Suspicion, or the New Prince

Frank I. Michelman†

I. SUSPICION?

We of the civilized nations sometimes convict people of offenses we strongly suspect them to have committed, even when we are not absolutely certain of guilt. We think it barbarous, though, to make a separate offense out of "being suspicious," here in the sense of behaving in a way that calls down suspicion upon oneself.[1] Is that so? Is it barbarous ever to see suspiciousness of behavior as itself a breach of good order?

A great many Americans suspect that a certain five justices of the United States Supreme Court, or some of them, acted reprehensibly in *Bush v Gore*.[2] The suspicion is that these justices, who cast judicial votes in that case to terminate the process of the year 2000 presidential election, were prompted to their actions by a prior personal preference for a Bush victory. The feeling is that they would not have done the same had the positions of the political parties and their nominees been reversed in an otherwise identical case—had it been Gore not Bush whom a Democratic Secretary Harris sought to declare victorious, Bush not Gore seeking recounts from Republican-appointed judges on the state supreme bench, and so forth.

The suspicion is not baseless. It springs initially from the observation that the justices who cast the pro-Bush votes include all and only the five who are commonly identified as composing the conservative wing of an ideologically polarized Court, and it is girded by certain

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† Robert Walsmley University Professor, Harvard Law School. Thanks to Heather Gerken, Andrew Kaufman, Richard Posner, and L. Michael Seidman for helpful comments and suggestions.

1 See John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* 47–48 (Chicago 1977) (absolving seventeenth-century Roman-canon law of accusations of the "barbarous practice" of punishing people not found guilty of anything else for "being suspicious"). See also *Rex v Haddock*, Misl Cas C Law 31 (Herbert, ed 1927) (Frog), reprinted in A. James Casner and W. Barton Leach, *Cases and Text on Property* 31 n 2 (Little, Brown 2d ed 1969):

> [C]itizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offenses, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable.

2 121 S Ct 525 (2000) (per curiam).

additional observations: the apparent novelty, contentiousness, and narrowness of the legal grounds supplied for the pro-Bush votes by those who cast them; the apparent difficulty of mapping the judicial votes cast, or the legal issues with respect to which they were cast, onto any cognizable grid of constitutional principles and ideals, or competing sets of them, that independently might explain the Court's division over these issues; and the refusal of the conservatives to heed their liberal colleagues' calls for abstention of the Court from substantial involvement in the election controversy when another branch of government was constitutionally available to resolve it—that branch having the clear institutional advantage, with the choice of a president hanging in the balance, of direct accountability to the electorate. In part, my purpose here is to see whether these grounds of suspicion are true or false, apt or inapt. In part, it is to ask "so what if they are true and apt?"

In the eyes of the public, and surely in the justices' eyes as well, the current membership of the United States Supreme Court is ideologically polarized. Not for the first time in American history, the Supreme Court today appears split into identifiably "conservative" and "liberal" wings of opinion, outlook, and sensibility. On the basis of such categorizations, we, and probably they, form our expectations of how the justices severally will vote when the Court divides over a wide range of matters. In practice, lawyers make tactical use of these perceptions, and doubtless justices do too, not to mention presidents and senators engaged in selecting new justices—although, of course, there are occasional surprises. No justice currently sitting is considered nonaligned. While not all are perceived as equally purist or predictable, and sometimes a justice's particular track record suggests in advance that he or she may break the usual ranks in a particular sort of case, each is perceived, by us and doubtless by them, to belong basically to one or the other wing.[3]

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[3] It may not be entirely clear what draws together, into identifiably "conservative" and "liberal" packages, the sets of positions a justice tends to take on matters as varied as religious establishment and religious freedom, states' rights and the extent of congressional powers to enact social and economic legislation, the scope and status of non-"enumerated" so-called fundamental rights of persons (including but not limited to abortion), the scope and strictness of constitutional protection for private property holdings against redistributive or regulatory acts of government, the scope and strictness of the Constitution's broadly-speaking procedural safeguards respecting criminal law enforcement, and the constitutional-legal status of so-called benign race-conscious legislation. Consider Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich L Rev 641 (1990). See also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375, 383 (on "ideological drift"). Maybe ideological polarization of the bench is traceable to some underlying, deep-rooted cleavage of temperament. Explaining its origins is not, however, our business here. It's enough for my purposes that its existence as fact is axiomatic in American political culture.

Acting at the insistence of a bare majority of the justices, a Supreme Court exactly split into the familiar, identifiably ideological wings threw itself aggressively and decisively into the year 2000 presidential election. As the justices fully knew it would do, the Court's action secured for the Republican candidate a victory then otherwise far from certain—a victory that either might not have been his at all or might have been his but severely compromised. Had the judicial recount proceeded to completion in Florida, Bush might or might not have been the winner judicially declared. Had he not been, the election would have had a materially different outcome from the one vouchsafed to the country by the ministry of the Supreme Court.[4] Either Bush would not now be President, or he'd be President with however compromised a mandate would have issued from an election decided in Congress and maybe brokered by Congress, on whatever special terms of power-sharing, express or implied, would have been the price. Out of uncertainty's jaws, then, the conservative majority's action drew a clean win for the candidate whom any judicial conservative could fairly be supposed to prefer, other things being in their minds more-or-less equal.

It is the stark fact of the five-to-four split in *Bush v Gore* that anchors my reflections here. I mean, of course, this particular split, in which an identifiably conservative-leaning majority, over the protest of an identifiably liberal-leaning minority, decides a legal case involving a presidential election on terms that effectively award an otherwise uncertain victory to the candidate that any judicial conservative obviously would tend to prefer. It is hard to say whether the fact that should mainly interest us is that the Court did in fact split along the familiar ideological divide, over legal issues that do not seem readily to map onto it,[5] or rather is that the majority saw fit to proceed once it saw that such would be the case. Let it be both.

This fact, or these facts, raises several questions worthy of consideration. *First*, is what happened remarkable in the slightest degree? *Second*, does its having happened give fair reason to suspect anything wrong about any justice's conduct? Given the actual division of the subjective views of conservative and liberal justices, respectively, regarding the legal issues raised by the *Bush* petitioners, what honest or good faith alternative, if any, did any justice have to acting as he or she in fact did act?

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4 See *Bush v Gore*, 121 S Ct 512 (2000) (application for stay) (Scalia concurring) (stating that "[t]he counting of votes that are of questionable legality does . . . threaten irreparable harm to . . . [Bush] . . . by casting a cloud upon what he claims to be the legitimacy of his election").

5 See Part II.

Here I must interrupt my list of questions to mention that an obvious alternative for the Court was abstention, meaning either refusal of review or dismissal of review once granted without decision on the merits. That leads to further questions: *Third*, how strong and clear were the reasons for abstention? Strong enough to fuel suspicion of ideologically self-serving motives on the part of a conservative majority that would not yield to them? *Fourth*, what apt or honorable explanations might there be for the majority's conduct, and are they compelling enough to dispel suspicion? *Fifth*, so what?

In what follows, I'll try to keep the focus from time to time on one or another of the questions in my list. Clean separation will not always, however, be possible.

II. IDEOLOGY?

There is nothing inherently untoward about a polarized Supreme Court, by which I mean a Court whose members line up repeatedly and often predictably in opposing wings having stable memberships. To find something amiss in that would be to eject ideology from constitutional adjudication in a way that can only be called wrongheaded in light of our country's long experience with this form of public decisionmaking. Justices arrive at the Court already honestly divided over sundry major issues of constitutional-legal principle, policy, and preference. Notwithstanding the futile and embarrassing protestations to the contrary of some judges and judicial candidates, knowledgeable, grownup Americans accept the ideological difference as unavoidable fact consistent with the public-spirited good faith of a judge and we don't, therefore, normally feel betrayed or aggrieved by its manifestations.[6] We think that there *are* such things in good people's heads as "constitutional ideals."[7] We think those things can vary, within limits, among reasonable, good faith American jurists. What less, then, should we expect of a judge than that she keep her adjudications in line with her own honest best understanding of the Constitution's aims, values, and meanings?

Accepting all of that, let me now ask you: Was it, accordingly, predictable that the Court would split as it did, right along the familiar conservative/liberal divide, over the particular legal issues raised by the parties in *Bush v Gore*? I want you to answer, for now, on impulse and not after anguished pondering.

If you said "yes," then let me be quick to point out that the division was *not* readily predictable from any liberal/conservative align-

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6 See David A. Strauss, Bush v Gore: *What Were They Thinking?*, 68 U Chi L Rev 737, 737 (2001).

7 See text accompanying note 23.

ment of constitutional ideals, of the kind I have just been describing and condoning. Taking one by one the issues of law that crucially divided the majority from the dissenters in *Bush v Gore*, it seems that ideological alignment either doesn't predict a vote at all or that it predicts the opposite of the votes cast by conservatives.

Does the use of the word "legislature" in Article II, Section 1, Clause 2 of the Constitution mean any of the following: that a state court is in any degree barred from adjudicating claims under the state's general election code, insofar as applied to elections of presidential electors? or that the state court's statutory-interpretative practice is, in that context, required to be any different from the same court's established, accepted, general practice of statutory interpretation, including its interpretations of the same election code as applied to all other elections? or that the state court's applications of state election law are, in such cases, required to proceed in disregard of the state's constitution or that these interpretations and applications are subject to a stepped-up, unusual kind and degree of federal judicial scrutiny?

In response to these questions, three and only three justices concluded that Article II, Section 1, Clause 2 required the national Supreme Court, in this case, to substitute its state statutory interpretations for those of the state's own high court.[8] Those three were exactly the three we'd normally have expected, on ideological grounds, to be the last and not the first to find such a claim persuasive. Their action in this instance was not predictable from their known prior stock of constitutional principles and ideals.[9]

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[8] The silence here of Justices O'Connor and Kennedy is fully consistent with suspicion that they acted in *Bush v Gore* (a) as judicial conservatives and (b) out of preference for a Bush presidency. They stood ready to assert other grounds in support of an order terminating the election controversy in Bush's favor. They may have wished not to compromise or complicate the general conservative stance in favor of maximum respect for the dignities of the states including their judicial branches, see, for example, *Teague v Lane*, 489 US 288, 310 (1989). And they may have wished to give their action as much protective cover of apparent nonpartisanship as could be mustered, witness their threadbare claim—ignoring the solid opposition of four justices to any intervention by the Court at all—of a seven-justice majority in favor of a decision for Bush (but for an insinuatedly minor disagreement over remedy). See *Bush v Gore*, 121 S Ct at 533.

[9] Once the (unpredictable) decision is made that Article II requires a sharp deviation from the usual stance of extreme deference to state judiciaries construing state law, *then* it may become fairly predictable that some of the Court's most conservative members—being also the ones most hostile to relatively freewheeling modes of legal interpretation—will be quickest to find excessive liberality in a state court's treatment of a state statutory election code. See Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 S Ct Rev 1.

Fairly read, do the Florida Supreme Court's opinions in the election cases[10] decide, as a matter of state law, that meeting the "safe harbor" date specified by federal statute is a hard-and-fast requirement of the Florida statutory election code as applied to elections of presidential electors?

Four liberals said "no."[11] Five conservatives said "yes."[12] Whichever to you seems the better response, how could you hope to predict any judge's answer from his or her membership in one or the other of the Supreme Court's ideological wings, lacking information about the concrete electoral outcomes hanging in the balance?

Does the Fourteenth Amendment's Equal Protection Clause require use of a standard more specific than manifest intent of the voter to govern evaluation of contested election ballots by sub-referees reporting to a single supervising judge?

The liberals divided over this one, while the conservatives uniformly answered yes. So far as I am aware, in no case prior to *Bush v Gore* has the Court recognized a claim to unequal protection of voting rights in which there was on the state's part no explicit or implicit act of what the jargon calls "classification"—that is, ex ante division of a population of actual or would-be voters into groups (defined by race, party, place of residence, wealth, or financial capability) to whose members the state accords differentially advantageous treatment within the general voting scheme.[13] This hitherto apparently crucial element of classification is missing from the *Bush v Gore* equal pro-

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10 *Gore v Harris*, 772 S2d 1243 (Fla Dec 8, 2000), revd and remd as, *Bush v Gore*, 121 S Ct 525; *Palm Beach County Canvassing Board v Harris*, 772 S2d 1220 (Fla Nov 21, 2000), vacd and remd as, *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471 (2000) (per curiam).

11 *Bush v Gore*, 121 S Ct at 541 (Stevens, joined by Ginsburg and Breyer, dissenting); id at 543 (Souter, joined by Breyer, Ginsburg, and Stevens, dissenting); id at 553 (Breyer, joined by Stevens, Ginsburg, and Souter, dissenting).

12 Id at 533 (per curiam). No legal deadline posed a need for federal judges thus to preclude Florida's high court from speaking for itself on this matter. As Professor McConnell notes, if—but only if—the *Bush* majority was right about the Florida court's understanding, an open remand would certainly have led to the same result as the one secured by the U.S. Supreme Court's actual order. See Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U Chi L Rev 657 (2001). In that event, the Florida court itself would soon have ordered all recounts terminated, retroactively, as of midnight, December 12. Secretary Harris forthwith would have recertified a Bush victory to Governor Jeb Bush, who forthwith would have certified the Bush electors to the federal authorities in Washington. The Governor's certificate would have been signed and arrived after the safe harbor day. So what? What chance was there that a Bush slate would have undergone a challenge on January 5? For all that was practically at stake, there was no compelling reason for the *Bush v Gore* majority to cram an unspoken holding down the throat of the Florida court.

13 See *Bush v Gore*, 121 S Ct at 531 ("The idea that one group can be granted greater voting strength than another is hostile to the one-man, one-vote basis of our representative government."), quoting *Moore v Ogilvie*, 394 US 814, 819 (1969); Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome of* Bush v Gore *Defended*, 68 U Chi L Rev 613 (2001); Cass R. Sunstein, *Order Without Law*, 68 U Chi L Rev 757 (2001).

tection theory, in which the complaint is that identical-looking ballots cast by sundry atomized individuals might be treated differently by different counters in the same or different places, although always in a fair-minded manner and randomly with respect to voter interest or partisan alignment.[14]

I do not here contend that the doctrinal novelty on which the *Bush v Gore* majority based its intervention is normatively wrong. My point is only that as legal doctrine it is novel, newly minted on the occasion of this case, hitherto—I daresay—widely unsuspected by bar and bench, and furthermore that it is perceived as problematic from birth by the very majority that authored it.[15] After all, it's not particularly to the Court's conservative ideological wing that you would normally look for a somewhat daring doctrinal innovation on behalf of voting rights. Conservative activism on behalf of individual rights claims has been confined to property rights and rights against ("reverse") racial classification. The current conservatives have displayed no special tenderness for voting rights.[16]

Back, now, to my question about the predictability of the Court's five-to-four split along the familiar ideological boundary. If your impulse-answer to my question was that the split was predictable, you must impulsively have found it so—this is what I have been arguing—on the basis of something other than any justice's known commitment to any cognizable set of "conservative" or "liberal" constitutional principles or ideals. On the basis of what, then, if not your assumptions about the election-outcome preferences of known-conservative as opposed to known-liberal judges? I don't mean you'd have to be thinking that any justice *calculatedly* or even consciously chose sides on the crucial legal issues with a view to achieving a preferred electoral outcome. In retrospect, though, you'd have to be saying at least this: that justices who could and should have been alert to the danger of bias from motives extraneous to the legal merits—on even the most expansive understanding of the legal merits—and who could and should,

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14 See *Bush v Gore*, 121 S Ct at 530–31; Part IV.

15 Allowing that equal protection's application to "election processes generally" presents "many complexities," the Court took care to confine committed application of its new doctrine to the "special instance" of "a statewide recount under the authority of a single state judicial officer." *Bush v Gore*, 121 S Ct at 532. Regardless of whether the Court's "limiting instruction" proves durable, see Samuel Issacharoff, *Political Judgments*, 68 U Chi L Rev 637 (2001), there can be no doubt that it was issued.

16 Racial gerrymandering cases, see, for example, *Miller v Johnson*, 515 US 900 (1995); *Shaw v Reno*, 509 US 630 (1993), are not to the contrary, being obviously contained within the same conservative commitment against race-conscious government action that is reflected in countless cases not involving voting. See, for example, *Adarand Constructors, Inc v Pena*, 515 US 200 (1995); *City of Richmond v J.A. Croson Co*, 488 US 469 (1989).

furthermore, have been alert to the near-certainty that that is exactly how a sizeable fraction of the country would view their action later given the actual lineup of the votes and the transparent contestability of the grounds, went ahead anyway rather than leave the matter to Congress.

III. ABSTENTION?

To me, as to many,[17] the majority's action was surprising. Abstention—or dismissal—is the course that, from the beginning, I fully expected the Court to take, at least in the event that the members found themselves without clear and compelling grounds for decisive intervention, commanding agreement from some majority other than that particular (predictable?) majority of five.[18] We cannot fault judges for giving an ear to what petitioning parties in a case of this magnitude have to say, or for having their own preliminary looks at the legal issues the parties raise. But preliminary looking is one thing and decisive intervention is another.

It is not as if the Court lacked a proper, honorable alternative to decisive intervention. The majority's woebegone plea to the contrary—"[w]hen contending parties invoke the process of the courts . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront"[19]—cannot be sincere. Why is certiorari jurisdiction discretionary, then? What is a political question?[20]

There were obvious considerations of principle, arguing powerfully for the Supreme Court's abstention in *Bush v Gore*. The first is a procedural consideration of gut fairness that Bush partisans have directed loudly against the actions of the Supreme Court of Florida, but which seems to apply as well to those of the Supreme Court of the United States. The second is an institutional consideration of profound significance to the understanding of Americans regarding the question of who governs in this country.

Speaking first, then, to those who take exception when rule deciders decide the rules after matters have proceeded so far that the decision obviously determines an outcome to which the deciders are

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17 See, for example, Strauss, 68 U Chi L Rev at 740 (cited in note 6).

18 Lacking credibility myself as a shill for the passive virtues in the face of human rights claims, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (Yale 2d ed 1986), I can't press to extremes the case for abstention. Had the *Bush* petitioners presented the Court with a case involving some evident, grave unfairness, which clearly applicable and pre-established legal grounds gave it some way to correct rather than re-enact, I would not be writing this. The point is, they didn't. There is such a thing as going too far.

19 *Bush v Gore*, 121 S Ct at 533.

20 See Issacharoff, 68 U Chi L Rev at 639–41 (cited in note 15).

perceived to be not indifferent; why not on that ground protest the action of the ideologically identifiable majority in *Bush v Gore*? That majority intervened aggressively, decisively, and knowingly to resolve a presidential election in favor of the contestant who had named two of them as the judicial models by which he would select future justices. It did so on the basis of a hitherto undeclared and unsuspected doctrine of constitutional law,[21] which it drew with a remarkable precision expressly meant to leave its authors unfettered in any future case that any of them are remotely likely to see in their lifetimes.[22]

Passing now to the question of who governs here, the issues generally perceived to divide judicial liberals and conservatives are ones in which the supposedly self-governing people of this country take a great interest. The Court—that is, its temporally prevailing majorities—to greater and lesser degrees decides these matters for the country. Some members go so far as to claim for themselves the role of "speak[ing] before all others" for the "constitutional ideals" of the country.[23] Shall a current ideological majority of a Court claiming such powers assume further for itself, then, unnecessarily and gratuitously, a crucial role in deciding whether relative conservatives or relative liberals are to be in control of its own near-term succession? What could be more grossly at odds than that with the divided powers, checks and balances spirit of American constitutional invention?

It is not as if some court had to preside over the election, and the choice was between which of the two high courts it would be, Florida's or the nation's. Had the national court kept out of the way, the Florida judiciary and legislature would have done whatever they were going to do. In due course, a contested Florida election would have landed on Congress's doorstep.[24] In the latter event, whatever claims of elec-

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21 See text accompanying notes 13–16.

22 See note 15; John Yoo, *In Defense of the Court's Legitimacy*, 68 U Chi L Rev 775, 780–81 (2001). Compare Antonin Scalia:

> I had always thought that the common-law approach had at least one thing to be said for it: it was the course of judicial restraint, "making" as little law as possible in order to decide the case at hand. I have come to doubt whether that is true. For when, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989).

23 *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 868 (1992) (O'Connor, Kennedy, and Souter).

24 The Constitution does not in so many words assign to Congress, any more than it does to the Supreme Court, a responsibility to resolve disputes over the presidential elector election

toral rights and wrongs were put to the Court could have been put to Congress and doubtless would have been, very loudly and publicly. That includes voting right claims. In the course of resolving the election, Congress or some part of it might or might not have arrived at something like a holding on a voting rights or equal protection claim, whether pressed by opponents or proponents of the state court's recount.[25] Had it done so, the Court, on a suitable future occasion, could have given that holding such value as a precedent as it saw fit.

In a comparison between the five-member, ideologically identifiable judicial majority that decided *Bush v Gore* and whatever partisan-political majority, coalition, or machination would have decided the election in Congress, individual members of either might claim lack of interest in any dimension of the outcome save getting the matter resolved according to law, or abstract fairness, or procedural justice. Members of neither could do so with much credibility. Senators and representatives have partisanly self-serving reasons to wish their party in control of the federal executive. Justices of an ideologically charged and divided Court have ideologically self-serving reasons to wish their ideological allies in a position to control the coming composition of the Court. The glaring difference, of course, is that senators and representatives caring to retain their offices would have had to face the judgments of voters on their manner of settling the election. In the circumstances of this case, that is a tremendous advantage of institutional competency or fitness. Whatever benefit may be claimed in other settings for the independence of the judiciary, this is one setting—the choosing not only of a political chief executive but of a maker of future members of the judiciary—in which insulation from the voters seems just about disqualifying.

All told, then, the *Bush v Gore* majority pressed ahead in apparent disregard for some obvious and weighty institutional counterindications. In doing so, they may have caused injury to public confidence either in the Court's supposed special guardianship of the rule of law or in the capacity of Congress to carry the burden of political leader-

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outcomes. The Twelfth Amendment's provision for electoral vote counting "in the presence" of the House and Senate is somewhat suggestive, however, as is the choice of the House and Senate as the forums for resolving failures of any candidate to achieve electoral-vote majorities. Presumably it was, in part, on the basis of these textual intimations that various Congresses enacted, and various Presidents signed, the bills now regulating the electoral process in 3 USC §§ 1–15 (1994).

25 The Court itself affirms that Congress in its own house may reach its own conclusions in matters of constitutional right. See *City of Boerne v Flores*, 521 US 507, 535 (1997) (Kennedy) (stating that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution").

ship in conditions of constitutional stress.[26] On those grounds, many judge them to have acted extremely badly.

What, then, of the *Bush v Gore* dissenters? They, no doubt, had reasons parallel to those of the majority for preferring an opposite electoral outcome and hence for preferring an opposite legal outcome in *Bush v Gore*, meaning any outcome that would have left the events in Florida to run their course unmolested by the federal judiciary. Still one cannot reprobate with an even hand, neater though it might be to do so. The dissenters get an exemption because they all maintain that the Court should have denied or dismissed the writs of certiorari in the election cases.[27] Granted, the exemption may just be a matter of the dissenters' moral luck.[28] We cannot know whether their abstemiousness was a matter of principle or rather was an accidental effect of the fact (assuming it was a fact, I don't know their wishes regarding the presidential election of 2000) that it was their Gore getting oxed by the Court's intervention.

In sum, the Court, and the majority as its steward, had both glaringly obvious and publicly respectable reasons of principle for keeping itself free of substantial, much less decisive, involvement in the election controversy. Doing so would have cost the justices some accusations of cowardice or shirking, but they could have relied confidently on armies of legal publicists and pundits to explain to the country the good grounds for their action, just as I am doing here, alas counterfactually.[29] Other things being equal, the case for abstention seems solid so far.

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26 See Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L Rev 30, 30 (1974) (stating "[i]t seems to me that some of the added strength of the Court has been achieved—unnecessarily, unfortunately, and unwisely—at the expense of the most emaciated and deserving of the three branches, the legislature").

27 *Bush v Palm Beach County Canvassing Board*, 121 S Ct 510 (2000); *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471 (2000) (per curiam); *Bush v Gore*, 121 S Ct 512 (2000) (application for stay); *Bush v Gore*, 121 S Ct 525.

28 See Thomas Nagel, *Mortal Questions* 24–38 (Cambridge 1979).

29 Had the Court preferred the assurance or the dignity of speaking these good grounds for itself, it easily could have done so. It could have granted the writ, denied the stay, ordered argument as to why the matter should not be classed as a political question unfit for judicial resolution, and then disposed of it accordingly ("case dismissed") with a full, explanatory opinion, maybe even including a gesture of confidence in Congress, the Constitution, and the country looking on.

IV. OUTRAGE IN FLORIDA?

Suspicion and the grounds for it, as I sketched them near the beginning, are now before us. Are there reassuring explanations for the majority's conduct that we have yet to consider?

We want and expect judges to correct outrageous injustice, don't we, even at the cost of smashing a few dishes? Suppose, in November–December, 2000, a justice is told by a petitioning party that monstrous injustices are in the course of perpetration in Florida—two of them, one macro, one micro: on the micro level, a denial to an indefinite number of voters of the constitutionally protected, fundamental human right to have one's vote counted equally with those of others; on a macro level, an injustice to candidate Bush and his political supporters (or consider it, if you prefer, an injustice to the country), consisting of the Florida Supreme Court's illegal swiping from them of a legitimate electoral victory.[30]

Consider first the claim of micro-injustice, the individual rights claim on which the majority in fact based its intervention. A due regard for the "equal dignity owed to each voter," says the Court, prevents states from valuing any person's vote over any other's.[31] Assuming there had been a petitioning party with clear and genuine standing to raise such a complaint to which the Court's new equal protection wrinkle is supposed to be responsive, of exactly what maltreatment would she have complained? The bottom line answer is: the chance that her ballot, in the event it fell into a batch submitted to recount, would undergo appraisal by an intent-of-the-voter standard, honestly applied by whomever would be applying it. True, her ballot stands possibly to be rejected by the official who happens to be the one to pick it up, whereas it might have been accepted if another official had been the one to pick it up first, because of differing rules of thumb in use by the two, each of them reasonably and impartially adopted and applied. These are eventualities about which our voter will never know, and it is not clear why she has any reason to care about them, either, given that the anticipated vagaries of ballot appraisal are utterly random with respect to partisan voter interest.

On the record before the Court in *Bush v Gore*, there was nothing going on more oppressive or nefarious than that. In *Bush v Gore*, to go by the doctrinal proposition there declared, the majority intervened not on behalf of would-be Gore voters whose votes were being weeded out by biased Republican counters, or would-be Bush voters whose votes were being weeded out by biased Democratic

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30 David Strauss disapprovingly explains the decision as prompted by a perception of this sort of macro-injustice. See Strauss, 68 U Chi L Rev at 755 (cited in note 6).

31 *Bush v Gore*, 121 S Ct at 529–30.

counters. All they found legally wrong was that the intent-of-the-voter standard—they thought unnecessarily—allows different honest counters, or groups of them, to make different dispositions of identical ballots, on a basis that is utterly random with respect to voter interest.[32] No one's equal dignity is impugned by this practice, and only Humpty Dumpty would describe it as valuing one person's vote over another's.[33] Is this a human rights emergency? I would like you even to put a name to the human right undergoing violation here.[34]

Remember, the issue for the moment is not whether the best theory of electoral administration, or the best theory of political justice, requires a strict by-the-numbers rule for the hand counting of contested punchcard ballots. It is whether higher duties of protection of the fundamental rights of persons compelled the Supreme Court's intervention in this case, against otherwise compelling reasons to the contrary. Why should we not be suspect when conservative justices suddenly forget their own characteristic insistence that the Supreme Court "need not . . . inject itself into every field of human activity where irrationality and oppression may theoretically occur"[35]—in a case, of all cases, where a presidential election hangs in the balance?

What of the claimed macro-injustice? The per curiam opinion in *Bush v Gore*—the only one to draw support from a majority of the Court—makes no reference to any such thing, being grounded solely on the proposition of an individual right to an equally counted and weighted vote. But we can't on that account dismiss the macro-injustice claim, because what we're trying to do just now is to see whether the *Bush v Gore* majority had an honorable or commendable ground for its action, which we should allow may not necessarily mean a ground it could prudently mention in public. Still, questions do come to mind. It's not just a given, after all, that the alleged macro-injustice—a subversion of the election by a reckless or larcenous Florida Supreme Court—was in fact occurring. The judicial minority in

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32 Id at 529–32.

33 See note 13.

34 How about the right to associate freely and equally with others in securing the election of your candidate of choice? That would make the Court's equal protection ruling into a newfangled protection against vote dilution—a hard thing to foist on the justices who elsewhere have concluded that vote dilution claims are far too lost in political theory to be justiciable. See *Holder v Hall*, 512 US 874, 892–94 & n 1 (1994) (Thomas, joined by Scalia, concurring) (maintaining that it is error to read either Section 2 of the Voting Rights Act or the Equal Protection Clause to cover dilution claims because such claims are beyond the proper adjudicative capacities of courts).

35 *Cruzan v Director, Missouri Department of Health*, 497 US 261, 300–01 (1990) (Scalia concurring). Justice Scalia went on immediately to add "and if it tries to do so it will destroy itself," id, a point on which I don't insist.

Bush v Gore did not think that it was, rather finding the Florida court to be acting within the bounds of a nonpartisan legal reason.[36] With the matter in that posture, why not leave it—it was a *presidential election*, for crying out loud—to Congress?

V. SALVATION?

A justice might lack confidence that Congress could manage the election imbroglio fairly, or without inflicting grave harm on the country. He or she might believe that members of Congress lack the temerity to withstand public pressure to hand the presidency to Gore, in case the Florida court's recount gave Gore the larger number of votes, in disregard of legitimate complaints about that recount from the Bush side; or that they otherwise lack motivation or skill to conduct the election *dénouement* in a manner likely to sustain public confidence in the basic decency, fairness, or good sense of the outcome; or that a congressional resolution would be so long delayed as to jeopardize national security interests or the preservation of governmental order; or that the country's general welfare cannot risk four years of a presidency scarred and weakened from birth by protracted partisan-political infighting required to create it. We easily may imagine a justice convinced beyond doubt, on grounds such as these, that the nation desperately needs a *clean* termination *now* to the year 2000 election.

Believing that only the Supreme Court can give the country what it needs, our justice would be caught in a paradox.[37] The Court's unique ability to produce a clean termination depends on the country's habit of unquestioning obedience to its rulings, and that habit, in the view of our justice,[38] depends on the country's belief that whatever the Court rules, it rules for reasons of law. If the Court stands openly before the country in the posture of a Regent, assuming dictatorial powers to tide us over an interregnal gap, the country will not heed it and the salvational project will fail. Thus, as our justices see matters, the Court—the governmental chamber expected beyond all others never to act for reasons other than the very ones it announces—cannot accomplish its national salvational end by saying up front that national salvation, not the law, is its reason for acting as it does.

Reasons having the form of plausible legal grounds will, therefore, have to be produced by the Court to explain its actions, regardless of whether one or another justice believes them to be true and

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36 *Bush v Gore*, 121 S Ct at 546–49 (Ginsburg, joined by Stevens, Souter, and Breyer, dissenting).

37 Compare Louis M. Seidman, *This Essay is Brilliant / This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L Rev 501, 522–24 (1998) (writing of "the trap of self-knowledge that makes contradiction inevitable").

38 As in the view of Professor Yoo. See Yoo, 68 U Chi L Rev at 777–78 (cited in note 22).

adequate legal grounds. The Court, moreover, will have to do the best it can to frame these *faux*-legal reasons extremely narrowly with a view to minimizing any risk of wreckage to the full body of constitutional-legal doctrine. And the Court, finally, if it's going to undertake this clean-termination project at all, will have to undertake it on behalf of the candidate who leads in the official vote tally at the instant of the Court's decisive intervention, which must not be much longer delayed. That means candidate Bush, as it happens. So the justice we're imagining doesn't choose Bush because she likes Bush better than Gore. He or she would have done the same for Gore—for the country, really—had the positions been reversed.

That is a possible account of what happened in *Bush v Gore*. It is not without its own problems of credibility, but one might believe it. If it occurs to you to wonder why five conservative justices would see matters in the way I've just described, while four liberal justices would not, you should attend carefully to Professor Pildes's explanation of why indeed they might.[39] If Pildes does not persuade you, you ought still to be willing to allow that it might, after all, in this instance be the conservatives who are having the moral luck.[40]

Insofar as you think members of the *Bush v Gore* majority may have acted on a basis something like what I've just sketched, suspicion for you is at an end—suspicion, I mean, that the majority justices were prompted to the actions they took by prior personal preference for a Bush victory. Repugnance, however, may still be going strong, for you possibly may think—as I tend to—that intentional judicial conduct of the kind I've just been sketching would have been arrogant, rash, miscalculated, even profoundly anticonstitutional and even bearing in mind that the Constitution is not a suicide pact. Of course, the conduct could have been all those things and still not shameless or depraved. The justices of the *Bush v Gore* majority might be imagined as Machiavelli's new prince, a ruler and savior prepared to sacrifice all to save the imperiled republic—probity, reputation, even the salvation of an honored place in history.[41]

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39 See Richard H. Pildes, *Democracy and Disorder*, 68 U Chi L Rev 695 (2001).

40 See note 28 and accompanying text.

41 See Sebastian De Grazia, *Machiavelli in Hell* 217–40 (Princeton 1989). Compare Posner, 2000 S Ct Rev at 54 (cited in note 9) ("Judges unwilling to sacrifice some of their prestige for the greater good of the nation might be thought selfish.").

Princes for judges. Is that what Americans want? Would that be keeping the faith?

I mean these questions in earnest. The answers, alas, are not obvious.[42]

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[42] For my further consideration of these questions, see Frank I. Michelman, *Machiavelli in Robes? The Court in the Election*, Colin Thomas Ruagh O'Fallon Lecture at the University of Oregon (forthcoming Apr 9, 2001). For starters, chew on the following. A Gallup Poll found that fully one half of respondents to a survey taken December 15–17, 2000, believed the justices' votes were "influenced by their personal political views." Yet of the respondents who disagreed with the decision (49 percent), almost two-thirds (32 vs 17 percent) "accepted" it. The poll is reported at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/18/cnn.poll/index.html> (visited Feb 25, 2001).