ESSAY

Renormalizing *Bush v. Gore*: An Anticipatory Intellectual History

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One immediate reaction to *Bush v. Gore*,[1] on both sides of the political spectrum, was to think it a narrowly partisan decision. The decision's obvious effect was to award the Presidency to George W. Bush, and it was difficult to avoid inferring that the five-Justice majority intended to accomplish the natural consequences of its actions. So, the immediate reaction I have described was readily translated into the thought that *Bush v. Gore* demonstrated, much to the dismay of many, that critical legal studies arguments, or at least legal realist ones, were correct.[2] Critical legal studies had been widely reported to be, in Duncan Kennedy's words, "dead, dead, dead."[3] *Bush v. Gore* seems to have let critical legal studies arise like Lazarus from the grave.[4]

There are reasons, though, that the demise of critical legal studies had been widely reported.[5] The critical legal studies claim that law, properly understood, was indistinguishable from politics, properly understood, was quite threatening to the self-understanding of legal elites.[6] Justice Robert Jackson once referred to the "mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges."[7] It is one thing to have those reservations, another to be reminded of them, and yet something else to be hit over the head with the realization that judges are not always dispassionate.[8] Legal elites

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

2. I received two e-mails suggesting this conclusion from mainstream liberal constitutional theorists. One, with the subject line "Taking the Constitution Away from the Courts," had as its message the single word, "Uncle." The other said, "Everyone has a breaking point," and appended an op-ed that the sender had written, which was highly critical of the Court's decision to stay the recount.

3. *See* Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 543 n.21 (2000) (referring to a statement by Professor Kennedy made in 1996).

4. For reasons that should be obvious, I do not want to force this metaphor too much.

5. I should note my belief that, as with those of Mark Twain's death, the reports of critical legal studies' demise had been greatly exaggerated. *See* OXFORD DICTIONARY OF QUOTATIONS 554 (3d ed. 1979).

6. I believe that this threat, rather than the purported inability of critical legal studies' adherents to devise reformist programs, was the source of the reports of critical legal studies' demise. *Cf.* Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779 (1992) (asserting that, in its critics' eyes, critical legal studies failed to articulate a reform program).

7. United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

8. One important criticism of critical legal studies was that its claim about the equivalence of law and politics could not be sustained unless the advocate of critical legal studies could identify a decision

are heavily invested in insisting that there is a real difference between law and politics.[9] They are also invested, though slightly less so, in insisting that judges typically do law rather than politics. These investments, and the threat to them posed by critical legal studies and the immediate reaction to *Bush v. Gore*, meant that something had to be done to take the sting out of the criticisms that the decision was infected by blatant partisanship.

I call the efforts that I am about to describe the "renormalization" of *Bush v. Gore*.[10] I draw that term from the domain of theoretical physics, but do not want to place too much weight on the precise metaphor.[11] However, a brief explanation follows: Some calculations in theoretical physics generate infinite quantities at troublesome places, which interferes with the physicists' ability to conclude their calculations. Renormalization is a technique by which these anomalous infinities get removed so that the calculations can be carried on to the desired conclusion.[12] I suggest that legal elites would like to renormalize the anomalous decision in *Bush v. Gore* so that we can return to our belief that law is sensibly distinguishable from politics.[13]

Drawing on my reading of newspapers, a flood of e-mail messages, and numerous law review articles that have begun to circulate in draft form in the wake of *Bush v. Gore*, I will identify several major techniques of renormalization. The first is simple enough: Ignore the case. Treat it as a unique event in the legal universe, unlikely ever to be repeated. This technique is available to the general public, but is harder for the legal elite to use.[14] The Supreme Court itself suggested the sui generis nature of *Bush v. Gore* in writing that it was ruling only on the precise facts before it.[15] The difficulty that ignoring the case poses for legal elites is precisely that the decision presents itself as *law*,[16] and

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that exclusively served narrow partisan goals. *See, e.g.*, Louis Menand, *Radicalism for Yuppies*, NEW REPUBLIC, Mar. 17, 1986, at 20, 21, 23. In my view that criticism misunderstood the definitions of "law" and "politics" that critical legal studies (appropriately) used. But, in any event, *Bush v. Gore* makes this criticism unavailable today, because such a decision is now readily identifiable. A better version of the critical legal studies claim is that in most interesting cases something other than law best explains outcomes. *That* claim is not advanced by pointing to a single case, even *Bush v. Gore*.

9. I include in the category "legal elites" legal academics, prominent lawyers who are frequently quoted in newspapers, and editorialists for most major journalistic outlets when they comment on legal issues.

10. Renormalization can be understood as a method of stabilizing the constitutional system in the aftermath of events that, if left unaddressed, may create a crisis of constitutional confidence.

11. An alternative term would be "domestication."

12. For a brief description of renormalization's role in theoretical physics, see STEVEN WEINBERG, DREAMS OF A FINAL THEORY: THE SEARCH FOR THE FUNDAMENTAL LAWS OF NATURE 108–14 (1992).

13. The title of Richard D. Friedman, Trying to Make Peace with *Bush v. Gore* (n.d.) (unpublished manuscript, on file with author), expresses the anxiety I describe here. Friedman concludes that he cannot "make peace" with the decision. *Id.* at 45.

14. For the general public, I suspect, *Bush v. Gore* will easily be ignored if the Bush Administration turns out to be a success and may become a focus of severe criticism if the Administration turns out to be a failure.

15. 531 U.S. at 109 ("Our consideration is limited to the present circumstances . . . .").

16. I believe that the concern for legality underlies an emerging tendency among the Court's defenders to focus on the Article II discussion, adopted by only three Justices, *see id.* at 111–23

for legal elites, judicial decisions are distinguished from executive ones, for example, precisely because executive decisions need have no implications for the future—can be sui generis—in ways that judicial decisions must.[17]

The second renormalization technique I label, "Great cases, like hard cases, make bad law."[18] That is, this technique acknowledges that the decision is *Bush v. Gore* cannot really be regarded as an example of courts operating at anywhere near their best and may even be a (hopefully) isolated case in which law was in fact reduced to politics. This technique comes in Republican and Democratic variants.

The Republican variant has one minor and two alternative major components. The minor component is "Don't shoot the piano player."[19] That is, the rough edges in the Court's decision are explicable by the tight time constraints under which the Court was operating. This explanation is not enough, though, because the time constraints were of the Court's own making and, in any event, the time constraints may account for some of the rough edges in the opinion but not for the apparent partisanship that fuels the critical legal studies reaction.[20]

So, the first of the alternative major components: The Justices in the majority sincerely believed that they were observing a process in which a highly partisan state supreme court had simply gotten out of control[21] and was attempting to steal the election from the rightful victor.[22] That they had few legal tools at hand

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(Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.), and rejected by four, *see id.* at 130–33 (Souter, J., dissenting, joined by Breyer, J., joined in part by Stevens and Ginsburg, JJ.), rather than on the equal protection holding adopted by five, *see Bush v. Gore*, 531 U.S. at 105–11. The Article II analysis can be treated as law with implications for the future, because, although the Article II analysis *could* be deployed in future cases, the circumstances triggering such an analysis are quite unlikely to arise. For additional discussion of the Article II argument, see *infra* note 53.

17. Richard Friedman pointed out to me that a President's decisions can have long-term effects by affecting that President's reputation. Clearly, most of those effects will fall on the individual President, not on the institution of the Presidency.

18. N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting). I think it worth noting that the "great" case to which Holmes referred is now known almost exclusively to specialists.

19. To complete the quotation: "He's doing his best." *See* Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 176 (1964) (quoting the apocryphal sign).

20. In addition, I note that real-time discussions of the issues in the case, particularly those involving Article II, on the constitutional-law and election-law listservs were significantly more sophisticated than the Supreme Court's treatment of the same issues. Without having counted, I have the sense that no more than forty people participated actively in the listserv discussions, a number roughly consistent with the size of the Supreme Court's legal staff.

21. The citations in Chief Justice Rehnquist's concurring opinion to cases from the 1960s in which the U.S. Supreme Court developed innovative doctrines to control the excesses of anti-civil rights Southern supreme courts support this conclusion. *See* Bush v. Gore, 531 U.S. 98, 114–15 (2000) (per curiam) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); and *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

22. This view may suggest drawing an analogy between the Florida Supreme Court's actions and the Yugoslav Constitutional Court's (abortive) decision that Slobodan Milosevic had received enough votes to force a run-off in that nation's 2000 elections. For a criticism of this view of the Florida Supreme Court's actions, see David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV.

to prevent the theft did not matter.[23] They were, in the Republican version of the "great cases make bad law" argument, forced to make bad law to avoid an even greater evil.[24] Notably, this alternative suggests rather strongly that the Court's decision was lawless, though justifiably so.

The second major alternative component is that the Court, and the nation, confronted a chaotic situation implicating both the selection of the nation's most important public official and an impending constitutional crisis. The Court, in this view, was in a position to resolve the crisis in a statesmanlike way.[25] Perhaps the Court's legal theory was thin, but a barely adequate legal theory may be sufficient when invoked to avert a serious constitutional crisis.[26]

The Democratic version of the "great cases make bad law" argument is of course more critical of the Court. In this variant, the Justices are indeed understood to have intervened to end what they saw as a national political crisis. But, in the Democratic view, the characterization of the situation as chaotic and critical is wildly overstated.[27] According to this view, the recounts ordered by the Florida Supreme Court were proceeding smoothly at the moment the U.S. Supreme Court stepped in to stay further counting. Even more, the purported constitutional crisis would have involved nothing more than the invocation of existing constitutional forms—the methods set out in the Constitution itself and in a federal statute of old vintage—to determine who the President should be. At the very least, the fact that there were no tanks in the streets meant that it required a stronger legal theory than the Court had to justify its actions.

The Justices' belief that they were the appropriate people to resolve the crisis, such as it was, is part of a mind-set that, according to Democrats, has become all too common on the Court: Contrary to Justice Stone, the Justices do indeed believe that they are the only agency of government with a capacity to govern.[28] On the view that the Court acted to avert a constitutional crisis, the crisis would

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737, 754 (2001) (noting a number of "indications that the Florida Supreme Court was not simply trying to ensure that Vice President Gore would win the election").

23. The idea here is that you have to set a thief to catch a thief.

24. In this they acted in a way reminiscent of the Warren Court's efforts to ensure that civil rights demonstrators would not be penalized. The Warren Court too articulated doctrines that were quite innovative and that may not have been intended to have implications beyond the cases at hand. It did so in the service of what its members regarded as the higher good of advancing the cause of civil rights. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 228–29 (2000) (discussing *Bell v. Maryland*, 378 U.S. 226 (1964)).

25. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001) (offering this argument).

26. Traditional legal theory may classify this argument under the heading *raison d'état*.

27. A subtle criticism of the proposition that the Court acted wisely in fending off a constitutional crisis is presented in Sotirios A. Barber & James E. Fleming, *Bush v. Gore*: Constitutionalist Though Not Constitutional? (Mar. 2001) (unpublished manuscript, on file with author). I should note that Barber and Fleming would (correctly) disclaim presenting an analysis that could appropriately be given a partisan label. I include the citation here while acknowledging that the "Democratic" label is one I have affixed for expository convenience.

28. *Cf.* United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting) ("Courts are not the only agency of government that must be assumed to have capacity to govern.").

have consisted of Congress exercising powers conferred on it by the Constitution.[29] In this light, the Democratic view is that *Bush v. Gore* is of a piece with *City of Boerne v. Flores*.[30] The Democratic variant of the "great cases make bad law" argument points to the flaccid rhetoric in *Bush v. Gore*'s final paragraph, with its reference to the Court's "unsought responsibility"[31] in a case in which the Court itself assumed responsibility, to show the Justices' inflated self-conception.[32]

A third technique of renormalization involves an explicit allocation of the burden of proof to those who would claim that the Justices were motivated by narrow partisan concerns. Those who insist on distinguishing between law and politics also insist that those who claim that a particular decision demonstrates the collapse of that distinction must present persuasive evidence to support their conclusion, beyond pointing to the result alone.[33] As it happens, there is indeed some evidence that the critical legal studies adherent can marshal. For example, Justice O'Connor reportedly said on election night at a time when it appeared that Vice President Gore might win, "Oh, this is terrible."[34] More interesting to me is the fact that the Supreme Court has recently considered not one but two cases directly implicating the narrow electoral prospects of the two parties—both *Bush v. Gore* and the census sampling decision.[35] I find it striking that the division in the Court was identical in these two cases, which clearly raised legal questions that had nothing whatever to do with each other and in which the narrow electoral interests of the two parties were directly opposed.[36] Finally, critics point to Justice Scalia's opinion concurring in the issuance of a stay, in

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29. Pursuing this analysis, Democratic critics of the Court may suggest that many Justices might have believed that remitting the problem to Congress would itself have been a form of constitutional crisis, because the Court's members have demonstrated a rather deep suspicion of claims that Congress can act to advance the public interest rather than narrow special interests. *Cf.* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001) (arguing that *Bush v. Gore* is consistent with cases involving political parties in which the Court expresses a suspicion of the political process).

30. 521 U.S. 507 (1997).

31. 531 U.S. at 111. In an exceedingly technical sense, the Court's responsibility was indeed unsought. Candidate Bush's lawyers filed an application for a stay of the recount ordered by the Florida Supreme Court. However, the U.S. Supreme Court not only granted the stay, but also, on its own, treated the application for the stay as a petition for a writ of certiorari and granted review. *See* Bush v. Gore, 531 U.S. 1046, 1046 (2000) (application for stay).

32. The Democratic variant would have it that the real conclusion of the Court's opinion read, "Our long national nightmare is over."

33. Sometimes the allocation of the burden of proof is justified, for legal academics, on pedagogical rather than ideological grounds. The idea is that it would be really depressing if we had to tell our students that their cases were over before they walked into the courtroom and that nothing they could say, either in their briefs or in their oral arguments, would make a difference. We must insist that law matters, if only to keep their (and our) spirits up.

34. *See* Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46, 46 (quoting two unnamed eyewitnesses).

35. Dep't of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

36. This bit of evidence, if nothing else, should make it clear that nothing in the critical legal studies perspective implies that it was only the Justices in the *Bush v. Gore* majority who ignored the purported distinction between law and politics. I think it entirely plausible that all nine Justices would have

which Justice Scalia found irreparable injury to Governor Bush in a flawed recount procedure that may have produced evidence inducing in some people the erroneous belief that Bush was not the legitimately chosen President.[37] Aside from the implicit assumption that Governor Bush might not prevail in the flawed recount, critics note as well that this analysis appears to violate free expression principles, under which a court may not issue a ruling predicated on a finding of injury arising from erroneous factual beliefs in a political context.[38]

Of course none of this is a smoking gun, nor do I think that, even when the Justices' papers are opened or some law clerk tells a version of the inside story, we will ever have smoking-gun evidence.[39] And the "burden of proof" technique can be used to set the bar as high as is needed to overcome whatever circumstantial evidence can be mustered by proponents of the critical legal studies interpretation of *Bush v. Gore*.[40]

I have not yet mentioned the circumstantial evidence of narrow partisanship on which most people have focused: the great innovativeness of the Court's legal analysis. The Justices in the *Bush v. Gore* majority are not averse to legal innovation, but they have ordinarily been quite suspicious of innovations in what appears to be a direction compatible with Warren Court inclinations. Critics of the decision note as well that the Court's apparent doctrinal innovations are coupled with an expressed unwillingness to indicate that those innovations had any implications for any other cases.[41]

What I mean by this comment is this: I think that there are three interesting

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reversed the positions they actually took in a reverse *Gore v. Bush*, had Vice President Gore been attempting to halt a recount ordered by an apparently partisan Michigan Supreme Court.

37. Bush v. Gore, 531 U.S. 1046, 1046 (2000) (application for stay) (Scalia, J., concurring).

38. *See* Strauss, *supra* note 22, at 742 (noting that "[o]rdinarily it is a fundamental principle of our system of freedom of expression that the government cannot limit what people hear about politics because it mistrusts their ability to evaluate that information rationally"); *cf.* Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991) (upholding a statute authorizing the commission to investigate and state its opinion on the falsity of statements made in political campaigns; the statute applied to statements made by a person knowing that they were false or made with reckless disregard of their truth or falsity); State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wash. 2d 618 (1998) (holding unconstitutional a statute banning false statements made with actual malice in political campaigns).

39. I am reminded here of the classic lawyer's observation that the presence of a fish in a load of milk is only circumstantial evidence that the milk had been watered down.

40. One could add to the circumstantial evidence the widely noted catch-22 the Court seemed likely to invoke: After *Bush v. Palm Beach County*, 531 U.S. 70 (2000), the Florida Supreme Court might reasonably have thought that any effort on its part to specify a standard for counting votes more specific than the statutory term "intent of the voter," FLA. STAT. ch. 101.5614(5) (2000), would lead the U.S. Supreme Court to find that it had violated Article II. This is particularly so in light of the Court's refusal to grant review before the Florida Supreme Court ruled in the contest case of a related but slightly different equal protection claim presented in the protest phase. Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001), presents an extremely sophisticated and broader version of the catch-22 argument.

41. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). This is reminiscent of Justice Owen Roberts's criticism of a majority opinion for rendering an earlier decision "good for this day and train only." Smith v. Allwright, 321 U.S. 649, 669

doctrinal innovations in *Bush v. Gore*—the central equal protection ruling, a comment made in passing that seems to me to hold that there is sometimes a constitutional right to an appeal in a civil case,[42] and the Court's penultimate paragraph in which it engages in an authoritative construction of Florida law with no guidance on the matter from the Florida Supreme Court.[43] I want to be clear that all three innovations are doctrinally defensible; it is just that one would not have expected these particular innovations from the five Justices in the *Bush v. Gore* majority.

On the central equal protection question, many have noted the apparent inconsistency between the Court's endorsement of an aggressive equal protection theory and the reluctance of the Justices in the majority in other cases to endorse rather less aggressive interpretations of the same clause, a matter to which I will return. Beyond this there are the trenchant criticisms the Chief Justice has lodged against the very idea of rationality review, with his assertions that all legislative and administrative action serves—rationally—a complex of interests and that invalidating policies as arbitrary amounts to substituting the judiciary's assessment of the relative importance of competing interests for the assessment of the legislature or the administrators.[44]

Further, Justice Thomas's agreement with the majority raises interesting questions relating to who may have standing in the case. According to the Court, arbitrary methods of counting votes hurt someone, but who exactly? Not someone in county *A* whose vote *is* counted when it would not have been

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(1944) (Roberts, J., dissenting). It is unusual, though, for a *majority* to say that its decision is good for this day and train only. For additional discussion, see *infra* text accompanying notes 50–51.

42. 531 U.S. at 110 ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise."). This appears to assert that the "work" "required" by equal protection and due process must include "orderly judicial review." Perhaps, however, this means not that some appellate court must review disputed matters but only that the judge supervising the recount would have to do so. Because of my uncertainty about the holding, I confine my comments on this apparent holding to this: The Chief Justice authored a decision, reaffirming well-settled law, that there is no constitutional right to appeal in a criminal case. Ross v. Moffitt, 417 U.S. 600 (1974). There is, in addition, the criticism leveled by Justice Thomas against the majority's analysis of the right to appeal in certain family law cases. *See* M.L.B. v. S.L.J., 519 U.S. 102, 129 (1996) (Thomas, J., dissenting) (referring to the "oft-affirmed view that due process does not oblige States to provide for any appeal, even from a criminal conviction" when the existence of a due process right would trigger strict scrutiny under the Equal Protection Clause). Finally, in the context of elections, Justice Scalia for a unanimous Court expressly denied that appellate review was required in *Growe v. Emison*, 507 U.S. 25, 35 (1993), writing that "such a requirement [of appellate review] would ignore the reality that States must often redistrict in the most exigent circumstances." *Id.* It is this precedent that makes it surprising to see those particular Justices sign on to an opinion apparently holding that there is sometimes a constitutional right to appeal in some civil cases.

43. 531 U.S. at 110.

44. *See, e.g.*, United States R.R. Bd. v. Fritz, 449 U.S. 166, 178–79 (1980) (opinion of Rehnquist, J.).

counted in another county; that person is better off than if there were no recount at all. Not someone in county *B* whose vote is *not* counted when it would have been counted elsewhere; that person is no worse off than if there had been no recount. The people who are hurt are voters whose votes would be counted no matter what; their votes are, to use the election-law jargon, diluted by the arbitrary inclusion of some additional votes. Justice Thomas, though, mounted a major challenge to the entire idea of vote dilution in his concurring opinion in *Holder v. Hall*.[45] According to Justice Thomas, "Vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make."[46] He continued,

> [I]n setting the benchmark of what "undiluted" or fully "effective" voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory . . . , a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy."[47]

And, he concluded, "such matters of political theory are beyond the ordinary sphere of federal judges."[48] Perhaps Justice Thomas thought that the political theory implicit in the Court's decision in *Bush v. Gore* was so uncontroversial that it was something that courts could indeed choose. Then, however, it would help to know what that theory is. Unfortunately, the only theory that seems available is something like, "All votes should count," a theory according to which no one's vote is "diluted" when someone else's vote is counted.

In addition, the contrast between the *Bush v. Gore* majority's willingness to engage in an authoritative interpretation of state law and the same Justices' willingness to defer to state judicial authority in other contexts has been so widely noted that I need say no more about it.[49]

Finally, there is something particularly pointed about Justice Scalia's agreement with the per curiam opinion and its refusal to generate a doctrine applicable beyond the facts of *Bush v. Gore* itself. For, after all, Justice Scalia has argued quite forcefully that the rule of law is a law of rules[50] and that standardless balancing tests that take all things into consideration are the

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45. 512 U.S. 874 (1994).

46. *Id.* at 894 (Thomas, J., concurring in the judgment).

47. *Id.* at 896–97 (quoting *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting)).

48. *Id.* at 901.

49. *See, e.g.*, Strauss, *supra* note 22, at 738 ("To the extent those questions raised familiar broad issues—like federalism . . . —the majority's reaction in this litigation contradicted their normal inclinations.").

50. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

antithesis of the rule of law itself.[51] Taken together, these doctrinal innovations and anomalies support the inference that the critical legal studies perspective asks us to draw.

But, and here I introduce a fourth technique of renormalization, perhaps we should not draw that inference from the doctrinal innovations themselves. One may say that the inference imputes a degree of insincerity to the Justices in the majority that is misplaced. For all we know, they are indeed committed to working out, in the future, the implications of the doctrinal innovations they introduced in *Bush v. Gore*. So, this technique of renormalization goes, what we should do is try to work out the doctrinal implications of the Court's innovations and explain why these particular Justices may indeed be committed to those implications.[52]

Here too there are Republican and Democratic variants.[53] The Republican

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51. *Id.* at 1185. Cass Sunstein has urged the virtues of what he calls "minimalist" judicial decisions—those that are not deeply theorized and have few doctrinal implications. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT *passim* (1999). One may see *Bush v. Gore* as the exemplary minimalist decision, one so minimalist that it is the legal equivalent of a Euclidean point, having existence without extension.

52. That the Supreme Court can authoritatively interpret state law is abundantly clear, as the Court's decisions on pendent jurisdiction and on the scope of protective federal jurisdiction demonstrate. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (holding that federal courts exercising federal question jurisdiction may also decide state law questions). That it properly did so in *Bush v. Gore* is of course more problematic, but perhaps one can defend the Court's action on the ground that a quick glance at Florida law, which was all the Court had time to do, suggested that Florida law did treat the December 12 deadline for choosing the state's presidential electors as absolute. *See* 531 U.S. at 111. Remanding the case for an authoritative determination of that state law question would have placed the case beyond the deadline, thus frustrating the apparent purposes of the Florida statute, and the U.S. Supreme Court's authoritative interpretation can be understood as a second-best solution. (I am indebted to Matthew Adler for suggesting this line of argument.) Obviously, this second-best solution is quite bad if the U.S. Supreme Court were wrong about Florida law. It is bad as well if even a quick glance should have shown that the Florida Supreme Court had given no indication that its legislature viewed December 12 as an absolute deadline. Suppose, however, that the U.S. Supreme Court was correct in its understanding of Florida law. Would the harm—depriving Florida's electoral votes of the protection afforded by the federal statute—actually have occurred? Almost certainly not. All that Florida law can definitively control is the consideration of legal challenges *within* the Florida judicial system. It certainly cannot control the timing of U.S. Supreme Court review. Had the U.S. Supreme Court delayed decision until after December 12, the Florida Supreme Court could easily have held that the Florida Legislature's requirement—and therefore Congress's requirement—that legal processes within Florida be completed by that date was satisfied. Of course, the Florida Supreme Court could not guarantee that Congress, in counting the electoral votes, would treat the process as completed by December 12. But, then again, neither could the U.S. Supreme Court guarantee that Congress would treat the process as satisfactorily concluded by the Court's termination of the recount process.

53. I confine to this footnote another version. Here, the argument goes, the Court's equal protection argument is indeed weak or even not supportable, but the concurring opinion's discussion of Article II is cogent. One difficulty with this version, aside from the uncomfortable fact that it is available only to Republicans, is that more Justices rejected the Article II argument than accepted it. *Compare Bush v. Gore*, 531 U.S. at 111–23 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (three Justices accepting the Article II argument), *with id.* at 130–33 (Souter, J., dissenting, joined by Breyer, J., joined in part by Stevens and Ginsburg, JJ.) (four Justices rejecting it). In addition, it lacks any supporting interpretive theory and leads to implausible conclusions. The argument's predicate is that the Florida Legislature receives its authority over presidential elections from Article II. U.S. CONST. art. II, § 1, cl.

variant is that the Court properly identified a quite narrow category of arbitrary decisionmaking, as the Court put it, by a single decisionmaker who was authorized, but failed, to impose standards on subordinates when standards more precise than those given them were available.[54] The Court simply applied well-established equal protection principles in finding a constitutional violation here. And, notably, the Chief Justice and Justice O'Connor both joined opinions finding a similar violation in the most directly relevant precedent,[55] thus demonstrating their commitment to a general principle justifying the result in *Bush v.*

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2. Florida law is nonetheless relevant, in allowing us to determine who the Florida Legislature *is*. And, if we must look to the Florida Constitution to decide who received the grant of authority from Article II, it is hard to see why we should not be able to look to the Florida Constitution to see what that body is authorized and required to do if its acts are to qualify as acts of that legislature. The issue, therefore, is integrating Article II with Florida law regulating the identification of and actions by the body receiving authority from Article II. The only truly plausible reconciliation is that offered by the dissenters in *Bush v. Gore*, that Florida law as interpreted by the state courts prevails unless the interpretation is quite unreasonable. 531 U.S. at 131–34 (Souter, J., dissenting, joined by Breyer, J., joined in part by Stevens and Ginsburg, JJ.) The three concurring Justices in *Bush v. Gore* used pejoratives such as "absurd," "peculiar," and "cannot reasonably be thought" in describing the Florida Supreme Court's interpretation of Florida's election statutes. *Id.* at 118–19 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.). For a more extended presentation of what I call the argument by pejorative adjective, see Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001). Much of the concurring Justices' analysis flowed, though, from the flawed premise that the Florida Constitution was irrelevant to the interpretation of the state's election code. Justice Souter offered what seems to me a better view of the matter, in his conclusion that the concurring Justices and the Florida Supreme Court each offered alternative reasonable interpretations. *See Bush v. Gore*, 531 U.S. at 131–34 (Souter, J., dissenting, joined by Breyer, J., joined in part by Stevens and Ginsburg, JJ.). Michael J. Klarman, Bush v. Gore*: Through the Lens of Constitutional History*, 89 CALIF. L. REV. (forthcoming Dec. 2001), provides a fully developed analysis of the reasonableness of the state court's interpretations.

Another problem: Suppose that, as a matter of state law, statements made by the Governor when signing a statute have some interpretive authority. Would Article II be violated if, in interpreting a statute regulating the counting of votes in a presidential election, a state court relied on a gubernatorial signing statement? Suppose that the state legislature expressly delegated interpretive authority over statutes regulating presidential elections to the state courts. Is every possible interpretation the state courts adopt thereby made constitutional? Are all interpretations thereby made unconstitutional?

54. Consider the following example, developed from an argument made in support of the Court's decision by Douglas Kmiec as part of an oral presentation at the annual meeting of the Association of American Law Schools on January 6, 2001. Two law professors teach the law of tort to different sections of the first-year class. The course is graded according to strong suggestions from the dean's office to follow a prescribed curve. The professors agree to give students in both sections a number of multiple-choice questions, and then to ask different questions on an essay part of the examination. The multiple-choice questions are machine-graded. The machine grading indicates that two students, one in the first section and the other in the second, have failed to answer one of the questions. On inspecting the answer sheets, both instructors notice essentially identical marks near the proper place for an answer. One instructor concludes that the student got the answer right, while the other disregards the answer. Dean Kmiec argues that a dean who failed to do something about this disparity would be acting arbitrarily: The professors can give different examinations (just as counties can adopt different methods of taking votes, through one or another type of machine), but if they have given the same type of examination, essentially identical answers should receive the same treatment. The disanalogy to *Bush v. Gore* comes with the realization that the Supreme Court failed to give the judge supervising the recount the opportunity, akin to the dean's in this example, to reconcile disparate outcomes.

55. Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1982) (opinion of Blackmun, J., joined by O'Connor, J.); *id.* at 443 (Powell, J., concurring in the judgment, joined by Rehnquist, J.).

Gore.[56] The Chief Justice wrote the opinion of the unanimous Court in *Allegheny Pittsburgh Coal Co. v. County Commission*,[57] finding unconstitutional a county assessor's policy of revaluing property only in the year immediately following a sale. The assessor's decision was arbitrary, according to the Court, because it reflected no considered judgment on the state's part about what sensible assessment policy was, and resulted in widely varying assessments of property currently worth essentially the same amount. Of course we could distinguish *Bush v. Gore* in a number of ways, but the fact that the Chief Justice wrote *Allegheny Pittsburgh* shows that he is not unequivocally opposed to applying a standard of arbitrariness to invalidate decisions by local officials.

As the Court acknowledged, regulation of elections is a complex matter, and according to this version of the argument, it was only prudent to confine the decision as narrowly as was reasonably possible. But the decision cannot fairly be described as good for this day and train only.[58] Perhaps the majority's desire that Bush become President made them appreciate the merit of claims they would not otherwise have seen as quite as pressing. But the general principles the Court invoked, while they came to bear on a particular set of facts, are more than what philosophers call a definite description of a singular event.[59]

The Democratic version takes the equal protection argument seriously and attempts to develop it in a progressive direction.[60] So, for example, the nonarbitrariness doctrine, for Democrats, casts doubt on the use of varying methods of taking votes in the first instance, not simply to counting them once they are cast.[61] Here the

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56. There are difficulties with this variant, but they are no larger than the difficulties associated with any doctrinal argument. One is that, in the posture of the case before the Court, there was no guarantee that a uniform standard would *not* be applied by the single decisionmaker once he had received reports on the recount results from various jurisdictions. He was in a position to reconcile inconsistencies were they to appear. Another difficulty is that any sensible set of precise guidelines for counting votes will almost certainly have to contain a residual category to allow the counting of votes when the voter's intention is entirely clear even though expressed in some manner not described by the guidelines. Consider a specification that a vote will not be counted unless two corners are detached, and a ballot with obvious stylus pricks and a hand-written comment, "There's something wrong with this damned machine, but I vote for George Bush." Perhaps the risk of arbitrariness associated with such a residual category and the concomitant risk of vote dilution (the only constitutional violation in the premises) are great enough to outweigh the denial of a particular voter's expressed choice.

57. 488 U.S. 336 (1989).

58. I think it worth noting that the Supreme Court has cited the *Allegheny Pittsburgh* case approvingly only once, *see* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), and that Justice Thomas urged that it should be overruled in *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992) (Thomas, J., concurring in part and concurring in the judgment).

59. That is, a definition using general terms but actually identifying only a singular event. *See* JOHN RAWLS, A THEORY OF JUSTICE 131 (1971) ("[P]rinciples should be general. That is, it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions.").

60. *See, e.g.*, SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 42–43 (2001) (describing *Bush v. Gore* as "extend[ing] these [voting] doctrines to the micro-level of the actual operation of the electoral machinery").

61. For Democrats, the relevant single decisionmaker is the state legislature, which licenses arbitrarily inconsistent decisions by subordinate jurisdictions. The Court suggested that an interest in local

proof of *Bush v. Gore* will come in the future, as courts grapple with its implications as a doctrine.[62] Only if the Supreme Court routinely rejects efforts to apply the case's doctrine will the charge of insincerity stick.[63] And that, according to this technique of renormalization, is something we cannot know today.[64]

A final technique of renormalization is in some ways the most interesting. It involves the generalized invocation of rule-of-law norms, typically in the form of assertions that the Supreme Court's decision, while perhaps incorrect, nonetheless deserves respect because the Court is our nation's voice of the law. The qualification in the preceding sentence is important. A

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control may justify such variations in the taking of votes. *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam). Democrats will undoubtedly argue that this dictum cannot be converted into governing law, because there is an interest in local control with respect to counting votes as well, particularly when that interest is subject to an overarching standard that every vote must count.

62. One possibility is that the case will come to stand for the proposition that procedures producing *systematically* different outcomes in identical situations are unconstitutional. Yet it is unclear to me that the Florida Supreme Court's procedures would have produced systematically different outcomes, given the ability of the judge supervising the recount to reconcile apparent inconsistencies among different counting procedures. The one argument for unfairness that seems at least plausible to me is the claim that combining the results of a full recount in twenty percent of the precincts in Miami-Dade County with the results of a recount only of the undervotes in the remaining eighty percent of the precincts would somehow be unfair. The Court noted that this procedure provided "no assurance that the recounts . . . [would] be complete." *Id.* at 108. Incompleteness does not entail some systematic defect. And it simply is not clear to me why a full recount would systematically differ from a recount only of undervotes. In the absence of evidence in the record that this is true, I would find it difficult to describe the Florida Supreme Court's procedures as likely to produce systematic unequal effects.

63. Peter Strauss, in conversation, pointed out to me that *Bush v. Gore* may have implications, which the Court may be willing to endorse, beyond the election context. Applying a general rule against arbitrary decisionmaking, *Bush v. Gore* appears to hold that a single centralized decisionmaker acts arbitrarily in allowing subordinate officials to invoke an otherwise acceptable general standard when a more objective rule is available, at least when there is reason to believe that some subordinates will find the standard violated in circumstances that others would not. This, however, is a phenomenon that is common in administrative law. Consider the administration of the Occupational Safety and Health Act, 33 U.S.C. §§ 651–678 (2000). The agency administering the Act has been moving away from specifying quite detailed rules in the direction of identifying appropriate standards. *See* Chamber of Commerce v. United States Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (invalidating on procedural grounds the agency's effort to adopt a less rule-like approach). So, for example, it may say that railings to prevent workers from falling from heights should be sufficiently strong to withstand the stress when two workers fall against it simultaneously. But clearly a more specific rule is available (one that specified, for example, that railings must be made of a particular kind of reinforced steel capable of withstanding a specified amount of stress, and with cross-bars set at specified heights). Are the standards developed by the agency unconstitutional under *Bush v. Gore*? Another area in which *Bush v. Gore* may be developed is that of the administration of capital punishment, where courts have struggled to develop approaches that reduce the risk of arbitrary application. Capital litigators can now use *Bush v. Gore* as the basis for arguing in favor of ever more precise rules to replace general standards. For a case preceding *Bush v. Gore* rejecting such efforts, see *Victor v. Nebraska*, 511 U.S. 1 (1994) (rejecting an effort to require greater specificity in the instructions defining the "beyond a reasonable doubt" standard in criminal law), *cited in* Bush v. Gore, 531 U.S. at 125 n.3 (Stevens, J., dissenting).

64. More subtle elaborations are possible. For example, Vicki Jackson suggested to me that *Bush v. Gore* may be seen as part of a developing theory according to which the U.S. Constitution has implications for separation of powers on the state level. E-mail from Vicki C. Jackson, Professor of Law, Georgetown University Law Center, to Mark V. Tushnet, Professor of Law, Georgetown University Law Center (Mar. 12, 2001) (on file with author).

decision can be justified by the rule of law standing alone only if there are no other reasons justifying the decision.[65] That is, rule-of-law ideas have force only when someone who disagrees with a decision is asked to accept it nonetheless. Not surprisingly, this creates something of a psychological difficulty, related to, but not quite the same as, the phenomenon of cognitive dissonance. People find it hard to think that decisions with which they disagree are nevertheless justified. People also find it hard to give up on the ideal of the rule of law. The outcome is predictable. As time passes, people come to think that the decisions with which they initially disagreed were actually not wrong. I think we can expect to see, and I think reasonably soon, progressives asserting that, as a matter of fact, *Bush v. Gore* was correctly decided.

As indeed it was.[66] After all, the equal protection doctrine the case articulated can certainly be turned to progressive uses. We can, and should, take the case as another in a long line of decisions by political actors—a category that includes judges—expanding and protecting the expansion of the franchise. Some of us may retain a lurking, or even overt, sense that the Justices who joined the majority opinion in *Bush v. Gore* did not see the case in those terms and that those Justices were motivated by narrow partisan concerns. Still, the case is there to be used by progressives in the future.[67] And that, to conclude, would be another vindication of a different critical legal studies claim, this one about the indeterminacy of legal doctrine.[68]

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65. Otherwise, those reasons, not the rule of law, justify the decision.

66. The best defense of the Court's equal protection decision that I have yet seen comes from a conservative. *See* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. (forthcoming Feb. 2001), *available at* http:/www.law.gmu.edu/faculty/papers/docs/01-17.pdf. Lund oversimplifies the doctrinal justification; I have tried to develop it more precisely in Mark V. Tushnet, The Conservatism in *Bush v. Gore* (June 4, 2001) (unpublished manuscript, on file with author).

67. The equal protection argument is at least available. I think it quite unlikely that the Supreme Court would actually develop it in useful ways in the near future. Lower courts may, however, and by the time the issues get to the Supreme Court, the Court's composition may have changed in ways that would lead that Court to find implications in *Bush v. Gore* that the present Court would not.

68. Professor Ran Hirschl of the University of Toronto's political science department suggested in conversation that we should see *Bush v. Gore* in a broader context. Noting the widely examined phenomenon of the worldwide judicialization of politics on the level of ordinary policy, Professor Hirschl suggested that there may be a nascent phenomenon extending judicialization to the electoral arena itself. While the evidence is thin so far, the suggestion is provocative and deserves further examination.