

THE REGULATORY ROLE OF STATE
CONSTITUTIONAL STRUCTURAL CONSTRAINTS
IN PRESIDENTIAL ELECTIONS

JAMES A. GARDNER*

I. THE <i>BUSH</i> DECISIONS.....	627
A. Bush I.....	627
B. Bush II.....	629
II. STATE POWER IN A FEDERAL SYSTEM.....	630
III. STATE CONSTITUTIONS AND THE SELECTION OF PRESIDENTIAL ELECTORS.....	640
IV. DECENTRALIZATION OF STATE ELECTORAL ADMINISTRATION.....	651
CONCLUSION.....	658

In our federal system of government, state officials are normally understood to draw their legitimate authority from affirmative grants of power under their state’s constitution. Just as it grants official power, however, a state constitution is normally understood to limit and condition it as well in ways that conclusively bind state actors. In *Bush v. Palm Beach County Canvassing Board (Bush I)*¹ and *Bush v. Gore (Bush II)*,² the U.S. Supreme Court unjustifiably departed from this model, a model drawn from salutary principles of federalism that play a significant role in the protection of popular liberty.

State constitutions serve three main functions: they authorize and empower the state government to achieve the public good; they grant the state power sufficient to resist abuses of national authority by the national government; and they control the state power thus granted by establishing institutions of governmental self-restraint so that the state government does not become an undue threat to its own people. Any state constitution thus strikes a balance between empowerment and restraint of state government. The way any state polity chooses to strike this balance will depend upon its trust in government generally and its relative trust of state and national power in particular. The U.S. Constitution, however, has virtually nothing to say about how a state may strike this balance. Although it protects a state’s citizens from their own state government by establishing a minimal level of individual rights, the U.S. Constitution leaves to state polities, through their state constitutions, any decisions about additional structural limitations on state power.

* Visiting Professor of Law, State University of New York, University at Buffalo School of Law; Professor of Law, Western New England College School of Law. I thank Bob Williams for commenting on an earlier draft.

1. 531 U.S. 70 (2000) (per curiam).
2. 531 U.S. 98 (2000) (per curiam).

In the *Bush* cases, the Supreme Court interpreted Article II, Section 1 and the Equal Protection Clause of the U.S. Constitution to create a different system in presidential elections. According to the Court in *Bush I*, a state legislature engaged in the process of selecting presidential electors, or determining how they will be selected, is free from any constraints that the state constitution might otherwise impose on the exercise of legislative power. The Court's ruling in *Bush II* further invaded state autonomy over the internal structure of state government by subjecting Florida's decision to decentralize the administration of statewide elections to what amounts to a federal nondelegation doctrine for states. These rulings unjustifiably disable state constitutions from serving in presidential elections the significant, liberty-protective regulatory function they serve on every other occasion in which state power is exercised: restraining the organs of state government from abusing important state powers.

Part I of this paper briefly discusses the *Bush* cases. Part II then lays out the role that state constitutions normally play in implementing the American structure of federalism, a system the principal goal of which is the adequate protection of liberty. Part III turns to whether state constitutions should be understood to play a diminished role in the protection of state liberty during presidential elections. Although Article II authorizes state legislatures to appoint presidential electors,³ I argue, it by no means follows that in so doing Article II unmoors state legislatures from the state constitutional restraints upon legislative power that attend its use in every other circumstance. In fact, it is far from unusual for the national Constitution to grant authority which state constitutions then limit or revoke, and there is no reason to suspect a different arrangement here. Moreover, if state constitutions do not permit state legislatures to exercise legislative power in a way that comports with the requirements of Article II, then Article II provides an obvious remedy: exclusion of the state's electors from the presidential selection process.

I argue in Part IV that the Court's ruling in *Bush II*, although couched in the language of equal protection, responds to similarly misplaced concerns about autonomous state decisions regarding the internal structure of state government. The Court's equal protection analysis is entirely unsatisfactory. Its main concern is apparently with what would ordinarily be characterized as a due process objection to the vagueness of the "intent of the voter" standard. Vagueness, however, is a concern under the Due Process Clause only with respect to laws addressed to individuals, not government officials. When laws are too vague for government officials reliably to follow, the problem is better cast in terms of nondelegation, a separation of

3. U.S. CONST. art. II, § 1.

powers doctrine. Yet the U.S. Constitution has nothing to say about the way a state chooses to divide power on the state level, including its choice not to observe a strict nondelegation doctrine. Moreover, a state's decision to decentralize the administration of elections is also a legitimate internal structural decision. To the extent it is based on a distrust of state as compared to local power, such a vertical dispersion of state power serves as a mechanism by which the state polity may protect itself from centralized state abuses of power during statewide elections. The Court's misguided equal protection analysis unjustifiably invades this essential area of state autonomy. In reaching these decisions, the Court has acted in a way that strips from the presidential election process two important, liberty-protective safeguards.

I. THE *BUSH* DECISIONS

A. Bush I

Article II, Section 1 of the U.S. Constitution provides that presidential electors from each state shall be selected "in such Manner as the Legislature thereof may direct." The Florida Legislature, like every other state legislature in the union, has long re delegated that responsibility to the people of the state, who elect slates of electors pledged to particular candidates.⁴ The first count of Florida's popular vote in the November 7, 2000, presidential election showed an exceedingly close result—George Bush led Al Gore by fewer than 1,800 votes out of nearly six million cast.⁵ Under Florida law, the closeness of the result triggered an automatic machine recount,⁶ further reducing Bush's lead. At the request of Florida Democratic Party officials, manual recounts of one percent of the ballots were conducted in several counties.⁷ These recounts further narrowed Bush's lead, causing county officials to determine that "an error in the vote tabulation which could affect the outcome of the election"⁸ had occurred, thus warranting full, countywide, manual recounts.⁹

At this point, questions arose concerning the statutory deadline by which counties conducting manual recounts had to certify their results to the Florida Secretary of State for final statewide tabulation.¹⁰ The Secretary of State, relying on an advisory opinion issued by the Florida Division of Elections, announced that she would not accept

4. FLA. STAT. § 103.011 (2000).

5. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1225 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

6. FLA. STAT. § 102.141(4) (2000) (amended 2001).

7. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1225.

8. FLA. STAT. § 102.166(5)(c) (2000) (amended 2001).

9. *Id.* § 102.166(5) (amended 2001).

10. *See Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1225-26.

vote totals submitted later than seven days after the election,¹¹ as provided in one section of Florida's election code.¹² Some county boards of elections, concerned that the seven-day statutory deadline would not provide them with enough time to carry out recounts that they were obliged to conduct under other sections of the election code, filed suit seeking a reconciliation of their duties.¹³ Several related cases were then consolidated before the Florida Supreme Court, which ruled on November 21, 2000.¹⁴

In its opinion, the Florida Supreme Court interpreted the contested provisions of Florida's election code.¹⁵ It held first that the statutory phrase "error in the vote tabulation" includes "a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts,"¹⁶ thus affirming the counties' decisions to conduct full manual recounts.¹⁷ It then reconciled several seemingly inconsistent provisions of the Florida election code concerning the timing of manual recounts,¹⁸ holding that the seven-day deadline was not a final deadline, and that the Secretary of State must accept manual recount totals unless they are so late as to preclude unsuccessful candidates from filing election contests.¹⁹ Finally, given the lateness of the hour and the tangled course of events, the court invoked its equitable powers to fashion a remedy in which the Secretary of State was directed to accept manual recount totals from counties until November 26, 2000.²⁰

In reaching this result, the Florida Supreme Court looked frequently to the Florida Constitution for guidance.²¹ The court's analysis was guided, it held, by a paramount obligation to effectuate the state constitutional right to vote of the voters, whom it regarded as the real parties in interest.²² In reviewing the applicable law, the court listed first two sections of the Florida Constitution dealing with elections, including one that authorizes the state legislature to regulate elections by law.²³ Finally, in construing conflicting electoral statutes and settling on a remedy, the court noted that the Florida

11. *Id.* at 1226.

12. FLA. STAT. § 102.111(1) (2000) (amended 2001).

13. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d. at 1226.

14. *Id.* at 1220, 1226.

15. *Id.* at 1220.

16. *Id.* at 1229.

17. *See id.*

18. *See id.* at 1231-39.

19. *Id.* at 1239.

20. *Id.* at 1240.

21. *See id.*

22. *Id.* at 1227-28.

23. *Id.* at 1230 (citing FLA. CONST. art. VI, § 1 ("Registration and election shall . . . be regulated by law . . .")).

Constitution prohibits the legislature from regulating elections in ways that impose “unreasonable or unnecessary” restraints on the right of suffrage.”²⁴

Bush appealed this ruling to the U.S. Supreme Court, which, in *Bush I*, vacated the Florida Supreme Court’s ruling and remanded for clarification as to the actual basis for the lower court decision.²⁵ The Court was unsure, it said, “as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2.”²⁶ Although the Court technically went no further than identifying this ambiguity, it suggested strongly throughout the opinion that the Florida Supreme Court had committed reversible error to the extent it had viewed the Florida Constitution as constraining in any way the authority of the Florida Legislature under Article II, Section 1 of the U.S. Constitution.²⁷ The Court quoted dicta from its 1892 decision in *McPherson v. Blacker*,²⁸ suggesting that Article II’s specific grant of authority to the “state legislature,” as opposed to the state itself, not only “operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power” but also “cannot be held to operate as a limitation on that power itself.”²⁹ Relying on this dictum, the Court went on to observe that the Florida Supreme Court had said things in its opinion “that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, ‘circumscribe the legislative power.’”³⁰ The implication of this sentence is clearly that the Florida Constitution may not be so read.

B. Bush II

Whereas *Bush I* arose out of the “protest” phase of Florida’s 2000 presidential election, *Bush II* arose out of the subsequent “contest” phase. Proceeding subject to the Florida Supreme Court’s decision in *Palm Beach County Canvassing Board v. Harris*, the Florida Election Canvassing Commission, after receiving various county manual recount totals, certified George Bush the winner of Florida’s electoral votes by a margin of 537 votes.³¹ Gore then filed a statutory contest proceeding, arguing that votes had been illegally counted in numbers

24. *Id.* at 1236-37 (quoting *Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977)).

25. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam).

26. *Id.*

27. *See id.*

28. 146 U.S. 1 (1892).

29. 531 U.S. at 76 (quoting *McPherson*, 146 U.S. at 25).

30. *Id.* at 77.

31. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000) (per curiam), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

sufficient to change the outcome of the election.³² In conducting an appellate review of various aspects of the counting of presidential votes, the Florida Supreme Court interpreted the state election code to require that certain disputed ballots be counted in Gore's total.³³ In addition, the court ruled that approximately 9,000 additional ballots (the so-called "undercounts")³⁴ in Miami-Dade County had to be recounted manually and the totals included in the final count.³⁵ Finally, the court held that similarly undercounted ballots throughout the state might also need to be manually counted and remanded the case for such a determination.³⁶ In conducting any recounts, the court held, canvassers should be guided by the statutory standard of attempting to effectuate the "clear . . . intent of the voter."³⁷

On appeal in *Bush II*, the U.S. Supreme Court reversed.³⁸ After noting that the U.S. Constitution grants no one the right to vote for presidential electors,³⁹ the Court went on to observe that the Florida Legislature's decision to permit citizens to vote for electors gave rise to an obligation under the Equal Protection Clause of the U.S. Constitution to avoid valuing any individual's vote arbitrarily over the vote of another.⁴⁰ The Florida Supreme Court's recount decision, the Court held, did not satisfy this obligation because the standard it directed to be applied—the "intent of the voter" standard—was too un-specific "to ensure its equal application."⁴¹ As a result, the Court said, "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."⁴² This process was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter" in the recount process.⁴³

II. STATE POWER IN A FEDERAL SYSTEM

To get our bearings, it will be useful to review some basic principles of federalism. Our system of government is founded on two fundamental premises that are in considerable tension with one another: first, government is necessary; second, it is dangerous. That

32. *Id.* (relying on FLA. STAT. § 102.168(3)(c) (2000)).

33. *Id.* at 1248.

34. Undercounted ballots are those on which a voter attempted to punch a vote for President but did so incompletely or in a way that caused the tabulating machine to record the ballot as registering no vote for President.

35. *Gore v. Harris*, 772 So. 2d at 1262.

36. *Id.*

37. *Id.*; see FLA. STAT. § 101.5614(5) (2000) (amended 2001).

38. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

39. *Id.* at 104.

40. *Id.* at 104-05.

41. *Id.* at 106.

42. *Id.*

43. *Id.* at 109.

we have a system of government at all shows, of course, that Americans have decided that the potential benefits of government outweigh the potential risks. If citizens were able to achieve all their goals without the application of organized governmental power, presumably they would attempt to do so without creating and empowering a government, with its attendant risk of official tyranny. The fact that the American polity has seen fit to create not one but many governments, much less to endow them with the enormous powers they currently possess, suggests that organized, collective social power wielded by a governmental apparatus is essential to the achievement of collective popular goals, whatever they may be.

American governments, it thus seems safe to say, require significant affirmative powers if they are to achieve the apparently ambitious goals that the people have established for them, and in so doing to effectuate the public good as citizens conceive it. That kind of power, however, is dangerous, and one of the chief sources of danger is the possibility that it may become excessively concentrated and centralized. As Madison famously observed, “[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny.”⁴⁴ Federalism, of course, is a method of structuring government power that recognizes the necessity of government while attempting to reduce the risk of official tyranny. Federalism protects liberty by giving each level of government, state and federal, substantial powers sufficient to allow each to monitor and check the abuses of the other. As with the horizontal separation of powers, which divides governmental power into legislative, executive, and judicial branches, each piece of government in this fragmented system is given the power and incentive to struggle against the others: “[a]mbition,” as Madison put it, “must be made to counteract ambition.”⁴⁵ The result is a compound federal republic in which power is deeply fragmented, reducing as far as possible by structural means the likelihood that a tyrannical measure of power can be accumulated in a single set of hands:

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different

44. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

45. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

governments will controul [sic] each other; at the same time that each will be controuled [sic] by itself.⁴⁶

The multiplicity of power centers in the American scheme can create the impression that the system is chaotic—a pure, Hobbesian war of all against all without any purpose other than the accumulation of power. This is not the case, or at least need not be the case. What unifies the dispersion of governmental power, in the Framers' view, is the people, for the entire system is designed to assure as far as possible that their wishes will be done and their liberties left intact. "The Federal and State Governments," Madison observes, "are in fact but different agents and trustees of the people, instituted with different powers and designated for different purposes."⁴⁷ Federalism is thus more than a passive institutionalization of political conflict. It is a dynamic system that is designed to be manipulated by the people to produce results they desire. Hamilton put this point clearly:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.⁴⁸

Thus, the Framers expressly contemplated that popular allegiances to any government would not be fixed organically but would ebb and flow according to their instrumental value to the populace at any given time. Each level of government would be given sufficient power to check any tyrannical tendencies of the other, but when and whether to activate this checking power would be up to the people. The "double security" of which Madison spoke,⁴⁹ then, does not arise so much from some complicated scheme of complementary powers, as is so often supposed, but from a conceptually much simpler arrangement in which the state and national governments independently police much of the same turf. To protect that turf, the people make use

46. *Id.* at 350-51.

47. THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961).

48. THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also THE FEDERALIST NO. 46, *supra* note 47, at 317, in which Madison, after remarking that Americans place their faith and trust primarily in their state governments, observes:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . .

49. See *supra* text accompanying note 46.

of whichever level of government is more capable and accommodating at any particular moment.

This scheme of federalism clearly contemplates that states will have significant powers. First, even apart from their functions in monitoring the exercise of national power, states will likely need significant powers if only to accomplish directly the public good, however the people of the states may understand it. The powers of the national government are impressive, but they are also limited; many collective social goals are largely beyond the power of Congress to effectuate. As we might expect, contemporary state governments possess significant powers which they can use affirmatively in pursuit of the public good. Indeed, the scope of state power tends to be (although it need not be) broader than the scope of national power, reaching many areas of ordinary life that the national government is usually understood to lack the power to regulate.⁵⁰ For example, state law overwhelmingly provides the controlling substantive rules in the laws of tort, contract, commercial transactions, crimes, property, wills, and family formation—the areas of law that are most likely to affect individuals directly in the most significant aspects of their daily lives.

Second, it is clear, particularly given the immense power now wielded by the national government, that state governments must themselves possess considerable power if federalism is to work as intended. States cannot possibly serve as effective counterweights to national power if they are too weak to erect effective obstacles to abuses of national power. States presently have numerous means at their disposal to check abusive exercises of national power. These range from illegal or extraconstitutional methods such as secession, the threat of force, or peaceful defiance of national law; to quasi-legal strategies such as deliberate failure fully to comply with or to enforce binding federal law; to fully legal means such as the use of political pressure, the exercise of ordinary state power where it is not preempted, refusal of national financial incentives, lawsuits against the national government in federal court, and setting higher standards of state conduct by granting more generous constitutional or statutory rights. All of these means of resistance, however, require the state to possess and exercise considerable governmental power.

Because state power in a well-functioning federal system must be significant, it inevitably presents a real and substantial risk of abuse. For this reason, state power must be not only granted for legitimate purposes, but somehow restrained so that it will not be used for illegitimate ones. State power may be so restrained in one of two

50. See, e.g., Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915).

ways. Federalism itself furnishes the first method. Just as federalism contemplates that state power will be deployed to check abuses of national power, it also contemplates that national power will be deployed to check abuses of state power. Thus, the national government has at its disposal numerous means by which abuses of state power may be curbed. These include such familiar mechanisms as preemption of undesirable state laws; the use of financial incentives to induce states to alter their laws or practices; protection of individual rights through application of the national Bill of Rights and the Fourteenth Amendment; and federal judicial review of the constitutionality of state laws. In addition, the national government may back these practices with the implicit (or sometimes explicit) threat of force.

It is at least conceivable that some state polity might think that the methods of restraint available to the national government amount to a set of external safeguards entirely sufficient to prevent a state from using its powers tyrannically against its own citizens, and consequently that no additional, internal measures were needed. In practice, however, no state polity has ever been willing to trust its freedom from state tyranny entirely to the national government. On the contrary, the citizenry of every state has thought it necessary to create internal safeguards, implemented by means of a state constitution, which deploy state power against itself to institutionalize a form of state self-restraint. The most common means of internally restraining state government include partially disabling it by dividing power horizontally, vertically or in both ways; creating a state bill of rights; and establishing state judicial review as an enforcement mechanism.

States, then, must possess significant power both to achieve the public good directly and to monitor and check abusive exercises of national power; yet the granting of such power poses risks to liberty that require state power to be hobbled by institutions of internal self-restraint. This tension imposes upon state constitutions a structural trade-off whose parameters are defined by the effectiveness of state power, on one hand, and the effectiveness of limitations on those powers, on the other. At one end of the spectrum, a state polity might create an extremely potent state government enjoying ample authority to impede national tyranny and facing few internal impediments to the effective exercise of those powers. Such a state government would be capable of protecting the liberty of its people vigorously against invasion by the national government, but only at the cost of leaving its citizens relatively vulnerable to invasions of liberty by the state itself. At the other end of the spectrum, a state polity might create a state government enjoying relatively few powers or facing significant internal self-restraints that impair its ability effectively to

exercise granted powers. Such a state government, because it would be weak, would pose few direct threats to the liberty of the state's citizens. It would, however, leave them relatively vulnerable to invasions of their liberty originating at the national level. There is no limit to the number of different ways in which a state polity may choose to strike a balance between state empowerment and restraint, and between state and national power. Under federalism, however, the exact nature of that balance is decidedly for the people of each state to determine.

Although any number of factors may influence the way in which a state polity chooses to balance these considerations, it seems certain that one extremely important factor will be the particular patterns of distrust of governmental power that prevail among the people of the state. American constitutional theory rests on the bedrock proposition that no government is entitled to the people's complete trust and faith.⁵¹ Yet it does not follow that all governments are to be distrusted equally. There are numerous reasons why a state polity might be less willing to trust one level of government than the other. Size alone, for example, may affect political dynamics in different ways on the state and national levels. As Madison argued in *The Federalist No. 10*, state political processes may well be more susceptible to a destructive, factional politics of self-interest than are national political processes simply because states are smaller, and contain fewer people, than the nation.⁵² State governments, on the other hand, are often said to be more responsive to public opinion than the national government, which might make them more rather than less trustworthy. Another factor that might affect the trust the people of a state feel for the national and state governments concerns the relative competencies of each. Not every government has the power, resources or incentives to do every job equally well. Finally, a state polity might feel different degrees of trust for the state and national governments as the result of its actual historical experience of life under both.⁵³ This is not a factor amenable to structural analysis, but rather a contingent matter that depends entirely upon the particular actions each level of government may have taken in the past, the effects of those actions on the state's citizens, and the ways in which the citizenry has chosen to interpret those actions. If the people of

51. THE FEDERALIST NO. 51, *supra* note 45, at 349:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls [sic] on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul [sic] the governed; and in the next place oblige it to controul [sic] itself.

52. THE FEDERALIST NO. 10, at 63-64 (James Madison) (Jacob E. Cooke ed., 1961).

53. See, e.g., C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 17-21 (rev. ed. 1960).

the state feel that the national government has, on the whole, treated them better than the state government, they may be more inclined to trust national power than state power, and vice versa.

Whatever the choices made by a state polity, it is clear that a critical function of a state constitution is to embody and institutionalize those choices through the establishment, empowerment, and restraint of concrete institutions of state governance. A state constitution, then, is neither a piece of legal decoration nor some kind of optional add-on that state polities may choose to create for purposes that are of no concern to the national polity or its government. On the contrary, state constitutions are critical tools in operationalizing and institutionalizing the principles of federalism. They are an indispensable component of a system that must function effectively at every level if liberty is to be protected adequately at any level.

Normally, the U.S. Constitution is understood to have little influence over these state decisions: it treats the protection of a state's citizens from their own state government largely as a matter of internal state self-governance.⁵⁴ Thus, how much power state governments are to possess, how that power is to be structured and divided, and what rights citizens are to hold against state governments are all questions for the people of each state to answer for themselves. The national Constitution does, to be sure, contain some mechanisms that protect citizens from state tyranny.⁵⁵ It establishes, for example, a minimal level of protection for individual rights which states are obliged to respect.⁵⁶ The Constitution also provides the national government with certain tools for intervening to relieve state citizens from the burdens of abusive state actions, preemption, financial inducements, and judicial review of state laws, for example. But these protections are quite limited. Congress can hardly monitor every law

54. See, e.g., *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902).

A local statute investing a collection of persons not of the judicial department, with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the Governor of the State, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belong to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.

Id.; see also *Mayor of Philadelphia v. Educ. Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.").

55. This occurs by operation of the Fourteenth Amendment's "incorporation doctrine."

56. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937).

enacted in every state,⁵⁷ and the protections furnished by the national Bill of Rights, though hardly inconsiderable, have never been thought to represent the last word on the relationship between individuals and the state.

If the U.S. Constitution provides some protection against state tyranny by establishing baseline levels of individual rights and by authorizing external intervention by the national government, it provides virtually (and perhaps literally) no such protection when it comes to the question of how state power ought to be structured and deployed—a question long understood in our system of constitutional government to be critical to the protection of liberty.⁵⁸ Here, state polities are left almost entirely to their own devices. A few provisions of the U.S. Constitution, by referring to a state legislature, state executive or state judiciary, clearly *presuppose* the existence of a state government divided into three branches.⁵⁹ Whether they *require* such a division is altogether a different question, and is in any event beside the point. Even if the U.S. Constitution requires state constitutions to establish three distinct government branches, it says nothing at all about what powers the branches ought to possess and how those powers ought to be distributed among them, leaving it silent on the one issue that actually counts in determining whether a system of constitutional separation of powers will protect liberty adequately and permanently.⁶⁰

The only provision of the U.S. Constitution that might plausibly be thought to establish specific, liberty-protective requirements relating to the internal structure of state government is the Guarantee Clause, which requires the United States to “guarantee to every State in this Union a Republican Form of Government.”⁶¹ The mean-

57. The Court’s Dormant Commerce Clause jurisprudence recognizes this reality in the economic realm.

58. The original U.S. Constitution, after all, did not contain a Bill of Rights; the Framers apparently believed that structural protections were the most important means for protecting liberty.

59. See, e.g., U.S. CONST. art. I, § 2, cl. 1 (voters for Representative “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* art. I, § 2, cl. 4 (vacancies in House to be filled by writs of election issued by state’s “Executive Authority”); *id.* art. I, § 3, cl. 1 (Senators from each state to be chosen by “the Legislature thereof”); *id.* art. II, § 1, cl. 2 (presidential electors to be appointed in each state “in such Manner as the Legislature thereof may direct”); *id.* art. VI, cl. 2 (“the Judges in every State shall be bound” by the U.S. Constitution). For a more detailed discussion, see Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51 (1998).

60. See THE FEDERALIST NOS. 47, 48 (James Madison) (Jacob E. Cooke ed., 1961).

61. U.S. CONST. art. IV, § 4. Another provision, Article I, Section 10, Clause 1, prohibits states from granting any “Title of Nobility,” which might be construed to forbid a monarchical or aristocratic form of government. I ignore it here because its applicability seems extremely limited and too remote from contemporary considerations of governmental structure.

ing of the Clause is obscure, however, because it has been neither authoritatively construed nor judicially enforced: the Supreme Court has consistently held that questions arising under the Guarantee Clause raise nonjusticiable political questions.⁶² Even if the Clause were enforceable, however, there are good reasons to think that it imposes structural requirements so minimal as to provide no meaningful constraints on a state's ability to structure state government in whatever way the people of the state think best protects them from state tyranny. According to Madison, all that is required for a government to qualify as republican is that its officers be elected, even indirectly, by the people.⁶³ The U.S. Supreme Court, moreover, has held that the Guarantee Clause was not intended to call into question any form of state government existing in 1787.⁶⁴ Given that Rhode Island and Connecticut then operated under their original royal charters, and that the rights to vote and to hold office were severely restricted in many states, it is difficult to imagine even a vigorously enforced Guarantee Clause requiring much of state governmental structure.

State politics, then, are generally quite free to experiment in their state constitutions by tailoring internal structures of self-governance to their particular tastes and notions about how liberty is best to be protected. This freedom has been frequently exercised, and in ways that often seem to reflect popular determinations about the trustworthiness or untrustworthiness of state as compared to national power. For example, many state constitutions seem to reflect a popular trust in state power by granting state governments far greater power than the U.S. Constitution grants the national government, and often giving it to them in more concentrated, and thus potentially more dangerous, forms. Thus, unlike the U.S. Constitution, which enumerates government powers, state constitutions tend to grant power to each branch of state government in one immense, undifferentiated and unlimited block. Some state constitutions, moreover, authorize a much more relaxed separation of powers than does the U.S. Constitution. For example, the Rhode Island Constitution permits state legislators to appoint members of executive branch agencies, including

62. See, e.g., *Baker v. Carr*, 369 U.S. 186, 208-10 (1962); *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150-51 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849). But see *New York v. United States*, 505 U.S. 144, 183-85 (1992) (noting disagreement as to the scope of nonjusticiability under the Guarantee Clause and concluding that the question need not be resolved in the case at hand); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874) (refusing to recognize suffrage rights for women under the Guarantee Clause).

63. THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961). The original U.S. Constitution used indirect election for Senators, the President, and the Vice President. U.S. CONST. art. I, § 3; *id.* art. II, § 1.

64. *Minor*, 88 U.S. (21 Wall.) at 175-78.

self-appointment⁶⁵—forms of cross-branch appointments forbidden under the U.S. Constitution.⁶⁶ Several state constitutions permit the state legislature to exercise a legislative veto over regulations promulgated by state executive departments,⁶⁷ a device that violates the constitutional separation of powers laid out for the national government.⁶⁸

In other cases, state constitutions impose constraints on state governments that have no counterpart on the national level, suggesting heightened popular *distrust* of state power. For example, many state constitutions divide and disperse state power in ways that the U.S. Constitution does not. Such measures include a highly splintered executive branch in which executive power is divided among multiple officials, each independently elected,⁶⁹ and a stricter horizontal separation of powers among branches of state government, such as a vigorous nondelegation requirement.⁷⁰ Many state constitutions restrict the exercise of state legislative power to a much greater degree than the U.S. Constitution restricts congressional power by imposing limitations on taxation and spending, as well as a host of technical requirements such as the single-subject rule or restrictions on special or local legislation.⁷¹ A number of state constitutions reveal a deep distrust of state government by creating numerous mechanisms of direct popular control such as referendums, initiatives, recall, and rotation in office.⁷²

If states are free to experiment to this degree, it is difficult to see anything in the U.S. Constitution that might prevent them from going even further afield from the standard, national model of governmental structure. The parliamentary system of government, for example, is the world's most popular structural form of democratic government. If a state wanted to adopt such a system, it is hard to imagine what provision of the U.S. Constitution might bar it from doing so. Only the extremely unlikely prospect of a radical expansion of no-

65. *In re* Advisory Opinion to the Governor (Rhode Island Ethics Commission—Separation of Powers), 732 A.2d 55 (R.I. 1999).

66. See U.S. CONST. art. I, § 6, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 120-24 (1976).

67. See, e.g., CONN. CONST. art. II; IOWA CONST. art. III, § 40; NEV. CONST. art. III, § 1(2)(c); N.J. CONST. § art. V, ¶ 6; *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990). For a discussion, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1212-16 (1999).

68. See *INS v. Chadha*, 462 U.S. 919, 941-43 (1983).

69. See 32 THE BOOK OF THE STATES 33-34 (1998). Regarding Florida in particular, see Deborah K. Kearney, *The Florida Cabinet in the Age of Aquarius*, 52 FLA. L. REV. 425 (2000).

70. See Rossi, *supra* note 67, at 1193-1201.

71. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 796-823, 917-93 (3d ed. 1999).

72. See James A. Gardner, *Devolution and the Paradox of Democratic Unresponsiveness*, 40 S. TEX. L. REV. 759, 766-67 (1999).

tions of due process⁷³ could, it seems, derail such a state decision concerning the details of its constitutional structure of internal self-governance.

If the picture I have painted of state autonomy over internal government structure is correct, the question raised by the *Bush* cases is this: are things any different during presidential elections merely because Article II gives state legislatures a role to play in the selection of presidential electors? The answer, I suggest, is no.

III. STATE CONSTITUTIONS AND THE SELECTION OF PRESIDENTIAL ELECTORS

For the reasons I have described, state constitutional restraints on the powers of state legislatures represent sober, potentially valuable, liberty-protective measures that may impair a legislature's ability successfully to abuse its often considerable powers. Article II, Section 1 of the U.S. Constitution grants state legislatures a power that their own state constitutions do not and could not grant: it specifically authorizes state legislatures to select presidential electors, or to determine the manner in which they shall be selected. Like any other power granted to a state legislature, this one is susceptible of abuse.

Madison's theory of self-aggrandizement assumes that legislatures will habitually act so as to increase their own powers at the expense of other political actors,⁷⁴ but this need not always be the case. History furnishes numerous examples of representative bodies voluntarily turning over power to tyrants of varying sorts. The Athenian Assembly relinquished all its power to the Four Hundred.⁷⁵ The Roman Senate on several occasions turned over its power to a single dictator.⁷⁶ In our time, the German Reichstag voted in 1933 to turn over all legislative power to an executive cabinet led by Hitler.⁷⁷ There is no reason to suppose that American state legislatures are

73. That is, the Court might have to find some kind of individual due process right to be subject only to laws made by a three-branch government whose powers are balanced in a way sufficiently close to the balance established by the U.S. Constitution. The theory for such a holding would be that only this arrangement, and no other, adequately protects personal liberty. Before the *Bush* decisions, I would have found this prospect laughable. Now I am not so sure.

74. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."); see also THE FEDERALIST NOS. 10, 47, 51 (James Madison).

75. THUCYDIDES, THE PELOPONNESIAN WAR 525-26 (Rex Warner trans., Penguin Books 1954).

76. See LIVY, THE EARLY HISTORY OF ROME 124-25, 137-38, 213 (Aubrey de Selincourt trans., Penguin Books 1960).

77. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 198-99 (1960).

somehow immune from the temptations that have led other legislatures to support tyrants.⁷⁸

It is far more likely, of course, that any abuse of the power to choose presidential electors would be less dramatic. Legislators might, for example, barter away their votes for political favors or even for cash. This is not an idle possibility. Before the ratification of the Seventeenth Amendment, when U.S. Senators were selected by state legislatures, bribery of state legislators by senatorial candidates was a widespread problem. In 1899, for example, one candidate for Senator handed out over \$140,000 of his own money to state legislators in exchange for votes.⁷⁹

Much is at stake in presidential elections. The office of President has attained a kind of preeminence that the Framers did not foresee and might well have thought undesirably reminiscent of the kingly authority they overthrew. Yet nothing in Article II itself sets any limits on the ways in which state legislatures may select electors. If that process is to be conducted and disciplined by law, that law must, it seems, be supplied by state constitutions.

There is little reason, moreover, to think that the people of any state would be particularly inclined to trust their state legislature to perform the critical task of selecting presidential electors completely free of popular guidance and constraints applied by constitutional means. First, there is a long American history of popular distrust of state legislatures and of corresponding efforts to use state constitutions to curb undesirable legislative behavior. A striking number of typical state constitutional provisions represent deliberate public responses to specific acts of state governmental malfeasance. For example, many state constitutions sharply restrict the state's ability to incur debt.⁸⁰ These restrictions date mostly from the middle third of the nineteenth century and were adopted in response to a series of disastrous public works expenditures on canals and railroads that caused serious financial difficulty for numerous states.⁸¹ Many state constitutions require that the title of a bill accurately reflect its sub-

78. The Framers clearly believed that a national legislature could not be trusted to resist such temptations. During debates at the 1787 convention concerning presidential selection, a proposal was rejected that would have permitted Congress to select the President. On several occasions, a concern was expressed that foreign nations would intrigue with members of Congress to corrupt the selection process, shaping it to their malevolent whims. See 4 THE FOUNDERS' CONSTITUTION 536-50 (Philip B. Kurland & Ralph Lerner eds., 1987).

79. C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 91 (1995); see also Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 538-41 (1997).

80. Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1305.

81. *Id.* at 1306-10.

ject. These provisions grew out of the infamous Yazoo scandal of 1795, in which the Georgia state legislature enacted a law whose innocuous title did not accurately reflect the fact that the law's main purpose was to sell public lands to private speculators at an unconscionably low price.⁸²

Second, popular distrust of state legislative power has typically been strongest in matters relating to the selection of government officials, a phenomenon reflected in an American electoral history of almost continuous democratization. The United States may have been founded by republicans, but it was soon inherited by populists.⁸³ The common current of American populist ideology in its various incarnations holds that the people are at least the equal of their representatives in respect of their competence to assess and to choose among competing public policies. However, populism holds unequivocally that the people are decidedly superior to their representatives in their innate virtue.⁸⁴ American populist movements, from the Jacksonians through the Progressives, have thus tended to see American politics as a ceaseless struggle by a virtuous and competent citizenry to prevent its will from being obstructed by corrupt officials or unsuitable governmental structures and institutions.

As a result, populists have turned frequently to constitutional amendment, most often at the state level, to strengthen popular control over what they understand to be unreliable government agents. This trend reached its height during the Progressive movement, whose leading historian described its purpose as opposing "the control of government by special interests and the prostitution of government to serve the needs of a small minority."⁸⁵ Progressives fought this domination by waging largely successful campaigns for reforms such as expanded suffrage, secret ballots, direct primaries, initiatives, referenda, recall, campaign finance disclosure, and easier constitutional amendment, among others, many of which were eventually implemented.⁸⁶ The purpose of these reforms was, according to the Progressives themselves, "to dissolve the unholy alliance between corrupt business and corrupt politics"⁸⁷ by giving "a majority of the

82. Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 391-92 (1958).

83. Rossi, *supra* note 67, at 1171-74.

84. See James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 130-36 (2000).

85. BENJAMIN PARKE DE WITT, *THE PROGRESSIVE MOVEMENT* 46 (Richard T. Ely ed., 1915).

86. See, e.g., *id.* chs. 10-11; WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH* (1910), *reprinted in* *THE PROGRESSIVE MOVEMENT, 1900-1915*, at 133-136 (Richard Hofstadter ed., 1963); *THE PROGRESSIVE PARTY PLATFORM OF 1912*, *reprinted in id.* at 129. See generally John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999).

87. *THE PROGRESSIVE PARTY PLATFORM OF 1912*, *supra* note 86, at 128.

people . . . an easy, direct, and certain control over their government.”⁸⁸

There are good reasons, then, to think that state constitutional restraints could serve a potentially valuable, liberty-protective function by regulating state processes of elector selection. There are also good reasons to think that state polities are likely to value highly their ability to impose such constraints on what would otherwise be unrestricted state legislative power. Conversely, and contrary to the Supreme Court’s intimations in *Bush I*, there is no good reason to think that Article II impairs the ability of state polities to use state constitutions for just this purpose.

Our theory of government is positivist. It holds that the organs of any government owe their existence, their legitimacy, and their powers to some founding act of popular sovereignty, the terms of which are usually embodied in a constitution.⁸⁹ This theory is generally thought to apply as much to state governments as to the national government.⁹⁰ The American system of federalism, to be sure, blurs some of the distinctions between state and national sovereignty by constituting a system of overlapping authority, and by making state power subordinate in some respects to national power. It does not, however, go so far as to undermine the positivist premise that state governments are created, and their powers granted and restrained, by state polities in state constitutions rather than by the national polity in the U.S. Constitution.

The Supreme Court’s decision in *Bush I* suggests that these otherwise valid principles do not apply to state legislative power during presidential elections because the power to select presidential electors is one granted to state legislatures directly and exclusively by the somewhat unusual provisions of Article II of the U.S. Constitution. A power granted to an organ of state government by the national Constitution, the Court apparently believes, cannot be modified by a mere state constitution, which is by definition subordinate. Yet the interplay between national and state constitutional authority under Article II is neither as unique, nor as straightforwardly hierarchical, as the Court assumes. In fact, the national Constitution

88. DE WITT, *supra* note 85, at 196.

89. This foundational proposition runs through the canonical texts of American political theory such as the Declaration of Independence, the preamble of the U.S. Constitution, and *McCulloch v. Maryland*, 17 U.S. 316 (1819).

90. See *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819) (“[I]t was neither necessary nor proper to define [in the U.S. Constitution] the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States.”). For more general discussions, see James A. Gardner, *Federalism and the Problem of Political Subcommunities*, in *TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER* 271, 282-83 (David E. Carney ed., 1999); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 69-70 (1998).

routinely grants power to the organs of state government in many situations in which no one seems to question the authority of state constitutions to guide and limit the ways that state governmental actors may exercise the granted authority.

For example, the U.S. Supreme Court frequently rules that particular state or national laws do not violate any provision of the Bill of Rights or Fourteenth Amendment. Each such ruling authorizes every legislature in the land to enact laws identical to the one upheld, free of national constitutional interference. Yet such rulings have never been understood to insulate state legislatures from restrictions and conditions on the exercise of legislative power imposed by state constitutions. The fact that the U.S. Constitution permits a state legislature to enact a law by no means frees the legislature from the host of prohibitions and restrictions, whether substantive or procedural, that state constitutions often impose. Indeed, the U.S. Supreme Court itself has often observed that state polities are free to bind state legislatures to more demanding constitutional standards for observing individual rights than the national Constitution requires of them.⁹¹

Similarly, the U.S. Constitution authorizes Congress to use its spending power to provide financial inducements to states to take actions that Congress desires.⁹² A necessary corollary of the Constitution's authorization to Congress to dangle financial inducements before state governments is the complementary authorization to state governments both to comply with congressionally imposed conditions and to accept the money. Yet no one, I take it, would dispute the authority of state constitutions to limit, condition, or even countermand this nationally granted authority to take actions necessary to receive national funds.⁹³ If a state constitution bars the legislature from enacting the federally required law, or subjects the collection or use of state revenues to budgetary or appropriations requirements, or imposes upon the state legislature procedural limitations that prevent it from accepting the offered gift, surely these limitations are not displaced simply because the national Constitution has attempted to create some new form of state legislative authority.

It might be objected that the kinds of national authorization just described are indirect, whereas Article II consists of a direct grant of

91. The most prominent such case is *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The most influential statement of this principle by a sitting Justice, however, is Justice Brennan's 1977 article, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

92. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

93. See *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court); William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J.L. & PUB. POL'Y 303 (1993).

state legislative authority. Yet the U.S. Constitution also grants authority directly to organs of state government in circumstances where state constitutions routinely limit or modify it. For example, the U.S. Constitution directly authorizes state courts to hear and decide questions of federal law.⁹⁴ This grant of authority, however, has long been understood to occur subject to state constitutional rules establishing the jurisdiction and powers of state courts. The U.S. Supreme Court has held, for instance, that state constitutions may establish standing rules broader than those permitted to federal courts under Article III and that state courts may hear federal law claims brought by parties who would lack standing to bring them in federal court.⁹⁵ Indeed, the Court has gone further: it has held that *its own* jurisdiction may be expanded by standing rules established by *state* constitutions, thus permitting the Court to hear appeals of federal questions from state courts utilizing standing rules that would require dismissal if the same parties had brought the case up through the federal judicial system.⁹⁶

The Supreme Court's position in *Bush I* is all the more surprising because the text and context of Article II suggest a ready alternative construction that would be far more consistent with the practices discussed above. If a state's constitution forbids its legislature to exercise the power to select presidential electors in a way that comports with the requirements of Article II, the obvious remedy is to exclude the state's electors from the presidential selection process—a power that Congress has already formalized by statute.⁹⁷ There is simply no reason for the Court, particularly in light of the anti-commandeering principles it has articulated under the Commerce Clause,⁹⁸ to construe Article II as dictating directly the content and organization of state legislative power when a system of structural incentives could easily achieve the same goals by penalizing the inappropriate use of otherwise autonomous state power.⁹⁹ Such a construction of Article II would give effect to the vital state constitutional regulatory function, while at the same time recognizing the requirement that national policy reign supreme in matters concerning national elections.

94. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816).

95. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612-25 (1989).

96. *Id.* at 618-24.

97. 3 U.S.C. § 15 (1994).

98. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

99. Section 2 of the Fourteenth Amendment furnishes an appealing model in these circumstances. That provision encourages states to grant the franchise as widely as possible, without requiring them to do so. States that disenfranchise males over the age of twenty-one are instead penalized by suffering a proportionate reduction in congressional representation. U.S. CONST. amend. XIV, § 2.

This conclusion would be in no way inconsistent with some of the Court's interpretations of other provisions of the U.S. Constitution that structure national political processes, most notably the Qualifications Clauses and the amendment procedures of Article V. In *U.S. Term Limits, Inc. v. Thornton*¹⁰⁰ the Court held that the list of qualifications for members of Congress set out in Article I of the U.S. Constitution¹⁰¹ is not subject to alteration by state constitutional provisions imposing additional or different qualifications on candidates running from the state in question. And in *Hawke v. Smith*,¹⁰² the Court invalidated a state constitutional provision requiring approval by popular referendum of state legislative ratifications of amendments to the U.S. Constitution on the ground that Article V requires that ratification be performed by the state legislature itself.¹⁰³ These cases, however, deal with provisions of the national Constitution that call upon American citizens to act exclusively in their capacity as citizens of the nation, in the former case by electing members of Congress, and in the latter by deciding whether to amend the national Constitution. Article V makes use of the state legislative form for this purpose, but it is clear that the state legislature is functioning in this circumstance only as a convenient vehicle for the state-by-state aggregation of *national* opinion rather than as an agent of a distinct *state* polity.¹⁰⁴

Not all national political processes, however, require Americans to act in their capacity as national citizens. As Madison noted, the U.S. Constitution is partly national and partly federal.¹⁰⁵ In the former capacity, the Constitution creates political processes that are truly national and that treat citizens as a unified national polity. The Qualifications Clauses and Article V fall into this category. In its federal capacity, however, the Constitution builds some of its political structures directly on the backs of state processes in which citizens act not as a single, national citizenry but as disaggregated members of the various state polities.¹⁰⁶ The preeminent example of

100. 514 U.S. 779 (1995).

101. See U.S. CONST. art. I, § 2, cl. 2 (qualifications of Representatives); *id.* art. I, § 3, cl. 3 (qualifications of Senators).

102. 253 U.S. 221 (1920).

103. *Id.* at 229-31.

104. As the Court observed in *Hawke*, "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." *Id.* at 229. The same can be said of the original 1789 ratification of the Constitution by specially designated ratifying conventions. See U.S. CONST. art. VII; *U.S. Term Limits, Inc.*, 514 U.S. at 821-22; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

105. THE FEDERALIST NO. 39, *supra* note 63, at 253-57.

106. That, at least, is the theory. In practice, things have not turned out that way. Today, it seems to me, when Americans act in a disaggregated way—which they frequently do—the cleavages along which they divide bear no meaningful relation to state boundaries. In contrast, when they act pursuant to formal constitutional processes that contemplate

this is undoubtedly the U.S. Constitution's treatment of the right to vote. As the U.S. Supreme Court has often pointed out, the Constitution grants no one the right to vote in national elections.¹⁰⁷ Instead, it adopts by reference the voter qualifications established by the states: "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."¹⁰⁸ In this setting, state constitutional provisions establishing and regulating the right to vote clearly control and are simply made a part of the national constitutional scheme. State constitutional regulation of state voting qualifications is not somehow displaced in this situation merely because the U.S. Constitution sees fit to make use of existing state processes as a step toward accomplishing national political objectives.

A national constitutional structure even more directly on point is the pre-Seventeenth Amendment apparatus governing selection of United States Senators.¹⁰⁹ Under the original scheme, U.S. Senators were elected by state legislatures: Article I, Section 3 of the U.S. Constitution expressly granted the power to conduct senatorial elections to "the Legislature" of each state. Moreover, Article I, Section 4 expressly provides that "The Times, Places and Manner of holding Elections for Senator . . . shall be prescribed in each State by *the Legislature* thereof . . ."¹¹⁰ Thus, the power to conduct and regulate senatorial elections was allocated expressly, in two separate provisions, to the state legislature specifically rather than the state generally just as it is in Article II.

Despite this doubly direct delegation of authority, no one appears to have assumed that state legislatures, in performing a vital national political function, somehow became immune in the performance of that function from the normal course of regulation by state constitutions. Indeed, the assumption appears to have been quite the opposite. Georgia's 1798 Constitution, for example, the first it adopted following ratification of the national Constitution in 1789, imposed direct, albeit minimal, regulations on the legislative process for electing senators:

disaggregation along state lines, they act almost always in response to forces that are national in scope. See Gardner, *supra* note 90; Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

107. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875).

108. U.S. CONST. art. I, § 2, cl. 1; see also *id.* amend. XVII, § 1 (same wording).

109. *Id.* art. I, § 3, cl. 1, amended by *id.* amend. XVII (1913).

110. *Id.* art. I, § 4 (emphasis added). Congress, however, is given the superseding power to regulate congressional elections. The full provision reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* art. I, § 4, cl. 1.

All elections by the general assembly shall be by joint ballot of both branches of the legislature; and when the senate and house of representatives unite for the purpose of electing, they shall meet in the representative chamber, and the president of the senate shall in such cases preside, receive the ballots, and declare the person or persons elected.¹¹¹

Vermont's 1793 Constitution also contained a provision regulating elections for U.S. Senator:

All elections, whether by the people *or the Legislature*, shall be free and voluntary: and any elector who shall receive any gift or reward for his vote, in meat, drink, monies or otherwise, shall forfeit his right to elect at that time, and suffer such other penalty as the law shall direct . . .¹¹²

Numerous other state constitutional provisions also imposed modest housekeeping requirements on legislative elections for U.S. Senator.¹¹³ Florida's 1868 Constitution was even more direct: "The legislature shall elect United States Senators in the manner prescribed by the Congress of the United States and by this constitution."¹¹⁴

Presidential elections possess this same federal, rather than national, character. The Constitution creates a system in which Presidents are selected after a process of aggregating one by one the preferences of individual state polities. The Framers did not believe that a single chief executive could be selected using a process continental in scope, if only because they believed no one could know the qualities of good candidates from around an immense nation,¹¹⁵ and they did not try to construct such a system. Instead, they assumed that

111. GA. CONST. art. IV, § 2 (1798). It is clear that this provision applies to elections, rather than ordinary legislative voting, because the provision goes on to state: "In all elections by the people the electors shall vote *viva voce* until the legislature shall otherwise direct." *Id.*

112. VT. CONST. ch. II, § 34 (1793) (emphasis added).

113. A fairly common type of regulation in early state constitutions provided: "In all elections by the general assembly, the members thereof shall vote *viva voce*, and the votes shall be entered on the journals." *E.g.*, ALA. CONST. art. VI, § 6 (1819). To similar effect were: ARK. CONST. art. IV, § 19 (1836); CAL. CONST. art. IV, § 38 (1849); FLA. CONST. art. VI, § 17 (1838); IND. CONST. art. II, § 13 (1851).

114. FLA. CONST. art. V, § 29 (1868). This provision was carried forward into the 1885 constitution, FLA. CONST. art. III, § 31 (1885), which remained in force until ratification of the Seventeenth Amendment.

115. For example, at the 1787 convention, Elbridge Gerry argued that the people should play no role in presidential selection because they were "too little informed of personal characters in large districts . . ." 3 THE FOUNDERS' CONSTITUTION, *supra* note 78, at 536 (statement of June 2). Roger Sherman similarly argued that the people "will never be sufficiently informed of characters . . ." *Id.* at 537 (July 17). Colonel Mason also believed that "[t]he extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates." *Id.* at 538 (July 17). *But see id.* at 537-38 (statement of Governour Morris, July 17): "[t]hey will not be uninformed of those great & illustrious characters which have merited their esteem & confidence."

presidential selection would be dominated by local knowledge and local biases, which led them to require that the presidential and vice-presidential candidates be from different states.¹¹⁶ Although national political parties have now extraconstitutionally coordinated the presidential selection process,¹¹⁷ the Constitution itself does not contemplate any fully national aspect to presidential selection. The electors from each state meet and deliberate only among themselves, for example, without deliberating with electors from other states.¹¹⁸ And, of course, if the Electoral College produces no majority winner, the selection process moves to the House of Representatives, where each state gets a single vote.¹¹⁹

In selecting presidential electors, then, or in providing for their selection, state legislatures act not as agents of the national citizenry but as agents of the citizenry of their own states. In granting this authority to state legislatures, the U.S. Constitution thus makes a grant of national power not to an agency of the nation but to an organ of state government, *functioning* as an organ of state government. When the national Constitution grants power in this particular way, it takes the organs of state government as it finds them—subject to control by the state polity and acting under whatever instructions, embodied in the state constitution, that the state polity has seen fit to impose for the protection of its liberty.¹²⁰

To take a relatively easy case, suppose, for example, that a state legislature were to use its Article II power to delegate the selection of presidential electors not to the people of the state but to some other organ of state government, such as the state supreme court. If state constitutional separation of powers principles prohibited state judges from exercising this function,¹²¹ Article II of the U.S. Constitution would not somehow override the state constitutional limitation on judicial authority. By the same token, it seems to me entirely within the reach of legitimate state constitutional power either to require the legislature to select presidential electors itself, or to forbid it from doing so and to require the legislature instead to provide for the selection of electors by popular election. This is, perhaps, not so far

116. See U.S. CONST. amend. XII.

117. See Kramer, *supra* note 106; see also E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1-12 (Dr. Phillips Bradley ed., 1942).

118. U.S. CONST. amend. XII.

119. *Id.*

120. This is the very position the Court took in *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932), where it rejected an argument that Article II forbids state laws regulating presidential elections to be submitted to the governor for signature or veto pursuant to the state's normal legislative processes established in its state constitution.

121. Cf. *Mistretta v. United States*, 488 U.S. 361 (1989) (holding under U.S. Constitution that Article III judges may not be given duties incompatible with their judicial duties or that undermine the integrity of the judicial branch).

from the position the Florida Constitution takes when it directly authorizes the state legislature to regulate elections, including presidential elections, by law.¹²²

Apparently, Congress understands these principles better than the Court does, for it has never claimed the power to regulate directly the process by which state legislatures select presidential electors, a power we might expect Congress to have if state legislatures, in choosing electors, were free from any controls originating at the state level.¹²³ Instead, such regulations as Congress has enacted all deal with how electoral votes are canvassed and counted;¹²⁴ they deal, that is to say, solely with the *output* of state legislative processes. Significantly, the only occasion on which Congress has intruded directly into the state legislative chamber to regulate state legislative processes is in a pre-Seventeenth Amendment statute establishing procedures for senatorial elections.¹²⁵ However, Article I, Section 4 of

122. See FLA. CONST. art. VI, § 1.

123. See *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934), in which the Court rejected a challenge to the Federal Corrupt Practices Act of 1925 regulating contributions by political committees. The defendants, charged with violating the Act, moved to dismiss their indictments on the ground that Congress lacked the power to regulate the way in which states select presidential electors, claiming that congressional power was limited by Article II, Section 1, Clause 4 to setting the date and time of voting for electors. The Court rejected this argument as taking too "narrow a view of the powers of Congress":

The congressional act under review seeks to preserve the purity of presidential and vice-presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states . . . Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately.

Id. at 544-45. While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties by virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

124. See 3 U.S.C. §§ 1-18 (1994).

125. 14 Stat. 243, ch. 245, § 1 (1866).

Each house [of the State Legislature] shall openly, by a viva voce of each member present, name one person for senator in Congress from said State, and the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At twelve o'clock, meridian, of the day following . . . the members of the two houses shall convene in joint assembly and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected senator . . . ; but if the same person

the U.S. Constitution, unlike Article II, Section 1, grants this power expressly to Congress: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but *the Congress may at any time by Law make or alter* such Regulations, except as to the Places of chusing Senators.”¹²⁶ Thus Congress, appropriately, has never interpreted its own powers to include regulatory oversight of state legislative selection of presidential electors. Conversely, state constitutions, for their part, have never sought to regulate the processes by which national officers are certified and installed.

All parties except the Court, then, seem to have understood that there is a boundary dividing state and national authority in presidential elections. This understanding makes the Court’s decision in *Bush I* all the more dangerous, for if Congress is correct that it lacks the power to regulate state legislative processes; and if the Court is prepared to cut off state legislatures engaged in selecting presidential electors from state constitutional oversight; then state legislatures are subject to no legal constraints at all. The national system still would not be without recourse: Congress might still reject a state’s electoral votes if they have been somehow tainted. But it seems both unnecessary and unwise to place that protection solely in the hands of congressional political judgments when state constitutions are available to do what they do best: restrain and control state legislative power by providing binding legal standards, judicially enforceable by independent state courts.

IV. DECENTRALIZATION OF STATE ELECTORAL ADMINISTRATION

Having embarked on the enterprise of displacing state internal structural decisions in *Bush I*, the Court proceeded to insert itself into another such decision in *Bush II*. Though somewhat better disguised, the Court’s equal protection analysis in *Bush II* provides cover for an intrusive ruling that constitutionalizes the Court’s disapproval of Florida’s decision to decentralize the administration of presidential and other statewide elections.

As discussed earlier, the principal function of a state constitution is to determine how much power the state government will exercise and the ways in which it will be distributed. These decisions affect the liberty of the state citizenry in three ways. First, by allocating to

shall not have received a majority of the votes in each house, . . . the joint assembly shall then proceed to choose, by a viva voce vote of each member present a person for the purpose aforesaid, and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected . . .

Id.

126. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

the state government a certain degree of affirmative power, the state polity determines the ability of the state government to use its powers directly to achieve the public good. Second, the decision determines how much power the state government will have at its disposal to monitor and, if necessary, check abuses of national power by the federal government. Third, decisions concerning the internal structure of state power influence the degree to which state power may be deployed against itself. Pitting state power against itself institutionalizes a form of governmental self-restraint that reduces the threat to liberty created by granting the state government powers sufficient to achieve the first two objectives. To make these constitutional decisions, a state polity must weigh its fears of state and national power, respectively, and balance those fears against the hopes and ambitions that caused it to create and empower a government in the first place.

A state polity that fears state power—and all do to some degree—has at its disposal numerous methods for restraining that power. As we have seen, one such method involves dispersing state power. State power may be dispersed horizontally, of course, through the standard practice of separating power into three branches. Indeed, most states have gone beyond the national model of separation of powers and have dispersed power horizontally to an even greater degree by subdividing the executive power and providing for the independent election of sub-gubernatorial executive branch officials.¹²⁷

Like national power, however, state power can also be dispersed vertically. The state level analogue to federalism involves the equally familiar distribution of power between state and local governments such as counties, towns, or cities. Exactly how much power a state polity chooses to withdraw from the centralized state government and allocate to decentralized local governments depends in part, as it does on the national level, on how much the polity is inclined to trust each level of government. In many states, local governments are granted little autonomous power. Municipal governments have often been regarded in the United States as administrative subdivisions of the states, “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,”¹²⁸ and most state constitutions grant the state legislature plenary power to create or dissolve local governments and to delegate to them whatever powers it chooses. Dillon’s Rule, traditionally followed throughout the United States, holds additionally that the scope of

127. New Jersey, which vests all executive power exclusively in its governor and elects no sub-gubernatorial officials (not even a lieutenant governor), is the prominent exception. See N.J. CONST. art. V.

128. *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

powers granted to local governments should be narrowly construed.¹²⁹ State governments that follow these practices thus may possess the power to decide which local governments will exist, if any; their precise configuration; the amount of power such governments will possess; and the circumstances in which that power may be used—all of which may be revoked or modified by the legislature at its pleasure.

From the point of view of vertical separation of powers, this arrangement is functionally the equivalent of allowing Congress to decide whether and how much authority state governments should exercise. It is not an arrangement, in other words, that can be expected to produce an effective check from below on abuses of state power. To allocate state power in this way is to grant power to state governments in a far more concentrated form than the form in which similar powers are allocated to the national government. Yet power concentrated, as Madison warned, is far more dangerous than power dispersed. That a state polity chooses nevertheless to forgo a vertical check and grant power to the state government in this concentrated form suggests a degree of popular confidence in state government that has no counterpart on the national level.

Not every state follows this approach, however. In some states, local governments are granted often considerable power through constitutional home rule provisions—provisions that place these local powers beyond the authority of state legislatures to invade or displace.¹³⁰ In these states, popular trust in local government may be far greater, at least with respect to the purposes enumerated in home rule provisions.

Florida, it seems, has chosen a middle approach toward its local governments. The Florida Constitution strikes the balance between state and local power generally in favor of the state, but it sets aside a few areas in which power is given unequivocally to local governments. Municipalities, for example, have presumptive independence under the Florida Constitution, which provides that “[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.”¹³¹ Yet nothing in this provision requires any municipalities to exist at all, and even

129. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

130. See 1 CHESTER JAMES ANTIEAU & JOHN MICHAEL ANTIEAU, *ANTIEAU'S LOCAL GOVERNMENT LAW* § 3.14 (1996).

131. FLA. CONST. art. VIII, § 2(b).

existing municipalities, though granted potentially broad powers,¹³² may see those powers revoked or altered at the pleasure of the legislature.

Things stand differently in Florida regarding counties. The Florida Constitution expressly requires that “[t]he state shall be divided by law into political subdivisions called counties.”¹³³ It then proceeds to grant expressly to counties the exclusive power to conduct all statewide and county elections.¹³⁴ Under the Florida scheme, then, the state itself has been stripped of the power to administer elections not only of officials of local governments, but of its own officials. This is about as clear an indication as one can expect to find that the citizens of Florida do not trust state officials with the administration of elections, or at least do not trust them to perform this function as much as they trust their local officials to do so.

It is not entirely clear what particular considerations or historical experiences caused the people of Florida to allocate power in this way, but it is easy to imagine why a polity might think such an arrangement more conducive to its liberty than a centrally administered state electoral system. First, a decentralized electoral system is more difficult to bring under the control of a single person, group, or party. Second, unlike state election officials, local election officials are ready at hand, visible, well known in their communities, and accountable to the local populace. Third, allowing state officials direct control over the very electoral system that could keep them in power might provide them with the means and the temptation to manipulate the system so as to secure their perpetuation in office. Whatever the reason, Floridians have made a decision about how best to protect their liberty from invasions at the hands of their own state government, a decision that was theirs to make and is not subject to review under any principle of national constitutional law.

Or at least that was the case prior to *Bush II*. In my view, the Court’s equal protection ruling in *Bush II* represents an attack on Floridians’ decision to protect their liberty by constitutionally decentralizing the administration of statewide elections. The Court’s ruling reacts to this entirely legitimate, internal, vertical separation of state powers by applying to Florida’s system, under cover of the

132. See *State v. Panama City Beach*, 529 So. 2d 250 (Fla. 1988); TALBOT D’ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 124-25 (G. Alan Tarr ed., 1991).

133. FLA. CONST. art. VIII, § 1(a).

134. *Id.* art. VI, § 5(a) (“A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election . . .”).

Equal Protection Clause, what amounts to a federal nondelegation doctrine for states.

My conclusion rests to a great extent on the facial implausibility of the Court's equal protection analysis, which I shall briefly rehearse. To begin with, there is no suggestion in *Bush II* that intentional discrimination played any role in the structuring of Florida's vote-counting processes.¹³⁵ This in itself is not fatal, however, since intentional discrimination has never been required in cases falling within the fundamental rights strand of equal protection analysis.¹³⁶ What has always been required in every equal protection case, however, is the identification of some class of persons disadvantaged by the challenged government action. Neither the parties nor the Court ever identified such a class, and indeed they could not do so. No class of voters *within* any county could have been systematically disadvantaged by that county's choice of vote-counting method, since the ballots of all voters within the county were counted by the same means. The essence of Bush's constitutional claim, moreover, was that the counting and invalidation of ballots fell essentially randomly, and was thus unconstitutionally arbitrary,¹³⁷ a premise inconsistent with the existence of an identifiable disadvantaged class.

The only plausible candidate for a disadvantaged class might consist of the class of all voters for statewide candidates who resided in counties that utilized the less-reliable methods of vote counting. Residents of these counties were at a disadvantage compared to residents of counties that used more reliable methods of vote counting because their ballots were disqualified at a higher rate, thus disproportionately diminishing the voices of such voters in determining the outcome of statewide races. The Court did not speak in these terms, but even if it had, such a claim contains a fatal flaw. When the people of a Florida county, through their elected representatives, adopt a substandard method of counting votes, the wound is self-inflicted, through ordinary processes of collective self-governance. It is, in other words, nothing more than an ordinary instance of interjurisdictional variation in the law, a commonplace phenomenon that has never been thought to raise equal protection concerns.¹³⁸

135. Allegations were later made, in other forums, of intentional discrimination against minority voters. See Dana Canedy, *Rights Panel Begins Inquiry Into Florida's Voting System*, N.Y. TIMES, Jan. 12, 2001, at A20. Even so, I do not believe that anyone has gone so far as to accuse the state of deliberately utilizing a system of punch-card balloting in heavily minority districts for the purpose of reducing the number of countable votes from those districts.

136. See Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

137. *Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

138. See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987).

Having before it no cognizable class of systematically disadvantaged voters, the Court resorts to different language, the language of *arbitrary* deprivation of the right to vote. “[T]he State,” says the Court, “may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.”¹³⁹ However, the right to be free from arbitrary deprivations of constitutionally protected interests is one that sounds in due process, not equal protection. The Court attempts nevertheless to shoehorn the problem into equal protection terms, by citing *Harper v. Virginia Board of Elections*¹⁴⁰ and *Reynolds v. Sims*¹⁴¹ to support its analysis. Neither of these cases helps, unfortunately, because both involved disadvantageous treatment of identifiable classes of voters: those who could not afford a poll tax in the former case, and those who lived in populous urban districts in the latter. Here, there is no such identifiable class.

The Court’s insistence on an equal protection analysis grows more puzzling as the opinion unfolds. Florida’s recount mechanisms, the Court asserts, “do not satisfy the minimum requirement for non-arbitrary treatment of voters”¹⁴² This was so, the Court explains, because the “intent of the voter” standard to be applied under Florida law contains an “absence of specific standards to ensure its equal application.”¹⁴³ It is, in other words, too vague. This vagueness then causes the arbitrary treatment of voters, according to the Court. Yet both of these related problems—arbitrariness and vagueness—have historically been treated by the Court as raising questions of due process, not equal protection. Both deal with the direct relationship of the law to individuals, not the relative position under the law of one individual compared to another. The right to nonarbitrary treatment under the law is, after all, the essence of due process rationality review.¹⁴⁴ When arbitrary treatment results from a law’s vagueness, the problem has always been treated as one of due process.¹⁴⁵

But even if the problem the Court identifies is couched more appropriately as one of due process vagueness, the claim still contains fatal flaws. Under the Due Process Clause, vagueness in a law raises

139. *Bush v. Gore*, 531 U.S. at 104-05.

140. 383 U.S. 663 (1966).

141. 377 U.S. 533 (1964).

142. *Bush v. Gore*, 531 U.S. at 105.

143. *Id.* at 105-06.

144. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955).

145. Vagueness, under the Due Process Clause, becomes a problem when a law is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). There is another, more specialized vagueness doctrine that arises under the First Amendment to combat statutory vagueness which chills speech, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), but that doctrine is inapplicable here.

constitutional problems only when the law is so vague that *individuals* become unable to understand it and thus to conform their conduct to the law.¹⁴⁶ That is why legislative vagueness most often rises to the level of a due process problem in the criminal setting. The vagueness here is very different: the recount law requiring application of the intent-of-the-voter standard is addressed not to individuals, but to *government officials*. There is no claim in *Bush II* that voting instructions provided to individual voters were too vague. Rather, the claim is that Florida law provides county election officials with insufficient guidance as to the proper method of counting ballots, allowing such officials to exercise inappropriately unconstrained discretion, which in turn “has led to unequal evaluation of ballots”¹⁴⁷ “[E]ach of the counties,” the Court complains, “used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes”¹⁴⁸

There is a constitutional doctrine that covers situations where legal rules meant to guide government officials instead vest them with excessive discretion, but it is a doctrine neither of equal protection nor due process. It is the nondelegation doctrine. The nondelegation doctrine prohibits legislatures from delegating power to executive branch officials in terms so vague as to give them essentially no legislative guidance.¹⁴⁹ That is precisely the problem here. The defect in Florida’s election procedure, according to the Court, is the lack of “adequate statewide standards for determining what is a legal vote”¹⁵⁰

Had this election been conducted by national administrative officials under laws enacted by Congress, the Court might have some business deciding that the intent-of-the-voter standard gave those officials a degree of discretion so great as to violate the nondelegation doctrine, and thus violated the constitutionally mandated separation of powers. Obviously, however, the U.S. Supreme Court had no business holding that the State of Florida violated any kind of separation of powers doctrine. The internal structure of Florida government, including its vertical separation of powers, is for the state’s citizenry to decide. Moreover, as shown earlier, states have exercised this freedom by choosing a wide variety of structures that allocate govern-

146. See, e.g., *City of Chi. v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

147. *Bush v. Gore*, 531 U.S. at 106.

148. *Id.* at 107.

149. See *Yakus v. United States*, 321 U.S. 414 (1944); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

150. *Bush v. Gore*, 531 U.S. at 110.

ment authority in different ways and which separate the allocated powers with different degrees of strictness. In fact, the strength of nondelegation principles is an area in which state constitutional practices differ widely, not only from one state constitution to another but as between the state and national constitutions.¹⁵¹

The Court took pains to disclaim any intention of interfering with state discretion in this area: “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”¹⁵² Yet that is pretty much what the Court has done. By basing its ruling, albeit indirectly, on its objection to Florida’s decentralization of election administration, the Court has interfered with, and for all practical purposes invalidated, a measure crafted by the state polity for the better protection of its liberty. Such a ruling fails to pay adequate respect to the national constitutional structure of federalism, a structure that allows state polities alone to decide how best to balance state power against national and local power.

CONCLUSION

The Court’s decisions in *Bush I* and *Bush II* may be criticized on many grounds, as the papers in this symposium reveal. But one of the worst aspects of the opinions is the way they invade state autonomy over internal structures of state self-governance. The Court’s decisions conflict with basic principles of federalism, which envision a shared, federal process of presidential selection in which state and national power each play distinct roles. The *Bush* cases transform the governance of presidential elections from a shared enterprise of the national and state legislative and judicial branches to one conducted exclusively by national actors. The result is a centralization of power in the national government—and particularly in the national judiciary—considerably at odds with the purposes and methods of federalism.

In other recent contexts, the U.S. Supreme Court has taken great pains to assert the importance of federalism to the protection of individual liberty. It has gone so far as to curb severely some major pieces of national civil rights legislation on the ground that they may not be enforced against the states without their consent¹⁵³—on the ground, that is to say, that the direct protection of individual liberty through specifically targeted legislation must take a backseat to the indirect protection of individual liberty through structural federal-

151. See Rossi, *supra* note 67, at 1191-1201.

152. *Bush v. Gore*, 531 U.S. at 109.

153. See *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

ism. It is difficult, to say the least, to square the Court's rulings in the *Bush* cases with this position.