such cases. Yet in many such cases the question answers itself. Consider, for example, the simplest **(2002) 82 B.U. L.Rev. 647** such case: An election has been certified. The loser challenges it. The trial court dismisses the loser's challenge, but stays the effect of certification pending appeal. The intermediate appellate court affirms. The state supreme court's affirmance, or the Supreme Court's denial of certiorari, will hand the election to the certified winner. But in this case, of course, it is the underlying vote that is vindicated. If you play with that hypothetical you will eventually come to the case in which the reversing court holds the underlying vote to have been unlawful. Can you posit any other disposition for this variant than one contemplating a resort to the electorate for a lawful vote?

In all election contest cases one might say that the very question for decision is, precisely, which of the candidates is the election winner. But the question for courts in reality is whether the electoral process has been lawful. My argument has been that a negative answer to that question places a constitutional duty on a court to mandate returning a lawful process to the electorate. Can we develop a hypothetical case in which it appears that the courts must name an election winner, notwithstanding an uncompleted election? Well, suppose that the election is a local one, deadlocked, and the statutory process for determining the winner has been fairly exhausted. Twenty or thirty votes will be decisive, and the highest state court will determine the legality of those twenty or thirty votes as a matter of law—thus naming the winner. In such cases, there seems to be no further administrative process to which the election can be referred. Indeed, a deadlocked election—one like the presidential election of 2000, in which only a few votes are needed by the loser to swing the election—is perhaps the most common configuration in which courts at all levels can confront an apparent obligation to announce an election winner on their own. But even in such cases courts can and generally do find remedial options that enable them to distance themselves from the appearance of political action, and to ensure that what they are doing is constitutional.

To take an easy example, imagine a case in which the trial court has identified all the valid ballots, but has discarded the votes in a few precincts, the legal votes and illegal votes together, on the not-uncommon thinking that irregularities "tainted" the election in those particular precincts. The appellate court, reinstating the identified legal votes in those precincts, in effect decides the election. But in this example the appellate court's remedy does not frustrate, but rather satisfies, the democratic/republican imperative. The court is restoring the franchise to the voters whose legal ballots were needlessly discarded.¹⁴⁹ In treating the legal votes as legal votes,

149. *Cf.* *St. Lawrence v. Holland*, 648 N.Y.S.2d 692, 693-94 (App. Div. 1996) (holding that the trial court erred when, having identified illegal votes in some districts, it discarded all the votes in those districts; directing that on remand the trial court count the legal votes and declare the winner). But it would have been better practice to

the court is simply **(2002) 82 B.U. L.Rev. 648** accepting the facts as found by the court below. Even so, in my view it would still be better to remand, simply to place a greater distance between the appellate court's judgment and the election's outcome. In this last example, remand clearly was not constitutionally required. Rather, remand would simply have been desirable on prudential grounds. When the appellate court reversed without remand, the sufficiency of the legal votes gave it more than "political cover." The sufficiency of the legal votes was the constitutionally-required predicate for the court's judgment. I should add that it would be unfortunate, if not unconstitutional, for the appellate court in this last hypothetical to find the primary facts—the identity and number of the legal votes in each precinct.¹⁵⁰ It would be far better for the appellate court to appoint independent auditors to find primary facts. With confidence in the court below, of course, remand would remain the preferred course.

It may seem that it is upon the trial courts that the heaviest political burden is likely to fall in election contest cases, given the constitutional pressures on higher courts to remand. But trial courts always have the political cover of appeal, and, on remand, of the appellate court's mandate. Appellate courts strongly urge, when they do not require, that a trial court dip back into the electorate for guidance—restore a case to the electoral process—rather than certify the judgment winner as the election winner.¹⁵¹ Indeed, appellate courts chronically urge trial courts to be inhospitable to challenges to elections in the first place.¹⁵² It is commonly said that there is no general state jurisdiction **(2002) 82 B.U. L.Rev. 649** over election contests at all; that such jurisdiction must be given by statute.¹⁵³ The burdens on a candidate seeking an injunction to stop voting, or to stop counting, or to void an election, are quite heavy.¹⁵⁴ It is the general rule

require the trial court to obtain an independent count of the legal votes and to order the relevant political authority to certify the correct winner.

150. See *Hale v. Eubanks*, 752 So.2d 1113, 1119 (Ala. 1999), in which the Alabama Supreme Court itself found the primary facts vis-à-vis the intentions of absentee voters. See *infra* notes 165-75 and accompanying text.

151. See *Marks v. Stinson*, 19 F.3d 873, 889-90 (3d Cir. 1994). *Marks* was a challenge to a state election. Political control of the state senate was at stake, and the election was close. The district court held that wrongdoing in the solicitation of absentee ballots had changed the outcome, and certified the previous loser as the winner. The Court of Appeals vacated this certification and required a retrial that would better demonstrate that the result would be worthy of the confidence of the electorate. The court encouraged the district court, if a violation were still found, to order a special election, but recognized the equitable power of a federal district court, if circumstances warranted it, to direct the certification of the winner. *Id.* at 889. For commentary on *Marks v. Stinson*, see Matthew C. Jones, *Fraud and the Franchise: The Pennsylvania Constitution's "Free and Equal Election" Clause as an Independent Basis for State and Local Election Challenges*, 68 TEMP. L. REV. 1473, 1492-95 (1995); Michelle L. Robertson, *Election Fraud—Winning at All Costs: Election Fraud in the Third Circuit*, 40 VILL. L. REV. 869, 900-23 (1995).

152. See the amusing case of *Phillips v. Earngey*, 902 S.W.2d 782, 783-85 (Ark. 1995) (refusing to permit the court below to set aside an election and order a special election, although the successful candidate in the challenged election had died; supporting documentation was lacking and statutory authority was unclear). See also, e.g., *Gooch v. Hendrix*, 851 P.2d 1321, 1327 (Cal. 1993) (explaining that only the clearest illegality could justify judicial interference with an election); *Jackson v. Maley*, 806 P.2d 610, 615 (Okla. 1991) (describing the heavy presumption in favor of the validity of an election). Moreover, even allegations of fraud may not be actionable if the plaintiff cannot allege but-for causation. See, e.g. *Fitzmorris v. Lambert*, 382 So.2d 169, 178 (La. Ct. App. 1979).

153. See 26 AM. JUR. 2d *Elections* § 329 (1996).

154. See, e.g. *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (requiring a showing of discriminatory intent

that federal courts will defer to existing state statutory mechanisms for election contests.¹⁵⁵ In addition, all courts tend to insulate themselves *as courts* from (2002) 82 B.U. L.Rev. 650 the process of counting or evaluating ballots.¹⁵⁶

Nevertheless, when confronted with an unfair election, courts will exercise extraordinary powers, sometimes ill-advisedly. The fiction that a demonstrated irregularity has "tainted" an election in whole or in part should not be used to justify a new election, in whole or in part, if to

in elections cases under the Equal Protection Clause); *City of Seat Pleasant v. Jones*, 774 A.2d 1167, 1181 (Md. 2001) (holding that mandamus would not lie for merely negligent failure to record the decisive single vote); *Gooch v. Hendrix*, 851 P.2d 1321, 1327 (Calif. 1993) (explaining that only the clearest illegality would justify judicial interference with an election); *Jackson v. Maley*, 806 P.2d 610, 615 (Okla. 1991) (describing the heavy presumption in favor of the validity of an election). But-for causation is generally required, even in cases of obvious irregularity. *Fitzmorris v. Lambert*, 382 So.2d 169, 178 (La. 1979). Although courts will void an election tainted by racial discrimination, fraud, or vote-buying, *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966), sometimes even without a showing of but-for causation, *e.g.*, *Bell v. Southwell*, 376 F.2d 659, 664-65 (5th Cir. 1967), they will not do so when the irregularities alleged are merely human or mechanical errors, *e.g.*, *Savage v. Edwards*, 722 So. 2d 1004, 1004 (La. 1998); *Snyder v. Glusing*, 520 A.2d 349, 358-59 (Md. 1987) (requiring but-for cause, over the dissent of three judges, to support allegations of an illegally confusing ballot); *but see* *Whitler v. Macoupin County*, 437 N.E.2d 1314, 1317 (Ill. 1982) (waiving the requirement on a showing of computer error). Beyond all this, courts so dislike upsetting a decided election that they may sometimes require pre-certification litigation. In *Paul v. Robicheaux*, 370 So.2d 588, 589 (La. App. 1978), for example, the losing candidate knew that cars were driving beyond city limits to import voters, but waited until the election was over before challenging it. The court held that the candidate could not be allowed to sit back and await the outcome of the election before complaining about the irregularity. Such a rule can be a trap for the unwary. *See, e.g. Ex parte Baxley*, 496 So.2d 688, 696 (Ala. 1986) (concurring op.) (taking the more common view that courts should not intervene in an election until the electoral process has run its course).

155. *See, e.g.* the controversial case of *Johnson v. Stevenson*, 170 F.2d 108, 111 (5th Cir. 1948) (holding that the district court could not intervene by injunction in the results of a senatorial primary in Texas in order to remedy an alleged counting of illegal votes, when the Texas statutes afforded ample machinery to deal with the problem); *id.* at 109 (rejecting the argument that there was insufficient time to contest the state-wide primary before the general election came on (citing U.S. Const. art. I, § 5)). My colleague, Doug Laycock, comments with much truth that *Johnson v. Stevenson* is better forgotten than held up as an example, since the case in effect condoned a famously lawless election. But the opinion seems in line, at least, with the traditional views of federal courts. *See, e.g.* *Gold v. Feinberg*, 101 F.3d 796, 802 (2d Cir. 1996). But as I hope I have made plain, *see supra* Part I, of course judicial deference to a lawless election is utterly misplaced.

For a recent *state* supreme court's expression of disapproval of federal judicial intervention in an election to the state's Chief Justiceship when the relevant statutory electoral process had yet to run its course, *see Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206, 1215-17 (Ala. 1995) (criticizing injunctive federal court interference as violating "basic tenets of federalism" and stating that the federal plaintiffs suffered no constitutional deprivation because state remedies adequately protected their interests).

156. This is so although for a trial court to count the ballots itself might not be an abuse of discretion. *E.g.*, *Villareal v. Hedrick*, 579 S.W.2d 41, 46 (Tex. 1979) (so holding). *See*, for a striking and unfortunate example of evaluation of ballots by both the trial court and the state's high court, *Eubanks v. Hale*, 752 So.2d 1113, 1150-56 (Ala. 1999). *Eubanks* is discussed more fully below. *See infra* notes 165-75 and accompanying text. As all law deans know very well, the thing to do is to appoint a committee. Courts sitting in equity have power to appoint independent bipartisan auditors or masters to make these evaluations and to make an independent determination of the outcome of an election. *But see, e.g.* *Indiana ex rel. Wheeler v. Shelby Circuit Court*, 362 N.E.2d 477, 477-78 (Ind. 1977) (reversing on the ground that the court's appointment of a recount commission violated the "sole judge" clause in the state constitution).

do so would entail discarding valid and invalid votes indiscriminately. Irregularities that disqualify some votes need not mysteriously infect otherwise legal votes.¹⁵⁷ The truly "tainted" election is one in which there has been some indeterminate unlawful influence upon or interference with the exercise of the right to vote.¹⁵⁸ In such cases it becomes impossible to ascertain the outcome of the election simply by counting ballots. In the election of 2000, for example, it was alleged that black voters had been harassed by police at roadblocks near their neighborhoods.¹⁵⁹ **(2002) 82 B.U. L.Rev. 651** Some observers believe that if the alleged harassment occurred, it voided the entire election.¹⁶⁰ We simply could not know how many black voters were discouraged from proceeding to their polling places. In a case of that kind an injunction ordering a new election in the affected counties would seem unavoidable.

The remedy of a fresh election is so often insisted upon, especially in close elections, that it makes the supposed activism of the Florida Supreme Court in *Bush v. Gore* seem a model of restraint.¹⁶¹ Yet this remedy can be problematic, and not only because it is likely to be expensive and drawn out. After all, to void even a bad election is to discard the legal votes of those who participated in it. Moreover, the first measure of the electorate's will is irreplaceable. The new

157. See, e.g. *In re* Protest of Election Returns & Absentee Ballots, 707 So.2d 1170, 1174-75 (Fla. Dist. Ct. App. 1998) (holding that instead of a new election the appropriate remedy for an election tainted by fraud in the casting of absentee ballots was to discard the absentee ballots).

158. See, e.g. *Fanara v. Candella*, 640 So.2d 406, 410 (La. Ct. App. 1994) (holding that the court below correctly ordered a fresh election, where one party's unauthorized "assistance" to seventeen voters made the outcome of the challenged election impossible to determine). The definite number "17" did not blind either court to the fact that there was no way to determine, after the fact, which of the "assisted" seventeen would have voted the same way in any event. *But see, e.g. Savage v. Edwards*, 722 So.2d 1004, 1004 (La. 1998) (holding, over two dissents, that evidence of pervasive fraud and vote-buying was insufficient to warrant voiding an election; affirming judgment for the winner of the tainted election).

159. KELLNER, GRAND THEFT, *supra* note 15, at 33, 106; NICHOLS, JEWS FOR BUCHANAN, *supra* note 15, at 53-58 (discussing reports of police intimidation of black voters at polling stations); Melinda Carter, *The Black Vote: Count On It*, NAT'L BAR ASS'N MAG., Jan.-Feb. 2001, at 14, 15 (referring to "police roadblocks/checkpoints" that were allegedly established near voting precincts in black communities to discourage people from voting; referring also to late opening and early closing of polls near historically black college campuses); MERZER, MIAMI HERALD REPORT, *supra* note 11, at 113 (referring to a roadblock by the Florida Highway Patrol in one county as intimidating black voters); *see generally id.* at 111-32 (summarizing testimony and other evidence of black disenfranchisement in 2000 in Florida at subsequent hearings by the U.S. Civil Rights Commission and by the NAACP). *Cf.* 28 U.S.C. § 1344 (1994) (granting jurisdiction over election contest cases alleging denials of the right to vote on account of race, color, or previous condition of servitude).

160. See, e.g. Robert E. Pierre & Peter Slevin, *The U.S. Civil Rights Commission Criticizes Florida*, WASH. POST, June 11-17, 2002 (nat'l weekly ed.), at 8.

161. *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978) (Campbell, Cir. J.): "Here, the closeness of the election was such that, given the retroactive invalidation of a potentially controlling number of the votes cast, a new primary was warranted." (citing cases). For a few recent examples of easy resort to new voting, *see, e.g. Broadhurst v. City of Myrtle Beach Election Comm'n*, 537 S.E.2d 543, 548-50 (S.C. 2000) (holding that an entirely new election in all precincts was the remedy for a voting machine's failure in a single precinct); *Adkins v. Huckabay*, 755 So.2d 206, 222 (La. 2000) (ordering a fresh election where a few outcome-determinative ballots were judicially invalidated). A better case for the remedy was made out in *In re Gray-Sadler*, 753 A.2d 1101, 1111 (N.J. 2000) (approving a new election where some votes were improperly rejected due to inadequate and confusing instructions regarding write-in votes).

election can never replicate the conditions of the original election,¹⁶² not least because in a second election the voters know the outcome of the first. Then, too, the electorate will not be the same. Some, who gave up a day of work to vote, will not give up another. Some will be ill; others will have become tired of turning out to vote; still others will have become energized by the knowledge that their party lost when they stayed home. Yet these arguments prove too much. Any judicial remedy can be criticized for its insufficiency. Damages, after all, will never make the grieving widow whole. But it might be argued further that a fresh election is not only an insufficient remedy, but also one that lends itself to the most cynical abuse. One can imagine a case in which, on some trumped-up claim, a high appellate court—perhaps mistakenly relying upon a politicized trial court's findings of **(2002) 82 B.U. L.Rev. 652** fact—voids a good election and remands with a mandate to the court below to order a new one. Perhaps the appellate court does this not to achieve a more legitimate engagement with the electorate, but in disagreement with it, deliberately disenfranchising the voters who turned out at first, in hopes of changing the result.¹⁶³ But this class of arguments also proves too much. Any remedy may be criticized for its vulnerability to abuse. In any election contest case, even the drastic remedy of a new election, even when it is ordered in precincts where it has not been shown to be necessary, is better than a judicial displacement of the election altogether and a judicial selection of the winner. A court's power to name an election winner must, in the end, depend on an election the court has validated on its merits and held completed. The power of election cannot be aggrandized to the courts, where it can have no legitimate exercise. The remedy of a new election, however drastic, is at least constitutional.

But certainly, in view of the problems attending the remedy, a new election should be narrowly limited to the particular precincts in which it has been found to be necessary.¹⁶⁴ Courts should preserve the original legal vote wherever it can be discerned, and defer to an ongoing electoral process wherever the process remains to be completed. A completely new election should be a remedy of last resort.

As we see in *Bush v. Gore*, courts depart at their peril from the general principles of deference to the electorate and to the electoral process that we glean from the Constitution and find reflected in elections cases. This is so even when the departure is within their constitutional

162. From the viewpoint of a federal court, however, the remedy is "adequate." *See, e.g.* Gold v. Feinberg, 101 F.3d 796, 802 (2d Cir. 1996) (affirming the rule against federal intervention in an election when an adequate state remedy exists; ruling that a court-ordered fresh election would be an adequate remedy).

163. I am indebted to Doug Laycock for this scenario.

164. *See, e.g.* St. Lawrence v. Holland, 648 N.Y.S.2d 692, 693-94 (App. Div. 1996) (holding that the trial court erred in disregarding all votes cast in districts containing irregularities; the remedy was to credit all ballots that were validly cast). It appears necessary to distinguish narrow tailoring of a remedy from piecemeal remediation. In *Bush v. Gore*, 531 U.S. 98, 106-08 (2000), the piecemeal order of the Florida Supreme Court, dealing only with the "undervotes," was troublesome to the Supreme Court. Nonetheless, Florida case law reasonably suggests that targeted remediation is correct in Florida as elsewhere when the ballots excluded from the remedy have not been challenged. *See, e.g.* *In re* Protest of Election Returns & Absentee Ballots, 707 So.2d 1170, 1174-75 (Fla. Dist. Ct. App. 1998) (holding that instead of a new election the appropriate remedy for an election tainted by voter fraud in the casting of absentee ballots was to discard the absentee ballots).

power. An interesting recent case in Alabama, *Eubanks v. Hale*,¹⁶⁵ illustrates the perils of deviation from these principles. In *Eubanks*, the incumbent sheriff of Jefferson County, one Woodward, had lost an election by thirty-seven ballots and had demanded a recount. The case began as an action by his opponent to halt the recount. In the course of the litigation seven judges below,¹⁶⁶ and one state supreme court (2002) 82 B.U. L.Rev. 653 judge,¹⁶⁷ recused themselves. There was a problem in finding anyone to try the case at all.¹⁶⁸ The trial judge dismissed, saying that it was not for him to take an election away from the electoral process.¹⁶⁹ But the Alabama Supreme Court held his feet to the fire. Eventually the trial judge determined, in part based on demeanor evaluations of testimony, that there was sufficient evidence of illegality to void the election, and he ordered a new election.¹⁷⁰ The Alabama Supreme Court, however, now refused to accept the trial court's findings of fact, narrowed the scope of controversy with questionable logic as to the absentee ballots, and itself decided the bona fides of absentee voters. In the course of this exercise, the court even invalidated two ballots of handicapped persons who, unable to sign their own ballots, asked their wives to do it for them. Invalidating these ballots apparently was a violation of federal law.¹⁷¹ The Alabama Supreme Court then threw out the trial judge's order of a fresh election, and, in one of the few existing state court precedents for *Bush v. Gore*, handed the election, without remand, to the incumbent sheriff, Woodward. That worthy, meanwhile, was about to come under indictment for buying votes,¹⁷² and did so in 2000.¹⁷³ Against this malodorous background, one might have admired the three Alabama judges who dissented;¹⁷⁴ but the division, apparently, was on partisan lines.¹⁷⁵

165. 752 So.2d 1113 (Ala. 1999).

166. For factual background see *Ex parte Woodward*, 738 So.2d 322 (Ala. 1998); see also *Woodward Files Formal Election Contest in Sheriff's Race*, AP Pol. Serv., Nov. 26, 1998 WL 7467575.

167. *Eubanks*, 752 So.2d at 1120.

168. See *Woodward files formal election contest*, *supra* note 166.

169. *Eubanks*, 752 So.2d at 1185 (Appendix A to Op. of Nov. 5, 1999). See also *Judge Rejects Challenge to Hale Victory in Close Sheriff's Race*, AP POL. SERV., Jan. 5, 1999, 1999 WL 3106748 (Jan. 5, 1999) (quoting the trial judge as saying that Woodward was "a good man," but that Woodward's criminal investigation among black voters was "frightening" and "has caused democracy to come dangerously close to resting on a cracked foundation").

170. *Eubanks*, 752 So.2d at 1120 (Appendix A. to Op. of Nov. 5, 1999).

171. *Id.* at 1168-69 (dissenting op.). See Voting Rights Act of 1965 § 2, as amended, 42 U.S.C. § 1973aa-6 (1994) (providing that persons with disabilities may seek assistance in voting); see also Americans with Disabilities Act of 1990, Title II, 42 U.S.C. §§ 12101, 12130-12165 (1994) (prohibiting the exclusion of disabled persons from participation in public activities).

172. *Eubanks*, 752 So.2d at 1121 n.1 (insisting the indictment was irrelevant to the case).

173. See Glenn R. Simpson & Evan Perez, *Broken Ballot—America's Dysfunctional Voting System—Tainted Returns: As Absentee Voters Increase in Number, Fear of Fraud Grows*, WALL ST. J., Dec. 19, 2000, at A1, reporting from Alabama, in June of that year, that "11 people—including a sheriff, a judge, and a court clerk—were indicted for buying absentee votes in 1998 with liquor and cash. Several pleaded guilty."

174. *Eubanks*, 752 So. 2d, at 1163, 1177, 1179. Two of the judges informed the court reporter that they would file additional "writings," but later backed out. *Id.* at 1163 (reporter's note).

(2002) 82 B.U. L.Rev. 654 The facts and proceedings of *Eubanks* seem to conspire to convince us that we are looking at extensive political corruption and that the Alabama Supreme Court is party to it. But we do not *know* that. It is perhaps more plausible to suppose that the Alabama Supreme Court intervened to restore or preserve rather than defeat the rule of law, or to avoid the extreme remedy of a fresh election. But we distrust the intervention; and among the main reasons we distrust the intervention is that the high court, in apparent eagerness to rule for Woodward—who himself had not moved for judgment—divested itself of the customary political cover of remand, even at the further cost of having to determine the number and legality of contested ballots itself—not even availing itself of the expedient of appointing an independent bipartisan auditor. In all of this the Alabama Supreme Court must have known that it could not avoid the appearance of taking an election away from the electorate. We view the state high court with suspicion *because* it took upon itself the counting of votes and the decision of the election's outcome. Although the Supreme Court of Alabama lacks the public faith invested in the Supreme Court of the United States, the parallels to *Bush v. Gore* are striking; and where the cases differ, the Alabama Supreme Court looks better, if only because it purported to be *counting* disputed ballots instead of refusing to let anyone count them at all.

The understanding that courts need to distance themselves from direct political action in election contest cases has special point in federal courts. Because elections are always the business of the states, federal judicial intrusion into the election process is also national intrusion into state governance. Of course federal courts must be open to review the constitutionality of state electoral processes and state election laws. When confronted with substantial constitutional claims in an election contest, federal courts will enforce the Constitution. They will void unconstitutional legislation in whole or in part, and in so doing will have to interpret state laws and sort out their inconsistencies.¹⁷⁶ This was the nature of the review given the *Bush-Gore* controversy by the Supreme Court itself. But there is inevitable offense to principles of federalism when any federal court goes so far as to *displace* a state's prescribed statutory electoral process, as interpreted by the state's highest court, on the ground of disagreement with the state court's interpretation of the state's own electoral code. There is inevitable offense to principles of federalism when the Supreme Court or other federal court takes a contested election from the processes, however clumsy, that a state legislature has prescribed to deal with it.¹⁷⁷

175. The judges on either side accused each other in so many words of "partisan politics." *Id.* at 1163 (concurring op.); *id.* at 1164 (dissenting op.).

176. For a compelling example *see, e.g.* *Bell v. Southwell*, 376 F.2d 659, 664-65 (5th Cir. 1967) (in a voters' rights case, ordering a new election upon a showing of blatant racial discrimination in the electoral process for which there was no pre-election remedy).

177. For expressions of these federalism concerns in elections cases in the United States Courts of Appeals, *see, e.g.* *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (authorizing federal relief nevertheless); *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) ("Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery...."); *Hutchinson v. Miller*, 797 F.2d 1279, 1280 (4th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987) ("Our constitution does not contemplate that the federal judiciary routinely will pass judgment on particular elections for federal, state or local office. The conduct of elections is instead a matter committed primarily to the control of states, and legislative bodies are traditionally the final judges of their own membership."); and *see* the useful general discussion in *Hubbard v.*

(2002) 82 B.U. L.Rev. 655 Of all federal courts, the Supreme Court—the one court from which no appeal can lie—should be the last to displace a state election. That is too much political power for the Court to take, and too naked an exercise of power for a democracy to bear. It must be acknowledged that if previous critics of *Bush v. Gore* have relied too heavily on considerations that are merely prudential, they are nevertheless correct that prudential as well as constitutional considerations should have prompted the Supreme Court to remand *Bush v. Gore* if the alternative was to hand the election to one of the parties. Constitutional faith is a faith in the Supreme Court in much greater degree than in courts generally. But even that consideration pales beside the awful reflection that, if the Justices, speaking finally, can halt ongoing elections and directly or indirectly declare the winner themselves, that is the end of our constitutional experiment.

Concededly, *Bush v. Gore* is not the only case in which the Supreme Court has famously halted a court-ordered election. In the controversy in the 1970s in Mobile, Alabama, over the discriminatory impact of at-large elections, the trial judge declared the existing city government unconstitutional under the Equal Protection Clause, and ordered an election under new rules. The Supreme Court reversed this disposition for want of a showing of "discriminatory intent."¹⁷⁸ The Court in that period had been engaged in energetically crafting tougher intent requirements not only for constitutional litigation under the Equal Protection Clause, but across a spectrum of federal-question cases.¹⁷⁹ Remanding in *City of Mobile*, the Court mandated that the (2002) 82 B.U. L.Rev. 656 district court call off the new election it had ordered.¹⁸⁰ But *City of Mobile* is hardly a sympathetic precedent for *Bush v. Gore*.¹⁸¹ After all, the case ought to have been

Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973) (denying relief). For a state supreme court's disapproval of federal judicial intervention in an election for state Chief Justice, when the relevant statutory electoral process had yet to run its course, see *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206, 1217 (Ala. 1995). For interesting discussion see Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1124-26 (1974).

178. *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980). To be distinguished, of course, are cases like *Fortson v. Morris*, 385 U.S. 231, 235-36 (1966), in which the Court determines an election winner by sustaining governing state election law as constitutional. *But see, e.g.* Alfred R. Light, *Bush v. Gore - Georgia Lived It Before: Pickrick and the Warren Court*, 18 GA. ST. U. L. REV. 449, 452-54 (2001) (arguing that *Fortson* was a case like *Bush v. Gore*).

179. For discussion, see Louise Weinberg, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 948-50 (1994); Louise Weinberg, *The New Judicial Federalism*, 29 STANFORD L. REV. 1191, 1192-94 (1977).

180. *City of Mobile*, 446 U.S. at 80.

181. Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973 (1994). Thus, voting rights litigation tends to be under the statute rather than under the Equal Protection Clause. Congress with some consistency requires a showing only of *disparate impact* rather than *discriminatory intent* for statutory anti-discrimination actions. *But see, e.g.* Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d to 2000d-7 (1994), which prohibits recipients of federal funds from intentionally discriminating on the basis of race, ethnicity, or national origin. Statutory departures from Supreme Court understandings of what a violation of the Equal Protection Clause is, of course, have yet to be tested under the restrictions upon the power of Congress newly imposed by *City of Boerne v. Flores*, 521 U.S. 507 (1997); see *infra* note 183.

governed by *Baker v. Carr*,¹⁸² in which discriminatory intent was not a feature. *City of Mobile* seemed so wrong to Congress that in 1982 it amended the Voting Rights Act to clarify that cases under the statute, if not under the Constitution, require only a showing of discriminatory results.¹⁸³ The even shorter answer to the question whether *City of Mobile* furnishes a precedent for *Bush v. Gore* is that in disapproving the trial court's disposition in *City of Mobile*, the Court was sustaining a completed underlying election, which it had itself validated on the merits—the essential feature missing in *Bush v. Gore*. It is also alarming, given *City of Mobile*, that *Bush v. Gore* halted a court-ordered counting of votes *even without* the showing of discriminatory intent¹⁸⁴ that has been required in elections cases ever since *City of Mobile*.¹⁸⁵

(2002) 82 B.U. L.Rev. 657 The concerns of democracy and republicanism that we have been examining have special force in election contests of national political significance, and especially when such cases reach the Supreme Court. One would not want the highest Court, from which there is no appeal, to abort, and name the winner of, a senatorial election within a state, when the balance of power in the Senate depends on the result.¹⁸⁶ The Constitution does not authorize the Justices to hold in their unchecked hands the balance of power in the Senate. But nowhere can the Constitution's contemplation of free elections weigh more heavily than in a *presidential* election, especially one in which the state result will determine the presidency for the nation—critical features of *Bush v. Gore*. As the per curiam opinion in *Bush v. Gore* conceded, it is the "Constitution's design to leave the selection of the President to the people,

182. 369 U.S. 186 (1962).

183. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (1994)). The effect of *City of Boerne v. Flores*, 521 U.S. 507 (1997), on "discriminatory impact" statutes under Congress's Fourteenth Amendment power is not yet known. *Boerne* holds that Congress has only remedial or preventive Fourteenth Amendment powers; Congress may not redefine a violation of the Fourteenth Amendment. Thus, the remedy provided must be proportional and congruent with the extent of known or threatened violations. *Boerne*, 521 U.S. at 520: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."

184. In the logic of Governor Bush's petition for certiorari, the record should at least have been held to support an inference of discriminatory intent on the part, apparently, of the Florida Supreme Court, or perhaps of "the state judges who would make the critical decisions if the vote count were to proceed." *Bush v. Gore*, 531 U.S. at 128 (Stevens, J., dissenting).

185. My colleague, Ernie Young, tells me that he believes the *Bush v. Gore* Court found the recount so irrational that it was not necessary to find it intentionally discriminatory as well. But he does not argue that *Bush v. Gore* should be read as a due process case. Rather, he relies on *Shaw v. Reno*, 509 U.S. 630, 658 (1993), to furnish a precedent for rational basis review of an equal protection voting rights claim. To be sure, in *Shaw v. Reno* the Court held that a gerrymandered district was so irrational as to be inexplicable except as an intentional racial separation. No further scrutiny was necessary. But *Shaw* was not about the unintended consequences of traditional American voting practices and standards. Rather, *Shaw*, in effect, held that that gerrymander was so extreme as to support an inference of intentional discrimination. Nothing in *Shaw* changes the position that it is invidious discrimination that is actionable under the Equal Protection Clause. Human blundering is not. That is a main reason why commentators have found the Court's equal protection rationale in *Bush v. Gore* to be unprecedented.

186. For an analogous state court case, *see, e.g.* *Marks v. Stinson*, 19 F.3d 873, 889-90 (3d Cir. 1994) (local election upon which the balance of political power in the state senate depended); *see also supra* note 151 (discussing *Marks*).

through their legislatures, and to the political sphere."¹⁸⁷

There is no room in the Constitution for a judicial kingmaker.

V. THE CONSTITUTIONAL LIMITS OF SUPREME COURT POWER TO DECIDE PRESIDENTIAL ELECTIONS

This last reflection brings us to the second cluster of concerns implicated by the happening of a *Bush v. Gore*. Although these concerns are also anchored in the Constitution, they are separate from those we have been discussing. There are two complex constitutional arguments that independently prohibit the Supreme Court (as opposed to other courts) from unilaterally naming the winner in a presidential election (as opposed to other elections), when the election within the state will determine the national outcome (as opposed to other presidential elections within a state).

These arguments address a peculiar set of problems which in the wake of the election of 2000 were widely noted, although not well understood. These are problems of entrenchment.¹⁸⁸ Commentators have been troubled by the fact (2002) 82 B.U. L.Rev. 658 that the President has the power of nomination of Supreme Court Justices—the future colleagues and successors of the present Justices. But no one has tried to trace this discomfort to its source. Yet it is precisely because the President has this power that *Bush v. Gore* becomes an affront to the Constitution of the United States on wholly independent grounds from those we have already examined. The rights to free elections and elected representation bear upon all courts in all elections cases. But when the Court handed down *Bush v. Gore*, a fracturing of our constitutional structure was sustained along more than that one fault line. We can detect other lines of serious damage, chiefly to Article III and to two strands of the principle of separation of powers.

The offense to Article III has to do with ideology, and politics, and controversies about constitutional and statutory interpretation. The offense occurs not simply when the Court chooses the President, a role Article III does not assign to it. The incidents of adjudication might be thought to encompass such an outcome on some set of facts. Rather, the offense to Article III occurs when, in choosing the President, majority Justices try to influence the choice of their own future brethren and successors, and so fasten on the country their own ideology and politics—their own interpretations of the Constitution and laws—for the future, beyond the ordinary reach of stare decisis and their own lifetimes. There is offense to Article III in this because life tenure is all the temporal power the Constitution bestows upon a Justice of the Supreme Court.¹⁸⁹

187. 531 U.S. 98, 111 (2000) (per curiam).

188. The entrenchment problem has been widely noted, although without much analysis. The earliest expression of concern with entrenchment as an issue appears in drafts of a letter by law professors, widely distributed to email lists. The letter eventually was signed by some 550 professors of law and published in *The New York Times*. See N.Y. TIMES, *supra* note 10, at A7. Some 100 additional legal academics made themselves signatories at the group's website, see *supra* note 13.

189. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their

Recall that Article III has been consistently read, for more than two centuries, as a ceiling, not a floor, on federal judicial power.¹⁹⁰ If we keep that (2002) 82 B.U. L.Rev. 659 understanding firmly in view, we can see that Article III's provision of life tenure for the Justices does not contemplate a self-renewing Supreme Court. Under the Constitution, the Supreme Court Justices, in their shifting coalitions, may fix their peculiar ideologies upon us for the whole of their long lives on the high bench. But—beyond the ordinary reach of *stare decisis*—they may not lengthen this period by seizing an opportunity to name the President of the United States.

Concededly this is a novel argument. But so is the circumstance to which the argument is addressed. Nor is this argument purely a textual one. The apparent purpose of the life-tenure provision of Article III is to ensure the political independence of the federal judiciary. It is not too great a stretch to apply the life-tenure provision to a case in which, through a political act, the judicial branch of the government seeks to influence the politics of the future federal judiciary. By attempting both to predetermine the politics of the Justices to come, and to influence the nature of the field of judicial nominees of the next President through an overt selection of the President himself, the Justices are using the judicial power itself to direct the very thinking of judges to come. To be sure, the President himself attempts to direct the thinking of the federal judiciary with every judicial nomination. But the President's nominations to the judiciary are authorized by the Constitution. It is within the contemplation of the Constitution that the President, the elected representative of the whole people, will make choices influenced by his own ideology. It is not within the contemplation of the Constitution that the President's choices will be controlled by the existing Supreme Court majority.

We can also begin to see, against this background, that *Bush v. Gore* was a twofold offense to the general principle of separation of powers, in that it was simultaneously an abuse of Article III and an assault on Article II. In attempting to predetermine the President's potential field of Supreme Court nominees, the Court abused its Article III power by arrogating to itself a part of the august power of nomination, a power that the Constitution lodges in the President, with the advice and consent of the Senate.

Continuance in Office." U.S. CONST. art. III, § 1.

190. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803) (Marshall, C.J.) (holding that Congress lacks power to *expand* the original jurisdiction of the Supreme Court beyond the limits of Article III) with *The Cohens v. Virginia*, 9 U.S. (6 Wheat.) 264, 399-401 (1821) (Marshall, C. J.) (explaining that Congress has power, under the Exceptions and Regulations Clause of Article III, to *restrict* the appellate jurisdiction of the Supreme Court). See, e.g. *Mesa v. California*, 489 U.S. 121, 136 (1989) (reaffirming, in a case considering the constitutionality of the officer removal statute as applied in a criminal case in which the officers raised no official defense or other national interest, that Congress could not expand the jurisdiction of the federal trial courts beyond the limits of Article III); but see *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (sustaining the jurisdictional provision of the Federal Sovereign Immunities Act of 1976 as applied in a case between a foreigner and a foreign country, arising abroad, under an ordinary contract, on reasoning similar to the federal "ingredient" theory of *Osborn v. Bank*, 22 U.S. (9 Wheat.) 738, 823 (1824) (Marshall, C.J.)). For an analysis of *Verlinden*, *Mesa*, *Osborn*, and related cases under the Due Process Clause as well as Article III, see Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 B.Y.U. L. REV. 731, 793-97 (1995).

To be sure, an individual Justice can be expected to try to resign at a politically strategic time, for the very purpose of entrenching her ideological outlook upon the Court through increasing the likelihood of a choice of an ideologically congenial successor. But that is not what was happening in *Bush v. Gore*. It is one thing for a single Justice to plan a strategic resignation. It is quite another for the majority of Justices, sitting within the jurisdiction of the Supreme Court of the United States, cloaked in all the majesty of Article III, to make the Court, as an institution, their instrument in putting their preferred candidate into the presidency, in order to facilitate their own strategic resignations. In a way that the single Justice cannot, the Court that decides who shall be President abuses the Article III judicial power. The abuse goes **(2002) 82 B.U. L.Rev. 660** well beyond the effects of a single strategic resignation, in that it seeks to direct the exercise of the Article II prerogatives of the presidency across the range of judicial nominations during that presidency.

For the composition of the federal judiciary as a whole, of course, is also at stake in a presidential election. We can readily see that the *Bush v. Gore* Court entangled itself in the future of the federal trial and appellate judiciary,¹⁹¹ as well as the Supreme Court. *Bush v. Gore* can be viewed as a kind of court-packing plan, a wholesale attempt to shape the future of the federal judiciary from top to bottom, with the some of the same unconstitutional resonances we have been examining, the same abuse of Article III, and the same encroachment upon Article II.

The peculiar vice of these encroachments is their thrust into the future. The overreaching is temporal in purpose. This temporal overreaching can become compounded by a further danger. Conceivably, whether the Court seeks such a result or not, the Court might clear a path for a cohort of future Justices who are not only of a like *mind* as the current majority Justices, but also of a like *ambition*. In this way the Justices could become, like a caste of Janissaries,¹⁹² future and present kingmakers in potential perpetuity. And, because the President would retain the power of nominating the Justices, in anointing itself perpetual kingmaker the Court would be anointing itself perpetual lawgiver too—self-perpetuating lawgiver and kingmaker both, not merely now, but possibly in perpetuity,¹⁹³ *quondam et futurus*. There are practical limits, but given a case—perhaps a contrived case—contesting a presidential election, it will be open to the

191. Cf. Tom Teepen, Cox Newspapers, Commentary, *Rehnquist Is Right: We Need Judicial Reform*, AUSTIN AMERICAN-STATESMAN, Jan. 7, 2002, at A11 (viewing President Bush's slate of nominees to the federal bench thus far as "one of the most ideologically vivid—lurid?—ever advanced"). See also the post-election website run by the Alliance for Justice, with information on the Bush administration's judicial nominees and coverage of the progress of the federal judicial selection process, at <http://www.afj.org/jsp/home.html> (last visited Mar. 15, 2002). See also, e.g., <http://www.IndependentJudiciary.com> (last visited Mar. 15, 2002).

192. The Janissaries originally were Christian captives of the Ottoman Turks under Sultan Murad I. They were forcibly converted to Islam and subjected to rigorous training. Their elite military corps became very powerful and could name or depose sultans. Moslems eager to join the Janissaries bribed their way in. By the 17th century the Janissaries were wholly Moslem, and membership had become substantially hereditary. It was not possible to dislodge them from power until the 19th century. See generally GODFREY GOODWIN, *THE JANISSARIES* (1997); FERUZ AHMAD, *THE MAKING OF MODERN TURKEY* (1993).

193. That would remain a risk to the extent challenges to presidential elections were to become a staple of the Court's quadrennial docket. One can conceive of a dystopian future in which the Court dispenses with the formality even of a feigned case, and adopts a pious fiction, duly recited whenever the outcome of a presidential election is not to its liking, that "a case has come before the Court...."

Court, by becoming present kingmaker, to become once **(2002) 82 B.U. L.Rev. 661** and future lawgiver at the same time.

These unconstitutional opportunities are hardly exaggerated or fanciful, since the Court has now availed itself of them, or at least shown itself willing to disregard the appearance of having availed itself of them, in *Bush v. Gore*. But it might be argued that this pathology is more likely to be self-limiting than self-perpetuating. Even assuming the fortuity of a presidential election contest in the courts every four years, how often can the Court decide a presidential election without destroying public confidence? How many of the Court's few and precious political chips can be staked on this game? The payoff was certainly not worth the hazards of the play in *Bush v. Gore*. Apparently chastened by the experience of *Bush v. Gore*, those among the Justices who may have looked forward to resigning have not, in fact, resigned.¹⁹⁴ And we now have reason to believe that, left to play itself out in Florida, the court-ordered recount would have yielded a victory for Bush.¹⁹⁵ Yet, all that having been said, there remains the risk of another such case. Having taken upon itself in *Bush v. Gore* the unilateral decision of a presidential election, the Supreme Court may find it easier to play that role the next time. A future Court, given the opportunity, may be emboldened rather than chastened by the precedent of *Bush v. Gore*. The ideological stakes may be high enough to suggest to the Court that it can institutionalize the kingmaker role.

And the ideological stakes are indeed likely to be high. The future composition of the Supreme Court is always a salient issue in a presidential election, and arguably the key issue—not only in elections we remember in part for that feature, like the elections of 1800¹⁹⁶ or 1936,¹⁹⁷ but in all presidential elections. Arguably this is so whether or not the candidates campaign on that issue. I would even argue that the future of the Court has been the key issue in elections that have been thought to be about something else, like the election of 1860.¹⁹⁸ But my point here is that the future of the Court was very much at stake in the election that the Supreme Court decided in 2000, in *Bush v. Gore*.

VI. THE STAKES

Political theorists who write about presidential elections seem uninterested **(2002) 82 B.U.**

194. See *supra* notes 21-26 and accompanying text.

195. See Fessenden & Broder, *Times Study*, *supra* note 11.

196. See WEINBERG, FEDERAL COURTS, *supra* note 179, at 281-83, 290-91 (on the political background of *Marbury v. Madison*).

197. Perceiving that he himself was the issue, Roosevelt campaigned on his themes of "happy days" and moving "forward." In Roosevelt's last known encounter with Governor Alf Landon, in September 1936, the candidates merely "exchanged pleasantries." See EILEEN SHIELDS-WEST, THE WORLD ALMANAC OF PRESIDENTIAL CAMPAIGNS 174-75 (1992).

198. I am working on a paper on the Supreme Court and the election of 1860 which will make this point.

L.Rev. 662 in the phenomenon,¹⁹⁹ but it seems obvious that the power of the President to name successors to the Court is a great prize of every presidential election. The Supreme Court was *the* great prize in the election of 2000, no matter what the candidates said. It is a curious feature of the presidential election campaign of 2000 that neither of the uncharismatic candidates *had* anything very interesting to say. What is surprising is the degree of passion these lackluster rivals generated at the ideological extremes of their parties. What was the election *about*?

Ralph Nader, the third-party candidate from the left, managed to split the Democratic party by arguing that the election was not about anything—that the main party candidates were both tools of the same moneyed interests.²⁰⁰ Nader gave insufficient weight to the ideological differences at the extremes. The irony is that the campaigns of the two major parties seemed to justify Nader's assessment. Because Bush's strategy, apparently, was to conceal his dependence upon support from the hard right, and Gore's strategy, apparently, was to make Marc Antony-like promises to various interest groups, this presidential election was fought over such things as degrees of support for prescription drugs for the elderly.

Yet the ideologues on both sides were telling us all along what was at stake—for them.²⁰¹ The religious right joined civil liberties groups in making a crusade of the election because the President would have it in his power to do something about "social values:" to try to put prayer back in schools, "defend" the institution of marriage,²⁰² continue to find protections for white rights,²⁰³ **(2002) 82 B.U. L.Rev. 663** and put a stop to the "murder" of fetuses. (The "murder" of stem cells had not yet captured the religious imagination.) Similarly, business and agricultural conservatives joined consumer and labor groups in making a crusade of the election simply because the President would have it in his power to implement a free market ideology: to

199. Standard and current works on the nomination of Supreme Court Justices make little or no reference to the Supreme Court nominations issue as a particular feature of presidential elections. *See, e.g.* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (revised ed. 1999); DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS (1999); DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999); JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES (1995).

200. *See, for background, LEWIS, THE BUYING OF THE PRESIDENT, supra note 15 (exploring interest-group expenditures in the presidential election of 2000).*

201. *See, for current discussion of past ideological controversies in the Supreme Court, HOWARD GILLMAN & CORNELL CLAYTON, THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (1999). See, for current discussion of present ideological controversies that might come before the Rehnquist Court, William J. Crotty, AMERICA'S CHOICE 2000: ENTERING A NEW MILLENNIUM (2001). See, e.g. MEREDITH BAGBY, WE'VE GOT ISSUES: ELECTION 2000: A GUIDE FOR 20-AND 30-SOMETHINGS (2000); Symposium, Advice to the New American President, 24 HARV. J. L. & PUB. POL'Y 369 (2001); see also, e.g., Jack N. Rakove, Judges: Conferring a Lifetime of Ideology, N.Y. TIMES, May 13, 2001, at 5.*

202. For recent discussion of this issue *see, e.g.* Gary Chatier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA. L. REV. 1593 (2001).

203. *See, e.g. Shaw v. Reno, 509 U.S. 630, 658 (1993) (holding, in a challenge to a redistricting, that white voters are denied equal protection when their district is gerrymandered to create a majority black district). See generally Louise Weinberg, This Activist Court, GEO. J. L. & PUB. POL. (forthcoming 2002-03).*

continue to erode antitrust enforcement and antidiscrimination laws; to continue to advance rights to sell guns,²⁰⁴ and tobacco²⁰⁵ to the youth market; and to continue to erode onerous and costly environmental, securities, and labor regulations. The President could advance these causes through his pronouncements, positions, and actions, and through the introduction of legislation.²⁰⁶ But a more potent and less ephemeral weapon in the fight would be his power of nomination to the federal judiciary, particularly to the Supreme Court. Even one death or resignation, even among some of the "conservatives" on the Court, might do the trick. If, for example, Justice O'Connor—the keeper of the keys to *Roe v. Wade*²⁰⁷—should resign, the President could find a replacement for her more likely to champion the rights of fertilized eggs. There was some talk of "litmus tests;" journalists asked the candidates about their "litmus tests" for Supreme Court nominees. The symbol of such concerns had come to be *Roe v. Wade*.²⁰⁸ Although *Roe* has become so diminished as to leave the reproductive choices of low-wage and unemployed women virtually at the mercy of state legislatures, the religious right and the feminist left seemed consumed by this issue.

The election, in short, was about gaining and holding the ideological future ground. Especially in the absence of any overriding controversy concerning our foreign policy, about which Americans tend to be reasonably united in any event, these policies *were* the stakes, and thus the election was obviously about **(2002) 82 B.U. L.Rev. 664** the Supreme Court. That is especially so since the President's power over the ideology of the lower federal judiciary could be somewhat neutralized in a strategic selection of cases by the Supreme Court. Indeed, the President's only power over the ideologies of the state judiciary would be his power of nomination to the United States Supreme Court. In the final analysis the Supreme Court was the issue.

CONCLUSION

With *Bush v. Gore*, the Supreme Court has shaken not simply our constitutional faith, but

204. *Cf.* *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that Congress lacks commerce power to criminalize the possession of guns near schools). Presumably the power of Congress to criminalize the sale of guns near schools is, for the moment, safe.

205. *Cf.* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565-66 (2001) (holding, *inter alia*, that state regulations prohibiting outdoor advertising of smokeless tobacco or cigars within 1,000 feet of schools or playgrounds violates the First Amendment, as do state regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than 5 feet from the floor of a retail establishment located within 1,000 feet of a school or playground).

206. *See, e.g.* Eric W. Treene, *Religion, The Public Square, and the Presidency*, 24 HARV. J. OF L. & PUB. POL'Y 573 (2001) (discussing ways in which a president can strengthen the role of religion in public life).

207. 410 U.S. 113 (1973).

208. From the circumstance that Chief Justice Rehnquist and Justices Scalia and Thomas have been explicit about their eagerness to rid the country of *Roe v. Wade* altogether, Professor Dworkin argues that *Bush v. Gore* was about future nominations to the Court. Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. OF BOOKS, Jan. 11, 2001, at 53.

our constitutional foundations. In its magnitude, this assault on the Constitution by its final expositor vastly overshadows the appearance of conflict of interest or partisanship so disturbing to the case's critics.²⁰⁹

Given the force of our democratic traditions, rooted as they are in the Constitution, we have seen that the courts must and do defer in election contest cases to the electorate and to the electoral process. In part for prudential reasons as well, courts should and do strive to distance themselves from the decision of election outcomes. These general principles of deference have their bite not at the moment of taking jurisdiction, nor of decision on the merits, but rather at the remedial stages of election contest litigation. Because courts generally may not take elections from the electorate, courts may not halt or void elections without returning them to the electorate. All courts must, and do, avoid intervention in an election while a prescribed electoral process has yet to run its course. The alternative, making the judgment winner the election winner, in the absence of a completed, valid election, is a political act that is not within the power of the judiciary. Because the Constitution contemplates free elections and representation only by those who have been chosen by the electorate, courts lack constitutional power to make a unilateral political choice.

All of these principles have application in the Supreme Court. The Court should not unilaterally determine the outcome of an election. The Court should not intervene in an election in such a way as to take it away from the electorate, or while the statutory process has yet to run its course. If it must void an election or a recount, the Court must remand for a new election, or a fresh recount. And in all elections cases, even in cases in which the Court must control a politicized state judiciary—cases more like the non-elections case of *NAACP v. Alabama* than *Bush v. Gore*—the Court should avail itself of remedial options that can distance it from an election's outcome.

In cases like *Bush v. Gore*, involving a challenge to a presidential election within a state that will in fact determine the presidency of the United States, (2002) 82 B.U. L.Rev. 665 there are additional constitutional bases for these conclusions. Article III, Article II, and more generally the principle of separation of powers, control such cases. In a presidential election, powerful contending groups—engaged in a *kulturkampf* at the passionate extremes of ideology—seek to influence the future of the Supreme Court through the President's power to nominate the Justices. They do so in the interest of protecting a cherished case or upsetting a hated one.²¹⁰ They wish to make an ideological change or preserve an ideological advantage. In other words, they seek to make or prevent an end run around the obstacles Article V presents to constitutional amendment.

To say that *Roe v. Wade* was in some sense "at stake" in the election of 2000, at least to American ideologues at either end of the political spectrum, is to see that what was "at stake"

209. *But see, e.g.* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1406, 1439 (2001) ("The problem is... whether the Court faced a serious conflict of interest.... It mattered a great deal to the Justices who became president").

210. On the effect, for example, of *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) on the presidential election of 1896, see Kurt Hohenstein, Note, *William Jennings Bryan and the Income Tax: Economic Statism and Judicial Usurpation in the Election of 1896*, 16 J. L. & POL. 163 (2000).

was the future of the Supreme Court itself. There lay the future of constitutional interpretation. There too lay the future of the power of Congress—of the "free" market—of the environment—of civil rights. But since the future of the Supreme Court is always at stake in a presidential election, it becomes utterly inappropriate and indeed unconstitutional for the Court itself to intervene in a presidential election in such a way as to determine its outcome, as the Court did in *Bush v. Gore*.

When the Court takes a hand in the determination of the outcome of a presidential election, without permitting the election and the processes prescribed for resolving it to run their course, the Court not only attacks our republican form of government, and our democracy, but also the powers of the political branches, and the independence of the future judiciary. In attempting to influence the selection of future Justices through the naming of a President, the Court projects its temporal power of constitutional interpretation and its own ideologies beyond the ordinary reaches of stare decisis because beyond the life-tenure limits of Article III. In thus attempting to cabin the field of prospective federal judicial nominees, the Court encroaches upon the prerogatives the Constitution confides to the presidency. When the Court attempts to control the ideology of courts in the future by becoming kingmaker, it also becomes a self-perpetuating lawgiver.

No power like the concentrated inauthentic power asserted in *Bush v. Gore* can be exercised consistent with our constitutional understandings. That is too much naked power for the Constitution to bear. Whatever the partisan passions that may have dulled the majority's sensibilities in *Bush v. Gore*, we can see, in retrospect and from now on, that the Supreme Court cannot abort a presidential election and unilaterally name the winner. The Court got one **(2002) 82 B.U. L.Rev. 666** thing right: *Bush v. Gore* was for one occasion only.²¹¹ It must never happen again.

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["Of Sovereignty and Union: The Legends of Alden](#) [Annual Federal Courts Issue]," 76 NOTRE DAME LAW REVIEW 1113 (2001).

211. *Bush v. Gore*, 531 U.S. 98, 109 (2000): "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

["The Article III Box: The Power of 'Congress' to Attack the 'Jurisdiction' of 'Federal Courts' \[Symposium: Restructuring Federal Courts\],"](#) 78 TEXAS LAW REVIEW 1405 (2000).

["Choosing Law and Giving Justice \[Symposium: Tribute to Symeon C. Symeonides\],"](#) 60 LOUISIANA LAW REVIEW 1361 (2000).

["Fear and Federalism \[annual constitutional law symposium\],"](#) 23 OHIO NORTHERN UNIVERSITY LAW REVIEW 1295 (1997).

["Holmes' Failure,"](#) 96 MICHIGAN LAW REVIEW 691 (1997).

["Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist \[AALS Conference Symposium\],"](#) 56 MARYLAND LAW REVIEW 1316 (1997).

["The Power of Congress Over Courts in Nonfederal Cases,"](#) 1995 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 731.

["Political Questions and the Guarantee Clause \[Rothberger Conference on Constitutional Law\],"](#) 65 UNIVERSITY OF COLORADO LAW REVIEW 849 (1994).

["The Federal-State Conflict of Laws: 'Actual' Conflicts,"](#) 70 TEXAS LAW REVIEW 1743 (1992).

["Against Comity,"](#) 80 GEORGETOWN LAW JOURNAL 53 (1991).

["The Monroe Mystery Solved: Beyond the 'Unhappy History' Theory of Civil Rights Litigation \[Federal Courts Symposium\],"](#) 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 737.

["Federal Common Law,"](#) 83 NORTHWESTERN UNIVERSITY LAW REVIEW 805 (1989).

["Choice of Law and Minimal Scrutiny,"](#) 49 UNIVERSITY OF CHICAGO LAW REVIEW 440 (1982). [Anthologized in A CONFLICT-OF-LAWS ANTHOLOGY 339 (Gene R. Shreve ed.; Cincinnati: Anderson Publishing Co., 1997).]

["The New Judicial Federalism,"](#) 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]