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JUDGING JUDGING: THE PROBLEM OF SECOND-GUESSING STATE JUDGES' INTERPRETATION OF STATE LAW IN *BUSH V. GORE*

HAROLD J. KRENT*

That the election for President in 2000 was decided by a court surprised everyone. That the election was decided by a federal court was even more surprising. But, the fact that three Justices supported that decision based on second-guessing a state court's construction of state law possibly was more astonishing still.

Prior to the 2000 presidential election, no one could have foreseen the pivotal role played by the United States Supreme Court. Never had an election of that magnitude hinged on court intervention. The Supreme Court's dramatic decision, *Bush v. Gore*,[1] doomed the hopes of former Vice President Gore and precipitated his concession. But, perhaps almost as importantly, the decision immediately cast a pall upon the institution of the Court itself, for the decision appeared to many as a crass political move designed to ensure the election of the Justices' personal choice for office. The reasoning of the Justices was labeled conclusory, unintelligible, and worse.[2]

Conservative members of the Court who champion federalism appeared willing in *Bush v. Gore* to ignore years of precedent by second-guessing the Florida Supreme Court's construction of state law. The U.S. Supreme Court on countless prior occasions had held that state

* Professor and Associate Dean, Chicago-Kent College of Law. I would like to thank Trevor Morrison and Steve Siegel for their excellent comments on an earlier draft, and I would like to thank the Florida State University College of Law for taking the initiative to host this symposium.

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

2. For a sampling of the editorials, see Fred Barbash, *A Brand New Game*, WASH. POST, Dec. 17, 2000, at B1; Alan Dershowitz, *The Supreme Court and the 2000 Election*, SLATE, July 2-9, 2001, *at* http://slate.msn.com/?id=111313; Anthony Lewis, *Legitimacy: Supreme Court Decision Undercuts Americans' Belief in Judiciary*, DALLAS MORNING NEWS, Dec. 12, 2000, at 27A; Kirk Loggins & John Shiffman, *Supreme Court's Decision to Stop Recount Spurs Ethical Political Debate*, THE TENNESSEAN, Dec. 14, 2000, at 1A.

supreme courts are the final expositors of the meaning of state law.[3] Under our system of governance, federal courts have no role in overseeing or participating in evolution of state law.

Nonetheless, three United States Supreme Court Justices in *Bush v. Gore* would have held that the Florida Supreme Court's decision ordering a recount violated Article II, Section 1's requirement that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct" electors for President and Vice President.[4] They reasoned that the Florida state court's "interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required"[5] and thereby violated Article II, Section 1 of the Constitution.[6] Indeed, that was the Bush team's principal argument in its brief: the Florida court in effect made new law in interpreting the contest provisions and thus trampled upon the state legislature's federal constitutional right to choose the manner in which electors are selected.[7] The three Justices, therefore, would have second-guessed the Florida Supreme Court's interpretation of Florida law to protect a federal constitutional guarantee.[8] That conclusion seems to turn federalism principles on their head and foretells an increased role for the Supreme Court in subsequent disputes over the interpretation and application of state law.

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3. *E.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (holding that Congress had not authorized U.S. Supreme Court review of state law issues). Despite those precedents, the Court's earlier decision in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), signaled its intent to review the Florida court's interpretation of its own state's law, and the question of whether the Florida court had acted properly in construing state law occupied the headlines leading to the second U.S. Supreme Court decision. Interestingly enough, however, the Supreme Court prior to 1863 deferred to state court construction of state law but had not ruled out its own role as a categorical matter. *See* Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291, 298 (1832) (finding that state tribunals had no "power to bind this Court"). The Court indicated change in *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 603 (1863).

4. U.S. CONST. art. II, § 1, cl. 2; *see also* McPherson v. Blacker, 146 U.S. 1, 35 (1892) (stating that Article II confers "plenary power to the state legislatures in the matter of the appointment of electors").

5. Bush v. Gore, 531 U.S. at 115.

6. This Article assumes the correctness of the Court's exposition of Article II, which the dissenting Justices largely did not dispute.

7. Brief for Petitioner at 19-33, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949). Indeed, some have speculated that the concurrence was originally slated to be the majority opinion. *See* David G. Sauvage & Harvey Weinstein, *Right to Vote Led Justices to 5-4 Ruling*, L.A. TIMES, Dec. 14, 2000, at A1. At oral argument, Justice O'Connor twice remarked that "it just does look like a very dramatic change made by the Florida court," and Justice Kennedy offered a similar observation. Oral Argument Transcript at 38-39, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), *available at* http://www.supremecourtus.gov/florida.html.

8. Chief Judge Richard Posner in his recent book wrote that the changed law argument would have provided the Court with the most solid legal ground upon which to base its result. According to Posner, the argument at a minimum was "respectable." RICHARD POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 152 (2001).

Despite the seeming affront to federalism, however, the three Justices were on firm ground in holding that the U.S. Supreme Court can review a state court's construction of state law in order to protect a federal right.[9] In a variety of circumstances, that Court has scrutinized state court decisionmaking to ensure that state judges had not altered state law so as to defeat federal rights. For instance, in *Bouie v. City of Columbia*,[10] the Court held that South Carolina's interpretation of a state trespass statute violated federal due process guarantees by changing the law in effect at the time of the defendant's offense.[11] Similarly, the Court in *Indiana ex rel. Anderson v. Brand*[12] reviewed the Indiana Supreme Court's determination that a public school teacher did not enjoy any contract rights under Indiana law so that it could ascertain whether subsequent legislation had impaired her rights under the Contracts Clause.[13] The Court has similarly reviewed state court construction of state laws in treaty cases whenever the federally protected right may be lost by a state court's overly creative interpretation of state law.[14] The three Justices thus had ample precedent for reviewing state judges' interpretation of state law to ensure protection for the constitutionally protected interest in state legislative selection of electors.[15]

Moreover, the Court in both the *Bouie* and Contracts Clause contexts has inquired whether state judicial decisions have so changed state law as to deprive an individual or firm of the settled expectations protected under the Constitution. In order to protect federal rights safeguarding against excessive retroactivity, the Court has not

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9. This is not to suggest, however, that the Court should have intervened in the dispute in the first instance. Rather, I contend that the three Justices' consideration of whether the Florida Supreme Court impermissibly changed state law is neither novel nor unwarranted.

10. 378 U.S. 347 (1964).

11. *Id.* at 349.

12. 303 U.S. 95 (1938).

13. Lower courts have also assessed whether state courts have changed state law governing election disputes. For an insightful analysis, see Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001); *see also* POSNER, *supra* note 8, at 159 ("Nothing is more infuriating than changing the election rules after the outcome of the election, conducted under existing rules, is known.").

14. *See* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 626-28 (1813) (concluding that state court erred in determining whether 1789 ejectment order constituted a confiscation under a 1783 peace treaty with Great Britain); *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 456 (1958) (second-guessing state court's application of state procedural rule that had the effect of barring review of a federal claim).

15. An interesting exception is posed in takings cases, where—despite the concurrence's implication to the contrary, *see* Bush v. Gore 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring)—the Court has steadfastly refused to hold that judicial changes in the law can effect takings of property. *See, e.g.*, Brinkeroff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); *see also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990) (addressing the Court's failure to permit changes in judicial doctrine to constitute takings under the Constitution).

only second-guessed determinations by the state's highest court on state law, but asked whether state judicial pronouncements changed prior law.

Irrespective of the doctrinal pedigree, however, the Rehnquist concurrence is extraordinary in applying the above principles. When the Court has reviewed state law decisionmaking in other contexts, it has afforded wide latitude to state court decisionmaking. It has only disputed state court construction of state law on rare occasions, and it has concluded that state court decisions made "new" law even more rarely. The Justices' willingness in *Bush v. Gore* to hold that the state court interpretation of state law changed Florida's law flies in the face of the Court's reticence to examine state court decisions closely, even in the contexts in which federal rights undeniably are at stake. The Court has taken great pains in other settings not to substitute its own view of state law for that of state courts. In *Bush v. Gore*, the instrument of last resort became a frontline weapon of attack.

Part I of this Article examines the state law issues in *Bush v. Gore* and the Rehnquist concurrence's willingness to substitute its own interpretation for that of the Florida Supreme Court. The Rehnquist concurrence focused principally on the Florida court's refusal to defer to the certification of election results and its determination that the intent of the voter standard should govern. In contrast, the dissenting Justices painted a very different picture of Florida's legislative terrain. And, they lambasted the concurrence for failing to defer to the state court's interpretation.

Part II of this Article sketches two contexts in which the U.S. Supreme Court has reviewed judicial interpretations to determine whether the interpretations "changed" or "altered" preexisting law. Under the *Bouie* doctrine, federal courts have assessed state court construction of state law to determine whether any change in doctrine violated the defendant's due process rights. Similarly, under the Contracts Clause, federal courts in the past questioned state court articulation of state contract law in order to protect the federal right that the state not impair the obligation of contracts.

Underlying decisions in the two contexts swirl notions of fair notice, predictability, and mistrust for lower court judicial power. To some extent the Article II, Section 1 setting shares these concerns. State court judges might alter state law in a way that favors their own political leanings or futures. Furthermore, stability and predictability are particularly important values when elections are at stake. In the absence of review, state courts, by interpreting state law adventurously, could nullify the directive in Article II that it is the province of state legislatures to determine the manner in which elec-

tors to the presidential election are to be chosen. The Rehnquist concurrence was on solid ground in asserting the power to review.

Yet, with limited exceptions, the Supreme Court in practice has upheld state court interpretation of state law in the *Bouie* and Contracts Clause settings. Part III sketches some of the means by which federal courts have avoided concluding that state law had "changed." Through a mixture of fictions and judicial legerdemain, federal judges have concluded that state judicial interpretations in both the *Bouie* and Contracts Clause contexts were foreshadowed in some way. Indeed, in the Contracts Clause setting, the federal courts subsequently withdrew from the field altogether. The Court is now willing to defer completely to state judicial construction of the state law determinants of the federally protected right.

Part III then returns to *Bush v. Gore* through the prism of these precedents. Although the principle underlying the Rehnquist concurrence is sound, the application is bewildering. The Florida Supreme Court's construction of Florida law, while in no way dictated by precedent or the plain language of the statutory scheme, was at a minimum, plausible. The U.S. Supreme Court has consistently failed to disturb far more questionable state court decisions in the *Bouie* and Contracts Clause contexts. There is nothing in the Article II setting that demands a more searching inquiry than in the *Bouie* or Contracts Clause contexts.

Sound policy reasons support the Court's prior reluctance to second-guess state court interpretations of state law. First, as a matter of judicial administration, permitting challenges to judicial decisions that "change" the law is highly problematic because many losing parties will have the incentive to challenge state court judgments in the Article II, Contracts Clause, and *Bouie* contexts in federal court. Second, given that judges always have made law interstitially through decisions, distinguishing which interpretations change the law more dramatically than others is quite daunting. Finally, federalism concerns plainly counsel against exacting scrutiny of state court interpretations of state law, even where federal interests are at stake. Thus, in comparison to decisions in related fields, the three Justices' conclusion that the Florida Court's decision was so unforeseeable that it *changed* law is nothing short of startling.

I. *BUSH V. GORE* AND JUDICIAL ENFORCEMENT OF ARTICLE II, SECTION 1

Florida's legislature, like that in every state today, has determined that presidential electors should be appointed by direct elec-

tion. Its legislatively designed mechanism for selecting electors in 2000[16] was relatively detailed, though far from clear.

Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates."[17] The legislature delegated to county canvassing boards the responsibility of administering elections.[18] The legislature also directs the canvassing boards to provide results to the state Elections Canvassing Commission, comprised of the Governor, the Secretary of State, and the Director of the Division of Elections.[19]

After the election, the county canvassing boards were to receive returns from precincts, count the votes, and conduct a mandatory recount if a candidate lost by less than .5% of the vote.[20] In addition, the boards were to certify election returns with the Secretary of State by 5 p.m. on the seventh day following the election, and the Elections Canvassing Commission subsequently certified the results of the election.[21]

A losing candidate could have contested the certified election results if, among other things, there was "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[22] The statute further provided that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."[23]

On November 26, 2000, the Florida Elections Canvassing Commission certified the results of the election in favor of Governor Bush. The next day, Vice President Gore filed a complaint in Leon County Circuit Court contesting the certification. A two-day evidentiary hearing focused on the so-termed undervote in counties in which machines tabulated votes on punch cards. Vice President Gore introduced evidence suggesting that the tabulation missed a sufficient number of votes that would have swung Florida's election in his favor. Governor Bush defended by arguing that no sound statistical method existed for determining the extent of the undervote, and he

16. The Florida Legislature passed wholesale amendments to its elections procedures in the 2001 session. *See* Florida Election Reform Act of 2001, 2001 Fla. Laws ch. 40, at 117-73.

17. FLA. STAT. § 103.011 (2000) (amended 2001).

18. *Id.* § 102.141 (amended 2001).

19. *Id.* § 102.111 (amended 2001).

20. *Id.* § 102.141(4) (amended 2001).

21. *Id.* §§ 102.111-.112 (amended 2001).

22. *Id.* § 102.168(3)(c).

23. *Id.* § 102.168(8) (repealed 2001).

asserted that it was not clear whether a different tabulation would have tipped the election.[24]

Leon County Circuit Court Judge Sanders Sauls agreed, holding that Vice President Gore had failed to meet the required burden of proof.[25] Judge Sauls ruled that the circuit court could not overrule the canvassing commission's certification absent an abuse of discretion. Gore's burden, according to Judge Sauls, was to prove, "but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner. . . . [A] reasonable probability that the results of the election would have been changed must be shown."[26] He concluded that "there [was] no credible statistical evidence, and no other competent evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which had been certified . . . ."[27] Judge Sauls did not, however, issue any specific findings of fact.[28]

On appeal, the Florida Supreme Court reversed in part. The court determined first that Judge Sauls had erred in extending deference to the certification of the state election authorities.[29] Rather, it was for the circuit court itself to determine whether "a number of illegal votes" had been counted or whether the state had rejected "a number of legal votes sufficient to change or place in doubt the result of the election."[30] Furthermore, the court held that the contestant did not need to show a "reasonable probability" that the election would have resulted differently if proper votes had been counted. Instead, a contestant need only demonstrate that "available data shows that a number of legal votes would be recovered from the entire pool of the subject ballots, which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election."[31] A possibility, in other words, would have sufficed.

In addition, the Florida Supreme Court concluded that Gore satisfied the threshold requirement by demonstrating that, upon consideration of the thousands of undervote ballots presented—those ballots with no registered vote—the number of legal votes therein were sufficient to at least place in doubt the result of the election.[32] To

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24. *See* Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

25. Gore v. Harris, CV No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000), *rev'd*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

26. Gore v. Harris, 772 So. 2d at 1255.

27. *Id.*

28. *Id.* at 1247.

29. *Id.* at 1252.

30. *Id.* at 1253 (emphasis omitted) (quoting FLA. STAT. § 102.168(3)(c) (2000)).

31. *Id.* at 1256.

32. *Id.*

reach its conclusion, it construed the statutory term "rejection" to include instances where the county canvassing board failed to count legal votes; that is, votes in which the intent of the voter could be discerned, irrespective of whether the ballots had been mismarked.[33] The court relied on a neighboring statutory provision, section 101.5614(5), to reject the view of the Secretary of State—reflected in an administrative opinion[34]—and the Bush camp that "legal vote" referred only to a vote "properly executed in accordance with the instructions provided to all registered voters."[35] As a remedy, the court determined that there should be a recount of the undervote in all Florida counties, not just those challenged by Gore in his contest petition.[36]

In dissent, Chief Justice Wells retorted that the majority's reading of the contest provisions "has no foundation in the law of Florida as it existed on November 7, 2000 . . . ."[37] He would have shown deference to the county canvassing boards and would have held that a contest could only be granted if the plaintiff demonstrated a "substantial noncompliance with election laws," which Gore had not done.[38]

The Rehnquist concurrence agreed with Chief Justice Wells. The opinion charged that the Florida Supreme Court decision "empties certification of virtually all legal consequence during the contest, and in doing so, departs from the provisions enacted by the Florida Legislature."[39] The concurring Justices asserted that the election code vests discretion in the county canvassing boards to determine whether to recount, and thus deference should have been afforded to the boards,[40] as Circuit Judge Sauls had held. Moreover, the concurrence stated that "Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots."[41] Thus, the concurrence, unlike the Florida Supreme Court, would have held that Florida law does not turn on an intent of the voter standard when a ballot had been mismarked. The statewide recount ordered by the Florida court similarly found no support in Florida law.

According to the concurrence, the Florida court had not merely misread the legislative scheme but rearranged it beyond recognition: "the Florida Supreme Court's interpretation of the Florida election

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33. *Id.* at 1257.

34. *See* Bush v. Gore, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., concurring) (addressing 00-13 Fla. Op. Div. of Elec. (2000)).

35. Gore v. Harris, 772 So. 2d at 1257.

36. *Id.* at 1261-62.

37. *Id.* at 1263 (Wells, C.J., dissenting).

38. *Id.* at 1264-68.

39. Bush v. Gore, 531 U.S. at 118 (Rehnquist, C.J., concurring).

40. *Id.* at 117-18 (Rehnquist, C.J., concurring).

41. *Id.* at 118-19 (Rehnquist, C.J., concurring).

laws impermissibly distorted them beyond what a fair reading required . . . ."[42] No deference was due because, "[t]o attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.[43] The concurrence thus advocated active, if not de novo, review of state law requirements.[44]

In dissent, Justice Stevens concluded that the Florida Supreme Court had not made "any substantive change in Florida electoral law.[45] Rather, "[i]t did what courts do—it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted.[46] Justice Souter's dissent similarly concluded that "[n]one of the state court's interpretations is unreasonable to the point of displacing the legislative enactment quoted."[47] The opinion noted that "other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority,"[48] but concluded that the state court's view was "within the bounds of reasonable interpretation . . . ."[49] Given that the statute did not define "legal vote," Justice Souter explained that the state court's adoption of the intent of the voter standard from a neighboring provision was highly plausible.[50] Similarly, its reading of "rejection" to mean not counted was reasonable—there was no requirement to read into rejection some kind of machine malfunction.[51] Moreover, Justice Souter found no clear Florida statutory basis for determining whether the contest standard required a plaintiff to demonstrate a probability as opposed to a possibility that the outcome would be different if the undervotes were tabulated.[52]

Similarly, Justice Ginsburg's separate dissent retorted that "disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated."[53] Justice Breyer's dissenting opinion also decried the analysis in the Rehnquist concurrence: "I do not see how one

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42. *Id.* at 115 (Rehnquist, C.J., concurring).
43. *Id.* (Rehnquist, C.J., concurring).
44. At one point the concurrence suggested that the Article II, Section 1 context was an area "in which the Constitution requires the Court to undertake an independent, if still deferential, analysis of state law." *Id.* at 114. (Rehnquist, C.J., concurring). The level of deference intended is unclear.
45. *Id.* at 127-28 (Stevens, J., dissenting).
46. *Id.* at 128 (footnote ommited) (Stevens, J., dissenting).
47. *Id.* at 131 (Souter, J., dissenting).
48. *Id.* (Souter, J., dissenting).
49. *Id.* (Souter, J., dissenting).
50. *Id.* at 132 (Souter, J., dissenting).
51. *Id.* (Souter, J., dissenting).
52. *Id.* at 132-33 (Souter, J., dissenting).
53. *Id.* at 136 (Ginsburg, J., dissenting).

could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature."[54]

Both the concurring and dissenting opinions accepted the premise that Article II, Section 1 prohibits state courts from changing the manner in which presidential electors are selected. Moreover, the opinions also agreed that claims asserting that state courts had changed state law were subject to U.S. Supreme Court oversight.[55] They disagreed, however, over the extent to which Florida's highest court changed Florida law and the measure of deference that the Court should afford to state court construction of state law.

II. SECOND-GUESSING STATE COURT CONSTRUCTION OF STATE LAW TO PROTECT FEDERAL RIGHTS

The Rehnquist concurrence's second-guessing of state court interpretations of state law is not unique. In a variety of other contexts, the Supreme Court has scrutinized state court interpretation of state law to ensure protection for federal rights. Accordingly, this Part focuses on two areas—the *Bouie* doctrine and Contracts Clause—in which the Court at times has exercised the power to review state court interpretations of state law.

A. Bouie *and its Progeny*

Prior to *Bouie v. City of Columbia*,[56] judicial change in the criminal law violated no federal constitutional guarantee. Although the Ex Post Facto Clause prohibited retroactive imposition of legislative change, members of the Court had long opined that judicial change did not fall within the Ex Post Facto Clause.[57]

In *Bouie*, however, the Court reversed a trespass conviction on the ground that the state conviction rested on an unexpected construction of the state trespass statute by the South Carolina Supreme Court.[58] The state supreme court had construed a trespass statute prohibiting "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry" to apply to African-American

54. *Id.* at 152 (Breyer, J., dissenting). Neither Justice O'Connor nor Justice Kennedy weighed in on the issue. Although one can speculate as to reasons for their reticence, the upshot is that no majority of the Court agreed on the Article II issue.

55. Justice Ginsburg's opinion, however, calls for almost total deference to the state court construction. *Id.* at 135-44 (Ginsburg, J., dissenting).

56. 378 U.S. 347 (1964).

57. *See, e.g.*, James v. United States, 366 U.S. 213, 224 (1961) (Black, J., dissenting) ("[T]he *ex post facto* [clause] . . . has not ordinarily been thought to apply to judicial legislation."); Ross v. Oregon, 227 U.S. 150, 161 (1913) (holding that the Ex Post Facto Clause "is a restraint upon legislative power and concerns the making of laws, not their construction by the courts").

58. *Bouie*, 378 U.S. at 350.

demonstrators at a lunch counter who entered the lunch counter premises *before* the owner asked them to leave.[59] Although the Supreme Court noted that the South Carolina Supreme Court's construction of the statute—applying it to individuals refusing to leave another's property after being so requested—was possible, it held that retroactive application of the interpretation violated due process because the statute did not "give fair warning of the conduct that it makes a crime."[60]

The Court acknowledged that it was reading ex post facto principles into the Due Process Clause. As the Court explained in greater depth:

> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.[61]

Given that the state court judges apparently strained to affix some criminal liability upon the civil rights protestors, prohibiting retroactive application of unforeseeable judicial constructions may have had the salutary effect of improving future state judicial decisionmaking. When evaluating the deeds of an accused, judges may wish to bend the law to ensure that the accused is punished by including the objectionable conduct within a criminal enactment. After *Bouie*, South Carolina and other courts might hesitate before again interpreting criminal provisions merely to ensure punishment for the offender before the court. Lower courts have extended the Supreme Court's due process analysis to unforeseeable judicial changes in sentencing structure as well,[62] making the theoretical reach of the Due Process and Ex Post Facto Clauses congruent.

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59. *Id.* at 349-50.

60. *Id.* at 350. For a contextual analysis of *Bouie* as part of the Court's response to the civil rights movement, see Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1530 (1968); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 273-76 (1991).

61. *Bouie*, 378 U.S. at 353-54. The Court adopted similar reasoning several years later in *Rabe v. Washington*, 405 U.S. 313, 316 (1972). *See also* Marks v. United States, 430 U.S. 188 (1977) (holding that the Due Process Clause prevented retroactive application of a new judicial test for ascertaining pornography restrictions); Douglas v. Buder, 412 U.S. 430, 432 (1973) (determining that the judge's construction of the term "arrest" to include traffic citation was unforeseeable); *cf.* Helton v. Fauver, 930 F.2d 1040, 1042 (3d Cir. 1991) (holding that New Jersey's construction of jurisdictional statute affecting prosecution of juveniles was unforeseeable); Moore v. Wyrick, 766 F.2d 1253, 1257 (8th Cir. 1985) (holding that the state court's change in felony murder doctrine was not foreseeable).

62. *See, e.g.*, Green v. Catoe, 220 F.3d 220 (4th Cir. 2000), *abrogated on other grounds by* Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000); Dale v. Haeberlin, 878 F.2d 930 (6th

Because interpretation is not a mechanical exercise, judicial constructions—particularly of broadly worded texts—seem like conventional lawmaking. Judicial interpretations that alter the substantive definition of a crime can imperil liberty to the same extent as legislative change that would violate the ex post facto doctrine. Surprising judicial decisions deprive an offender of notice to the same extent as a new legislative enactment enlarging the scope of a criminal provision.[63]

B. Contracts Clause

The Constitution provides that "[N]o State shall . . . [pass any] law impairing the obligation of contracts . . . ."[64] The Contracts Clause operates as a substantial protection against state interference in private contractual obligations. For instance, in *Allied Structural Steel v. Spannaus*[65] the Court struck down a Minnesota statute that safeguarded certain workers' expectations of receiving pensions. The Court reasoned that the law "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts."[66]

The Supreme Court has held that the question of whether the contract was impaired, as in *Spannaus*, is a federal question. Given that the Constitution introduces the term "impairing," that conclusion is logical. But a more intriguing issue is whether federal courts, in order to protect federal rights, can second-guess a state court's determination whether a contract exists.

Consider *Indiana ex rel. Anderson v. Brand*.[67] There, a public school teacher asserted that she had earned tenure under the existing statutory framework.[68] Her contract had contained the clause: "[I]t is further agreed by the contracting parties that all of the provisions of the Teachers' Tenure Law, approved March 8, 1927, shall be in full force and effect in this contract . . . ."[69] Upon termination in

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Cir. 1989); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

63. Indeed, the concern for constructive notice may play a larger role in restraining judicial, rather than legislative, retroactivity. When the legislature changes a standard of conduct retroactively, there is little concern for augmenting the power of police and prosecutors. In contrast, when judges fashion new doctrine and apply it to the case at bar, police and prosecutors as opposed to legislators have already selected the particular defendant for punishment. In any common law of crimes system, prosecutors and police play a more important role than with legislatively defined crimes.

64. U.S. CONST. art. I, § 10, cl. 1. For a history, see BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 3-26 (1938).

65. 438 U.S. 234 (1978).

66. *Id.* at 247.

67. 303 U.S. 95 (1938).

68. *Id.* at 97.

69. *Id.* at 97.

July 1933, she sued in state court, alleging a breach of contract. The Indiana Supreme Court upheld her dismissal on the ground that the Teachers Tenure Law of 1927 had been repealed with respect to township public school teachers and that, under Indiana law, no tenure attached and therefore that no tenure rights could currently be enjoyed.[70]

The U.S. Supreme Court acknowledged that the question posed was "one primarily of state law," but continued that, "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."[71] The Court explained that "[u]ntil its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual."[72] The Supreme Court therefore rejected the state court's apparent flip-flop, and held that the teacher's contract had been impaired by the 1933 law. In order to protect the petitioner's contract rights, the Supreme Court thus rejected the state Supreme Court's analysis of whether a contract existed under state law.

More recently, the Court in *General Motors Corp. v. Romein*[73] clarified that, although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court."[74] Federal courts will second-guess state courts' determination of whether contractual rights exist under state law.

But the Contracts Clause context also highlights another problem: what if it is a state judicial decision as opposed to state legislation which impairs the obligation of contract? In *Brand*, for instance, it may have not been the 1927 law that stripped away the teacher's expectations but the judicial decision construing the law's requirements. Should judicial changes in statutory interpretation be treated the same as a legislative amendment? As in the ex post facto context, the language of the clause seems directed to state legislatures as opposed to state judiciaries, but the impact of any impairment would be identical on the firm whose contract rights had been impaired.[75] Judicial change can be as devastating as legislative alteration.

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70. *Id.* at 98.
71. *Id.* at 100.
72. *Id.* at 105.
73. 503 U.S. 181 (1992).
74. *Id.* at 187 (quoting *Brand*, 303 U.S. at 100).
75. For a review of the original understanding, see Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1384-87 (1992).

The mid-nineteenth century case of *Gelpcke v. City of Dubuque*[76] is representative. In 1800s Dubuque and elsewhere, taxpayers were stuck holding the bag when municipalities could not afford to honor their obligation on railway bonds. The predicted economic boom did not come to pass. Iowa's courts had previously sustained the constitutionality of the municipalities' authority to issue the bonds, but taxpayers nevertheless sued the City of Dubuque, renewing their argument. This time, the state court held that the city had no such power under Iowa's Constitution.[77] Bondholders, seeing the handwriting on the wall, sued the city in federal court for recovery of interest on the bonds. The case eventually was heard by the U.S. Supreme Court.

The Supreme Court, relying on its diversity jurisdiction,[78] held that federal courts were bound by decisions of state courts on state law at the time the contract was concluded, but that subsequent state decisions as to the substance of state law were not binding. Accordingly, the Court relied on the earlier Iowa judicial pronouncements and concluded that the city was obligated to pay the bondholders. Changes in judicially fashioned law could only be applied prospectively: "otherwise . . . rights acquired under a statute may be lost by its repeal."[79] The Court concluded that "[w]e shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."[80] As Chief Justice Waite later commented in *Douglass v. Pike County*,[81]

> [a]fter a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.[82]

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76. 68 U.S. (1 Wall.) 175 (1863).

77. State *ex rel.* Burlington & Mo. R.R. v. County of Wapello, 13 Iowa 388, 407 (1862).

78. Under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), federal courts exercised the power to interpret state law to protect the out-of-state party. The Court in *Gelpcke* and its progeny, however, appeared to base its rulings as well on the power to resolve the Contracts Clause claim. *See, e.g.*, Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362, 375 (1914); Douglas v. Kentucky, 168 U.S. 488, 498 (1898); WRIGHT, *supra* note 64, at 239-41; Thompson, *supra* note 75, at 1412-13. The Court in *Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 678 (1873), for instance, stated that "the National Constitution forbids the States to pass laws impairing the obligations of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."

79. *Gelpcke*, 68 U.S. (1 Wall.) at 206.

80. *Id.* at 206-07.

81. 101 U.S. 677 (1879).

82. *Id.* at 687. The Court continued that "[t]he true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and exist-

The *Gelpcke* doctrine likely arose from both ideological and economic considerations. First, federal courts feared that state court elected justices would side with local interests and repudiate the obligations. As the Supreme Court noted in *Wade v. Travis County*,[83] absent federal court review, state decisions "would enable the State to set a trap for its creditors by inducing them to subscribe to bonds, and then withdrawing their own security."[84] Bondholders such as Gelpcke often lived outside the jurisdiction. Second, federal judges may have believed that stability in the capital markets was critical to continued growth of the country. The views expressed in the municipal bond cases are all the more notable given the prevailing view at the time that judges applied or found the law, not made it.[85]

The *Bouie* and Contracts Clause contexts are analogous in many respects. Two overlapping rationales justified their invocation. First, in both cases, the Supreme Court was deeply concerned about process. In *Bouie*, the Court feared that state judges—who largely were elected—would adopt strained interpretations of state statutes and common law in order to penalize a particular offender.[86] Such overreaching would redound to their political benefit. Conversely, those subject to criminal sanctions constituted an easy target given their relative poverty and inability to sway elections. The concern for judicial lawlessness was particularly acute in the civil rights era. Similarly, the U.S. Supreme Court applied the Contracts Clause to judicial impairments in large part due to fears that state judges would protect municipalities within their jurisdictions at the expense of bondholders, who may well have lived outside the jurisdiction. Indeed, a number of state legislatures in the years prior to *Gelpcke* had lessened judges' independence, which could well have sparked federal judicial concern.[87] Retroactive decisionmaking could target unpopular or politically powerless individuals and firms.

Moreover, as in the *Bouie* example, those injured could not easily influence the political process if they were outside the jurisdiction.[88] The two doctrines therefore serve as a check on state judicial power in order to ensure that federal constitutional rights are protected.

Second, the *Bouie* and *Gelpcke* doctrines privileged concerns for settled expectations. In *Bouie*, the Court reasoned that all criminal

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ing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive." *Id.*

83. 174 U.S. 499 (1899).

84. *Id.* at 509; *see also* Ga. Ry. & Power Co. v. Decatur, 262 U.S. 432 (1923); McCullough v. Virginia, 172 U.S. 102 (1898).

85. Thompson, *supra* note 75, at 1419-22.

86. *See* Bouie v. City of Columbia, 378 U.S. 347, 535 (1964).

87. *See* Thompson, *supra* note 75, at 1396-97.

88. In comparison to criminal defendants, however, bondholders could influence elections more effectively in light of their comparable economic clout.

defendants should have notice of the criminality and consequences of conduct before the fact.[89] The rule of law demands that criminal prohibitions be clear before the disputed conduct takes place. Similarly, in *Gelpcke,* the Court believed that bondholders should understand the scope of their rights and obligations at the time they concluded the contract.[90] Economic stability depended heavily on settled expectations.

Concerns underlying the Article II, Section 1 directive that state legislatures have exclusive power to direct the manner in which presidential electors are chosen[91] similarly militate for federal court oversight. In the absence of review, Congress, governors, or state courts could manipulate the selection process so as to rob Article II of its meaning.

Article II, Section 1 reflects the view that individual citizens have no federal constitutional right to vote for electors unless the state legislature so directs. At times state legislatures exercised the power themselves to appoint electors.[92] When states vest that right in their citizens, as they now all do, other governmental actors must abide by that choice. Under the Constitution, it remains the province of the state legislature not only to choose who selects electors but also the manner in which the selection takes place.[93] As James Madison noted, "The State Judiciarys had not & he presumed wd. Not be proposed as a proper course of appointment of the Presidential electors."[94]

A concern for predictability, as in the *Bouie* and Contracts Clause contexts, is absolutely vital in the election context. When the rules of the game change midstream for criminal punishment or contract enforcement, individual rights undoubtedly suffer. But, when the rules of an election change, faith in the integrity of the election process itself may be compromised. The Constitution mandates that any such change come from the state legislature.[95]

Moreover, the U.S. Supreme Court scrutinized state court decision making in the *Bouie* and Contract Clause contexts as a check on judicial power. That concern applies as well in the Article II, Section 1

89. *Bouie*, 378 U.S. at 352.
90. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206 (1863).
91. U.S. CONST. art II, § 1, cl. 2.
92. *See* McPherson v. Blacker, 146 U.S. 1, 28-33 (1892).
93. U.S. CONST. art. II, § 1, cl. 2.
94. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed., 1966).
95. U.S. CONST. art. II, § 1, cl. 2. Congress has also limited the legislature's flexibility somewhat by fashioning the safe harbor provision. 3 U.S.C. § 5 (1994) (informing state legislatures that changes after the fact in the manner in which legislators are to be selected may be challenged in Congress). At some point, congressional interference in the state legislative decision might itself violate Article II, Section 1.

context. Some oversight is needed to check state court jurists' ability to affect a presidential election.

To the extent that history is relevant, the Framers wished to ensure both that the President not become beholden to the electing body and that the electing body not be subject to untoward political pressures. The Framers plausibly sought a compromise between vesting the selection power in an entity that was too powerful and might abuse the power to appoint electors and vesting it in an entity that was not accountable to the people for any manipulation. Unlike state executives, state legislatures were more numerous, less stable, and therefore unlikely to form a coalition over time that could extract promises from a President.[96] And, unlike Congress, state legislatures would be more likely receptive to state concerns.[97] The state legislature is directly accountable to the electorate and arguably is less likely subject to presidential influence than a governor hoping for a cabinet position (or other influence) or than a state judge hoping for elevation to the federal bench (or other position). Individual judges might be susceptible to untoward pressures to affect the manner in which presidential electors are selected.

Nor were judges necessarily subject to sufficient majoritarian checks. The choice of state legislature over national legislature, state executives, and state judiciary was significant but apparently was more a selection among lesser evils. Irrespective of the reason for the constitutional choice, fidelity to the Constitution presupposes some oversight of the elector selection process to ensure that it is the state legislature, as opposed to executive or judiciary, that is exercising the constitutionally entrusted power.

There is one important difference to consider. The purpose of Supreme Court review under *Bouie* and the Contracts Clause is to protect individuals, not the legislative domain. The Clause protects individuals only indirectly to the extent that vesting the power to determine the manner of selecting electors in the legislature preserves their interests. One might argue, therefore, that the structural pro-

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96. As Justice Story commented, "The appointment of the president is not made to depend upon any preexisting body of men, who might be tampered with beforehand to prostitute their votes." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 745 (1987).

97. As James Madison explained, "the candidate would intrigue with the Legislature . . . and be apt to render his administration subservient to its views," 2 JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 109, and that the national legislature, "being standing bodies, they could and would be courted, and intrigued with by the candidates by their partisans." *Id.* at 110. Butler summed up the problem: "The two great evils to be avoided are cabal at home, and influence from abroad. It will be difficult to avoid either if the Election be made by the National Legislature." *Id.* at 112; *see also* 46 CONG. REC. 4398 (1879) (reprinting letter from Madison to Jefferson averting to dangers of congressional interference in Electoral College).

tection should be enforced less rigorously under Article II, Section 1 than the individual rights under *Bouie* and the Contracts Clause.

Indeed, many might believe that enforcement of Article II should be left completely in Congress's hands. Congress retains the right under Article II and the Twelfth Amendment to determine whether to count electoral votes from particular states. During the 1876 election, Congress received two slates of electors from Florida and two other states and eventually had to determine which slate to count.[98] Congress at other times has determined whether to count contested votes from individual electors.[99] The Constitution, therefore, may be seen as vesting enforcement of the Article II, Section 1 right in Congress which, after all, is comprised of representatives from each state. Congress possesses the ultimate power to determine if a state judge or governor has impermissibly infringed the state legislative perrogative to prescribe the manner in which presidential electors are selected.

The Article II, Section 1 challenge might, therefore, be viewed as a political question. Similarly, in *Luther v. Borden*,[100] the Court held that the Constitution commits the Republican Guarantee Clause[101] to congressional enforcement. In the *Borden* case, two different governments claimed lawful authority in Rhode Island, and rather than decide between the two, the Court opined that

> Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the union, . . . [a state's] republican character[] is recognized by the proper constitutional authority. And its decision is binding on every other department of the government . . . .[102]

Subsequent republican guarantee claims have been held nonjusticiable.[103]

The Article II claim in *Bush v. Gore* similarly may be committed to Congress's determination.[104] If Congress accepts the electoral

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98. *See Day by Day: What Happened in the Electoral College Controversy of 1876-77*, HARPWEEK, *at* http://elections.harpweek.com/9Controversy/events-controversy.htm (last visited Dec. 10, 2001).

99. *See* LAWRENCE D. LONGLEY & NEIL PIERCE, THE ELECTORAL COLLEGE PRIMER 2000, at 113 (1999).

100. 48 U.S. (7 How.) 1 (1849).

101. U.S. CONST. art. IV, § 4.

102. *Borden*, 48 U.S. (7 How.) at 42. There was little judicial oversight over federal elections at all prior to *Baker v. Carr*, 369 U.S. 186 (1962).

103. *See, e.g.*, Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912); Coyle v. Smith, 221 U.S. 559, 579 (1911).

votes, then it must have determined that the state legislature appropriately set the manner in which the electors were selected. Moreover, vesting that decision completely in Congress may prevent delays and ensure sufficient time within which to conduct an orderly transition to the new administration. As Justice Breyer stated in the *Bush v. Gore* dissent, "[C]ongress is the body primarily authorized to resolve remaining disputes."[105] Justice Breyer further noted that "there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court."[106]

Nevertheless, the Rehnquist concurrence plausibly concluded that at least some review is appropriate.[107] In the absence of oversight, a judge, governor, or Congress could meddle in the state's choice of how electors should be selected. Given that one of the reasons Article II vests the selection power in state legislatures was to prevent *congressional* interference, it would make little sense—given contemporary understanding of judicial review—to vest all oversight in Congress. As the Framers warned, Congress could become too powerful if it exercised a direct role in selecting presidential electors. Article II, Section 1, therefore, should be seen as an aspect of federalism woven into the Constitution, and accordingly subject to some type of Supreme Court enforcement.

Thus, as in the *Bouie* and Contract Clause contexts, concerns for predictability and accountability support the Supreme Court's decision to review state court interpretation of state law in the presidential elector setting. The question of whether state legislators have established the manner in which presidential electors are selected arguably does not pose a nonjusticiable political question. But, as Part III discusses, the availability of judicial review should not lead to the conclusion that exacting scrutiny is appropriate.

III. RETREAT FROM ENFORCEMENT OF *BOUIE* AND JUDICIAL IMPAIRMENT DOCTRINES

The Justices' conflict in *Bush v. Gore* could not have been more clear. Three Justices were convinced that the Florida court's construction of state law was unmoored from the statute, while the four Justices in dissent were just as emphatic that the Florida court's opinion reasonably reflected and implemented the intent of the legislature. What neither side fully grappled with, however, was the theoretical and doctrinal difficulty of distinguishing reasonable from un-

104. *Cf.* Nixon v. United States, 506 U.S. 234 (1993) (holding that the constitutional command in Article I, Section 3 that the Senate shall "try all Impeachments" is for the Senate alone to resolve).

105. Bush v. Gore, 531 U.S. 98, 154 (2000) (Breyer, J., dissenting).

106. *Id.* at 155 (Breyer, J., dissenting).

107. *Id.* at 113 (Rehnquist, C.J., concurring).

reasonable constructions of law. Examination of the *Bouie* and Contracts Clause cases provides a cautionary tale.

Despite the doctrinal clarity of the *Bouie* and judicial impairment precedents, the Supreme Court, shortly after articulating the doctrines, began whittling away at their core. That Court and lower courts became extremely wary of second-guessing state court construction of state law and therefore devised a series of devices to avoid the need to upset state court construction of state law. The Rehnquist concurrence in *Bush v. Gore* simply ignored this history. Chief Justice Rehnquist's declaration that "[t]o attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II,"[108] is undercut by generations of experience in the two analogous contexts.

A. The Bouie *Doctrine*

The Rehnquist concurrence noted that the Supreme Court had equated judicial interpretation with change in *Bouie v. City of Columbia*;[109] and that the *Bouie* line of cases therefore supported its conclusion of a federal constitutional violation in *Bush v. Gore*.[110] The concurrence was half right. *Bouie* fully supports the concurrence's position but as this section discusses, developments after *Bouie* have dramatically limited its reach, undercutting the concurrence's prop.

Just weeks before deciding *Bush v. Gore*, the Court heard oral argument in a *Bouie* case. In *Rogers v. Tennessee*, the defendant brutally knifed a friend after a card game.[111] Prosecutors indicted Rogers for attempted murder. The victim, reduced to a vegetative state, lingered for over a year until he died from a kidney infection as a complication of his injuries.[112] Accordingly, prosecutors obtained a new indictment, charging Rogers with first-degree murder. A jury subsequently convicted Rogers of second-degree murder.[113]

On appeal, Rogers argued that preexisting Tennessee law provided that a killing could only be prosecuted as a homicide if the death arose within one year and a day.[114] The Tennessee Supreme Court agreed with the defendant's assessment of Tennessee homicide

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108. *Id.* at 115 (Rehnquist, C.J., concurring).
109. 378 U.S. 347 (1964).
110. Bush v. Gore, 531 U.S. at 115 (Rehnquist, C.J., concurring).
111. State v. Rogers, 992 S.W.2d 393 (Tenn. 1999), *aff'd*, Rogers v. Tennessee, 121 S. Ct. 1693 (2001).
112. *Id.* at 395.
113. *Id.*
114. *Id.*

law but abolished the year-and-a-day rule.[115] It noted that "[m]odern pathologists are able to determine the cause of death with much greater accuracy than was possible in earlier times."[116] Because the reasons underlying the rule no longer existed, the court decided to overrule it judicially.

With respect to whether to apply the rule retroactively, the state court held that abolition of the rule was "not an unexpected and unforseen [sic] judicial construction of a principle of criminal law."[117] The Tennessee court further reasoned that "the rule has fallen into disfavor and had been legislatively or judicially abrogated by the vast majority of jurisdictions which had recently considered the issue."[118] Developments in other jurisdictions had foreshadowed Tennessee's own change. Moreover, the court pointed out that the rule had not been applied recently within the state.[119]

In a sense, the Tennessee court changed the law and expanded the zone of criminal liability. When Rogers committed his offense, the law of causation in Tennessee arguably precluded prosecutions for murder if the victim did not die within a year and a day.[120] Indeed, the Tennessee highest court, unlike the Florida Supreme Court in *Gore v. Harris*,[121] admitted that it was altering the preexisting law.[122] No Tennessee court had ever called the year-and-a-day rule into question. After *Bush v. Gore*, therefore, one might imagine that the Justices would easily conclude that retroactive application of the Court's decision violates *Bouie*.

The Supreme Court, however, hardly blinked. Justice O'Connor's opinion for the Court reinterpreted *Bouie* to wrest it from its roots in ex post facto doctrine.[123] To apply the same strictures to the courts as to the legislature "would evince too little regard for the important institutional and contextual differences between legislating and common law decisionmaking . . . ."[124] She continued that "[s]trict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system."[125] Only state law interpretations that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue" should be

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115. *Id.* at 401.
116. *Id.*
117. *Id.* at 402.
118. *Id.* at 397.
119. *Id.* at 402.
120. *Id.* at 395.
121. 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* Bush v. Gore., 531 U.S. 98 (2000).
122. State v. Rogers, 992 S.W.2d at 400-01.
123. Rogers v. Tennessee, 121 S. Ct. 1693 (2001).
124. *Id.* at 1695.
125. *Id.* at 1700.

overturned.[126] Under that standard, the Court then held, as had the Tennessee Supreme Court, that the year-and-a-day rule "was not unexpected and indefensible."[127] The Court noted that the rule widely had been viewed as "an outdated relic," that it had been abolished in "the vast majority of jurisdictions recently to have addressed the issue," and that the rule had not been applied recently, if at all, in Tennessee.[128]

In dissent, Justice Scalia could only wonder what had happened to *Bouie*. Justice Scalia persuasively asserted that *Buoie* had not focused on "the unexpected and indefensible" language relied on by the majority, and he concluded that the majority opinion could not be squared with *Bouie*: "Today's opinion produces . . . a curious Constitution that only a judge could love. One in which (by virtue of the Ex Post Facto Clause) the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed, but in which unelected judges can do precisely that."[129]

Rogers, however, can be reconciled with developments post-*Bouie*. Few *Bouie* claims over the past twenty-five years have been successful.[130] Courts routinely apply new interpretations of statutory language to criminal defendants appearing before them, even when those interpretations are not dictated by the plain language of the statutory provision. *Bouie* principles seldom prevent courts from arriving at novel interpretations of statutory terms or from changing prior interpretations of the statutory language. The *Bouie* cases stand in stark contrast to the Rehnquist concurrence's analysis. This Part next examines the doctrinal formulations that courts have used to block *Bouie* claims.

As in *Rogers*, courts have used foreseeability as the key to the *Bouie* inquiry, upholding judicial alterations in statutory interpretation as long as the changes were foreseeable. When courts make law, retroactive application arguably can be as unjust as in the legislative context,[131] but when courts engage in the evolutionary interpretive process, their decisions are foreseeable and thus should be applied retroactively without concern for the individual rights at stake.

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126. *Id.* (citation omitted).

127. *Id.* at 1701.

128. *Id.*

129. *Id.* at 1703 (Scalia, J., dissenting).

130. I have adapted the following section from Harold J. Krent, "*Should* Bouie *Be Buoyed?" Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 57-77 (1997).

131. For instance, U.S. Constitution Article I, Section 10, Clause 1, the Ex Post Facto Clause, would plainly prevent a state legislature from retroactively rescinding the year-and-a-day rule.

Courts, however, have construed the objective foreseeability requirement quite laxly. They have considered a wide range of factors in determining that a judicial change was foreseeable, stressing the ambiguity of a statute or regulation,[132] precedents from other jurisdictions,[133] prior administrative interpretation of the statute,[134] and whether the Supreme Court had granted certiorari in a similar case.[135] No one indicator is dispositive, leaving wide room for the courts to deny a *Bouie* challenge. Courts, in other words, have acted as if judges almost never make law.

For instance, in *State v. Mummey*,[136] the defendant assaulted a man outside a bar, in part by bludgeoning him with tennis shoes. Under the pertinent statute distinguishing felony from misdemeanor assault, the defendant could only be convicted if he used a weapon, which was defined as an instrument "readily capable of being used to produce death or serious bodily injury."[137] The court held that tennis shoes so qualified, and that the defendant should have anticipated such a construction of the statute.[138] The conclusion of foreseeability is perplexing—tennis shoes in the public eye are not weapons, let alone "readily capable of being used to produce death or serious bodily injury." Moreover, if tennis shoes and other everyday articles of clothing can be considered weapons, then the difference between Montana's punishment scheme for misdemeanor assault (without the weapon) and felonious assault (with a weapon) is difficult to perceive.

Mummey is far from unique. As the Ninth Circuit earlier opined, as long as the state court "construed the sentencing scheme in accordance with the principles of statutory construction and its conclusion is certainly not 'unexpected' or 'indefensible' no *Bouie* claim should be successful."[139]

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132. *See* McSherry v. Block, 880 F.2d 1049 (9th Cir. 1989).

133. *See* Hagan v. Caspari, 50 F.3d 542 (8th Cir. 1995); State v. Mummey, 871 P.2d 868 (Mont. 1994).

134. *See, e.g.*, Lustgarden v. Gunter, 966 F.2d 552 (10th Cir. 1992).

135. *See* United States v. Russotti, 780 F. Supp. 128, 134 (S.D.N.Y. 1991) (holding that the change in the interpretation of the criminal statute was foreseeable because the Supreme Court had granted certiorari in a case raising a similar interpretive question before the defendant had committed the crime).

136. 871 P.2d 868 (1994).

137. MONT. CODE ANN. § 45-2-101(76) (1994).

138. *Mummey*, 871 P.2d at 871.

139. Aponte v. Gomez, 993 F.2d 705, 708 (9th Cir. 1993). Consider as well the *Bouie* challenge raised in *United States v. Lanier*, 520 U.S. 259 (1997). Even though *Lanier* addressed a challenge to judicially imposed change in federal law, the analysis is representative. The same need exists to determine whether judges have changed the law. Prosecutors alleged that the defendant state court judge assaulted several women in judicial chambers. They charged him with violating a civil rights statute, 18 U.S.C. § 242 (1994), on the ground that he had deprived the victims of "rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful

Moreover, courts have held that judges make no law even when overruling controlling administrative interpretations. Consider the Eleventh Circuit's decision in *Metheny v. Hammonds*.[140] There, four Georgia state prisoners challenged retroactive application of a rule by the Georgia Board of Pardons and Paroles that prisoners convicted of a fourth felony were ineligible for parole. The pertinent statute on its face was clear, providing that, upon conviction of the fourth felony, the individuals "shall not be eligible for parole until the maximum sentence has been served."[141] Nevertheless, two Georgia Attorneys General had issued advisory opinions that the statute unconstitutionally infringed on the Board's power under the Constitution,[142] and thus the Board had permitted parole for four-time offenders.

In 1994, however, the Georgia Supreme Court in *Freeman v. State*[143] signaled that the legislature could ban parole for a particular category of offenders. In response to *Freeman*, a new Attorney General decision directed the Board to stop granting parole for four-time offenders,[144] and the Board accordingly changed its policy.

Those convicted of a fourth offense prior to *Freeman*, when the Board had been granting parole, argued that *Freeman*'s change could not be applied retroactively. The *Metheny* court, however, responded: "[T]hat lower state courts had struck down a few other attempts to limit the Board's power or that the Attorney General had issued an opinion stating that the statute was unconstitutional is not deci-

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sexual assault." *Id.* at 262 (quoting trial court indictment). After conviction, the defendant appealed, arguing that the federal statute did not criminalize sexual assaults by state officials, and that, if it did, then retroactive application of that novel interpretation violated his due process rights. United States v. Lanier, 73 F.3d 1380, 1394 (6th Cir. 1996). The Sixth Circuit Court of Appeals agreed with him, setting aside the conviction, by holding that "[t]he indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand." *Id.*

In reversing, the Supreme Court did not take issue with defendant's assertion that application of the civil rights statute to sexual assault was entirely novel. Yet the Court held that novelty was not the key; rather, it stated that the "touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." 520 U.S. at 267. The Court counseled that, in considering whether the conduct's criminality was "reasonably clear," the Court itself need not have considered a similar claim, nor need it identify any lower court precedents involving substantially similar facts. Indeed, the Court clarified that criminal liability can attach merely if, "in light of pre-existing law, the unlawfulness [under the Constitution is] apparent." *Id.* at 271-72 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The Court accordingly remanded the case to the court of appeals for application of the new standard. The court of appeals never reached the issue on remand because Lanier failed to turn himself in to federal authorities. Accordingly, the appeal was dismissed with prejudice. United States v. Lanier, No. 99-5983, 2000 U.S. App. LEXIS 28047 (6th Cir. Nov. 6, 2000).

140. 216 F.3d 1307 (11th Cir. 2000).

141. GA. CODE. ANN. § 17-10-7(c) (2000).

142. *Metheny*, 216 F.3d at 1308.

143. 440 S.E.2d 181 (Ga. 1994).

144. *Metheny*, 216 F.3d at 1309.

sive."[145] The court continued that, because the Georgia Supreme Court had yet to decide the issue, its subsequent decision in *Freeman* was not "unforeseeable."[146] Indeed, the Eleventh Circuit stressed "[t]hat the erroneous interpretations were later declared invalid and corrected by the state supreme court does not entitle Plaintiffs to the benefit of those mistaken interpretations."[147] It seems to blink reality to suggest that an inmate is not entitled to rely upon the official, articulated position of the state parole authority with respect to the construction of a statute it is charged with administering, particularly when two Attorney General opinions supported that position.[148]

The argument against foreseeable change is likely greatest when courts explicitly overrule judicial as opposed to administrative precedent. In that context, courts act more overtly like legislatures in changing the law directly. Courts, however, have held that reversal of prior case law does not necessarily make the decision unforeseeable.

For example, in *Dale v. Haeberlin*,[149] the Sixth Circuit rejected a due process challenge to the Kentucky Supreme Court's decision in *Dale v. Commonwealth*,[150] which upheld the prosecution's use of the same felony both to prove underlying guilt (felon in possession of a weapon charge) and then to enhance his sentence for armed robbery as a persistent felony offender. The Sixth Circuit acknowledged that the Kentucky Supreme Court's *Dale* opinion overruled a prior Kentucky Supreme Court decision but concluded that the offender had fair warning that his sentence for robbery could have been twenty-

145. *Id.* at 1312-13.

146. *Id.* at 1313.

147. *Id.* at 1314.

148. The Tenth Circuit's decision in *Lustgarden v. Gunter*, 966 F.2d 552 (10th Cir. 1992), is similar. The court rejected a prisoner's due process challenge to the Colorado Supreme Court's construction of a parole statute that limited parole opportunities for certain sexual offenders. The statute targeted "any person sentenced for conviction of a sex offense, as defined in section 16-13-202(5) . . . [and] any person sentenced as a habitual criminal." *Id.* at 554 (citing COLO. REV. STAT. § 17-2-201 (5)(a) (1990)). The Colorado Parole Board had construed that statute to apply to habitual offenders and only those sexual offenders sentenced under the Sex Offenders Act, of which section 16-13-202(5) was a part. The state supreme court later disagreed, however, reading the statute to cover anyone convicted of any charge within the broader category of sexual offenses. Thiret v. Kautzky, 792 P.2d 801, 806 (Colo. 1990). The Tenth Circuit in *Lustgarden* conceded an ambiguity in the statute, namely whether the reference to section 202(5) was intended to limit the impact to those convicted under the Sexual Offenders Act or rather, as the state supreme court in *Thiret* had determined, just to furnish a definition of "sex offense." The federal court held, however, that the state supreme court's change was not unforeseeable, given that it accorded with the most logical construction of the statute. *Lustgarden*, 966 F.2d at 553.

149. 878 F.2d 930 (6th Cir. 1989).

150. 715 S.W.2d 227 (Ky. 1986).

five years, even if the same prior felony could not have been used at the time to establish one charge and enhance the other.[151]

Whether Dale could have anticipated a twenty-five year sentence or not is beside the point. He arguably should not have anticipated the state supreme court's abrupt change as to whether the same prior felony could be used both at the liability and enhancement stages.[152] And, he certainly was likely to receive a lighter sentence without the enhancement.

In *United States v. Newman*[153] a defendant who pleaded guilty to bank robbery charges requested sentencing credit for time spent on pretrial release at a residential drug treatment program.[154] Under Ninth Circuit precedent, Newman argued, credit was available both at the time Newman committed his offense and when he made the decision to participate in the drug treatment program.[155] Shortly after Newman committed his offense, however, the United States Supreme Court in *Reno v. Koray*[156] held that credit should not be available under the pertinent federal sentencing statute.[157] The par-

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151. *Dale*, 878 F.2d at 935. In another case, *Commonwealth v. Santiago*, 681 N.E.2d 1205 (Mass. 1997), the Supreme Judicial Court of Massachusetts held that Santiago could be tried for first degree murder on the theory that "where the defendant chooses to engage in a gun battle with another with the intent to kill or do grievous bodily harm and a third party is killed, the defendant may be held liable for the homicide even if it was the defendant's opponent who fired the fatal shot." *Id.* at 1215. Prior to that case, however, the Massachusetts court arguably had held that first degree murder could not be demonstrated in such circumstances. *See* Commonwealth v. Balliro, 209 N.E.2d 308, 314 (1965) (requiring that defendant be the one who pulled the trigger). The Court was not troubled by the change.

152. More generally, courts have held that litigants should anticipate that courts will overrule prior precedents from lower courts. For instance, in *Hagan v. Caspari*, 50 F.3d 542 (8th Cir. 1995), the petitioner argued that the Missouri Supreme Court's rejection of his double jeopardy claim was unforeseeable. *Id.* at 544. He had been charged both with second degree robbery for forcibly grabbing the keys to a van and then for stealing the van. *Id.* He argued that the two crimes merged because of Missouri's single larceny rule, which defined the stealing of several articles of property during the same scheme or course of conduct as a single offense under *Missouri Revised Statutes*, § 570.050 (1986). *Id.* at 546. Under similar facts, a Missouri appellate court had found that conviction on both a robbery and theft charge would violate the Double Jeopardy Clause. *See* State v. Lewis, 633 S.W.2d 110 (Mo. Ct. App. 1982). Therefore, the petitioner in *Hagan* argued that, in overruling the appellate court's interpretation of Missouri's larceny statute, the state supreme court violated *Bouie*. *Hagan*, 50 F.3d at 544.

The Eighth Circuit disagreed, holding that the change was foreseeable largely because the appellate court's reasoning was plainly wrong. *Id.* at 546-47. The larceny statute may have prevented conviction on two separate stealing charges, but not for the distinct robbery and theft charges. Thus, the Double Jeopardy Clause did not bar conviction of the two charges. The court further commented that "[w]e have some doubt whether a state supreme court's overruling of an intermediate appellate court decision ever can constitute a change in state law for due process purposes." *Id.* at 547.

153. 203 F.3d 700 (9th Cir. 2000).

154. *Id.* at 701.

155. *Id.* at 702.

156. 515 U.S. 50 (1995).

157. *Id.* at 65.

ties agreed that retroactive changes in the length of punishment fall within the protection of the Due Process Clause's incorporation of ex post facto principles.

The Ninth Circuit, however, held that retroactive application of *Koray* to Newman was permissible, even though it marked a clear change of law within the circuit.[158] The court reasoned that "the decision in *Koray* was reasonably foreseeable given the circuit split on the meaning of [the statute]."[159] Cases from other jurisdictions evidently undermined the plaintiff's entitlement to rely on Ninth Circuit precedent. The *Newman* court also suggested that a "reversal of a prior incorrect interpretation of a statute . . . [was not] barred by *Bouie* . . . ."[160] The undoing of a precedent, therefore, may be foreseeable.[161] Defendants may not be entitled to rely on the construction of a statute adopted by an appellate court because those precedents can always be overturned.[162]

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158. *Newman*, 203 F.3d at 703.

159. *Id.* The Ninth Circuit previously had held that defendants may not rely upon any judicial opinion that is subject to rehearing on review or certiorari. *See* United States v. Ruiz, 935 F.2d 1033, 1038 (9th Cir. 1991) (holding that defendants were not entitled to rely on a prior appellate opinion which was withdrawn by the Ninth Circuit after the plea agreement had been reached); United States v. Kincaid, 898 F.2d 110, 111 (9th Cir. 1990) (holding that defendants could not rely upon the fact that federal sentencing guidelines had been invalidated at the time of sentencing, because the guidelines were later reinstated by the Supreme Court).

160. 203 F.3d at 702.

161. Similarly, in *United States v. Rodgers*, 466 U.S. 475 (1984), a federal case, the United States Attorney charged the defendant with making a false statement to the FBI and Secret Service in a "matter within the jurisdiction of any department or agency of the United States." *Id.* at 476 n.1 (quoting 18 U.S.C. § 1001 (1994)). Defendant allegedly apprised the FBI that his wife was involved in a plot to assassinate the President and that she had been kidnapped. *Id.* at 476. The defendant moved to dismiss the indictment on the basis of a prior Eighth Circuit decision that construed the language "within the jurisdiction of any department or agency" to refer only to areas in which the agency had the power to make final or binding determinations, such as for monetary awards. *Id.* at 477-78 (citing Friedman v. United States, 374 F.2d 363 (8th Cir. 1967)). On that authority, the district court and Eighth Circuit in Rodgers dismissed the indictment because the defendant's comments merely triggered a criminal investigation. United States v. Rodgers, 706 F.2d 854, 855 (8th Cir. 1983).

The Supreme Court reversed, holding that the language "within the jurisdiction of any department or agency" was to be read broadly, including any matters pertaining to criminal investigations. *Rodgers*, 466 U.S. at 479. The defendant argued, however, that the more expansive construction, even if adopted, could not be applied to him retroactively given his reliance on the prior Eighth Circuit precedents. *Id.* at 484. The Supreme Court disagreed due to "the existence of conflicting cases from other Courts of Appeals [which] made review of that issue by this Court . . . reasonably foreseeable." *Id.* For a discussion of *Rodgers*' significance, see Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 457-58 (2001).

162. *See also* Green v. Catoe, 220 F.3d 220 (4th Cir. 2000), *abrogated on other grounds by* Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000) (concluding that "if the change of law was reasonably foreseeable, based on indications in prior case law, then the defendant had sufficient notice in the due process sense").

The foreseeability inquiry, therefore, has been manipulated substantially. Courts have rationalized that litigants should have expected the new or changed judicial interpretation, even when the judicial interpretation overrules administrative or judicial precedents. Courts have sufficient leeway to permit retroactive application of new statutory interpretations in the criminal context by dint of the foreseeability analysis. Judicial opinions ex post can be justified on the basis of the general evolution of the law.[163]

Arguably, the foreseeability analysis may further rule of law values in limiting *judicial* power. The foreseeability inquiry may constitute a sorting mechanism to separate those instances of judicial interpretation that represent conventional common lawmaking or statutory construction from those that are fueled by animus toward the offender. According to traditional analysis, the Ex Post Facto Clause protects against arbitrary governance as well as safeguarding the offender's reliance interest. Judges may interpret common law doctrines, statutes, or regulations in order to increase the severity of the punishment for one particular odious offender. Perhaps no direct way to police judicial bias exists, but if a construction is foreseeable, then it makes it less likely that animus was a determining factor.

On occasion, therefore, the federal courts may be convinced that an impermissible risk of state court bias or arbitrariness exists, as in *Bouie* itself. In *Douglas v. Buder*,[164] the Supreme Court intervened to stop the apparent arbitrary determination of a Missouri state court judge to reincarcerate an individual who was on probation. The probationer had not immediately reported a traffic citation to his probation officer, which would be required if the citation were the equivalent of an arrest.[165] The Supreme Court signaled its disbelief that the Missouri court would ever have determined that a traffic citation constituted an arrest but for the court's evident animus against the probationer.[166] Irrespective of whether the trial court's interpretation was foreseeable, *Bouie* allows reviewing courts to rein in lower courts when they appear influenced by vindictive or arbitrary aims.

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163. Professor Fisch's theory of equilibrium is similar. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997). She argues that most common lawmaking—as opposed to legislation—should be considered foreseeable because the common law reflects an unstable equilibrium that can be moved with the slightest tug in any direction. *Id.* at 1108-09. Thus, litigants cannot justifiably rely on any particular common law position. The only exception she notes is when the Supreme Court overturns its own precedents. *Id.* at 1107-08. In that context, adjudication more closely resembles legislation and may disrupt a stable equilibrium upon which litigants are entitled to rely. *Id.* at 1108.

164. 412 U.S. 430 (1973).

165. *Id.* at 431.

166. *See id.* at 431-32. Indeed, the probation officer and prosecutor in the case had argued that the probationer should not be reincarcerated. *Id.* at 431.

Thus, on balance, *Bouie* is best understood as a means of limiting judicial vindictiveness rather than protecting offenders' reliance interests or ensuring repose. The foreseeability analysis acts as a crude filter to separate judicial reinterpretations animated by retributive impulses from the more familiar common law evolutionary process. Courts seem to determine whether barring retroactive application of a new interpretation is needed to restrain judicial overreaching. The *Bouie* inquiry is admittedly ad hoc, but serves as a last-line check against prosecutorial and judicial overreaching.

B. Contracts Clause

After *Gelpcke v. City of Dubuque*,[167] courts enforced the judicial impairments doctrine for the next generation. Judicial decisions that altered prior precedent in a way that impaired contract rights were suspect.[168] But by the late nineteenth century, federal courts began retreating from the judicial impairments doctrine. For reasons of politics and judicial ideology, they became far more chary of pinning federal rights on a conclusion that state judicial opinions had "changed" law.[169] Federal courts became increasingly loathe to second-guess a state court's decision as to state law matters.[170]

For instance, some federal courts strained to find no change on the ground that the prior state court decisions were not controlling. In *Keokuk & W.R. Co. v. County Court*,[171] the question for resolution, although quite convoluted, concerned whether a railroad could be exempt from taxation. Missouri had granted exemptions to certain railroads but then forbade new exemptions several years later. At the time that the plaintiff railroad had formed through consolidation with another, a prior Missouri state court decision[172] assumed that companies did not lose their tax exemption through merger or other consolidation.[173] That court rejected the argument "that a change in the political form of civil society has the magical effect of dissolving

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167. 68 U.S. (1 Wall.) 175 (1863).

168. Federal courts principally deployed the doctrine when lower courts departed from prior precedent as opposed to when they merely rested a decision on an unforeseeable interpretation of a statute. *But see* Pine Grove Township v. Talcott, 86 U.S. (19 Wall.) 666, 678 (1874) (finding an impairment of contract in absence of prior state court decision—"In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation").

169. Thompson, *supra* note 75, at 1426-38.

170. For a time, federal courts also disregarded state courts' older precedents if convinced that they were plainly incorrect. *See*, *e.g.*, Bd. of Comm'rs v. Coler, 113 F. 705, 708 (4th Cir. 1902), *aff'd*, 190 U.S. 437 (1903); Jones v. Great S. Fireproof Hotel Co., 86 F. 370, 372 (6th Cir. 1898), *aff'd*, 177 U.S. 449 (1900).

171. 41 F. 305, 310 (E.D. Mo. 1890), *aff'd*, 152 U.S. 301 (1894). The Supreme Court affirmed on slightly different grounds.

172. *See* Scotland County v. Mo., Iowa & Neb. Ry. Co., 65 Mo. 123 (1877).

173. *Id.* at 134-35.

its moral obligations or impairing contracts previously vested"[174] and accordingly upheld the tax exemption for the railroad. In *Keokuk*, the contract for consolidation of the two railroads included a clause that any immunities previously enjoyed would continue in the new company.

The Missouri high court later held, however, that the consolidated railroad was in effect a new corporation. Accordingly, the railroad could not rely on the prior decision. The federal courts agreed, reasoning that: "To say that, because a state court has once decided that a certain corporation is entitled to exemption from taxation, the decision must thereafter be followed, although erroneous, would involve consequences of such a serious [financial] nature that any court ought to hesitate . . . ."[175] The second Missouri decision merely clarified the reach of the legislative tax exemption. Accordingly, the federal court rejected plaintiff's argument that the second state court decision had impaired contractual obligations (and violated a property right).

Similarly, federal courts strained to distinguish the holdings in prior state court decisions. The Supreme Court's decision in *Sauer v. New York*[176] provides a good example. There, a homeowner challenged the city's construction of an elevated viaduct near his home on several grounds. New York's courts rejected the challenge, reasoning that a homeowner did not, under New York law, enjoy the right to unimpeded access to his home.

In turn, Sauer sued in federal court, arguing that the New York decision changed the preexisting law in New York. He cited a case decided four years before he acquired title to his land—*Story v. Elevated Railroad*[177]—which assured landowners abutting public roads to easements of access, light, and air. The United States Supreme Court, however, was unmoved. It distinguished the prior case on the grounds that the city there had blocked access to benefit private corporations such as railroads: "The structure in these cases were held to violate the land owners' rights, not only because they were elevated and thereby obstructed access, light and air, but also because they were designed for the exclusive and permanent use of private corporations."[178] Accordingly, it held that plaintiff "has not shown that in his case the state court has changed, to his injury, the interpretation of his contract with the city . . . ."[179]

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174. *Id.* at 135.
175. *Keokuk*, 41 F. at 310.
176. 206 U.S. 536 (1907).
177. 90 N.Y. 122 (1882).
178. *Sauer*, 206 U.S. at 552.
179. *Id.* at 555. As Justice Holmes commented in dissent in *Muhlker v. New York & Harlem Railroad*, 197 U.S. 544 (1905), federal courts should not reverse state courts if the

The Justices in dissent accused the majority of reinterpreting precedents to arrive at the conclusion of no changed law.[180] The prior decision had mentioned, but not stressed, the fact that a private corporation was involved. For instance, the court in *Story* had asked what "is the extent of this easement? What rights or privilege are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot and light and air furnished across the open way."[181] And, the court stressed that the "public purpose of a street requires of the soil the surface only."[182] The dissenting judges would have held that the new judicial decision breached the state's obligation to its contract.[183]

Like the *Bouie* doctrine today, however, the judicial impairments doctrine presented a flexible means for setting aside state court decisions as in *Gelpcke* that seemed arbitrary or targeted at outsiders. For instance, in *McCullough v. Virginia*,[184] bondholders challenged a Virginia Supreme Court of Appeals decision that bondholders could not require the state to accept coupons as payment of taxes because the 1871 bond issuance was illegal. The U.S. Supreme Court reversed, stressing that the Virginia high court on several prior occasions had upheld the bonds' validity:

> These . . . bonds, amounting to many millions of dollars, have passed into the markets of the world, and have so passed accredited, not merely by the action of the General Assembly of the State of Virginia, but by the repeated decisions of her highest court . . . for substantially a quarter of a century . . . .[185]

Indeed, the Court stressed that in "reversing its prior rulings" the Virginia court "put[] at naught the repeated decisions of this court as well as its own."[186] As in *Bouie*, therefore, the judicial impairments doctrine served as a last-ditch means of restraining state court prejudice.

Within a generation, however, the Court stopped enforcing the judicial impairments doctrine. In part, the change stemmed from greater acceptance of judicial realism. As Justice Brandeis described

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recent state courts' efforts to distinguish prior cases were "not wanting in good sense." *Id.* at 574-75.

180. *Sauer*, 206 U.S. at 556-60.

181. *Story*, 90 N.Y. at 146.

182. *Id.* at 161.

183. In addition, the U.S. Supreme Court refused to take some cases during that period even if some change existed on the ground that "mere reversal by a state court of its previous decision [did] not . . . violate any clause of the federal constitution." Tidal Oil Co. v. Flanagan, 263 U.S. 444, 454-55 (1924); *see also* Brinkeroff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930).

184. 172 U.S. 102 (1898).

185. *Id.* at 108.

186. *Id.* at 122-23.

in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,[187] "[t]he process of trial and error, of change of decision in order to conform with changing ideas and conditions,"[188] was a fundamental part of all judging.[189] He continued that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions."[190] With *Burns Mortgage Co. v. Fried*[191] in 1934, the Court implicitly overruled the *Gelpcke* line of cases by holding that, in diversity cases, the Court had no choice but to accept state court interpretations.[192] The Supreme Court has not revisited the *Gelpcke* doctrine since the beginning of the twentieth century—judicial changes do not violate the Contracts Clause.

No one explanation for the decline in enforcement of the judicial impairments and *Bouie* doctrines is likely dispositive. And, the judges' motivations for the decline may have changed over time. Nonetheless, striking similarities for the decline exist.

First, as a matter of federalism, it became increasingly difficult to justify intervention in state law matters. The Supreme Court rarely second-guessed state law interpretation in the hundreds of cases decided each year. Although some oversight might be necessary to protect the federal constitutional rights at stake, each reversal of a state court decision on the ground that the court had changed state law appeared unseemly.

Moreover, over time, there may have become less reason to mistrust state court judges. For instance, after the mid-nineteenth century municipal bond crisis, state courts were not as active in attempting to protect local taxpayers at the expense of out-of-state investors. Similarly, after the initial years of the civil rights movement, state judges were not as hostile to the rights of those in the movement, as they had been in *Bouie* itself. The United States Supreme Court began to trust state courts to enforce federal rights.

Second, distinguishing state cases that changed prior law from those that refined it or just applied it to a new setting became increasingly problematic. As judicial realism became more accepted, the Court was less secure in reaching the conclusion that a state court decision had in fact changed state law. Given the complexities

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187. 281 U.S. 673 (1930).

188. *Id.* at 681 n.8; *see also* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

189. The Supreme Court consistently had declined to find that judicial changes in the law have effected compensable takings. *See* Thompson, *supra* note 15.

190. *Hill*, 281 U.S. at 681 n.8.

191. 292 U.S. 487 (1934) (relying on section 34 of the Judiciary Act of 1789).

192. *Id.* at 493-94. Despite *Erie v. Tompkins Railroad Co.*, 304 U.S. 64 (1938), the Court still could have exercised the power to review claims directly under the Contracts Clause, as it had on occasion previously. *See supra* Part II.B.

of judicial decisionmaking and the difficulty of construing statutes, demarcating a bright line between law application and lawmaking is daunting.

Third, the Court may have believed that notice was not as important as previously thought. Under *Bouie*, cases such as *Mummey* demonstrate the fictive nature of reliance. Criminal defendants do not scan judicial opinions prior to committing an offense. Although commercial entities may be more familiar with the peculiarities of judicial interpretations prior to entering into a deal, counsel themselves may well predict that certain doctrines or precedents are unstable. Counsel, for instance, could have predicted that the tax exemption in *Keokuk* was not secure. In other words, judges may have become less committed to maintaining the status quo.

Fourth, and relatedly, the Court may have become more reluctant to privilege older as opposed to newer judicial interpretations. The second interpretation may be "better," and therefore justice may be served by upholding the second interpretation. For instance, in *Mummey*, precluding courts from applying the new definition of "weapon" would have resulted in a lesser penalty for a perceived wrongdoer. In *Metheny*, retroactive application of the state court decision prevented parole for a category of offenders that the legislature deemed likely to be recidivist. Similarly, in cases such as *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*,[193] the judicial impairment stemmed from judicial efforts to peel back legislatively granted monopolies, a goal that many federal jurists likely favored.[194] In *Sauer*, the Court may have wanted to pave the way for internal improvements such as the pedestrian overpass considered there. Preventing state courts from changing law may freeze law which is normatively unattractive.

Finally, the U.S. Supreme Court may have become more concerned about the institutional impact of encouraging claims alleging federal constitutional violations arising from changed state law. With both *Bouie* and Contracts Clause claims, the Court perceived that the doctrines triggered a substantial increase in litigation. The *Bouie* doctrine presented a convenient hook upon which state defendants could hang their arguments, and *Gelpcke* threatened to convert many disagreements over state contract rights into a federal constitutional

193. 125 U.S. 18 (1888) (upholding legislature's decision to grant permission to refining company to lay water pipes despite prior legislative monopoly).

194. *See, e.g.*, Lehigh Water Co. v. Easton, 121 U.S. 388 (1887) (holding that legislative monopoly did not preclude competition from water works operated by municipality).

claim.[195] Retrenchment may be seen as a natural response designed to preserve institutional resources.

In short, the U.S. Supreme Court has backed off from both the *Bouie* and judicial impairment doctrines for similar reasons. Concerns of federalism, preserving institutional resources, the difficulty of determining when as a principled matter intervention is warranted, and the unattractiveness of compelling state courts to adhere to "law" that may be "wrong" or "backward" all fueled the retreat.

C. Enforcement of Article II, Section 1

The *Bouie* and Contract Clause experiences shed light on the Rehnquist concurrence's analysis of Florida law. No one doubts that Florida's legislative scheme was open to differing interpretations. The only question is how far the Florida court strayed from the text. Few benchmarks aid that inquiry.

Nonetheless, courts in the *Bouie* and judicial impairments context have asked four general questions. First, courts have inquired whether the judicial interpretation under scrutiny reversed settled precedents. Indeed, that was the principal question asked in the judicial impairments context. The Court used that factor to stress that "new" law had been fashioned in *McCullough*. However, this factor by itself is not dispositive as suggested by the *Dale* and *Newman* cases. Individuals (or counsel) at times should be able to anticipate judicial change. In any event, the Florida court's decision in *Gore* in no way overturned any pertinent precedent. Indeed, the 1999 revision to the election code had never been reviewed judicially prior to the presidential election controversy.

Second, to a lesser extent, federal courts have focused on whether state courts have overruled administrative precedents. Legislatures often delegate subsidiary lawmaking authority to administrative entities, and courts will defer to reasonable agency interpretations of law that emerge from the lawmaking or enforcement context.[196] Brushing aside administrative interpretations may suggest, therefore, that courts are fashioning new law. The Florida court decision

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195. On the increased litigation in contracts cases, see CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 401-05 (1939); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 60-102 (1928).

196. Under the federal doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court has directed that courts should defer to reasonable constructions of statutory language by agencies. Florida courts may afford less deference than the U.S. Supreme Court to agency construction of statutory language, but it defers nonetheless. *See* Donato v. AT&T, 767 So. 2d 1146 (Fla. 2000); Tampa Elec. Co. v. Garcia, 767 So. 2d 428 (Fla. 2000); Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844 (Fla. 1993); *cf.* James Rossi, HAMSTRINGING STATE AGENCY AUTHORITY TO PROMULGATE RULES: A QUESTIONABLE WAY TO IMPROVE ENVIRONMENTAL REGULATION, 29 ENVTL. L. REP. 10735 (Dec. 1, 1999).

set aside the Florida Secretary of State's opinion on defining "lawful" votes,[197] and the legislature had delegated the Secretary authority to oversee elections.[198]

That clash, however, does not significantly support the Rehnquist concurrence's determination. As an initial matter, the Secretary of State issued the opinion in the midst of the election crisis, not before. The administrative precedent, therefore was in no way settled. In addition, courts retain the right to reject any administrative construction of the law that is deemed unreasonable. As the *Metheny* example illustrates, courts have not hesitated to find that judicial reversals of administrative precedent are foreseeable. Even if the court erred in overturning the precedent, that error is not by itself tantamount to a conclusion that the court changed the manner that the *legislature* provided for selecting presidential electors. Courts may pay insufficient heed to administrative rulings without changing the law.

Third, courts have investigated whether developments in other jurisdictions made the state court decision under scrutiny foreseeable. Although an interpretation by another state's highest court obviously is not controlling, reviewing courts have relied on such developments to suggest that the state court decision under consideration is not unexpected. Indeed, as in *Rogers* and *Mummey*, one might defend the Florida court's analysis as to what constitutes a lawful vote by reference to the position adopted by other states.[199] State courts had held that the intent of the voter standard governs. From the perspective of the developing law in other jurisdictions, therefore, the Florida Supreme Court decision seems foreseeable.[200]

Fourth, the question of whether the Florida court's interpretation derived from the legislature's text is more open-ended. Judgments can differ. Certainly, the concurrence's sally that the Florida court rid the certification of independent meaning finds its mark. On the other hand, no specific language in the statute mandates deference. Moreover, the statute is not clear as to whether the intent of the voter standard was to govern. Overall, as compared to cases such as *Mummey* and *Lanier*, the Florida court's interpretation rests more

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197. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1282-83 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

198. *See* FLA. STAT. § 97.012(1) (2000) (designating Secretary of State as "chief election officer" with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of election laws").

199. See the discussion in *Bush v. Gore*, 531 U.S. 98, 150-54 (2000) (Breyer, J., dissenting); *see also* Brief for Respondents at 36, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

200. Professor Pildes argues that, in the election context, federal courts should stay their hands unless plaintiffs can show, in addition, detrimental reliance. Pildes, *supra* note 13, at 722-23.

comfortably on the legislative language.[201] Using the benchmarks set out in the *Bouie* and Contracts Clause context highlights the weakness of the concurrence's analysis.

In retrospect, the concurrence's chief error may have stemmed from its assumption that the Article II, Section 1 directive demands stringent enforcement. The question should not be whether the Florida court "distorted the [statutory language] beyond what a fair reading required." Because the "beyond . . . a fair reading" standard is so open-ended, it invites second-guessing by reviewing courts. The standard converges with one of clear legal error. The Supreme Court's own interpretation of the Equal Protection Clause, in many minds, might be characterized as distorting the Equal Protection Clause "beyond what a fair reading required." The Court never applied *Bouie* or the judicial impairments doctrine to state court decisions that were merely wrong, or even clearly wrong. Rather, intervention should be reserved only for the most adventurous or unanticipated judicial changes in the law.[202]

Full enforcement of the Article II, Section 1 provision should be rejected. Despite the importance of federal oversight, the concerns prompting a more hands-off stance in the *Bouie* and Contracts Clause contexts fully apply. Indeed, the reasons against federal judicial second-guessing were even stronger in *Bush v. Gore* than in the contexts described above.

As an initial matter, the institutional arguments are quite powerful. The Rehnquist concurrence would open federal courthouse doors to any claim that state jurists have changed the manner in which electors can be chosen. Any judicial interpretation of appropriate districts set out by the legislature, of appropriate voting methodology, of tabulation procedures, or of a state's contest process could form the basis of a federal challenge. Particularly when a presidential election may hang in the balance, inviting such challenges risks embroiling the Court in political disputes. Over time, courts will likely become more reticent about inviting challenges to judicial interpretations of selection decisions given the high stakes. Although the Court—and particularly the concurring Justices—seemed eager to take on the challenge of determining whether the Florida Justices changed law in *Bush v. Gore*, it is doubtful whether subsequent courts will be so willing.

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201. *See also* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) (lambasting concurrence's analysis of Florida law).

202. Even under the concurrence's standard of "beyond what a fair reading required," the dissenting Justices were on firm terrain in finding that the Florida Supreme Court's interpretations were grounded in the statutory language.

Aside from the institutional concerns, the inquiry of whether a judicial construction of a state's legislative scheme for selecting electors changed the law is insufficiently bounded. On the one hand, almost every judicial decision of interest either elaborates on a previously uncertain point or clarifies a prior conflict. The common law method presupposes at least interstitial change. Evolution may at times appear more dramatic than at others. In a sense, therefore, many judicial decisions "change" the law, whether through interpretation of statutes or modifications of prior judicial doctrines.

On the other hand, judges can always rationalize various opinions as foreseeable. Some decisions are, of course, more anticipated than others, but the decisions following *Bouie* are ample testament to the elasticity of the inquiry. In *Bush v. Gore*, for instance, the fact that four of the seven Justices on the Florida Supreme Court agreed on a set of key interpretations of the legislative landscape, and that their view was defended as plausible by four U.S. Supreme Court Justices, demonstrates the difficulty of distinguishing interpretation from lawmaking. Reasonable minds may disagree as to what is a reasonable interpretation. There are few objective benchmarks available to determine which decisions "change" the law as opposed to adapting law to respond to new social, economic, or technological realities, or even an unforeseen set of facts. The general foreseeability inquiry in the *Bouie* and judicial impairments contexts—based on consistency with judicial precedent, administrative precedent, precedent from other jurisdictions, and the statutory text—does not add sufficient concreteness or predictability.

In addition, the concurrence's approach undermines the respect due state judiciaries. Although this Supreme Court has championed federalism by limiting the powers of Congress,[203] the concurrence's position all but heaps scorn on state jurists. Second-guessing state court decisions to determine whether they go beyond "interpreting" law undermines the respect due to the highest court of the states. The decline in enforcement of the *Bouie* and judicial impairment doctrines in no small measure arose because of increased confidence and respect in state judges.

Indeed, review of state court decisionmaking under Article II—from a federalism perspective—is far more jolting than under *Bouie*

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203. For a sampling of recent decisions, *see* Bd. of Trustees v. Garrett, 531 U.S. 356 (2000) (holding that Congress could not subject states to suit in federal court for violations of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (limiting Congress's power under Commerce Clause); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (limiting Congress's power to impose suit against states under the Eleventh Amendment); Printz v. United States, 521 U.S. 898 (1997) (deriving principle that prevents congressional commandeering of state officials under the Tenth Amendment); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting Congress's power to fashion appropriate legislation to enforce equal protection requirements in the Fourteenth Amendment).

or the Contracts Clause. The consequence of a successful challenge in the latter two contexts is that the interpretation cannot be applied retroactively. The state courts, however, remain free to apply interpretations such as the trespassing rule in *Bouie* or the authority to issue bonds in *Gelpcke* prospectively. Retroactive invalidation does not tie the state courts' hands in future cases, once notice has been assured.

The Rehnquist concurrence, however, would have precluded application of the Florida Supreme Court's interpretation of election law in all future cases. Even if the Florida court afforded notice, the concurrence still would have invalidated the state court holding for abridging the legislature's authority under Article II to select the manner in which electors are chosen. Viewed in that light, review under Article II is not concerned so much with retroactivity but with the allocation of power between state legislature and judiciary. Review by federal courts, therefore, compromises state judicial authority to a greater degree than in the retroactivity cases.[204]

The threat to federalism accordingly is more acute in the Article II setting than in other contexts. As an analogy, consider the independent and adequate state grounds doctrine. Under *Michigan v. Long*,[205] the Court will not review a state court decision if an independent state ground exists, even if the decision includes an analysis of a federal constitutional guarantee. The state ground may have been crafted in order to insulate the state court decision on federal law from Supreme Court review. Regardless, the U.S. Court will not intervene.

Prior to *Michigan v. Long*, however, the Court scrutinized the state law ground to determine whether it was "adequate" enough to immunize the decision from federal court review.[206] Justifications deemed too makeweight or too ill thought-out were not sufficient to insulate the state courts from federal review. The Court rejected that tradition in *Michigan v. Long* in part because "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar."[207] In addition, the Court justified its refusal to second-guess state law grounds on "[r]espect for state courts."[208] Under *Michigan v. Long*, therefore, the Court will permit state court interpretations of state law with which it would be unlikely to concur. For instance, the Florida Supreme

204. I am indebted to Trevor Morrison on this point.

205. 463 U.S. 1032, 1037-41 (1983).

206. *See, e.g.*, Texas v. Grown, 460 U.S. 730, 732 n.1 (1983); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

207. Michigan v. Long, 463 U.S. at 1039.

208. *Id.* at 1040.

Court in *State v. Lavazzoli*[209] disagreed with the U.S. Supreme Court's view of search and seizure doctrine but pegged its decision on a novel interpretation of Florida's constitutional requirements.[210] Under the independent and adequate grounds doctrine, no federal review could follow.

The Rehnquist concurrence does not manifest the same measure of respect for state court interpretation of state law. The concurrence dismissed difficult questions of state law with the back of its hand. On questions of the U.S. Supreme Court's own power, the Rehnquist Court ironically has become nationalistic.[211]

Finally, the radical "realism" of the Rehnquist concurrence—equating judicial interpretation with lawmaking—if followed, might well have a destabilizing effect on other areas of the law. Viewing judicial interpretation as changed law can open a wide array of constitutional challenges to judicial decisionmaking. For instance, courts might heed the analysis in the concurrence to permit far more *Bouie* challenges despite *Rogers*. As a result, the burden of convicting and sentencing clearly guilty offenders would increase. Similarly, pressure would increase to recognize takings challenges to judicial decisions, an area in which courts have so far steered clear.[212]

Curiously, Justice Scalia, in *James B. Beam Distilling Co. v. Georgia*,[213] recognized the difficulty of characterizing judicial lawmaking as legislation. There, the Court considered whether to apply new constitutional rules retroactively. Concurring in the judgment, Justice Scalia explained why he believed that courts could not, like legislatures, apply new rules prospectively only: the Article III judicial power "must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' not the power to change it."[214] Justice Scalia immediately continued, however, that "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."[215] But, they make law "*as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law is, rather than decreeing what it

209. 434 So. 2d 321 (Fla. 1983).

210. *Id.* at 323-24.

211. *See* Dickerson v. United States, 530 U.S. 426 (2000) (holding that state (and lower federal) courts must abide by Supreme Court's constitutional common lawmaking in the *Miranda* decision); Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582 (1995) (depriving state courts of power to enjoin state taxing authority sued under federal law).

212. *See* Thompson, *supra* note 15, at 1498-1502 (addressing institutional factors that have led some to caution against recognizing judicial takings).

213. 501 U.S. 529 (1991).

214. *Id.* at 549 (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

215. *Id.* (Scalia, J., concurring).

is today *changed* to, or what it will *tomorrow* be."[216] Maintaining the fiction that judges do not make law may be important to the judicial system as we know it.

To the extent that judges are considered lawmakers, pressure builds to impose the same constraints on judges that currently circumscribe legislative authority. In particular, the limits on retroactive decisionmaking embodied in the Ex Post Facto Clause, Bill of Attainder, and Takings Clauses might apply. Such constraints would, for better or worse, straightjacket judicial decisions considerably. At least in contexts such as criminal law and property rights, in which retroactivity is disfavored, much judicial decisionmaking would be suspect.

In short, the concurrence plausibly concluded that judges can review claims alleging that state legislatures have been deprived of their constitutional power to determine the manner in which presidential electors are selected. Nonetheless, concerns for preserving institutional capital, avoiding administrative line-drawing difficulties, maintaining tenets of federalism, and fostering stability in other doctrinal areas all suggest that the constitutional provision should not be aggressively enforced.

Underenforcing the Article II, Section 1 directive would not be novel. One relatively familiar example may prove helpful. In *Garcia v. San Antonio Metropolitan Transit Authority*,[217] the Court declined to enforce the Tenth Amendment principally for institutional reasons. In rejecting a challenge to application of the Federal Labor Standards Act (FLSA) to a municipal body, the Court reasoned that a judicially crafted test to distinguish traditional from other state functions was "unsound in principle and unworkable in practice."[218] The Court had previously struggled in fashioning a test to determine which state functions to preserve from federal interference. Despite the Court's decision not to enforce the Tenth Amendment directly, it signaled that the Tenth Amendment norm continued to merit deference.

In legislating, Congress still presumably considered the Tenth Amendment norm to the extent that it considers any constitutional

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216. *Id.* (Scalia, J., concurring).

217. 469 U.S. 528 (1985).

218. *Id.* at 546. The Court justified its refusal to enforce the Amendment on the ground that political process checks existed to check Congress's regulation of state and local governmental authorities, namely that state and local governments enjoyed ample voice in Congress's affairs. *See* Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 173 (1997) (arguing that the court should defer to congressional interpretation of constitutional text when judicially appropriate standards are wanting).

question.[219] Indeed, Congress amended the FLSA after *Garcia* to protect local governments from some of the Act's provisions.[220] A constitutional provision can retain vitality even when not actively enforced by the judiciary.[221] In a system marked by separated powers and federalism, the Court logically may allow institutional factors to shape constitutional rights.[222] Just as in *Garcia*, an underenforcement tack in reviewing claims under Article II, Section 1 would reflect a strategy of enforcing constitutional rights indirectly to avoid the political or institutional pitfalls of more direct enforcement.

The Supreme Court should only conclude that state courts have changed the manner in which electors are selected in the rare case. The U.S. Court should not intervene unless the state court's construction is both unsupportable by reference to conventional textual analysis and relevant precedents and, in addition, threatens to gut the legislature's control of the process to select presidential electors.

CONCLUSION

The concurrence's opinion in *Bush v. Gore* is as startling as it is misconceived. The opinion oozes disrespect for the Justices on the Florida Supreme Court and flies in the face of the Court's frequent paeans to the fundamental role of federalism in our system. Federalism is something evidently that Congress, not the Court, must live with.

To be sure, the concurrence was on firm ground in asserting the power to review the Florida Supreme Court's construction of state

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219. Obviously, members of Congress do not usually pore over constitutional law tomes prior to voting on proposals. Most members are probably inclined to allow the judiciary to resolve any disputed issue. But members of Congress formally have the obligation to uphold the Constitution. Some may solicit the views of others as to the constitutionality of various provisions, and others may in fact reach their independent view of the constitutional question prior to voting.

220. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (codifed at 29 U.S.C. § 207(o)(2)(A) (1994)). Moreover, the Court has construed legislation narrowly in light of Tenth Amendment concerns to preserve state sovereignty. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court determined that Congress had not evinced a clear enough intent to subject state judges to the Age Discrimination in Employment Act. The Court explained that its clear statement approach ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

221. The Court has recently enforced the Tenth Amendment more actively. *See* Printz v. United States, 521 U.S. 898 (1997) (limiting scope of Brady Handgun Violence Prevention Act); New York v. United States, 505 U.S. 144 (1992) (stating that Congress cannot compel states to enforce federal regulatory programs).

222. The Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), can be viewed from a similar perspective. The Court may have upheld the $1,000 contribution limitation on the ground that, despite the First Amendment interests at stake, Congress was institutionally better able to set an appropriate limit. *Id.* at 24-30. The nondelegation doctrine can be viewed in similar light. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001).

law. Otherwise, the Article II, Section 1 directive that state legislatures must select the manner in which presidential electors are chosen might become a dead letter. State judges through their interpretations might change the way that electors are selected and thereby rob the legislature of its constitutionally assigned function.

But judicial interpretations should only rarely be considered tantamount to lawmaking. The *Bouie* line of cases and judicial impairments precedents manifest skepticism about the wisdom of second-guessing state court interpretations of state law—the concurrence simply ignored the doctrinal history. Courts backed off from full enforcement for a number of reasons. Drawing a line between interpreting and making law is notoriously slippery. Few benchmarks exist to determine when interpretation stops and lawmaking starts. Moreover, equating judicial interpretation with lawmaking provides incentive for disappointed litigants to seek redress in federal court for their disagreement with the state court interpretation of state law. And, the more we equate judicial interpretation with lawmaking, the more society may be willing to restrain judges. The lessons of history should have alerted the concurrence to the quagmire of robust enforcement of the Article II, Section 1 directive—some constitutional rights are better left underenforced.