

THE ODD CONSEQUENCES OF TAKING  
*BUSH V. GORE* SERIOUSLY

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I. CONSEQUENCE ONE: THE NATIONALIZATION OF ELECTIONS..... 1007  
II. CONSEQUENCE TWO: THE NEW EQUAL PROTECTION OF ELECTIONS..... 1014  
III. CONSEQUENCE THREE: THE ELIMINATION OF STATE CONSTITUTIONAL AND  
JUDICIAL LIMITATIONS ON STATE LEGISLATIVE POWER..... 1021  
A FEW PRELIMINARY CONCLUSIONS ABOUT THE CONSEQUENCES OF TAKING  
*BUSH V. GORE* SERIOUSLY..... 1027

In the short time since the November 2000 presidential election, it has become commonplace in both academic and popular forums to deride the Supreme Court’s decisions in *Bush v. Palm Beach County Canvassing Board*<sup>1</sup> and *Bush v. Gore*<sup>2</sup> as—to put it bluntly—intellectually corrupt.<sup>3</sup> The common theme of these attacks on the Court’s abrupt resolution of the 2000 presidential election is that the decisions were crassly political efforts to decide the election on behalf of the party favored by the five Justices who formed the *Bush v. Gore* majority. There is ample justification for this derisive response, in light of the way in which the Court aggressively reached out to de-

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1. 531 U.S. 70 (2000), *vacating sub nom.* *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

2. 531 U.S. 98 (2000), *rev’g sub nom.* *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

3. This is how Benjamin Wittes of *The Washington Post* described the tenor of academic responses to the Supreme Court’s actions: “An overpowering chorus of (mostly liberal) legal scholars has condemned the decision as a politically motivated disgrace to the court that will, and should, discredit it institutionally.” Benjamin Wittes, *Maybe the Court Got It Right; A Judge’s Defense of the Florida Election Decision*, WASH. POST, Feb. 21, 2001, at A23. This response to the Court’s decision was not limited to domestic commentators. As one British commentator summed up the fallout of *Bush v. Gore*:

One institution is damaged worse than any other. The circumstances of Bush’s election may make him weak for four years, but they will corrupt the reputation of the US supreme court, which presided over their working-out, far beyond that. . . .

The case of *Gore v Bush* has ruined [the public’s] trust [in the Court], as some of Tuesday night’s judgments regretfully acknowledged. Taking the case in the first place was a political act, transgressing the court’s historic restraints against interfering in state elections. It came peculiarly from a rightwing court, whose thrust under Chief Justice Rehnquist has been in favour of states’ rights on all matters. Such a deviation from their norm showed that politics had well and truly triumphed over intellect.

Hugo Young, *Comment and Analysis: Democracy Was Poisoned to Give Bush the Presidency*, THE GUARDIAN (London), Dec. 14, 2000, at 24. Jack Balkin has made this point even more pungently. In a recent essay in the *Yale Law Journal*, Professor Balkin noted a recent speech in which Justice Thomas told some high school students that politics and partisan considerations played no part in the Supreme Court’s deliberations. “Afterwards the question on many legal scholars’ minds was not whether Justice Thomas had in fact made these statements. The question was whether he also told the students that he believed in Santa Clause, the Easter Bunny, and the Tooth Fairy.” Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001).

cide a case that was by most measures unripe for Supreme Court review, and also in light of the weak constitutional doctrines relied upon by the majority.

Instead of adding another voice to the chorus of denunciations, this Article will take a somewhat different approach to analyzing these decisions. This Article proceeds from the assumption that the Court's holdings in *Bush v. Palm Beach Canvassing Board* and *Bush v. Gore* are serious efforts by the majority to articulate new constitutional doctrine, which the majority intends to apply consistently to future cases. In other words, this Article will assume that the Court intends the legal world to take its two decisions seriously. The consequences of taking these decisions seriously are both extensive and odd. The consequences are extensive because if the Court's holdings in *Bush v. Palm Beach Canvassing Board* and *Bush v. Gore* are generalized, they would change much about what the courts have previously said regarding both the application of constitutional law to elections and the application of jurisdictional flushing mechanisms increasingly used by federal courts in recent years to avoid making substantive constitutional rulings altogether. These consequences are odd because they fly in the face of the increasingly conservative (in the sense of "restrained") attitude taken by the Court's current majority in matters of constitutional structure, substantive constitutional rights, and principles of justiciability.

The simplest way to make this point is to focus on the two most salient features of *Bush v. Gore*, and attempt to project these features into the broader context of future constitutional litigation. The two most salient features of *Bush v. Gore* are: (1) The Court's holding that the Equal Protection Clause prohibits the state of Florida from allowing local officials to control recounts in elections in which questions have been raised about the accuracy of the vote count;<sup>4</sup> and (2) the three-judge plurality's assertion that Article II of the Constitution and federal election statutes prohibit states from structuring their elections for presidential electors in a manner that permits state judicial review of the accuracy of election results.<sup>5</sup> A third feature of both decisions is the procedural irregularity of the decisions; i.e., the fact that the Court took an appeal that was not ripe, in which the main plaintiffs probably did not even have standing, and in which the state supreme court clearly indicated its reliance on an independent and adequate state ground—all in order for the five-member majority to provide its version of what Judge Richard Posner

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4. *Bush v. Gore*, 531 U.S. at 105-06.

5. *Id.* at 114 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.).

has characterized as “rough justice.”<sup>6</sup> This Article focuses, however, on the two substantive aspects of *Bush v. Gore*. After discussing the strange doctrinal repercussions of these two substantive rulings, the Article concludes with a few preliminary conclusions concerning whether and how to take *Bush v. Gore* seriously.

#### I. CONSEQUENCE ONE: THE NATIONALIZATION OF ELECTIONS

To the extent that there is any clearly articulated holding in the schematic *Bush v. Gore* per curiam opinion, it is that Florida’s system of ensuring accurate vote counts violated the Equal Protection Clause of the Fourteenth Amendment by permitting losing candidates to engage in an extended “contest” of disputed votes.<sup>7</sup> Beyond this bald and broad statement, it is difficult to discern from the Supreme Court’s opinion exactly what part of the Florida contest system violated the Constitution. The Court identified three factors that raised constitutional concerns: (1) there were no uniform standards to guide local officials in determining when certain ambiguously marked ballots indicated the voter’s intent to vote for a particular candidate;<sup>8</sup> (2) in at least one county (Miami-Dade), only a portion of the county’s votes were manually counted and conveyed to the Secretary of State for inclusion in the certified results;<sup>9</sup> and (3) the use of voting machines to identify for manual tabulation both undervotes (where it initially appears that no candidate was selected) and overvotes (where it initially appears that more than one candidate was selected) would go beyond the design parameters of the machines in a way that could produce inaccurate results.<sup>10</sup> According to the Court, these problems made it impossible for the manual recount ordered by the Florida Supreme Court to satisfy minimal constitutional standards of “equal treatment and fundamental fairness”<sup>11</sup>—at least in time to satisfy what the Court felt was the absolute deadline of December 12th for determining the outcome of any election challenge.

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6. See Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719, 736 (2001); see also William P. Marshall, *The Supreme Court, Bush v. Gore, and Rough Justice*, 29 FLA. ST. U. L. REV. 787 (2001).

7. Under Florida law, challenges to the accuracy of vote counts prior to the certification of the vote results were conducted before the local canvassing board under the “protest” statute, FLA. STAT. § 102.166 (2000) (amended 2001), while postcertification challenges must have been raised in the circuit court under the “contest” statute, *id.* § 102.168 (amended 2001). Florida’s election laws are codified at FLA. STAT. chs. 101-02 (2000). After the 2000 presidential election, the Florida Legislature made significant amendments to the state election code. See 2001 Fla. Laws ch. 40. This Article considers the election statutes as they then existed before the 2001 amendments.

8. *Bush v. Gore*, 531 U.S. at 105-06.

9. *Id.* at 108.

10. *Id.* at 110.

11. *Id.* at 109.

The intricacies of the particular version of equal protection used by the Court to reach this conclusion are dissected at length by other contributors to this symposium. I would like to focus on the consequences of a tangential aspect of the Court's ruling. In holding that the Florida Supreme Court had failed to satisfy basic equal protection standards when that court ordered the manual recount to continue, the United States Supreme Court majority emphasized the inconsistency of having local variations within the context of a statewide recount. "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."<sup>12</sup> The inequality, in other words, was inherent in the fact that Florida voters living in counties that did not undertake a manual recount of ballots received a less rigorous review of their votes than Florida voters who lived in counties where manual recounts did occur.

The odd thing about this holding is that the *Bush v. Gore* majority went out of its way to emphasize the link between the inconsistent treatment of voters in different localities and the fact that the state supreme court had ordered a statewide remedy. Conversely, the Court also suggested that if the local governments themselves had implemented the unequal treatment of voters, there would be no equal protection violation. "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."<sup>13</sup> This conclusion refers to the Florida Supreme Court's order that a manual recount be conducted "in all Florida counties where there was an undervote."<sup>14</sup>

In fairness to the United States Supreme Court, this ruling by the Florida court was the weakest part of the state court's opinion. The Florida court greatly complicated the practical difficulties of the manual recount by suddenly expanding the Gore contest case from the handful of counties selected by the Gore campaign to every county in the state—including counties where neither the Gore nor the Bush campaign had identified problems or even suggested that problems with the vote count might have occurred. This not only took the case far beyond the parameters of the carefully focused Gore complaint, it also unnecessarily broadened the scope of the Florida election contest statute. The Florida court used the broad equitable

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12. *Id.*

13. *Id.*

14. *Gore v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

authority granted under one subsection of the contest statute<sup>15</sup> to override another subsection's particularized requirements for bringing a contest action. Under the latter subsection's requirements, a plaintiff in an election contest case must raise specific allegations of fraud, misconduct, or the rejection of "a number of legal votes sufficient to change or place in doubt the result of the election."<sup>16</sup> The most reasonable reading of the statute therefore would limit the scope of an election challenge to the specific areas in which the plaintiff has raised and can substantiate the required allegation of fraud, misconduct, or undercounts. If no such allegation can be made regarding the count in particular counties, then the statute presumably does not envision a contest with regard to the count in those counties. If a statewide election is held in which there is evidence of fraud in only one county, for example, it is neither logical nor reasonable that plaintiffs seeking to contest the vote count in the problematic county should be forced to investigate fraud in every other county of the state at the same time.

By ordering statewide relief for what was evidently a localized problem, the Florida Supreme Court gave the United States Supreme Court the opening it needed to reverse the state court on equal protection grounds. But the United States Supreme Court's equal protection ruling is not rendered any more logical by the state court's misapplication of Florida election law. The United States Supreme Court's ruling rests on the dichotomy the majority draws between a purely localized electoral system and one operated under the aegis of statewide rules. The *Bush v. Gore* majority evidently believed that the Equal Protection Clause provides different levels of protection under the two different systems. Under a purely localized system, different counting methods—and presumably differential error rates—do not violate the Equal Protection Clause. This is the clear implication of the Court's emphasis on the fact that *Bush v. Gore* was not a case in which "local entities, in the exercise of their expertise, may develop different systems for implementing elections."<sup>17</sup> Under an electoral system governed by statewide rules, on the other hand, the Supreme Court seems to hold that the Equal Protection Clause requires "equal treatment and fundamental fairness" in the form of uniform standards governing postelection assessments of electoral accuracy.

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15. The contest statute provides the judge in a contest case with the authority to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is *investigated, examined, or checked*, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." FLA. STAT. § 102.168(8) (amended 2001) (emphasis added).

16. *Id.* § 102.168(3)(c).

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

There are three problems with this dichotomy. First, there is no such thing—in Florida or in any other state—as truly “local entities, in the exercise of their expertise” regarding electoral matters. Every local entity operates under authority granted by some aspect of state law. No local government entity exercises sovereign authority over elections independent of the state government from which the local government obtains its power. Assume, for example, that Florida election law did not provide for the intervention of the state courts in election disputes via the contest statute.<sup>18</sup> This hypothetical system would leave all election disputes to the separate canvassing boards in each county, operating under authority granted to them by the Florida election protest statute.<sup>19</sup> Such a hypothetical system would involve, to use the Supreme Court’s phrase, “local entities, in the exercise of their expertise . . . develop[ing] different systems for implementing elections,”<sup>20</sup> but the local entities would be exercising this authority only because a statewide rule—i.e., the protest statute—authorized different counties to devise different vote count methods. In such a system, it is still the state—not the local government—that is creating the “different systems for implementing elections.” It is therefore unclear why the Supreme Court’s *Bush v. Gore* majority believes that one form of statewide authorization of differential vote counts—i.e., the protest statute—satisfies the Equal Protection Clause while another form of statewide authorization of differential vote counts—i.e., the state supreme court’s enforcement of the contest statute—does not. Indeed, the logic of the Court’s equal protection decision in *Bush v. Gore* compels the contrary conclusion. In other words, if the Equal Protection Clause indeed requires uniform standards and recount methods whenever state law provides a remedy for an election challenge, it should not matter whether the state law providing that remedy is embodied in a state court opinion or a state statute devolving responsibility to local boards. A statewide remedy is a statewide remedy, and the method of implementing that statewide remedy is irrelevant to the application of the underlying equal protection principle.

The second problem with the United States Supreme Court’s decision to overturn the Florida Supreme Court’s election contest ruling on supposedly narrow equal protection grounds<sup>21</sup> is that the United States Supreme Court’s broad requirement of “equal treatment and

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18. See FLA. STAT. § 102.168 (amended 2001).

19. *Id.* § 102.166 (amended 2001).

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

21. The Court emphasized that its equal protection ruling was not intended to apply beyond the context of the Florida election contest case. *Id.* at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

fundamental fairness” is not logically limited to postelection challenges of vote counts. The logic of the Court’s *Bush v. Gore* opinion applies also to the conduct of the election itself. If federal constitutional principles of “equal treatment and fundamental fairness” require identical standards for resolving disputes over the accuracy of vote counts, those same principles logically should require similar safeguards in every aspect of the election process. It would be incoherent to permit unequal treatment and fundamental unfairness in the original electoral process and impose equality and fairness requirements only to postelection contests, after the real damage has already been done.

The problem with this seemingly unavoidable conclusion is that many radical consequences necessarily flow from the application of the Court’s equal protection holding in *Bush v. Gore* to contexts beyond postelection challenges. In particular, the *Bush v. Gore* equal protection principles logically mandate that states such as Florida may not allow their counties to use different types of voting machines if there is evidence that some machines produce significantly higher error rates than others. In a system such as the one Florida used in the 2000 election, the percentage of a county’s votes that were counted as valid often depended on the type of voting machine used by that county.<sup>22</sup> Therefore, voters in counties that used more sophisticated, optical-scanning machines had a much greater likelihood of having their votes counted as valid than voters in counties using flawed punch-card machines.<sup>23</sup> This disparity violates the basic equality principle cited by the *Bush v. Gore* majority as the justification for its decision to overturn the Florida Supreme Court: “The idea that one group can be granted greater voting strength than another

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22. The error rates of the various kinds of voting machines may be a more complicated issue than it seemed immediately after the Florida vote. A recent study by political scientists and computer engineers at Caltech and the Massachusetts Institute for Technology confirmed the common assumption that optical scanners are the most reliable types of voting machines and that both punch-card and lever machines are deeply flawed and should be replaced. See Richard Winton, *Balloting Study Calls for Updating Equipment*, L.A. TIMES, July 17, 2001, at A1. The study also found flaws in some types of electronic voting methods, however. The study found, for example,

that some electronic voting machines, such as those that use buttons, were more prone to error than optical scanners. It also said that touch-screen voting remains “unproven” and that Internet voting is far from secure. Internet voting, the authors said, is a decade away because of the potential for fraud and hackers.

*Id.*

23. According to the Florida Governor’s Select Task Force on Election Procedures, Standards, and Technology, “voters in counties that used optical scanners with the votes counted at precincts had an average error rate of 0.83 percent, compared with an average statewide error rate for all equipment of 2.93 percent.” Sue Ann Pressley, *Election Panel Calls for Changes in Florida*, WASH. POST, Feb. 24, 2001, at A10.

is hostile to the one man, one vote basis of our representative government.”<sup>24</sup>

Other elements of state voting systems also should be subject to attack under this new electoral equal protection regime. For example, one of the key factors contributing to variations in the application of voting standards is the localized nature of the administrative apparatus that actually conducts elections. In Florida, as in most states, the supervisor of elections is a local official, whose authority is circumscribed somewhat by state law but who may exercise significant discretion in crucial decisions ranging from the types of voting machines purchased by the county, to the hiring of the personnel who administer the election, to the actual counting of the votes and the initial assessment of challenges to the vote count. If absolute consistency in the application of statewide election law is now a mandate of the Equal Protection Clause, then the typically localized structure of election law administration should be considered unconstitutional, at least to the extent that local officials are given discretion to introduce into the electoral system variables that lead to the conclusion that local officials are using “varying standards to determine what [is] a legal vote.”<sup>25</sup> States may continue to elect their election officials locally without violating the equal protection principles of *Bush v. Gore* but only if those local officials are transformed into purely ministerial actors carrying out policies that are identical for the entire electorate of the state. Despite the Court’s suggestion to the contrary, if we are to take *Bush v. Gore* seriously, local officials may *not*, “in the exercise of their expertise . . . develop different systems for implementing elections.”<sup>26</sup>

The radical implications of applying the equal protection principles of *Bush v. Gore* seriously do not stop at the state border. The third problem with the Court’s attempt to limit the scope of its ruling is that the *Bush v. Gore* equal protection principles must apply nationwide. According to the Supreme Court’s own logic, it is the Equal Protection Clause itself that imposes the requirement of uniformity—i.e., “equal treatment and fundamental fairness”—on the electoral system, not the particular structure of each state’s system. According to the Court, equal protection norms now prohibit a state from ordering one county’s local officials to implement state election law in a manner that varies from the way that law is applied in other counties in the same state. The logic of these equal protection norms should also prohibit any state from devising election procedures in a national election that have the effect of granting one group (i.e., that

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24. *Bush v. Gore*, 531 U.S. at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

25. *Id.*

26. *Id.* at 109.

state's voters) a more effective voting process than another (i.e., the citizens of other states who are voting for candidates for the same national office).<sup>27</sup> If, as the *Bush v. Gore* majority holds, equal protection principles now prohibit a state from "accord[ing] arbitrary and disparate treatment to voters in its different counties,"<sup>28</sup> then those same principles prohibit "arbitrary and disparate treatment" of voters in different states, at least in a national election. A quote used to support the concurring Justices' argument regarding the Article II issue in *Bush v. Gore* is also apropos to the equal protection issue: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."<sup>29</sup> Therefore, to put the matter bluntly, *Bush v. Gore* has nationalized the electoral process of electing a President.

This conclusion is a basic and unavoidable consequence of the Court's expansion of equal protection principles in *Bush v. Gore*. Once the Equal Protection Clause is expanded to encompass the requirement that all vote counts and challenges to vote counts in a particular election must be conducted uniformly, it is impossible to avoid the implication that the same uniformity must extend nationwide—at least with regard to presidential elections. Consider the other two categories of electoral law in which the Equal Protection Clause has played a significant role prior to *Bush v. Gore*: racial equality and the *Reynolds v. Sims*<sup>30</sup> principle of one-person, one-vote. Neither of these applications of equal protection jurisprudence would permit officials in one state to deviate significantly from the norm established by the Court and applied to every other state. In neither area would the Court even consider allowing (to cite the *Bush v. Gore* locution) "local entities, in the exercise of their expertise, [to] develop different systems for implementing elections."<sup>31</sup> Mississippi may not "in the exercise of local expertise" construct an electoral system based on different, more discriminatory standards of racial equality than those applied by Georgia. Likewise, the Tennessee Legislature may not argue, based on its local expertise, that voters in rural districts in that state deserve a somewhat greater proportion of the state's overall allocation of congressional offices than voters in the similarly sylvan areas of North Carolina. The one-person, one-vote principle applies to all states in exactly the same way.

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27. See *supra* note 24 and accompanying text.

28. *Bush v. Gore*, 531 U.S. at 107.

29. *Id.* at 112 (Rehnquist, C.J., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (footnote omitted)).

30. 377 U.S. 533 (1964).

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

The lesson to be learned from the Court's pre-*Bush v. Gore* equal protection jurisprudence is that equal protection rules are the same everywhere, and if those rules now include uniformity in the mechanisms for ascertaining voter accuracy, then those standards should require the identical vote-count and vote-challenge mechanisms in all the relevant jurisdictions whose citizens participate in a particular election. In county elections, therefore, every precinct must follow the same standards; in statewide elections, every county must follow the same standards; and in presidential elections, every state must follow the same standards. In sum, if we take *Bush v. Gore* seriously, one of the most far-reaching consequences is that the new Equal Protection Clause election jurisprudence dictates the nationalization of the administration of elections.

## II. CONSEQUENCE TWO: THE NEW EQUAL PROTECTION OF ELECTIONS

The nationalization of elections is not the only odd consequence that flows from the Supreme Court's equal protection holding in *Bush v. Gore*. The other odd consequence is the lowering of constitutional obstacles to challenging election results. Prior to *Bush v. Gore*, the federal courts had been notably reluctant to entertain constitutional challenges to election results. As a federal district court in Florida summarized the pre-*Bush v. Gore* law, "it is not the job of a federal court to involve itself with settling disputes as to how the state deals with counting votes after illegal votes are cast. Instead, a federal court should only intervene into state election disputes where the entire process is fundamentally unfair."<sup>32</sup> Historically, federal courts have held that this standard has not been met in cases involving the miscounting of votes by human election officials,<sup>33</sup> mechanical errors in the operation of the voting machines,<sup>34</sup> political party intervention in determining the outcome of a disputed political primary,<sup>35</sup> or even massive voter fraud that does not result in the state's invalidation of the election.<sup>36</sup> In one Fifth Circuit decision explaining that court's refusal to intervene in an election dispute over the counting of absentee ballots, the court asserted the traditional reluctance of federal courts to get involved in "garden variety" election disputes.<sup>37</sup> The court cited as a "typical result" one of its own election law precedents,

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32. *Scheer v. City of Miami*, 15 F. Supp. 2d 1338, 1342 (S.D. Fla. 1998).

33. *Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270 (7th Cir. 1986).

34. *Bodine*, 788 F.2d at 1270; *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975).

35. *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986).

36. *Scheer*, 15 F. Supp. 2d at 1338.

37. *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985), *vacated on other grounds and remanded*, 777 F.2d 191 (5th Cir. 1985).

in which “even though votes inadvertently counted incorrectly threw an election to the wrong candidate, this court refused to intervene.”<sup>38</sup>

The general rule prior to *Bush v. Gore* was that federal courts would intervene in election disputes only where there was evidence of discrimination on the basis of race, systematic disenfranchisement of voters, or fraudulent conduct (such as stuffing ballot boxes) that is intended specifically to throw an election.<sup>39</sup> There was no evidence of the first or third types of claims in the Bush campaign’s federal court constitutional challenges to the Gore campaign’s state-court actions contesting the election results in certain Florida counties. While the Gore campaign might have had evidence to assert racial discrimination against its supporters,<sup>40</sup> the Bush campaign did not. The Bush campaign also could not claim that intentional fraud was behind the decision of the Florida Supreme Court to order the recounts to continue. Florida has produced other cases that provide illustrations of this kind of behavior, but even the most partisan Bush supporters would not argue that in its resolution of the Gore appeals, the Florida Supreme Court engaged in massive election fraud of the sort that often justifies federal court intervention.<sup>41</sup>

Since the Bush campaign had no evidence of racial discrimination or massive vote fraud in the state court’s application of the Florida election contest statute, the United States Supreme Court majority that ruled in Bush’s favor had the choice of either holding that the Florida Supreme Court’s interpretation of Florida election law

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38. *Id.* (citing *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980)).

39. *See Pettengill v. Putnam County Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973) (holding that federal courts will not intervene in the administration of an election “in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing of the ballot box, or other unlawful conduct which interferes with the individual’s right to vote”) (citations omitted).

40. *See* U.S. Comm’n on Civil Rights, Draft Report: Voting Irregularities in Florida During 2000 Presidential Election (2001), at <http://www.usccr.gov/vote2000/stdraft1/main.htm> (citing widespread disenfranchisement of voters in the 2000 presidential election in Florida, especially of African-American voters).

41. Prior to *Bush v. Gore*, even massive election fraud did not always justify federal court intervention. The most notorious recent Florida case involving widespread election irregularities involved the 1994 Miami mayoral election. The Florida courts found evidence of massive absentee voter fraud. *See In re The Matter of the Protest of Election Returns and Absentee Ballots in November 4, 1997 Election for Miami, Fla.*, 707 So. 2d 1170 (Fla. Ct. App. 1998), *review denied*, 725 So. 2d 1108 (Fla. 1998). According to the state court, “the evidence demonstrated an extensive ‘pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of the absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated.’” *Id.* at 1171 (quoting final judgment of the Circuit Court). Nevertheless, the state courts refused to void the election but chose instead to invalidate only the absentee ballots. *Id.* at 1175. In a subsequent federal court challenge to the constitutionality of this remedy, the federal district court refused to get involved. “[F]ederal courts can only intervene in a state election dispute in . . . extreme circumstances. This case does not present one of those circumstances.” *Scheer*, 15 F. Supp. 2d at 1340.

amounted to a systematic disenfranchisement of voters or broadening the equal protection standard beyond its previously very narrow scope. The Court chose to do the latter, because there was no serious argument that the “arbitrary and disparate treatment” of voters—if indeed that is what happened in Florida’s election contest cases—was “systematic” in the way earlier jurisprudence had defined that term.

The classic case of systematic disenfranchisement is *Reynolds v. Sims*,<sup>42</sup> in which voters were systematically disenfranchised because the very structure of the electoral system regularly gave some voters more power than others. What happened in Florida was very different. The difference is encapsulated in *Gamza v. Aguirre*,<sup>43</sup> a prominent Fifth Circuit election decision. In that case, the Fifth Circuit

recognize[d] a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual’s vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.<sup>44</sup>

*Gamza* involved facts very similar to the facts in Florida. Specifically, the case involved errors in punch-card voting machines. In some precincts, voters were given ballots that contained the names of five candidates, despite the fact that only two candidates were running in the runoff election.<sup>45</sup> Thus, in the three precincts with the incorrect ballots, the plaintiff Gamza was listed in position one on the ballot. In the precincts with the correct list of candidates, the winning candidate was listed in position one and Gamza was listed in position two.<sup>46</sup> Unfortunately, when the votes were counted, all the votes in position one from every precinct were tabulated and awarded to the winning candidate, including the votes from the three precincts in which Gamza had actually been listed in position one.<sup>47</sup> If this error had not been made, Gamza would have won the election. To make matters worse, ballots were destroyed in violation of a court order during the period when the election results were being challenged.<sup>48</sup> Based on this evidence, the federal district court ruled that Gamza’s constitutional rights were violated.<sup>49</sup> The Fifth Circuit reversed, holding that whatever errors occurred in the process were

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42. 377 U.S. 533 (1964).

43. 619 F.2d 449, 453 (5th Cir. 1980).

44. *Id.* at 453.

45. *Id.* at 451.

46. *Id.*

47. *Id.*

48. *Id.* at 451-52.

49. *Id.* at 450.

merely “episodic events” that did not amount to systematic violations of federal constitutional rights.<sup>50</sup> “The unlawful administration by state officers of a non-discriminatory state law, ‘resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.’”<sup>51</sup>

The phrasing of the distinction between systematic disenfranchisement and “episodic events” that produce inaccurate election results is peculiar to the Fifth Circuit, but similar themes appear in various lower court opinions from many different circuits.<sup>52</sup> The general pattern in these cases, as summarized by the Ninth Circuit Court of Appeals, is that the federal courts will intervene to overturn an election only if two elements are present: “(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.”<sup>53</sup>

*Bush v. Gore* seems to broaden the equal protection analysis of election law significantly beyond this previously narrow range of factors. This is difficult to understand, however, because the lower courts’ circumscribed approach to the constitutional review of election cases reflects the same general tendencies that have defined the increasingly conservative Supreme Court’s constitutional jurisprudence in recent decades. One such principle is the heavy emphasis the Supreme Court has recently placed on the requirement that plaintiffs in an equal protection case demonstrate that the alleged

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50. *Id.* at 453-54.

51. *Id.* at 453 (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

52. *See, e.g.*, *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (“In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.”); *Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996) (“[P]laintiffs who can establish nothing more than ‘unintended irregularities’ in the conduct of elections are barred from obtaining § 1983 relief in federal court, *provided an adequate and fair state remedy exists.*”); *Kasper v. Bd. of Election Comm’rs*, 814 F.2d 332, 340, 344 (7th Cir. 1987) (expressing unwillingness to get involved in overseeing local elections process and suggesting that a federal constitutional claim for election irregularities exists only if the election officials have “adopted a canvassing system incapable of producing an honest vote even when the [officials do their] utmost” or when the system is “designed from the ground up to ensure dishonest elections”); *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986) (“Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election.”); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (“[N]ot every election irregularity gives rise to a constitutional claim. Whether the irregularity amounts to a constitutional claim depends on its severity, whether it was intentional or more of a negligent failure to carry out properly the state election procedures, and whether it erodes the democratic process.”).

53. *Bennett*, 140 F.3d at 1226-27.

violation is the result of intentional conduct by the government.<sup>54</sup> Thus, allegations of negligence or incompetence in the operation of an election are insufficient to state an equal protection claim—regardless of the effect such actions have on the outcome of the election.<sup>55</sup> The second such principle—articulated in due process terms in *DeShaney v. Winnebago County Department of Social Services*<sup>56</sup>—is that the government is not responsible for protecting private parties against their own incompetencies, or even against intentional harms created by other private parties. The Seventh Circuit Court of Appeals has applied this principle in the election context in terms that seem directly applicable to the Florida presidential election fiasco:

The natural reading of the documents is that the Board has done a slapdash job of administering the law, and that private parties (“dishonest precinct captains”) have taken advantage of its laxity. The failure of the police and other agents of the government to stop private offenders is not itself a violation of the Constitution. . . . The remedies for ineffectual public officials are political rather than constitutional.<sup>57</sup>

It is difficult to see how any of the facts in the Florida Supreme Court’s handling of the 2000 presidential election could be made to fit the pattern of constitutional litigation in the election cases described above. There is simply nothing to indicate that Florida officials—including judicial officials—intentionally designed its election system to deny Bush voters the right to exercise their franchise effectively, nor is there any evidence that any public official intentionally manipulated an otherwise legitimate electoral process with the specific intent to deny George W. Bush the election. There is abundant evidence of administrative incompetence, poor planning, incoherent statutory drafting, inadequate state guidance on election procedures, and fumbling judicial efforts to craft remedies in response to vote-count challenges at the last minute and under the heavy pressure of a looming federal deadline. But none of these factors even come close to stating a claim under the precedents that existed prior to the Supreme Court’s decision in *Bush v. Gore*. Thus, if we are to take *Bush v. Gore* seriously, we must assume that the Supreme Court intended to alter these precedents and the broader equal protection principles on which they are based.

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54. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

55. See *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986) (“[S]ection 1983 is implicated only when there is ‘willful’ conduct which undermines the organic processes by which candidates are elected.”) (quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)).

56. 489 U.S. 189 (1989).

57. *Kasper*, 814 F.2d at 343.

The question is: which elements of the preexisting precedents did the Supreme Court intend to alter? It is difficult to believe that the Supreme Court's *Bush v. Gore* majority is proposing to do away with the intent requirement for equal protection challenges in the election context, but if these five Justices do not propose to abandon the intent requirement, then they must at least propose to expand the notion of intent to encompass the concept that officials "intended" to produce the inequalities that actually resulted from the officials' actions in adopting a flawed system of counting votes. The problem with this theory, on the other hand, is that it contradicts the very specific statements the Court has made with regard to intent in cases like *Personnel Administrator of Massachusetts v. Feeney*<sup>58</sup> and *McCleskey v. Kemp*.<sup>59</sup> *Feeney* established the proposition that

"[d]iscriminatory purpose". . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.<sup>60</sup>

*McCleskey* applied that rationale to reject an equal protection challenge to the Georgia death penalty statute, which had the unfortunate consequence of producing death sentences that correlated heavily with the race of the victim—a clear form of racial discrimination. The Court held that the Georgia statute was not unconstitutional because it was not adopted "because of" the racial inequalities produced by the flawed application of the statute in the real world. "There was no evidence [at the time the statute was enacted], and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose."<sup>61</sup>

In *McCleskey*, the Court did suggest that proof of intentional discrimination in individual cases could result in an as-applied equal protection challenge to the particular application of the statute, but that theory would not help the Bush campaign in *Bush v. Gore*. No one in *Bush v. Gore* suggested that any judge or election official ordered the recount of votes with the specific intent of denying the election to George W. Bush. Thus, unless the concept of intent is expanded far beyond the *Feeney* notion that the Constitution prohibits only actions that occur "because of" their invidious effects, even an as-applied challenge to the Florida vote counting process would be unavailing. So the only possible explanation of the Supreme Court's equal protection holding (again, if we are to take *Bush v. Gore* seri-

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58. 442 U.S. 256 (1979).

59. 481 U.S. 279 (1987).

60. *Feeney*, 442 U.S. at 279 (footnote and citation omitted).

61. *McCleskey*, 481 U.S. at 298.

ously) is that the Court intended to abandon the narrow *Washington v. Davis/Feeney/McCleskey* concept of intent. For the sake of all those languishing on death row in Georgia and other states, it is unfortunate that the *Bush v. Gore* majority was not more explicit about announcing this very important change.

Aside from the intent problem, there is the matter of converting every local election irregularity into a matter of federal constitutional law. This is the great fear expressed by the lower federal courts, which recoil at the prospect of a deluge of constitutional challenges to every close vote count in every election.

If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.<sup>62</sup>

Apparently the lower courts' greatest fear has now been realized, because the Florida election dispute was little more than a run-of-the-mill dispute about snafus in the counting of disputed ballots. These disputes happen frequently in local, state, and national elections, and all such disputes apparently have now been elevated to the status of equal protection claims pertaining to the state's "obligation to avoid arbitrary and disparate treatment of the members of its electorate."<sup>63</sup> The only plausible way around this result is to somehow treat presidential elections different from all other elections, and thus limit at least the frequency of the constitutional/electoral deluges to once every four years. The problem with this explanation, however, is that the nature of the office for which the election is held has no bearing on the nature of the underlying constitutional claim. It is impossible to imagine a decision from the Supreme Court holding that the rules regarding racial discrimination are more rigorous in presidential elections than in local or state elections. Racial discrimination is racial discrimination, and the type of election in which the discrimination occurs is irrelevant to the existence of the constitutional violation. Thus, the only logical conclusion one can draw from the Court's equal protection holding in *Bush v. Gore* is that every election is now subject to the new, more liberal equal protection challenges to election procedures.

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62. *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980).

63. *Bush v. Gore*, 531 U.S. 98, 105 (2000).

III. CONSEQUENCE THREE: THE ELIMINATION OF STATE  
CONSTITUTIONAL AND JUDICIAL LIMITATIONS  
ON STATE LEGISLATIVE POWER

The contradictions between the *Bush v. Gore* majority's equal protection holding and the general tenor of equal protection election law prior to *Bush v. Gore* is only one dissonant aspect of that decision. It is difficult to reconcile the majority's aggressive stance toward the abstruse equal protection claims in *Bush v. Gore* and the Court's comparatively constrained approach to the enforcement of equal protection rights in other, more concrete contexts such as *Feeney* and *McCleskey*. But the inconsistencies between *Bush v. Gore* and existing jurisprudence do not stop with the majority's equal protection ruling.

A separate set of inconsistencies stems from the three concurring Justices' application of Article II, Section 1 to state-court interpretations of state law. Chief Justice Rehnquist's opinion for the three concurring Justices starts from the premise—also articulated in the per curiam opinion—that state legislatures have plenary power over the details of presidential elections. Rehnquist then proceeds to explain that the presumption of plenary state legislative power gives federal courts the authority to override state court interpretations of state laws in order to ensure that the state courts are not altering the state legislature's policies in postelection vote challenges. Postelection alterations in state law are significant because the “safe harbor” provision of federal law provides that the state's selection of electors shall be “conclusive” if the electors are chosen “by laws enacted prior to the day fixed for the appointment of the electors.”<sup>64</sup> There is no question that the Florida election laws used in the Gore election challenges were literally *enacted* prior to election day, but the Supreme Court held in *Bush v. Palm Beach County Canvassing Board* that “a legislative wish to take advantage of the ‘safe harbor’ would counsel against any *construction* of the Election Code that Congress might deem to be a change in the law.”<sup>65</sup> Thus, the Court expanded the federal statutory term “enacted” to mean “definitively interpreted,” which makes judicial interpretations of state law relevant in assessing whether changes in the law have taken place after the election.

Of course, the federal safe harbor provision does not impose a binding obligation on the states. In other words, the states are not required to partake of the conclusive presumption afforded to them if they comply with the requirements of federal election law. Nothing in the federal law prohibits a state from deciding, for example, that

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64. 3 U.S.C. § 5 (1994).

65. 531 U.S. 70, 78 (2000) (emphasis added).

other values—such as the value of electoral certainty regarding the intent of the voters—trump the importance of the conclusive presumption. Certainly nothing in Florida law specifically makes meeting the federal safe harbor certification deadline the premier value to be elevated over all others in presidential elections. In the absence of such clear and unequivocal guidance, whether the state has made this value choice would ordinarily be a question determined by the state courts in interpreting the entire corpus of state law on the subject of elections. In the concurring opinion in *Bush v. Gore*, however, Chief Justice Rehnquist transferred the power to answer this question of state law from the state courts to the federal courts and then proceeded to exercise this new federal power to interpret state law to override the Florida Supreme Court's interpretation of its own state election code.<sup>66</sup>

Whether the state supreme court or three concurring Justices of the United States Supreme Court had the better argument about the meaning of Florida law as applied to presidential elections is really beside the point, although there is a good case to be made that the state court produced a far more subtle and detailed analysis of the relevant law than the concurring Justices. In truth, the literal terms of the relevant Florida statutes do not answer precisely the questions posed in the 2000 presidential election dispute. It is impossible to envision full compliance with all of the main legal requirements imposed by Florida law on the election process: i.e., the accurate determination of voter intent,<sup>67</sup> full consideration of pre-certification challenges under the protest statute,<sup>68</sup> compliance with the state canvassing commission's obligation to certify the election seven days after the election,<sup>69</sup> complete judicial adjudication of postcertification challenges under the contest statute,<sup>70</sup> and satisfaction of the presumed legislative desire to take advantage of the safe harbor provision of federal law.

The unfortunate fact is that the Florida election code was an inconsistent, poorly drafted mess, which provided no clear answers to most of the major questions posed by the 2000 presidential election challenges and downright contradictory answers to some of those

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66. *Bush v. Gore*, 531 U.S. at 112-22 (Rehnquist, C.J., concurring).

67. FLA. STAT. § 101.5614(5) (amended 2001) ("No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.")

68. *Id.* § 102.166(5) (amended 2001) (requiring county canvassing boards to rectify problems in an election if a sample recount "indicates an error in the vote tabulation which could affect the outcome of the election").

69. *Id.* § 102.111 (amended 2001).

70. *Id.* § 102.168(3)(c) (permitting judicial challenges to election results upon proof of the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election").

questions.<sup>71</sup> The *Bush v. Gore* concurring Justices were correct in pointing out that the Florida Supreme Court introduced deadlines into the protest/certification/contest process that were not stated in the statutes themselves. But the Florida court did so in an effort to give all the various Florida election statutes some semblance of their intended effects, and to avoid effectively reading the protest and contest statutes out of presidential elections altogether. The Florida court's effort may have been imperfect, and it will always be possible to challenge the precise guidelines set down by the Florida court, but it was a plausible effort to afford the candidates at least some effective access to the election challenge process that the Florida Statutes clearly provide.

In contrast to the Florida court's effort to make the best of a bad situation, the *Bush v. Gore* concurring Justices' attempt to become the definitive arbiters of Florida election law is weak and poorly supported. The concurring opinion ultimately rests of a combination of *ipse dixit* and feigned astonishment at what the concurring Justices apparently viewed as the Florida court's incompetence. The latter is not an overstatement of the concurring Justices' injudicious treatment of the Florida court; on just one page of the concurring Justices' opinion, they describe various aspects of the Florida court's interpretation of Florida law as "absurd," "peculiar," "inconceivable," and an interpretation that "no reasonable person" would adopt.<sup>72</sup> Unfortunately, most of these comments are made in the context of little more than conclusory rejections of the Florida court's statutory analysis, in favor of the concurring Justices' own determinations of what the state statutes mean, coupled occasionally with references to supporting conclusions from the *dissenters* in the Florida Supreme Court's opinion.<sup>73</sup>

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71. To cite just one simple example, the two statutes describing the state canvassing commission's responsibility to certify the results of elections are inconsistent regarding what became a crucial aspect of the 2000 presidential race—i.e., the failure of some county canvassing boards to report complete results from their counties by the statutory deadline. One statute says that the votes of the counties in which results are not reported in a timely fashion "shall be ignored." *Id.* § 102.111 (amended 2001). The other statute says that such late or inadequate returns "may be ignored." *Id.* § 102.112 (amended 2001). As even the most rudimentary dictionary will attest, "shall" does not mean the same thing as "may." If the commission "shall" ignore the results, then there is no discretion to accept some results because of extenuating circumstances. If the commission "may" ignore the results, then the commission has some discretion to accept late results, and the crucial legal issue becomes how that discretion is limited by other provisions of Florida law. Choosing "shall" over "may" (or vice versa) is itself a value choice about the meaning of state law. The point is: the actual text adopted by the Florida Legislature does not decide that question, which is why the role of the state courts is critical.

72. *Bush v. Gore*, 531 U.S. 98, 119 n.4 (Rehnquist, C.J., concurring).

73. *See id.* at 120 (Rehnquist, C.J., concurring) (citing Chief Justice Wells' dissenting argument that the voters' intent statute relied upon by the Florida Supreme Court majority—FLA. STAT. § 101.5614(5)—is irrelevant to the resolution of the Gore challenge).

The real answer to the statutory interpretation dilemma in *Bush v. Gore* is that the Florida election laws were badly drafted and often inconsistent, and the flaws inherent in these laws were magnified when the various certification and voter challenges had to be conducted in the truncated time frame necessary to send a valid certification of the election results to Washington for the determination of the national presidential election. But does the poor foresight and drafting skills of the Florida Legislature and the obvious inadequacy of the simple text of Florida election law to answer a particular set of new issues justify federal court intrusion into a matter that is traditionally the exclusive province of the state courts? The concurring Justices say “yes,” on the ground that *Bush v. Gore* involved one of “a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government.”<sup>74</sup> The “exceptional case” in *Bush v. Gore* is created by the statement in Article II that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,”<sup>75</sup> electors for President and Vice President. “If we are to respect the [state] legislature’s Article II powers,” the concurring Justices insisted, “we must ensure that post-election state-court actions do not frustrate the legislative desire to attain the ‘safe-harbor’ provided by [3 U.S.C.] § 5.”<sup>76</sup> Thus, in a strange reversal of the usual mechanisms of federalism, the Florida Supreme Court’s interpretation of its own state law is preempted by the Federal Court’s perceived need to interpret that state law to implement the Federal Constitution’s preference for another branch of state government.

This is odd logic, but odder still is the notion that this particular example of federal constitutional authority preempts state court enforcement of its own law when a multitude of other examples of federal constitutional authority do not. In the last few decades, the Supreme Court has subordinated federal constitutional authority to state court power by several different methods. In some of these cases the state courts have been allowed to interpret and apply federal constitutional law and then bind the parties to the state-court interpretation—either through the application of *res judicata* principles<sup>77</sup> or by foreclosing any subsequent federal litigation due to the *Younger* abstention notion that in a system defined by “our federal-

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74. *Id.* at 112 (Rehnquist, C.J., concurring).

75. U.S. CONST. art. II, § 1.

76. *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

77. *See Migra v. Warren*, 465 U.S. 75 (1984) (holding that federal claims may be barred from subsequent litigation in federal court if state *res judicata* rules would bar re-litigation of claims that should have been raised in previous state court litigation); *Allen v. McCurry* 449 U.S. 90 (1980) (holding that state *res judicata* and collateral estoppel rules apply to bar subsequent federal court litigation of claims and issues previously litigated in state court).

ism,” state courts are just as competent to interpret and apply federal law as federal courts.<sup>78</sup> How odd that in *Bush v. Gore* the same state courts that are afforded deference in interpreting and applying supreme federal law in other contexts cannot be afforded the same deference in interpreting and applying state election law with regard to which (judging from the unsatisfactory interpretations of that law offered by the concurring Justices) the state courts are markedly more familiar and competent than the federal courts.

Odder still, there is another well-developed body of law that allows state courts to avoid the application of federal law altogether if a party has failed to abide by procedural rules that are based entirely in state law.<sup>79</sup> According to the Supreme Court,

[t]he procedural default doctrine and its attendant “cause and prejudice” standard are “grounded in concerns of comity and federalism. . . .” We therefore require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim.<sup>80</sup>

Thus, the United States Supreme Court will apply principles of “comity and federalism” to give effect to state court procedural rules and adjudications that totally foreclose federal court enforcement of federal law in situations that often involve matters of life and death (i.e., federal challenges to death sentences) and yet not apply those same principles of comity and federalism to state court determinations that are based entirely on interpretations of state election law. There is no clear reason why the federal constitutional allocation of power between the various branches of state government in Article II should give federal courts more authority to intrude into state court prerogatives than federal constitutional designations of individual rights in the Bill of Rights and the Fourteenth Amendment. If anything, the tendency to defer to state courts should run in the opposite direction. The Bill of Rights and the Fourteenth Amendment do not merely favor one branch of state government over another; they completely foreclose *any* action by *any* branch of state government that violates these federal provisions.

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78. See *Pennzoil v. Texaco*, 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971).

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Our system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction. . . . These vehicles for review, however, are not available indefinitely and without limitation. Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim.

*Daniels v. United States*, 121 S. Ct. 1578, 1582-83 (2001) (citations omitted).

80. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

So what are we to make of these inconsistencies and anomalies in the deference being denied to state courts by the concurring Justices in *Bush v. Gore*? If we take their opinion seriously, the concurring Justices must now be reconsidering the range of different circumstances in which state courts are allowed to apply independent interpretations of federal law in a way that forecloses subsequent federal court consideration of the same matters. These Justices presumably must also be reconsidering the situations in which state courts will be allowed to apply their own interpretations of independent and adequate state legal grounds for relief, where those interpretations would have the effect of foreclosing relief on federal grounds. At the very least, the *Bush v. Gore* concurring Justices must mean that federal courts must now independently interpret state laws that are being asserted as independent and adequate grounds for relief. Thus, if we take the concurring Justices seriously, a great deal that we now understand about the relationships between state and federal courts is about to change.

And yet . . . it is odd that the concurring Justices would choose *Bush v. Gore* to announce such a major change in their heretofore very different attitudes toward deferring to state courts. It is also strange that the concurring Justices did not mention the implications of their opinions on any of these other areas of traditional deference to state courts. Thus, with regard to the concurring Justices' approach to federal court enforcement of Article II, as with regard to the majority's approach to the Equal Protection Clause, there is the lingering suspicion that maybe the Justices in the *Bush v. Gore* majority do not really intend to adhere consistently to their newfound fondness for a strong equal protection jurisprudence and reinvigorated federal court supremacy. But if the Justices do not intend to adhere consistently to these new principles, what justifies the result in *Bush v. Gore*? The answer may lie in the Court's own disclaimer to its equal protection ruling: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."<sup>81</sup> The Justices themselves tell us, in other words, that we should not expect *Bush v. Gore* to have any effect on constitutional doctrine beyond the boundaries of this one, isolated dispute. It is in the context of the Court's own disclaimer—"[o]ur consideration is limited to the present circumstances"<sup>82</sup>—that it is possible to draw some preliminary conclusions about the broader consequences of *Bush v. Gore*.

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

82. *Id.*

A FEW PRELIMINARY CONCLUSIONS ABOUT THE CONSEQUENCES  
OF TAKING *BUSH V. GORE* SERIOUSLY

The main obstacle to taking *Bush v. Gore* seriously is that no one really believes that the *Bush v. Gore* majority intends to follow the logic of its decision beyond the results of the case that decided the presidential election of 2000. It is highly unlikely that a majority of Justices on the current Supreme Court will ever pursue the implications of their *Bush v. Gore* ruling even in other election cases, much less in cases outside the election context. The Court inasmuch as said so itself: “Our consideration is limited to the present circumstances.”<sup>83</sup> So how are we to explain the *Bush v. Gore* result in a way that preserves the usual requisites of judicial review, such as the expectations that the Court’s doctrine will be determinate, generalized, consistent, and coherent?

If we abandon the pretense that *Bush v. Gore* is connected in any way to a systematic body of doctrine, then it is possible to construct an explanation for the Court’s behavior. The most sensible way to do so is to argue along with Judge Richard Posner that the decision can be explained as an example of “rough justice.”<sup>84</sup> Posner’s theory is that the Florida Supreme Court misinterpreted Florida law, and that even if the recount did go forward under such a misinterpretation, Gore probably would have lost anyway. This argument begs the question by assuming that even if the Florida Supreme Court did misinterpret Florida law (which, contrary to Posner’s rather superficial analysis, the Florida Court almost certainly did not<sup>85</sup>) the United

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83. *Id.*

84. Posner, *supra* note 6, at 736.

85. Posner’s primary complaints about the Florida Supreme Court’s interpretation of Florida election statutes are that (1) the Florida court did not respect the power of the Secretary of State to be free from judicial interference in exercising discretion to reject votes from counties whose results were deemed by her to be out of compliance with Florida law, *see id.* at 729-30; (2) the Florida court interpreted the Florida contest statutory term “error in the vote tabulation” to include mismarked ballots that could not be read by machine, *id.* at 730 (quoting *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1283-84 (Fla. 2000)); and (3) the Florida court interpreted the contest statute expansively to provide legal remedies independent of the Florida protest statute, thus making “the protest a meaningless preliminary to the contest and expanded, without any basis in the statute, the power of the courts relative to that of the [election] officials,” *id.* at 731. This is not the place for a full exegesis of Florida election law precedents, and some leeway has to be afforded for the fact that so many outside observers have had to become experts on Florida election law so quickly, but suffice it to say for present purposes that Judge Posner is almost certainly wrong—as a matter of Florida legislative history, precedents, and the reasonable application of English usage—on the latter two points. The first point is more complicated, but again if the full range of Florida administrative law regarding the discretion granted to the Secretary of State is taken into account, Posner is probably wrong on that score as well. But the point is, it does not matter: jurisdictional limits being what they are, it does not matter what a federal appellate court judge—or for that matter a United States Supreme Court Justice—thinks Florida law means. Determining the meaning of

States Supreme Court has legal authority to override the Florida Court's interpretation. This is the argument of the *Bush v. Gore* concurring Justices, which is addressed in the previous section of this Article. The more important point is that the "rough justice" argument more or less concedes that *Bush v. Gore* was, in the end, an unprincipled, ad hoc decision. It is essentially an argument that somebody had to decide the election, and it may as well have been the United States Supreme Court as any other governmental body.

This argument will not ultimately be sufficient to salvage *Bush v. Gore* from its critics. The "rough justice" argument is insufficient because it does not require the Court to provide a statement of law to which everyone on both sides of the political divide can potentially benefit; thus such a decision cannot satisfy the requirement that law be generalized and applicable to every party encountering similar circumstances. The argument is also insufficient because it provides fodder for those advancing the crasser theories of the judicial process as radically indeterminate, and if the perception of radical indeterminacy becomes too great, it robs the courts of their ability to segregate law from politics.<sup>86</sup> Finally, it is insufficient precisely because it is an argument for ad hoc justice, and if ad hoc justice is not inevitably corrupt (in the sense that decisions are sold to the highest bidder), it will probably always be *perceived* as corrupt, and from the perspective of the courts that perception is probably just as debilitating as actual corruption itself.

In the end, assessing the meaning of *Bush v. Gore* presents legal analysts with a vexing quandary. In finally coming to terms with *Bush v. Gore* and its relationship to the Supreme Court's general constitutional jurisprudence, it is not healthy for those of us within the legal system to insist on thinking of the case in the dark terms of corruption or the other disparaging characterizations that many previous commentators have applied to the majority's decision. But it is also implausible to take *Bush v. Gore* seriously as an articulation of new constitutional doctrine. I would rather choose a third option and view the decision in a more lighthearted vein. We cannot take the case seriously as doctrine, and we do not want to take it seriously as evidence of corruption or irresponsibility. So maybe we should just write off the entire exercise as five Supreme Court Justices' little joke and hope that the fact that few people are laughing will cause

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Florida law is the job of the Florida Supreme Court, which frankly accomplished that task with much more aplomb than its critics.

86. "Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it." Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12 (1984).

the members of the next majority who confront a similar dispute to take their jobs a little more seriously.