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Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore

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CONCEPTIONS AND MISCONCEPTIONS OF STATE
CONSTITUTIONAL LAW IN *BUSH V. GORE*

ROBERT A. SCHAPIRO*

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Although the United States Supreme Court's disposition of *Bush v. Gore* (*Bush II*)¹ ultimately turned on the Equal Protection Clause of the Fourteenth Amendment, an alternative theory, based on Article II of the United States Constitution, has garnered significant academic support in the year following the decision.² The Article II theory was suggested in the initial per curiam opinion (*Bush I*)³ and in the questions of the Justices during the oral arguments, and was fully embraced by the concurrence in *Bush II*, which was written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas. The reliance on Article II entailed a distinctive vision of the role of state constitutions in the state governmental process and of the place of federal courts in overseeing that role. The concurrence explicitly adopted the view that the Constitution provided federal constraints

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

2. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001).

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

on the authority of state courts to construe state procedures governing presidential elections.⁴ Under this conception, the concurrence insisted on a central role for federal courts in policing the relationship between state courts and state legislatures.

The concurrence understood Article II both to grant plenary power to state legislatures and to mandate federal oversight of a state court's interpretation of state law. Under this theory, the federal courts not only review whether state law, as interpreted by state courts, violates the Federal Constitution, but also review whether the state court correctly interpreted state law. The concurrence justified this extraordinary assertion of federal authority based on the need to protect the state legislature from the state courts. The concurrence further contended that uniformity in the construction of state election procedures was desirable and justified federalizing the interpretation of state law.

Underlying the concurrence's interpretation of Article II was a conception of the state constitutional system. The concurrence envisaged a unitary model of state constitutionalism that involved a strong dichotomy between state constitutions and other forms of state law. The concurrence apparently conceived of state constitutions and state statutes as relatively autonomous with little interpenetration. In the concurrence's vision, state constitutions and state statutes may be divided in a fairly straightforward manner without any particular need to examine the context of a specific state's constitutional system. The concurrence further assumed the predominance of uniform principles of the allocation of interpretive authority at the state level. At various points, the concurrence also evinced skepticism about the ability of state judges to reach fair and reasonable decisions and a corresponding confidence in the ability of federal courts to discern appropriate benchmarks against which to measure state judicial deviation.

This Article argues that the flawed nature of the concurrence's understanding of state constitutional systems fatally undermined its conclusions. The concurrence's homogenizing conception failed to capture important features of state constitutions. An understanding of the role of state constitutions in the state law process requires an appreciation of the characteristics of a particular state's constitution. The attempt to fit all state constitutions into a particular mold will necessarily fail, and the complexity of each state's constitutional dynamic suggests that the United States Supreme Court should not attempt to create uniform rules of interpretation governing the role of state constitutions in presidential election disputes. The principle of separation of powers in state governments takes a variety of forms

4. *Bush v. Gore*, 531 U.S. at 111-22 (Rehnquist, C.J., concurring).

and often differs substantially from the federal model. Without an understanding of a particular state's system, it is impossible to comprehend the appropriate relationship between state courts and state legislatures. Moreover, the diversity of state statutory regimes belies the concurrence's apparent confidence in the existence of a single, correct method of interpreting state statutes and its related assertion that it, rather than the Florida Supreme Court, best understood the Florida Election Code.

Part I reviews the concurrence's theory that Article II of the Federal Constitution grants special, plenary authority to the state legislature. I argue that this interpretation did not rest on firm foundations of text, precedent, or history. Rather, the concurrence's conception could be justified, if at all, only by resort to unarticulated federal interests. Part II analyzes the concurrence's related, but distinct conclusion that Article II mandates that federal courts independently review the correctness of state courts' constructions of state laws governing presidential elections. As with the concurrence's notion of plenary legislative power, I argue that the concurrence's scrutiny of state courts' interpretation of state law can be justified only by the existence of extraordinary federal interests, which remain unexplored in the opinion. Part III turns directly to an account of the federal interests at stake. This Part examines potential interests, such as the need to protect the state legislature from unprincipled judicial activism, the need for uniformity in the interpretation of presidential election codes, and the relative competence of the federal courts in interpreting state election laws. I argue that a proper understanding of state constitutional systems demonstrates the absence of any of these potential justifications for federal judicial intervention in this case. Part III further contends that the diversity of state constitutional contexts undermines the concurrence's efforts to formulate uniform interpretive rules for state election codes. Part IV concludes with some more general reflections on the implications of the concurrence's flawed conception of state constitutional law.

I. ARTICLE II AND STATE LAW

Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President.⁵ In *Bush I*, the United States Supreme Court suggested that this language did not merely specify that state law would govern the conduct of presidential elections but in fact constituted a special kind of delegation of authority to the state legislature.⁶ In

5. U.S. CONST. art. II, § 1, cl. 2.

6. The per curiam opinion stated:

Bush II, the concurring opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, explicitly adopted this position. The concurrence asserted that Article II “leaves it to the legislature exclusively to define the method” of selecting presidential electors and that a “significant departure from the legislative scheme,” therefore, raises a federal constitutional question.⁷ Indeed, from the remainder of the opinion, it is clear that under the concurrence’s theory, a significant departure from the legislative scheme not only raises a constitutional question but actually violates the provisions of Article II. Accordingly, the concurrence undertook the task of determining whether the Florida Supreme Court’s interpretation of Florida law distorted the intent of the legislature, thus transgressing Article II.

This section examines some of the bases for the theory that Article II confers plenary power on the state legislature. I explore in particular the justification for concluding that Article II frees the state legislature from the constraints that the state constitution otherwise would impose. The state constitution assumes particular importance in the discussion because, with the exception of the United States Constitution, the state constitution generally serves as the sole check on state legislative power. The primary target of a plenary power reading of Article II is the state constitution. As became apparent in *Bush II*, the concurrence’s theory targets the state judiciary as well.

In defending its understanding of Article II, the concurrence relied primarily on the text of the constitutional provision and on language drawn from *McPherson v. Blacker*.⁸ As the dissenters pointed out, however, neither the word “legislature” nor the *Blacker* precedent can bear the weight that the concurrence places on it.⁹ A possible source for the interpretation of Article II on which the concur-

[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 76.

7. Bush v. Gore, 531 U.S. at 113 (Rehnquist, C.J., concurring) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

8. 146 U.S. 1 (1892).

9. See Bush v. Gore, 531 U.S. at 123-24 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.) (rejecting concurrence’s interpretation of Article II and *Blacker*); *id.* at 147-48 (Breyer, J., dissenting, joined in relevant part by Stevens, Ginsburg, and Souter, JJ.) (same); see also *id.* at 141-43 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.) (rejecting concurrence’s interpretation of Article II, without specific reference to *Blacker*); POSNER, *supra* note 2, at 156 (describing Article II theory as “not compelled by case law, legislative history, or constitutional language”).

With regard to the Article II issue, Justice Souter’s dissent focused on defending the Florida Supreme Court’s decision against the charge of being unreasonable. Justice Souter did not confront directly the concurrence’s derivation of a special limitation on judicial interpretation of state laws governing presidential elections. See *id.* at 129-33 (Souter, J., dissenting, joined in relevant part by Stevens, Ginsburg, and Breyer, JJ.).

rence did not rely was evidence of the Framers' conception of the relationships between state legislatures and state constitutions. The inferences from the founding period, however, are similarly unresponsive of the concurrence's position.

A. Text and Context

The concurrence proceeded as if the constitutional language contained a clear, self-evident grant of plenary authority to the legislature. The text, however, is not nearly so univocal. Contrary to the theory of the concurrence, the constitutional use of "legislature" certainly could refer to the lawmaking authority of the state generally. Under this interpretation, the constitutional language indicates that the determination of the method of selecting presidential electors shall be governed by state law, as state law is commonly made in the state. The constitutional language, in this view, does not endow the state legislature with a special role. Instead, the state legislature would act in this area of lawmaking as it does in all others, subject to the constraints of the state constitution and to the interpretive authority of the state courts, insofar as the courts have jurisdiction under the relevant statutory and constitutional scheme. The United States Supreme Court previously adopted such an interpretation of similar language in Article I, Section 4 of the Constitution. That provision states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"¹⁰

In *Ohio ex rel. Davis v. Hildebrant*,¹¹ the United States Supreme Court addressed a claim that in light of Article 1, Section 4, a state legislative reapportionment scheme could not be subject to a popular referendum. The Court found that the challenge under Article 1, Section 4 should be construed as raising a claim that the state referendum system destroyed the legislative power, thus violating the guarantee of republican government contained in Article IV of the United States Constitution.¹² As thus construed, the Court held the challenge to be nonjusticiable. Because the Court relied on nonjusticiability rather than a direct interpretation of Article I, Section 4, *Hildebrant* may be of limited relevance. Nevertheless, a possible inference is that the Court concluded that the only way in which state-law restrictions on legislative prerogative could raise constitutional issues would be for the limitations actually to obliterate the exercise of legislative power. The Court colorfully characterized the challenge

10. U.S. CONST. art. I, § 4, cl. 1.

11. 241 U.S. 565 (1916).

12. "The United States shall guarantee to every State in this Union a Republican Form of Government" U.S. CONST. art. IV, § 4.

to the referendum procedure as resting “upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government”¹³ *Hildebrant* thus could be understood to stand for the principle that, at least with respect to Article I, Section 4, state-law restrictions on legislative power are constitutionally acceptable as long as they do not infect the state with a virus that fatally undermines legislative power.

In a later case, *Smiley v. Holm*,¹⁴ the Court more directly confronted the interpretation of the grant of authority to the “legislature” in Article I, Section 4. *Smiley* raised the question whether this language empowered a state legislature to establish congressional districts free from the usual state-law requirement of presentment to the Governor for signature or veto. In *Smiley*, the state supreme court had accepted an argument, similar to that endorsed by concurrence in *Bush II*, that the constitutional reference to “legislature” gave the state legislature special authority, different from the lawmaking power that it normally exercised.¹⁵ The United States Supreme Court rejected this argument, holding that Article I, Section 4 merely referred to the normal lawmaking processes of the state, including any limitations imposed by the state constitution.¹⁶

Stronger, albeit inferential, support for the plenary power position comes from the analogy to the action of the state legislature in ratifying amendments to the United States Constitution. Under Article V, one path to the ratification of an amendment is approval by “the Legislatures of three fourths of the several States”¹⁷ In two cases in the 1920s, the United States Supreme Court suggested that in ratifying constitutional amendments, state legislatures did operate independently of certain provisions of state law.¹⁸

*Hawke v. Smith*¹⁹ concerned a provision of the Ohio Constitution that apparently made legislative ratifications of amendments to the United States Constitution subject to a popular referendum. In finding the referendum provision inapplicable, the United States Supreme Court gave an expansive account of the power of the state legislature. The Court asserted that in ratifying constitutional amend-

13. *Hildebrant*, 241 U.S. at 569.

14. 285 U.S. 355 (1932).

15. *Id.* at 364-65.

16. *Id.* at 367-68 (“We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the Constitution of the State has provided that laws shall be enacted.”).

17. U.S. CONST. art. V.

18. See generally *Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith* 253 U.S. 221 (1920).

19. 253 U.S. 221 (1920).

ments, the state legislature enjoyed special authority, independent of its usual lawmaking competence. The Court noted the argument that ratification constituted an act of lawmaking subject to state-law requirements. The Court rejected this position, asserting that “ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word.”²⁰ The Court further emphasized the federal nature of the ratification authority: “It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution.”²¹

In assessing this language, it is useful to keep in mind the extraordinary circumstances in which *Hawke* arose. After the Ohio Legislature purportedly ratified the Eighteenth Amendment, establishing Prohibition, the Secretary of State of the United States declared the amendment valid, listing Ohio as one of the ratifying states.²² The Court expressed understandable concern at the prospect that the validity of an amendment to the United States Constitution could be undermined based on a state-law challenge brought after national recognition of the ratification.²³ In the context of constitutional amendments, the Court suggested, uniform procedures were required to avoid confusion and disarray.²⁴ The inhospitable context in which the challenge arose may limit the broad applicability of the language in the Article V context.²⁵

The other case addressing the influence of state law in limiting the state legislature’s ratification authority arose in a similarly unappealing context. *Leser v. Garnett*²⁶ concerned challenges to the validity of the Nineteenth Amendment, granting suffrage to women, based on alleged failures to comply with state-law mandates. In rebuffing these claims, the Court again affirmed that when exercising its ratification authority, the state legislature acts unrestricted by

20. *Id.* at 229.

21. *Id.* at 230.

22. *Id.* at 225; see also Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1076-79 (2000) (describing circumstances surrounding *Hawke v. Smith*).

23. See *Hawke*, 253 U.S. at 230.

24. See *id.* (“Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States.”).

25. See Amar, *supra* note 22, at 1079-80 (suggesting that the distinctive factual context of *Hawke* limits its applicability as an interpretation of the scope of state-law limitations over Article V processes); see also Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of The Twenty-seventh Amendment*, 103 YALE L.J. 677, 731 (1993) (discussing the role of state law in regulating the state ratification process and concluding that “*Hawke* was wrongly decided”).

26. 258 U.S. 130 (1922).

state law limitations.²⁷ The broad language mirrored the statements in *Hawke*. As in *Hawke*, one can understand the reluctance of the Court to entertain attempts to revoke a constitutional amendment that had been certified by the Secretary of State of the United States. For present purposes, the Court's emphasis on the federal character of the state legislative ratification remains most relevant: "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."²⁸ Also relevant is the Court's apparent, though unexpressed, concern about the chaos that such after-the-fact challenges could produce.

The ratification of constitutional amendments differs in many ways from designating the manner of selecting presidential electors. The latter involves the articulation of election procedures in a manner generally accomplished by legislative activity. Promulgating an election code, for whatever office, is a kind of function normally undertaken by the body wielding the lawmaking authority of the state. Approving or disapproving a proposed amendment to the United States Constitution is arguably *sui generis*; setting election processes is not. In this way, regulating presidential elections seems to bear a much closer resemblance to regulating congressional elections than it does to ratifying constitutional amendments.²⁹

On the other hand, setting procedures for presidential elections does share some attributes with the amendment process. In particular, the outcome of the process has national effects in a way that the election of representatives and senators from a state does not. As with the ratification of amendments, in a presidential election each state is a participant in a process with a single national outcome. As we are all now painfully aware, delay or confusion in the election process in any one state puts the rest of the nation on hold. Clarity and finality serve strong national interests with respect both to amendments and to presidential elections. The analogy is not exact, but similar concerns attend both processes.

Without much amplification, the concurrence in *Bush II* noted the strong national interest in the conduct of presidential elections. Rather than rely on *Hawke* or *Leser*, the concurrence quoted general statements from other opinions about the important federal functions performed by presidential electors and the national interest in presi-

27. See *id.* at 137.

28. *Id.*

29. See *Bush v. Gore*, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting) ("Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision.").

dential elections.³⁰ What remains unclear, however, is how the strong federal interest in presidential elections generates the unusual view of legislative authority and judicial interpretation that the concurrence proceeded to employ in the case. In brief, granting that the selection of presidential electors implicates significant national concerns, why would eschewing reliance on state constitutions serve that interest?

B. *The Blacker Precedent*

The theory that Article II's reference to the "Legislature" means something other than the usual lawmaking authority of the state does not ineluctably follow from the constitutional text. The main case on which the concurrence relied, *McPherson v. Blacker*,³¹ similarly provides at best ambiguous support for the plenary power theory.

Blacker concerned the Michigan Legislature's division of the state into districts for presidential elections. By statute, the state legislature had provided that presidential electors would be elected in each congressional district, rather than on a statewide basis.³² The statute was challenged on the theory that statewide election was required by Article II's command that "[e]ach *State* shall appoint"³³ presidential electors. In rejecting this argument, the Supreme Court asserted that the constitutional reference to a "State" designated the lawmaking authority of the state, a conclusion the Court found reinforced by the language "in such Manner as the Legislature thereof may direct . . ."³⁴ The Court concluded that Article II could not be read to limit the authority of the state legislature to allocate electors by district, rather than by the state as a whole.³⁵ The Court buttressed its conclusion by noting the long history of states selecting presidential electors by districts.³⁶

The opinion does contain language emphasizing the authority reposed in the state legislature. The opinion refers to the "plenary power"³⁷ of the state legislatures in the appointment of electors. The concurrence emphasized *Blacker's* statement that the United States Constitution "leaves it to the legislature exclusively to define the

30. See *id.* at 112 (Rehnquist, C.J., concurring) (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934), and *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)).

31. 146 U.S. 1 (1892).

32. *Id.* at 24.

33. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

34. *Id.*

35. *Blacker*, 146 U.S. at 27, 35-36.

36. *Id.* at 29-33.

37. *Id.* at 35.

method” of selecting presidential electors.³⁸ As the context of this particular quotation,³⁹ as well as the opinion as a whole, indicates though, all this language is focused on supporting the power of the legislature to choose various methods of selecting electors. In *Blacker*, no state-law impediment blocked the legislative choice, and the language of the opinion certainly does not command the conclusion that state-law restrictions are rendered impermissible by Article II.

The strongest support for the proposition that the state legislature acts outside of the usual state-law framework appeared in a Senate Report quoted in the opinion.⁴⁰ With regard to the power of the state legislature to choose presidential electors, that Report asserted, “This power is conferred upon the legislatures of the States by the constitution of the United States, and cannot be taken from them or modified by their State constitutions”⁴¹ The Senate Report recommended a constitutional amendment providing that a state’s electoral votes be determined by a direct vote of the people of each state, on a district-by-district basis.⁴² The Report stressed the residual power of the state legislatures and thus emphasized that only a constitutional amendment could guarantee direct popular participation in a presidential election.⁴³ This language from a Senate Report supporting an unadopted constitutional amendment adds little to the basic point that *Blacker* used broad language endorsing state legislative power, but deployed that language in responding to quite a different question from that posed in the *Bush* cases.

As Justice Stevens pointed out in his dissent, *Blacker* also contains isolated language that contradicted the concurrence’s theory.⁴⁴ In certain passages, that opinion suggested that in determining the

38. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

39. The quoted language comes from the following paragraph:

The [United States] [C]onstitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

Blacker, 146 U.S. at 27. In this passage, the word “exclusively” appears to refer to the absence of federal constitutional limitations on the legislature’s choice, rather than the absence of any state law limitations. Indeed, the emphasis on the legislature’s representing the people could be quite compatible with the notion that the legislature might need to take cognizance of the will of the people as expressed in the state constitution.

40. *Id.* at 34-35 (citing S. REP. NO. 43-395 (1874)).

41. *Id.* at 35 (quoting S. REP. NO. 43-395, at 9).

42. S. REP. NO. 43-395, at 2.

43. The Report proved quite prescient in certain regards. It expressed concern that a President might be elected by receiving a majority of the electoral votes while “his opponent may carry the remaining States by such majorities as to give him perhaps half a million majority of the whole vote of the people.” *Id.* at 5.

44. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

manner of appointing presidential electors, as in other legislative actions, the state legislature must conform to the usual restrictions on legislative power, including any limitations imposed by the state constitution.⁴⁵ The dissenters also might have noted that in its lengthy description of the various methods by which states had chosen electors in previous presidential elections, *Blacker* mentioned that the manner of selection in Colorado actually was set by the state constitution.⁴⁶ None of Justice Stevens' references definitively refute the concurrence's theory of plenary legislative power under Article II. The references merely confirm that *Blacker* offers at best limited support for the concurrence's thesis.

C. *The Framers' View of State Constitutions and State Legislatures*

The evidence from the founding period does not appear sympathetic to a conception of plenary legislative power. Rather, the Framers harbored a certain degree of distrust of state legislatures.⁴⁷ The Framers of the United States Constitution were aware of the different forms of government attempted under state constitutions, and they understood the problem of legislative overreaching that could occur under the then-existing state charters.⁴⁸ Indeed, scholars such as Robert Williams have suggested that the unchecked legislative power embodied in such documents as the Pennsylvania Constitution of 1776 provided a kind of negative exemplar for those drafting the United States Constitution.⁴⁹ Such sources imply that the Framers understood how state governments and state constitutions operated and that they had concerns about the constitutional notion of un-

45. Justice Stevens characterized *Blacker* as follows:

Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), that “[w]hat is forbidden or required to be done by a State” in the Article II context “is forbidden or required of the legislative power under state constitutions as they exist.” In the same vein, we also observed that “[t]he [State’s] legislative power is the supreme authority except as limited by the constitution of the State.”

Id. at 123 (Stevens, J., dissenting).

46. *Blacker*, 146 U.S. at 33. Other states also regulate presidential elections in part through state constitutional provisions. See OKLA. CONST. art. 3, § 3 (regulating nomination of presidential electors); PA. CONST. art. 7, § 13 (mandating judicial resolution of disputed presidential elections). *But see* State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286-87 (Neb. 1948) (interpreting *Blacker* to prohibit a state constitutional provision from circumscribing the legislature’s prerogative).

47. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 438-53 (1969); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989).

48. See, e.g., Robert F. Williams, “Experience Must Be Our Only Guide”: *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 424-27 (1988).

49. *Id.*; Williams, *supra* note 47, at 576, 584-85; see also WOOD, *supra* note 47, at 438-53.

checked state legislative power. Of course, before the Reconstruction Amendments and the doctrine of incorporation, the state constitution served as the primary limitation on state legislative power and the primary protector of individual rights. The United States Constitution in this period offered only quite modest constraints on state legislative power.⁵⁰ Again, the sources are not conclusive but do not appear to lend support to the view of the concurrence. These observations from the founding are certainly consistent with the notion that Article II confers power on the state legislature as situated within an ongoing constitutional system, as opposed to the idea that Article II lifts the state legislature out of the usual state governmental framework.

II. SUPREME COURT REVIEW OF STATE COURT DETERMINATIONS OF STATE LAW

The concurrence's theory of plenary legislative authority under Article II, I have argued, does not rest on firm foundations of text, precedent, or history. The truly remarkable feature of the concurrence, however, lies in its assertion of a strong federal role in reviewing state court determinations of state law.⁵¹ Warned by the United States Supreme Court's remand in *Bush I*, the Florida Supreme Court disavowed reliance on the state constitution in its subsequent rulings. In *Bush II*, the concurrence clarified that in the view of the Chief Justice and Justices Scalia and Thomas, the plenary power theory served not only to disable the state constitution, but also to impose a federal anti-distortion rule on the state judiciary.⁵²

The concurrence acknowledged that in reviewing cases arising out of state courts, the United States Supreme Court generally accepts as authoritative state court determinations of state law.⁵³ In this instance, however, the concurrence drove a federal wedge between

50. See, e.g., U.S. CONST. art. I, § 10.

51. *Bush v. Gore*, 531 U.S. 98, 112-15 (2000) (Rehnquist, C.J., concurring).

52. *Id.* at 111-22. The Florida Supreme Court apparently understood the Article II issue as a rather formalistic prohibition on relying on the state constitution. Accordingly, on remand in *Bush I*, the Florida Supreme Court largely reiterated its first opinion, deleting the references to the state constitution. See *Gore v. Harris*, 779 So. 2d 1270 (Fla. 2000). The Florida Supreme Court seems to have understood the situation as presenting a kind of harmless error calculation. A common occurrence, particularly in criminal cases, is for the United States Supreme Court to suggest that a state court relied on an invalid basis for a judgment. It is typical for the state supreme court then to undertake a harmless error analysis, which may well result in the court's reissuing the same judgment. At least certain Justices on the United States Supreme Court apparently contemplated that they were dispensing a more thoroughgoing rebuke to the Florida Supreme Court and that its reissuing the prior judgment indicated insubordination. See Oral Argument at 44, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at <http://www.supremecourtus.gov/florida.html>; Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 19, 2001, at A1.

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

state law as promulgated by the legislature and state law as interpreted by the state courts. Article II, the concurrence asserted, conferred independent significance on the former and imposed a corresponding duty on the United States Supreme Court to ensure that the state court interpretation did not distort the legislative command.⁵⁴

A. *The Concurrence's Standard of Review: "Independent" and/or "Deferential"*

In discussing its review of the Florida Supreme Court's judgment, the concurrence referred to the United States Supreme Court's constitutional duty "to undertake an independent, if still deferential, analysis of state law."⁵⁵ An initial problem in understanding this formulation is that it appears to contemplate review that is both "independent" and "deferential." This standard has an oxymoronic quality in that independent review generally is contrasted with deferential review.⁵⁶

In any event, the concurrence's analysis of the opinions of the Florida Supreme Court could hardly be termed deferential. Having avowed a deferential standard, the concurrence deployed the necessary adjectival barrage. The concurrence labeled the Florida Supreme Court's interpretation of the Florida election scheme "absurd"⁵⁷ and "peculiar"⁵⁸ and asserted that "[n]o reasonable person"⁵⁹ could share that court's understanding of the law. The dissenters objected that the Florida Supreme Court's interpretation of Florida law was reasonable.⁶⁰ The arguments of the dissenters, as well as of subsequent academic commentators,⁶¹ cast substantial doubt on the concurrence's characterization of the Florida Supreme Court's interpretation of Florida law. Indeed, the concurrence appeared to engage in de novo review of the state court's interpretation of the state statutory scheme. Based on the answer the concurrence provided, the proper question was not whether the Florida Supreme Court departed substantially from the legislative plan but simply whether that court correctly construed the statutes. Such judgments are of

54. *Id.* at 112-15 (Rehnquist, C.J., concurring).

55. *Id.* at 114 (Rehnquist, C.J., concurring).

56. *See, e.g.,* *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("[T]he difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984))).

57. *Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., concurring).

58. *Id.*

59. *Id.*

60. *See, e.g., id.* at 151-52 (Breyer, J., dissenting).

61. *See, e.g.,* James M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1416-25 (2001).

course contestable, but the concurrence's approach did not appear deferential.⁶² For present purposes, though, the critical question is not whether the concurrence or the Florida Supreme Court better understood Florida law or even the precise standard of review that the concurrence adopted. Rather, the key issue is the justification for federal scrutiny of the state court's interpretation of state law. Consideration of other contexts in which the United States Supreme Court has exercised review of state-law issues helps to provide a framework for assessing the concurrence's approach.

B. Precedents for Federal Review of State Court Determinations of State Law

In a variety of areas, the United States Supreme Court has asserted the authority to review state court determinations of state law. Though diverse in terms of subject matter and approach, these cases generally involve a strong federal interest in the predictable application of state law and a suspicion about whether the state courts will adequately protect the federal interest. One could characterize the cases as involving a presumed federal interest in predictability and a presumed comparative institutional advantage of the federal courts in interpreting the applicable law. Invocations of due process limitations on retroactivity, general common law, and federal common law reflect these principles.⁶³

62. Of course, "deference" may be a relative term, and the approach of the concurrence may have some affinities with the scope of review that the Court has adopted in some recent cases testing the breadth of congressional authority. See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 669-80 (2000). In embarking on its current course of reviewing congressional power to enforce the Reconstruction Amendments, for example, the Court avowed "deference" to congressional judgments. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))). Especially as elaborated in subsequent cases, however, the Court's mode of review appears rather skeptical. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001). To put it slightly differently, if deference is defined by *Kimel* and *Garrett*, the approach of the concurrence in *Bush II* may appear relatively more deferential. Cf. *id.* at 386-87 (Breyer, J., dissenting) ("The Court's more recent cases have professed to follow the longstanding principle of deference to Congress. . . . But the Court's analysis and ultimate conclusion deprive its declarations of practical significance. The Court 'sounds the word of promise to the ear but breaks it to the hope.'").

63. Protective jurisdiction also often reflects an interest in the uniform development of the law and a skepticism about the capacity of state courts to sustain this federal interest. See Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 566-76 (1983).

1. *Bouie and Fair Notice*

The principal precedents cited by the concurrence were *Bouie v. City of Columbia*⁶⁴ and *NAACP v. Alabama ex rel. Patterson*.⁶⁵ In these cases, the United States Supreme Court concluded that state courts had engaged in novel acts of interpretation that deprived individuals of valuable rights without fair notice. In *Bouie*, the South Carolina Supreme Court had adopted a new construction of a criminal trespass statute to affirm the convictions of demonstrators protesting a racially segregated lunch counter.⁶⁶ The *NAACP* case concerned a contempt citation against the NAACP for refusing to divulge its membership lists. The United States Supreme Court refused to allow the state court's invocation of a novel procedural rule to thwart federal review of the underlying constitutional issue.⁶⁷ In both cases, the federal interest in the predictable applications of state law was clear and was embodied in the Due Process Clause of the Fourteenth Amendment. Further, the civil rights context in which the cases arose evoked some suspicion of the state courts. In her dissent in *Bush II*, Justice Ginsburg emphasized the civil rights background to the cases,⁶⁸ and commentators have stressed this aspect as well.⁶⁹ As I will suggest, presidential elections do implicate important federal interests, but whether that federal interest requires a federal standard of predictability is far from certain.

2. *General Common Law*

In some measure, the concurrence's review of state court determinations of state law hearkens back to United States Supreme Court jurisprudence in the pre-*Erie* era. During this period the federal courts generally deferred to state court constructions of state statutes and state constitutions, even while they disavowed reliance on state court precedent in matters of general common law. However, federal courts sometimes did engage in independent interpretation of state statutes and constitutions.⁷⁰ In *Township of Pine Grove v. Tal-*

64. 378 U.S. 347 (1964).

65. 357 U.S. 449 (1958).

66. 378 U.S. at 348, 355-56.

67. 357 U.S. at 454-58.

68. *Bush v. Gore*, 531 U.S. 98, 139-41 (2000) (Ginsburg, J., dissenting).

69. See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 54-56 (1997); see also *id.* at 55 n.82 (citing sources). Professor Krent has suggested that while *Bouie* has been applied outside of the civil rights context, its application often has been associated with "limiting judicial vindictiveness." *Id.* at 74.

70. See Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1281-82 (2000); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 117-22 (1998).

cott,⁷¹ for example, the United States Supreme Court confronted the question whether a state statute violated the state constitution. The Michigan Supreme Court had adjudicated this question on two occasions.⁷² The United States Supreme Court, though, refused to follow those opinions.⁷³ The Court reviewed and rejected the state court's interpretation of the Michigan Constitution.⁷⁴ The United States Supreme Court stated: "With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered."⁷⁵ In this period, the United States Supreme Court appeared especially willing to reject state court interpretations that departed from prior state decisional authority so as to frustrate commercial expectations. For example, in suits by bondholders, the Court did not feel bound to follow novel state court rulings that the bonds were issued without proper legal authority and were therefore uncollectible.⁷⁶ The Court's decisions reflected a strong federal interest in a uniform, predictable law governing commercial activity. Further, the Court's decisions evinced a skepticism about the fairness of state court decisions, particularly as they related to the rights of out-of-state creditors. Such skepticism may have been warranted.⁷⁷ As the Court memorably summed up its attitude toward state court interpretations of state law, "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."⁷⁸ Even in this period, the United States Supreme Court exercised interpretive autonomy only if an independent basis of federal jurisdiction, such as diversity, existed. The Court did not view such flawed state court rulings as creating a federal question permitting direct review by the United States Supreme Court.⁷⁹ Rather, it was the constitutional and statutory grants of diversity jurisdiction that provided a legal basis for skepticism about state court interpretation of state law.

3. *A Federal Common Law of Election Procedure*

Perhaps the better framework for understanding Chief Justice Rehnquist's approach is federal common law, the modern successor that arose out of the ashes of general common law. In effect, the concurrence treated the Florida code governing presidential elections as

71. 86 U.S. (19 Wall.) 666 (1874).

72. *Id.* at 677.

73. *Id.*

74. *Id.*

75. *Id.*

76. See Collins, *supra* note 70, at 1269-72.

77. See *id.*

78. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863).

79. See Collins, *supra* note 70, at 1271-72.

a species of federal law, subject to plenary review in the United States Supreme Court. The relevant precedent was not the line of cases including *Murdock v. City of Memphis*⁸⁰ and *Michigan v. Long*,⁸¹ establishing that the United States Supreme Court would generally not review state court resolutions of state law issues. Nor, despite the claims of the concurrence, did the opinion draw its support from *Bouie* and its progeny, establishing that in narrow circumstances novel state court interpretations of state law would impose unconstitutional burdens on litigants without fair notice. The manner of interpretation undertaken by the concurrence suggested that the controlling authority was *Martin v. Hunter's Lessee*,⁸² which affirmed the Supreme Court's authority to review state court interpretations of federal law.

As the concurrence did not fully explain its independent standard of review, it did not address the implicit transmutation of state law into federal law. In light of the concurrence's emphasis on the important federal interests involved, it appears that the concurrence essentially decided that Article II authorized a federal common law governing presidential election procedures. In accord with Article II's command, the state legislature determined the content of the election code, but the interpretation of the code presented a federal question. As with the other areas discussed, the creation of federal common law is generally justified by the strength of the federal interest and the need for predictability and uniformity.⁸³ Skepticism of allowing the conduct to be regulated wholly by state law as defined by state courts also characterizes federal common law.⁸⁴

III. THE FEDERAL INTEREST IN STATE PRESIDENTIAL ELECTION PROCEDURES

So far, I have argued that both the concurrence's conception of legislative power under Article II and its approach to reviewing the

80. 87 U.S. (20 Wall.) 590 (1875).

81. 463 U.S. 1032 (1983).

82. 14 U.S. (1 Wheat.) 304 (1816).

83. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 982-83 (1986); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1170 (1986); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979).

84. Thus, when federal common law incorporates state law, courts generally recognize a reserved federal right to disregard state law that would disserve the particular federal interest at issue. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) ("This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests."); *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956) (in context of Copyright Act, concluding that "[t]his does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of 'children' we deem state law controlling").

Florida Supreme Court's interpretation of state law depended on unarticulated notions of federal policy. Part I contended that the concurrence's theory of plenary legislative power under Article II lacked support in text, precedent, or history. The strongest basis for the concurrence's understanding of legislative authority was the nature of the federal interest in presidential elections. Part II argued that the concurrence's scrutiny of the Florida Supreme Court's interpretation of state law is best explained as an attempt to fashion a federal common law of presidential election procedures. However, whether understood as federal common law, general common law, or the application of *Bouie*, the justification for the concurrence's scrutiny of state law requires an articulation of the nature of the federal interest in the conduct of presidential elections in each state.⁸⁵ The concurrence did little to explicate the nature of the federal interests that it understood to ground its disposition of *Bush II*. This Part explores the potential federal interests at stake, including protecting state legislatures from judicial overreaching, ensuring uniformity in presidential election procedures, and imposing preferred modes of statutory construction. I argue that a proper understanding of state constitutions and the relationship between state courts and state legislatures demonstrates that no federal interests justify the kind of intrusive federal intervention advocated by the concurrence. Moreover, the complexity of each state's constitutional dynamic belies the concurrence's attempt to mandate uniform rules for the interpretation of state election statutes.

A. *Federal Protection of State Legislatures*

In its rejection of a role for state constitutions in setting presidential election procedures, as well as in its formulation of an anti-distortion rule, the concurrence expressed a need to protect state legislatures from activist state courts. The concurrence assumed that the will of the legislature would be thwarted by the limitations of the state constitution and by the interference of the state courts. Rather than conceiving of the state legislature as one part of functioning state constitutional system, the concurrence insisted on extracting the state legislature from its constitutional setting. The concurrence refused to understand the state legislature as integrally connected to a complex governmental structure that included a state constitution and state courts. The concurrence contended that constitutional text and precedent erected a judicially enforceable federal shield around

85. This Part focuses on the federal interests that might underlie the creation of federal common law. A similar analysis would apply to the invocation of *Bouie* or general common law. Federal court review of state law in those areas, as well, rests on federal interests in the uniform application of law and assumptions about the relative competence of federal and state courts.

the state legislature. As discussed above, these claims are unconvincing. Moreover, the concurrence's more general assertion of the need to protect the state legislature manifested a lack of appreciation of the functioning of state political systems. A more complete account of the relationship among state courts, state constitutions, and state legislatures indicates the absence of any need for federal intervention. Contrary to the view of the concurrence, the relationship among state courts, state legislatures, and state constitutions can be conceived of as cooperative, rather than adversarial.

1. *State Constitutions and State Legislatures*

The concurrence did not devote much attention to supporting the proposition that Article II's reference to the legislature disabled the state constitution. The concurrence appeared to assume a strong separation between the state legislature and the state constitution, and between state statutes and state constitutional law. Perhaps the concurrence, or the Court generally, understood the structure of the national government in such dichotomous terms, but state constitutional systems generally have much less dualist tendencies. State constitutions function more like statutes than does the Federal Constitution, and the state legislature has a much greater role in the amendment and interpretation of the constitution than Congress normally enjoys.

Other features of state constitutions support the principle that state legislatures are well integrated into state constitutional law processes. State constitutions function in a variety of ways. They allocate governmental authority. They place limits, both negative and positive,⁸⁶ on state governmental activity. They state broad principles of democratic governance. They regulate apparently trivial aspects of state law.⁸⁷ State legislatures play an active role in their promulgation and (frequent) amendment.⁸⁸ The length, specificity, and easy amendability of state constitutions helps to highlight the substantial degree of integration between state constitutions and other forms of state law. In Florida, for example, it is the state constitution that

86. For a discussion of state constitutions as affording positive rights, mandating governmental action, see Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057 (1993); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999); Schapiro, *supra* note 62, at 709-10.

87. For some classic examples, see N.Y. CONST. art. 14, § 1 (regulating width of ski slopes), and TEX. CONST. art. 16, § 16 (providing for banks' use of "unmanned teller machines"); see also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818-19 (1992) (collecting examples of state constitutional provisions).

88. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 23-27 (1998); see also Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 428-30 & n.148 (1998) (citing sources).

provides a comprehensive plan for judicial organization and jurisdiction.⁸⁹ The interconnected nature of the statutory and constitutional systems appears as well in the separation of powers principle embodied in the Florida Code, which makes explicit reference to the state constitution:

The State Constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. . . . The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.⁹⁰

Other statutory provisions purport to define the meaning of terms contained in the constitution, and state courts often defer to these legislative judgments.⁹¹

2. State Courts and State Legislatures

Indeed, another key feature that distinguishes state constitutionalism from federal constitutionalism is the greater deference to the legislature that state courts generally manifest. Perhaps because their handiwork is more easily revised or because they are often subject to direct electoral review, state court judges generally avow a very deferential standard of review in assessing the constitutionality of legislative judgments.⁹² This high standard of invalidity corresponds to a background notion of one sense of plenary legislative power. Under state constitutional schemes, state legislatures are generally presumed to exercise all powers, unless the constitution imposes limitations. Unlike the national legislature, the state legislature is not limited to enumerated powers. This plenary power theory may incline state courts to adopt a lesser role in constitutional review.⁹³

If citizens or legislators believe that state courts are invoking their power unwisely, various remedies are available. States have shown a fair amount of creativity in limiting the exercise of judicial review under the state constitution. The constitutions of Nebraska

89. See FLA. CONST. art. V.

90. FLA. STAT. § 20.02(1) (2000).

91. See, e.g., *Greater Loretta Improvement Ass'n v. Boone*, 234 So. 2d 665, 670 (Fla. 1970) ("In *Jasper v. Mease Manor, Inc.* (Fla. 1968), 208 So. 2d 821, this Court sustained a statute defining the word 'charitable' as used in the Florida Constitution even though such definition conflicted with earlier decisions by this Court."); see also ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 642-47 (3d ed. 1999) (discussing legislative interpretation of the state constitution); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 200-01 (1983) (same).

92. Schapiro, *supra* note 62, at 690-95.

93. See *id.* at 693-95 (discussing connection between plenary power of state legislature and deferential standard of judicial review).

and North Dakota, for example, require a supermajority vote of their state supreme courts to declare a law unconstitutional.⁹⁴ My point is not that state courts never manifest activist tendencies; rather, the point is that state political systems have evolved mechanisms for addressing the appropriate interaction of the state legislature and state courts. In accordance with varying legal regimes, the relationship between state legislatures and state courts varies among states and does not conform to the federal model.

Through the mediating force of the state judiciary, state legislatures tend to have a close and interactive relationship with state constitutions. Not only does the position of the state legislature differ from that of Congress, but state legislatures may occupy different roles in each state. Different amendment procedures, among other features of state constitutions, produce different constitutional contexts in each state. I do not mean to take this argument of contextual constitutionalism too far. Federal constitutional requirements⁹⁵ and a relatively common political culture may ensure that state constitutional systems do not diverge radically. Yet within the bounds of cultural and legal constraints, diversity may be quite significant. Again, while not conclusive for interpreting Article II, the diversity of legislative roles in state constitutional systems suggests the conceptual difficulty in attempting to detach the legislatures from their state constitutional moorings.

B. Diversity in State Presidential Election Procedures

A need for uniformity generally serves as an important prerequisite for the creation of federal common law.⁹⁶ The concurrence, however, provided no convincing account of the need for uniformity in state presidential election procedures. Undoubtedly, the process of choosing presidential electors implicates important federal interests. The federal interests, however, do not justify the concurrence's federalization of the interpretation of state election codes. As with the issue of protecting state legislatures, an understanding of the state po-

94. NEB. CONST. art. V, § 2; N.D. CONST. art. VI, § 4 (requiring concurrence of four justices to hold legislation unconstitutional); *id.* art. VI, § 2 (setting membership of supreme court at five justices). For examples of applications of these provisions, see *Spire v. Beermann*, 455 N.W.2d 749 (Neb. 1990) (upholding legislation despite four of seven justices finding it unconstitutional); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994) (upholding state's school finance system despite vote of three of five justices that system violates state constitution). The Ohio Constitution previously contained a supermajority requirement, but this provision was repealed in 1944. OHIO CONST. art. IV, § 2 editor's comment (West 1999). For further discussion of these supermajority requirements, see Schapiro, *supra* note 62, at 691 n.220 (citing sources).

95. For a discussion of the federal constitutional constraints on the allocation of state governmental authority, see Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51 (1998).

96. See Field, *supra* note 83, at 953; Meltzer, *supra* note 83, at 1170-71.

litical system suggests the theoretical and practical problems with attempting to mandate uniform principles of interpretation in the election context.

The Article V precedents, *Hawke v. Smith*⁹⁷ and *Leser v. Garnett*,⁹⁸ provide some support for applying federal common law to state election procedures.⁹⁹ As in the case of constitutional amendments, substantial federal interests turn on the outcome of a state's selection of presidential electors. Confusion and delay could be extremely detrimental to national concerns. However, the strength of the federal interest in predictability and uniformity is questionable. Certainly, the integrity of the election process is critical, but the concern of frustrating legitimate expectations appears absent. It is not clear that anyone relied on any particular interpretation of the election code; nor is it certain that this area is one in which a uniform baseline exists to help ensure predictability. Election codes and their interpretation do vary widely and unavoidably from state to state. State courts would seem to be in the best position to interpret the particular election codes in their states.

The Court's attempt to impose centralized control over the interpretation of states' presidential election codes thus appears misguided. Congress adopted a particular set of procedures, which contemplated states' employing various methods in resolving contested elections.¹⁰⁰ Thus, neither Article II nor its congressional implementation suggests a need for interstate uniformity, much less a uniformity imposed by the United States Supreme Court. The congressionally established procedures entailed electoral determinations in each state with Congress resolving any lingering disputes.¹⁰¹ By exercising independent review of state court determinations, effectively federalizing state election codes, the United States Supreme Court would be offering assistance that Congress did not seek.¹⁰² Nor did the election cases present a scenario, like *Hawke* or *Leser*, in which state court action threatened to undermine the finality of a national decision. The electors had not voted, nor had Congress received their votes.

97. 253 U.S. 221 (1920).

98. 258 U.S. 130 (1922).

99. *Cf.* Paulsen, *supra* note 25, at 743 n.224 (arguing that the effect of a state's application to Congress for a constitutional convention should be governed by federal law).

100. *See, e.g.*, 3 U.S.C. § 5 (1994).

101. 3 U.S.C. §§ 1-18 (1994).

102. Perhaps the concurrence's view could rest on a notion that in the course of resolving election disputes, Congress may have to analyze the state election codes. By offering its own interpretation of the election codes, the United States Supreme Court would thereby be assisting Congress, utilizing its greater institutional competence in interpreting law. Again, given the statutory scheme, the Court would be affording "unsought" and apparently undesired assistance. *Cf.* *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) (characterizing Court as discharging "unsought responsibility").

What does tie the concurrence to the *Bowie* line of cases, general common law, and federal common law is a skepticism about the ability of state courts to protect the federal interest. Whether characterized as an interest in protecting state legislatures, who are acting as federal agents, or as an interest in predictable resolution of election controversies, the concurrence clearly believed that reliance on state courts would jeopardize that interest. From the tenor of the opinion and overall flow of the proceedings, the concurrence seemed to view the activities of the Florida Supreme Court as proof that state courts cannot be trusted in this area.¹⁰³ Other than disagreement with the Florida Supreme Court's opinions in this case, however, the concurrence provided no explanation of why state courts are particularly untrustworthy in interpreting presidential election codes. Moreover, skepticism about state courts, in the absence of any special need for uniformity, provides a very weak justification for federalizing the interpretation of state law.

C. *Legislative Intent and the State Constitution*

Even if the concurrence were justified in federalizing the interpretation of state election laws, a serious question would remain about the particular interpretive methodology employed. Assuming that federal interests in uniformity did demand that the interpretation of state election codes be freed from the usual state law constraints, the concurrence still would have to justify adopting a particular manner of statutory construction different from that employed by the state court. All parties agreed that even if the state legislature possessed plenary authority, it could delegate that power.¹⁰⁴ In this instance, the legislature had set up a statutory scheme for resolving election contests that contemplated judicial involvement. The key question with regard to the state constitution, then, was not the abstract matter of whether the state legislature could have acted without regard for constitutional constraints. The practical issue was whether the state legislature intended to free itself of any constitutional limitations. The concurrence raised the intent of the legislature to supreme importance, but the question remained how that intent should be understood with regard to the state constitution. Here, again, the

103. In this regard, the best explanation for the concurrence's position is that applied by Justice Stevens to the majority's decision to intervene in the recount. See *Bush v. Gore*, 531 U.S. at 128 (Stevens, J., dissenting) (in context of recount procedures, noting the majority's endorsement of the petitioners' "lack of confidence in the impartiality and capacity" of the state judiciary).

104. See, e.g., Brief for Petitioners at 28-31, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at <http://www.supremecourtus.gov/florida.html/> (addressing scope of legislature's grant of authority to the Florida courts); Brief for Respondent Albert Gore, Jr. at 13-14, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at <http://www.supremecourtus.gov/florida.html/> (same).

concurrence's vision of state constitutionalism asserted itself and led the concurrence to reject the notion that the legislature desired to resort to constitutional principles.

A significant portion of the oral argument in *Bush I* revolved around whether the references to the Florida Constitution in the state court's opinion reflected a necessary reliance on that charter, or merely an invocation of an additional, aspirational set of values.¹⁰⁵ The Justices mooted whether the state constitution had become a substitute for the legislative text or whether it functioned like Blackstone, simply providing a nonbinding statement of principles.¹⁰⁶

Justice Scalia, most notably, pressed the notion that the Florida Supreme Court had used the state constitution to trump the legislature. Certainly, Justice Scalia asserted, the legislature could not have welcomed the court's use of the state constitution. In a series of challenges to Laurence Tribe, who represented Vice President Gore, Justice Scalia probed this point:

Question: Professor Tribe, can I ask you why you think the Florida legislature delegated to the Florida Supreme Court the authority to interpose the Florida Constitution? I mean, I—maybe your experience with the legislative branch is different from mine, but in my experience they are resigned to the intervention of the courts, but have certainly never invited it

Question: They are resigned, that they are resigned to, but they need not be resigned to the Florida Supreme Court interposing itself with respect to Federal elections, they need not be because the Florida Constitution cannot affect it. And I—I just find it implausible that they really invited the Florida Supreme Court to interpose the Florida Constitution between what they enacted by statute and the ultimate result of the election.¹⁰⁷

It is hazardous to ascribe views to Justices based on their questions. However, Justice Scalia certainly suggested that the state constitution would operate only as an unwanted intruder in the interpretive process.

Justice Scalia appeared ready to accept the notion that the state constitution might present general aspirational principles, but he firmly denied the notion that the state legislature would want to bind itself to the state constitution, as interpreted by the state court. Based on the general features of state constitutions discussed above, I would like to explore two responses to this view. First, it is not clear why a state legislature would necessarily wish to exclude state constitutional limitations from the consideration of the judiciary. Sec-

105. See Oral Argument at 56-61, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), available at <http://www.supremecourtus.gov/florida.html>.

106. *Id.*

107. *Id.* at 66-67.

ond, it is not clear that a uniform characterization of state constitutions is possible. State constitutions vary a great deal. Without a comprehensive assessment of a particular state's constitutional system, an appreciation of the relationship among the constitution, the legislature, and the courts will remain elusive.

1. *Determining Legislative Intent*

On two levels, a court's attention to the state constitution may promote, rather than deform, the statutory scheme. First, the state constitution may announce general principles that inform legislative, as well as judicial, decisions. Second, when the legislature enlists judicial aid in resolving election disputes, it is a fair inference that the legislature expects the court to decide cases in the way in which the court generally decides cases.

The state constitution may contain an accurate rendition of the goals and fears of the state legislature. In this way, the state constitution may function as a well-publicized, formally adopted legislative finding. Of particular use in close or ambiguous cases, the state constitution may reveal the general purposes of the legislative enactment. The Florida Supreme Court's invocation of the state constitution in its opinion in *Bush I* was consistent with this view of the state constitution as an interpretive guide, rather than a self-aggrandizing judicial sword. That opinion certainly allowed the view of the constitution as a guide to, rather than a substitute for, statutory meaning.

At several points, the Florida Supreme Court emphasized that the Florida Constitution establishes the right of suffrage. The court stressed that the very first words of the Florida Constitution declare that "[a]ll political power is inherent in the people,"¹⁰⁸ and the court characterized the right of suffrage as "preeminent."¹⁰⁹ For the most part, the court appeared to use the fundamentality of the right to vote as an aid to statutory construction, as a means of making sense of a conflicting statutory regime. The court did imply that facilitating the right to vote was not only the presumed intent of the legislature but also a mandate limiting the discretion of the legislature: "To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage"¹¹⁰ The court, however, followed this assertion with a resort to a rule of construction, stating that "[b]ecause election laws are intended to facilitate

108. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1236 (Fla. 2000) (quoting FLA. CONST. art. I, § 1) (internal quotation marks omitted), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

109. *Id.*

110. *Id.*

the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote"¹¹¹ The court also suggested that the interpretive principles flowing from the state constitutional right to vote pointed away from a strict textual approach. The court warned that "[t]echnical statutory requirements must not be exalted over the substance"¹¹² of the right to vote and disavowed a "hyper-technical reliance upon statutory provisions"¹¹³

Do these passages mean that the court was substituting the constitutional right for the statutory text or, alternatively, that the court had given proper effect to legislative intent through appropriately intentionalist interpretation? Particularly because of the close interconnection of statutory and constitutional law, such questions have no clear answers. Would the legislature have wanted the court to enforce the letter of the statute if it conflicted with more basic democratic principles? Did the legislature believe that the letter of the law properly embodied its democratic commitments?

One response to these interpretive ambiguities would be a strict reliance on the text of the election code. A committed textualist might argue that the language of the statute should be taken as conclusive evidence of the goal of the legislative scheme. Any reliance on the state constitution to vary the text would thus be illegitimate. The concurrence did stress the significance of the statutory text. The concurrence asserted that because of Article II's direct conferral of authority on the state legislature, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."¹¹⁴ Perhaps in this view, the state courts must adopt a textualist approach to statutory interpretation.¹¹⁵ The United States Supreme Court would then defer to the state court as to which of competing textualist arguments deserved credence. The United States Supreme Court, though, would not be bound to defer to nontextual conclusions of the state courts. Such a preference for textualism would coincide with the concurrence's skepticism of the state judiciary, for one of the justifications for a textual approach lies in its purported ability to restrain unprincipled judicial activism.¹¹⁶

If the supposed plenary authority of the legislature were to yield some preferred method of statutory construction, however, it is not clear that textualism would be the leading candidate. After all, tex-

111. *Id.* at 1237.

112. *Id.*

113. *Id.* at 1227.

114. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

115. See RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 63 (4th ed. Supp. 2001) (noting possibility that concurrence suggests an Article II directive to employ textualism).

116. See, e.g., WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 229 (2000).

tualism often is contrasted with other methods of interpretation that attempt more directly to ascertain the intent of the legislature.¹¹⁷ Application of a textualist approach might entail contravening the intent of the enacting body in a specific instance.¹¹⁸ Textualism draws support instead from rule-of-law and separation of powers principles.¹¹⁹ Indeed, textualism sometimes functions as part of a strategy to discipline the legislature to induce it to act more responsibly.¹²⁰ Whatever the merits of a judge's exercising disciplinary control over the legislature, such a judicial role stands in substantial tension with a hypothesis of plenary legislative power.¹²¹

In addition, the explicit delegation of authority to the courts suggests the expectation that the customary judicial armamentarium will be employed, including reliance on a variety of interpretive methods and on all usual sources, including the state constitution. Such an inference seems at least as compelling as the contrary, that the legislature intended the judiciary to ignore the usual sources of law. That this contrary view would lead to divergent interpretations of the election code in different settings presents an additional reason to doubt such a legislative intent. The Florida Legislature enacted one set of laws that generally apply to presidential and nonpresidential elections. The concurrence's theory, however, would bifurcate the interpretation of the election laws between presidential elections and all other elections, which do not implicate Article II. One might doubt that the Florida Legislature intended such a result.

117. See *id.* at 211, 213-36 (contrasting interpretive approaches based on legislative intent and on textual meaning); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1091 (1995) ("In contrast to textualism, intentionalism contends that the interpreter should be the faithful agent of the intentions of the enacting legislature.").

118. In response to Justice Scalia's questions, Professor Tribe suggested a possible divergence between the language of the statute and the intent of the legislature:

Well, I suppose if [the state legislators] were at all far-sighted, if they looked at their own work and saw how self-contradictory it was, they might say we would want someone with the authority to reconcile these provisions to do so in the light not only of the literal language but of the fact that they are dealing with something very important, the franchise, that disenfranchising people, which is what this is all about, disenfranchising people isn't very nice.

Oral Argument at 67-68, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), available at <http://www.supremecourtus.gov/florida.html>.

119. See ESKRIDGE ET AL., *supra* note 116, at 229.

120. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636-46 (1995) (discussing textualism as a "disciplinarian" approach to statutory construction).

121. One might note further that textualists often exhibit a skepticism about the legislative process and legislative judgments. See *id.* at 645; Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1264 (2000) ("[N]ew textualism embodies a skepticism of legislative judgments . . ."). Though such views are not logically inconsistent with a conclusion that Article II vests plenary power in the state legislature, such skepticism about the political process might make one less inclined to infer plenary authority in the absence of a clear constitutional mandate.

2. *Contingency and Context*

The proper interpretive approach depends in part on the relationship among the constitution, the courts, and the legislature, and a variety of views of this relationship appear at least plausible. A more robust account would require an analysis of the constitutional structure, constitutional history, and constitutional culture of a particular state. The answer to the question of the proper interpretive method does not lie in a hypothesized common law of constitutions but in the thick background of each state's constitution. Such questions of state constitutional theory are contingent and contextual. They cannot be resolved in the abstract. In this regard, one might question Justice Scalia's proffer of his experience with "the legislative branch."¹²² His universalizing observations, perceptive though they may be, shed little light on the constitutional context in which the country's fifty legislative branches function.¹²³ More generally, a recognition of this variety and contingency casts doubt on the wisdom of assigning the interpretive task to the United States Supreme Court. Unlike the state supreme courts, the United States Supreme Court has little experience or expertise with such potentially intricate questions of state law. It is important to note that what renders the question so intricate is the concurrence's hypothesis of plenary legislative power. To what extent the legislature would have wanted the court to take account of the state constitution, given the hypothesis of a nonbinding constitution, is quite a complex inquiry. A generalized view of state constitutions will do little to resolve this issue, and indeed the hypothetical and abstract quality of the query constitutes an argument against the theory that would produce it.

IV. IMPLICATIONS FOR STATE CONSTITUTIONAL LAW

Having argued that the concurrence's flawed conception of state constitutional systems undermined its interpretation of Article II, I now turn to some of the broader ramifications of the concurrence's views. Cases concerning presidential elections do not arise very frequently, but the theory of state constitutions embodied in the concurrence could have more widespread implications. Federal courts face state constitutional issues in a variety of contexts. The interpretation of the state constitution, itself, may raise a federal claim, or a federal court might have supplemental jurisdiction over a state constitutional claim. The conception

122. Oral Argument at 66, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), available at <http://www.supremecourtus.gov/florida.html>.

123. For a related argument that state separation of powers principles should be developed in light of the varying contexts of the various state systems, see Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 99-108 (1998).

of state constitutionalism implicit in the *Bush II* concurrence suggests interpretive principles that would apply in these areas.

The concurrence adopted a uniform view of state constitutions. The concurrence showed no interest in examining specific state constitutions or constitutional systems. The concurrence seemed to assume that all state constitutional systems function in a roughly similar manner. The concurrence also evidenced a distrust of state judges.

This combination of a skepticism about the state judiciary and a homogenous view of state constitutions does not bode well for the New Judicial Federalism. This development involves state courts interpreting their constitutions independently of the Federal Constitution, often with the effect of extending constitutional protections beyond those mandated by the federal charter.¹²⁴ Under the conception of the *Bush II* concurrence, state constitutional decisions deviating from the federal norm might elicit suspicion. The assumption of general uniformity of constitutional systems might raise a concern that a court's decision to depart from the federal standard reflects unprincipled activism, and the Court's apparent skepticism about the state judiciary also might trigger a more searching review of state constitutional decisions.

As far as the concurrence is concerned, the villain of the piece is the Florida Supreme Court, representing judicial activism. Justice Scalia's questioning implied that the very reliance on the state constitution signaled a kind of activism and that the business of state constitutions is to distort the will of the legislature. Such views might influence the Justices to cast a sympathetic eye on the argument that the state court interpretation of the state constitution actually violated federal law.

Similarly, the assumptions underlying the concurrence imply that the federal courts might take a narrow view of state constitutional interpretation that arises in the context of supplemental jurisdiction. The concurrence's approach suggests that a federal court would be reluctant to credit a claim that the state constitution protects rights in addition to those enshrined in the Federal Constitution. Inclined to impose a uniform vision on state constitutions, the concurrence's view raises the possibility that any federal baseline that did exist would be treated as a presumptive norm. Within this framework, chastened by the view of state judges as activists, the federal courts would be less likely to acknowledge additional protections conferred by the state charter. In certain areas, federal courts currently play

124. For an overview of the New Judicial Federalism, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1112-13 (1997) (discussing growth of "new judicial federalism"); see also Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25 (1993) (same).

an active role in the development of state constitutional law, particularly in the context of cases raising constitutional claims under both the state and federal constitutions.¹²⁵ Under the concurrence's approach, federal courts might be less willing to engage in this kind of distinctive state constitutional interpretation. At least in supplemental jurisdiction cases, the federal floor may turn into a ceiling. Relatively novel claims in particular might suffer under this analysis.

A proper role in the interpretation of state constitutions would require federal courts to attend to the particular constitutional circumstances in each state. Federal courts are certainly able to perform such tasks. My point has been that the concurrence showed no willingness to undertake such an interpretive exercise in *Bush II*. The different institutional circumstances of the federal courts might make them valuable partners in providing a different perspective on state constitutional issues. In the supplemental jurisdiction context, however, unlike in the presidential election cases, the federal courts would remain bound by authoritative state court determinations of state law. Federal courts could participate in the interpretive process, but they would not have the last word.

Certainly, even if the concurrence in *Bush II* had garnered majority support, it would not provide an authoritative guide for a particular reading of state constitutions in other contexts. Nevertheless, the concurrence evidenced a particular attitude to state constitutions and state courts that may apply more generally. Further, the presidential election cases may help to shape the approach of those Justices who had not devoted much attention to state constitutions and their role in state legal systems. For the five Justices who joined the majority opinion in *Bush II*, the image of state constitutions and state courts may be tarred by the Justices' perceptions of the impropriety of the Florida Supreme Court's actions. When state constitutional issues present themselves, these Justices might be more inclined to "rein in" activist interpretations that deviate from the standards in other states and from the federal standard. Such an attitude to state constitutionalism would be an unfortunate reaction to the presidential election dispute, and it would, as I have suggested, ignore important features of state constitutionalism. In this regard, one might hope that the Supreme Court's treatment of state constitutions in the *Bush* cases was anomalous. In this area, it would be desirable if the Court followed the proviso that it attached to its equal protection ruling: "Our consideration is limited to the present circumstances"¹²⁶

125. For a discussion of the role that federal courts currently play in the interpretation of state constitutions, see Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

126. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).