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THE SUPREME COURT, *BUSH V. GORE*, AND ROUGH JUSTICE

WILLIAM P. MARSHALL*

Bush v. Gore[1] is not defensible doctrinally. The opinion is unsound on a number of grounds, including equal protection,[2] standing,[3] political question,[4] and remedies.[5] Indeed, the lack of doctrinal founda-

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

2. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) ("[T]he newly articulated equal protection doctrine is dramatically wide-reaching. . . . The difficulty in defining the scope of this new equal protection right is made all the worse by the Court's disingenuous limiting instruction."); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 691 (2001).

> All [the Court] found legally wrong was that the intent-of-the-voter standard—[the Court] thought unnecessarily—allows different honest counters, or groups of them, to make different dispositions of identical ballots, on a basis that is utterly random with respect to voter interest. No one's equal dignity is impugned by this practice, and only Humpty Dumpty would describe it as valuing one person's vote over another's.

Id.

3. *See* Note, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170, 2189 (2001).

> The [*Bush v. Gore*] majority may have implicitly carved out an exception to equal protection standing requirements that is applicable only to a presidential election contest. The lack of explicit inferences from prior law and the failure to distinguish the question of due process for candidates from that of equal protection for voters are weaknesses in the opinion.

Id.

4. *See* Michelman, *supra* note 2, at 686 (noting that the Court could have "proper[ly], honorabl[y]" abstained from intervention by treating the matter as a political question); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 760 ("This was not technically a 'political question,' but it did not seem to be the kind of question that would warrant Supreme Court involvement, certainly not at this preliminary stage.").

5. *See* Issacharoff, *supra* note 2, at 651.

> *Bush v. Gore* is entirely lacking in such analysis [of remedies]. The Court presumed that once it found the federal interest, its remedial obligations followed. In this regard, the Court's reliance on the magic December 12 date for the safe

tion in the opinion is so transparent that even the case's few defenders tend to rest on the grounds offered by the concurrence rather than the majority.[6]

Bush v. Gore also does not neatly fit within the Court's traditional approach to constitutional principles of federalism and separation of powers. The opinion gives little or no regard to the state court's construction of its own law and little or no deference to the constitutional provisions that delegate the resolution of electoral disputes of the type at issue in the case to the Congress and not to the courts.

Not surprisingly, these doctrinal and theoretical weaknesses have led numerous observers to roundly condemn the opinion. These academic attacks, even if accurate, however, may fundamentally misconceive what the case was truly about. *Bush v. Gore* cannot be understood as about legal doctrine. Rather, it is a case that tests the limits of the Court's ability to go beyond traditional legal analysis to achieve what it deems to be a just result—a case that attempts to achieve what others have dubbed "rough justice."[7] Seen in this light, the fact that the Court did not follow traditional analysis in order to

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> harbor under 3 U.S.C. § 5 is particularly ironic. This statutory provision emerged from a rather deliberate congressional effort to provide for orderly resolution of presidential election controversies in the wake of the hastily-crafted Electoral Commission approach from 1877. A review of this statute, however, reveals that it carefully reserved to the political branches the key role in resolving contested presidential elections.

Id.; David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 740 (2001) ("What does seem indefensible is the Court's remedy."). John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 790 (2001).

> [T]he per curiam's sudden introduction of the December 12 cutoff date for a remedy—based on the assumption that the Florida legislature intended to adopt the safe harbor date for the selection of presidential electors provided for by 3 U.S.C. § 5—makes almost no sense at all unless read in light of the concurrence's structural analysis.

Id.

6. *See* Richard A. Epstein, *'In such Manner as the Legislature Thereof May Direct': The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 634 (2001) ("In sum, there is ample reason to believe, as the Rehnquist concurrence in *Bush v. Gore* urges, that the Florida Supreme Court adopted, under the guise of interpretation, a scheme for conducting election challenges that deviates markedly from that which the Florida legislature had set out in its statutes."); Yoo, *supra* note 5, at 790.

> This is not to say that the precise reasoning of the per curiam was utterly correct. I vastly prefer the theory put forward by the Chief Justice's concurrence: Florida's judiciary had so re-written the state's electoral laws that it had violated Article II's delegation of authority to the state legislatures to choose the method for selecting presidential electors.

Id. (citations omitted).

7. The term "rough justice" has been used by both Richard Posner and Richard Hasen to describe the result in *Bush v. Gore*. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 23 (2001); Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 391, 406 (2001).

reach its decision is not, taken alone, fatal. Nor is it unprecedented.[8] As we shall see, the Supreme Court, prior to *Bush v Gore*, had decided cases with little or no reference to established legal principle in order to achieve "rough justice."[9] Indeed, in all likelihood, the Supreme Court will continue to exercise this power to act when circumstances so dictate.

The question of whether *Bush v. Gore* was based on sound legal principle thus does not end the inquiry. Even if the decision was not doctrinally or theoretically sound, there remains the question of whether the Court nevertheless acted illegitimately. This inquiry may then be broken down into two sub-parts: 1) Was the Court justified in intervening in this case to attempt to achieve rough justice? 2) If intervention was appropriate, did the Court reach the right result?

This Essay addresses these issues. Part I of the paper discusses whether Supreme Court intervention to accomplish rough justice in this case was warranted. Part II of the paper then addresses the question of whether, if judicial intervention was appropriate, the Court exercised the power correctly in this case. As will subsequently become clear, I conclude that although the Court's intervention was indeed appropriate, it ultimately reached the wrong result in its decision.

I. *BUSH V. GORE* AND ROUGH JUSTICE

Imagine the Court believed one of the following: 1) sending the election to the Congress would have created a constitutional crisis, 2) the Gore forces were improperly manipulating the vote count in order to win the election, or 3) the Florida Supreme Court's decision authorizing the recount to continue was a lawless exercise of judicial power intended to achieve a partisan result. If so, would its intervention be justified *even if its decision were not based in legal principle*? I believe the answer to this question is yes.

Let me immediately clarify this point. I am not arguing that judicial opinions that do not follow legal principles are examples of good or correct legal decisionmaking. Judicial decisions not based in law are, by definition, "wrong" jurisprudentially. My point is that the conclusion that a case is jurisprudentially wrong does not necessarily end all inquiry into a decision's legitimacy. Occasionally other exigencies may trump jurisprudential purity. Larry Alexander and Frederick Schauer, for example, make this point in reference to Abra-

8. For example, as my colleague Eric Muller has noted, the Court's "shock the conscience" test that it has employed in such cases as *Rochin v. California*, 342 U.S. 165 (1952), may be little more than the Court giving itself license to accomplish rough justice under the guise of an announced judicial standard. ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY 154-55 (2001).

9. *See infra* notes 17, 34, and accompanying text.

ham Lincoln's rejection of the rule of law in his suspension of habeas corpus:

> If it was important for winning the Civil War that Lincoln suspend habeas corpus and infringe on other civil liberties, then the moral importance of winning the war was sufficient to justify his actions. Reaching this conclusion . . . does not mean that suspending habeas corpus was right. It just means that this wrong was outweighed by the greater wrong that would have occurred had the war been lost.[10]

Courts, like Presidents, may also understand that right results sometimes require something more than pure fealty to law.[11] They may also realize that exigent circumstances may demand that the wrong of ignoring legal principle may be outweighed by the need to avoid the harms that would occur if legal principle were studiously followed. Certainly for any actor, relying on a nebulous vision of rough justice is a dangerous ground to tread. In acting outside traditional legal boundaries, any actor risks harming its own institutional credibility as well as the legitimate expectations of the parties it affects.[12] And it may be that because of the specific origins and limits of judicial power, the Supreme Court may have less latitude to seek to effectuate rough justice than do the other branches.[13] But risky or not, the power to accomplish rough justice is not alien to the judicial role. Certainly, as the next section will demonstrate, there is ample precedent for its use.

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10. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382 (1997).

11. There is certainly ample indication in the *Bush v. Gore* opinion itself that would indicate that the Court well knew that it was not engaging in business as usual. For example, the fact that the Court strongly suggested that its equal protection analysis might not extend to future cases would seem illustrative of the Court's intention to attempt to reach a specific result only in the case at hand, rather than create new doctrine. *See* Bush v. Gore, 531 U.S. 98, 109 (2000).

> Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount . . . .

Id.

12. Justice Stevens's dissent in *Bush v. Gore*, of course, makes this very attack against the majority opinion: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." *Id.* at 128-29 (Stevens, J., dissenting).

13. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed., Yale Univ. Press 1986) (1962). Because the other branches are subject to electoral control, judicial action raises a countermajoritarian difficulty that actions by the Executive and the Congress do not. *Id.*

A. Bush v. Gore*'s Pursuit of Rough Justice Was Not Unprecedented*

The notion that settled constitutional principles give way in exigent circumstances did not originate with *Bush v. Gore*. As we have already noted, Abraham Lincoln suspended the writ of habeas corpus[14] and also directly rejected controlling Supreme Court authority when he resisted *Dred Scott*[15] and issued the Emancipation Proclamation.[16] Similarly, and more importantly for our purposes, the Supreme Court has at times also strayed from strict legal decisionmaking when it believed circumstances so required. *Bush v. Gore* was not the first case in which rough justice rather than legal doctrine provided the Supreme Court with its rule of decision.[17] The following are but two examples of this exercise.

1. New York Times Co. v. Sullivan

Let me begin controversially by offering one of the most important First Amendment decisions of the United States Supreme Court, *New York Times Co. v. Sullivan*,[18] as a primary example of a case decided by rough justice. The facts of *Sullivan* are well known but deserve some repeating. On March 29, 1960, *The New York Times* ran an ad designed to generate support for the civil rights movement entitled "Heed Their Rising Voices."[19] The primary thrust of the ad was to depict the ongoing struggle between the "thousands of Southern Negro students [who were] engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights" and the "wave of terror" being waged against them by their opponents.[20] Unfortunately, the ad contained a number of inaccuracies. It stated, for example, that in connection with a demonstration in Montgomery, students had been padlocked in a cafeteria and police had ringed the campus where the demonstration had taken place.[21] It also alleged that Martin Luther King Jr. had been arrested seven

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14. For a direct comparison of Lincoln's suspension of habeas corpus and the decision in *Bush v. Gore*, see Sotirios A. Barber & James E. Fleming, Bush v. Gore*: Constitutionalist Though Not Constitutional?* 9-11 (unpublished manuscript, on file with the author).

15. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

16. Alexander & Schauer, *supra* note 10, at 1382-83.

17. Robert Pushaw, for example, makes the point in this symposium that a similar attempt to achieve rough justice occurred when the Supreme Court entered the election law arena in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). *See* Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 605-11 (2001).

18. 376 U.S. 254 (1964).

19. *Id*. at 256.

20. *Id*. at 256-57.

21. *Id*. at 258-59.

times and had been assaulted.[22] In fact, the cafeteria had not been padlocked, the police had not ringed the campus, King had been arrested not seven but four times, and King's claim of being assaulted had occurred a number of years earlier.[23]

Based on these inaccuracies, Montgomery Commissioner L.B. Sullivan sued *The New York Times* for defamation. Sullivan's claim was not strong. To begin with, the ad did not explicitly refer to him, and there was nothing in its text that would tie him to any of the alleged activities. It seemed, therefore, that Sullivan could not meet the basic requirement of a defamation suit that the alleged matters be "of and concerning" the plaintiff.[24] Further, it was not clear, in any event, that Sullivan's reputation would in any way be defamed or tarnished in his community even if he were deemed to be one of the subjects of the ad. Rather, given the spirit of the times, it is more likely that his community standing would be improved by the suggestion that he opposed the civil rights demonstration.

These matters, however, did not deter the Alabama courts. The Alabama jury awarded him damages of $500,000, an exorbitant amount at that time in any jurisdiction and an even more outrageous amount given that only 394 copies of the *Times* had been sold in Alabama and only thirty-five had been sold in Montgomery County.[25]

Even before it reached the Supreme Court, it was clear that the action brought by Commissioner Sullivan against the *Times* was no mere libel suit. Rather, the case marked a major battle between the entrenched racist Southern power structure and the civil rights movement. The purpose of the litigation was to chill press efforts to cover the civil rights movement, and Sullivan's initial victory in the Alabama courts was a significant step in that direction.[26] Not only would the $500,000 verdict alone have been crippling to *The New York Times*,[27] but there were also numerous other libel suits against the newspaper that were in the works at the time the case was decided.[28] Yet even more was at issue than simply deterring Northern media coverage. Sullivan's victory signaled that those challenging the status quo could expect to suffer considerable legal costs in mounting their effort. As Rodney Smolla has explained, "to the extent that the verdict represented the special antipathy that the community of Montgomery, Alabama felt for aggressive blacks and

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22. *Id*. at 258.
23. *Id*. at 258-59.
24. *Id*. at 267 (noting that for the plaintiff to succeed in a defamation action in Alabama, a jury must find that the defamatory words were "of and concerning" the plaintiff).
25. *See* RODNEY A. SMOLLA, SUING THE PRESS 30 (1986).
26. *See* ANTHONY LEWIS, MAKE NO LAW 34 (1991).
27. *Id*.
28. *See* SMOLLA, *supra* note 25, at 43-44.

their Yankee fellow travelers, it threatened to cripple the Fourteenth Amendment's guarantee of equal protection under the laws."[29]

With both press freedom and the civil rights movement at stake, it is therefore not surprising that the Supreme Court reversed the Alabama court's decision. However, like *Bush v. Gore*, *New York Times Co. v. Sullivan* was not exactly based upon firm doctrinal footing. Instead, the extent to which the decision paved new ground (and dug up the old) cannot be overestimated. The following are only some of the highlights.

To begin with, the decision effectively constitutionalized the law of defamation. It removed a traditionally state-bound and state-defined common law action from the state courts (and state legislators) into the jurisdiction of the federal courts. Prior to *Sullivan*, libel law had not been thought to raise any First Amendment concern; and had traditionally been within the exclusive province of the states. Second, the Court's rule of decision in the case, that a plaintiff could not succeed in a libel action against a public official unless he could show that the defendant acted with "actual malice," meaning knowledge of falsity or reckless disregard for the truth,[30] was not only wholly unprecedented in federal law[31] but also ignored previous Court statements to the contrary.[32] Third, the Court acquitted *The New York Times* even though the facts of the case might still suggest the newspaper's actions were subject to liability even under the new actual malice standard. The *Times* apparently had the correct version of the events in its files but had not crosschecked the account presented in the ad with its own information.[33]

Yet, despite its enormous breadth and consequence, that the Court reached the result it did appears virtually inevitable in hindsight. As Smolla notes,

> [I]t is clear that the Supreme Court could no more permit southern juries in libel trials to punish those who were seeking to snuff out the yet unfulfilled promise of *Brown v. The Board Of Education*, than it could permit southern legislation to outlaw or cripple the NAACP. The case was arguably more the product of a *due process* deficiency than a First Amendment concern, for against the backdrop of the period the problem was really one of litigation fairness: four black preachers and a New York newspaper simply could not get a fair trial in Alabama in 1960 in a case concerning civil rights

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29. *Id*. at 35.

30. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

31. The Court relied on the law of a number of selected states in fashioning this standard. *See id*. at 280-83.

32. Prior to *Sullivan*, the Court had indicated that the First Amendment did not protect libel in a number of cases. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

33. *See Sullivan*, 376 U.S. at 287.

> issues. Had the events surrounding the Sullivan lawsuit not been so patently racist, in fact, it is doubtful that the Supreme Court would have bothered to hear just another libel suit at all. What was not foreordained, however, was that in aid of the civil disobedience tactics of Martin Luther King and his followers, the Supreme Court would write an opinion that would forever influence the way American law treated freedom of speech.[34]

In short, rough justice, not doctrine, dictated the result in the *Sullivan* case. Libel law, certainly, was forever changed by the decision. But that was a result of the Court's subsequent decisions applying *Sullivan* to later cases—an option which now awaits the Court in its future interpretations of *Bush v. Gore*. The fact that the case would eventually enjoy precedential effect was only a by-product of the Court's efforts to achieve rough justice—it was not its cause.[35]

2. Henry v. Mississippi

If *Sullivan* was an example of a rough justice case in which the Court would eventually abide by the doctrinal implications of its decision, *Henry v. Mississippi*[36] was an example of where the doctrine created by a rough justice decision would eventually lead nowhere. Aaron Henry was the president of both the Coahoma Mississippi County Branch of the NAACP and of the NAACP's State Conference of Branches.[37] He was convicted in Mississippi of disturbing the peace by "indecent proposals to and offensive contact with an 18-year-old hitchhiker to whom he is said to have given a ride in his car."[38]

The legal issue in *Henry* involved the application of the adequate state ground doctrine, which governs when decisions by a state court may be reviewed by the United States Supreme Court. In the case itself, Henry's attorney had failed to make a contemporaneous objection to the admission of evidence on Fourth Amendment grounds.[39] Failure to raise the objection would, under Mississippi law, foreclose consideration of the merits of the Fourth Amendment claim, but the Mississippi Supreme Court initially reached the constitutional issue (and reversed the conviction) believing that Henry's counsel was out-

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34. SMOLLA, *supra* note 25, at 44-45.

35. In fact, *Sullivan* and its progeny have proved less than successful in fashioning a law of defamation that both serves the purposes of the tort while protecting First Amendment interests. *See generally* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169 (discussing how the rules announced in *Sullivan* and later cases discourage responsible journalism).

36. 379 U.S. 443 (1965).

37. *See* Terrance Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 190.

38. *Henry*, 379 U.S. at 444.

39. *Id.* at 445.

of-state and not familiar with local procedure.[40] After being informed by the state, however, that Henry's counsel was local, the Mississippi court reversed its previous decision and held that the constitutional issue could not be considered because of failure to comply with the appropriate procedure.[41]

The United States Supreme Court reversed again. In an opinion generously described by the Hart and Wechsler textbook as "confusing,"[42] the Court held: 1) a state rule could not bar consideration of a litigant's federal rights unless the rule served a legitimate state interest;[43] 2) Mississippi's contemporaneous objection requirement served a legitimate state interest;[44] and 3) Mississippi procedure allowed litigants to raise a constitutional challenge to the evidence in motions for directed verdict at the close of trial, which also served the interests of the contemporaneous objection rule by allowing the judge to instruct the jury to disregard the evidence and thus avoiding the need for a new trial if the claim was meritorious.[45] This meant that the contemporaneous rule used to bar Henry's appeal in effect served no independent purpose.[46] The Court, nevertheless, did not hold that Henry's claim could not be barred because of the ostensible superfluousness of the contemporaneous objection rule. Rather, it held that the case should be remanded to determine if Henry's counsel deliberately did not comply with the procedural rule.[47] Why a deliberate failure to object should be relevant if such failure itself was not an adequate bar to consideration of the legal claim was not explained.

Despite its ambiguity, there was much in the *Henry* decision that, if followed, could have dramatically changed the law of the adequate state ground. For example, that the adequacy of one procedural rule in barring a federal claim could be evaluated by reference to another was itself a significant development. Even more broadly, as Justice Harlan argued in dissent, the opinion may be read as "portend[ing] a severe dilution, if not complete abolition, of the concept of 'adequacy' as pertaining to state procedural grounds."[48] Similarly, Professor Terrance Sandalow, writing shortly after the decision, was also concerned that the opinion suggested the elimination of "the concept of

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40. *Id.*

41. *Id.* at 445-46.

42. RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 584 (4th. ed. 1996).

43. *Henry*, 379 U.S. at 447.

44. *Id.* at 448. As the Court explained, "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided." *Id.*

45. *Id.* at 448-49.

46. *See id.*

47. *Id.* at 451-53.

48. *Id.* at 457 (Harlan, J., dissenting).

adequacy so far as state procedural grounds are concerned [a development which would ignore] the interests of both the litigants and the judicial system in orderly procedure."[49]

Sandalow, however, also foresaw another explanation of the Court's opinion.

> Of all the problems raised by *Henry*, none is more trouble-some than that of determining the material facts. Almost the first lesson taught in law school is that "facts of person, time, [and] place . . . are presumably immaterial unless stated [by the court] to be material. As a rule the law is the same for all persons, at all times, and at all places within the jurisdiction of the court." Yet, even though not mentioned by the Court, is it really immaterial that the petitioner was not merely a man charged with disturbing the peace, but Aaron Henry, a Negro resident of Clarksdale, Mississippi, and president of both the Coahoma County Branch of the National Association for the Advancement of Colored People and of its State Conference of Branches? Is it, moreover, immaterial that the prosecution was commenced in 1962 in Mississippi and not at another time and in another place? The traditional answer to these questions, one suspects, is neither entirely realistic nor necessarily desirable. Yet more than a lawyer's conservatism argues for caution in accepting a conclusion that the Court was or ought to have been influenced by such factors, particularly in a case which touches what historically has been one of the more sensitive areas of federal-state relationships.[50]

Subsequent events appear to have proved Sandalow's latter explanation to be correct. As one textbook notes, "[d]espite its radical potential, the *Henry* decision has had little effect on the standards applied on direct review in judging the adequacy of state procedural grounds."[51] The result in *Henry*, in short, was dictated not by doctrine but by "the possibility that Henry's prosecution was a consequence of his active participation in the civil rights movement."[52] Rough justice, not the adequate state ground rule, was the governing principle.

B. Supreme Court Intervention in Bush v. Gore *Was Appropriate*

The fact that stretching judicial power is not unprecedented, of course, does not in itself justify its particular exercise in any given case. Moreover, it might quickly be contended that *Sullivan* and *Henry* are not proper precedents for *Bush v. Gore*. After all, both cases involved protecting civil rights interests against a hostile and entrenched political establishment. *Sullivan* and *Henry*, therefore,

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49. Sandalow, *supra* note 37, at 239.
50. *Id.* at 190 (citations omitted).
51. FALLON ET AL., *supra* note 42, at 585.
52. Sandalow, *supra* note 37, at 196.

might be viewed as classic examples of cases in which judicial intervention is most needed—cases in which the political processes cannot be trusted to reach fair and just results on their own accord.[53] In *Bush v. Gore*, on the other hand, the prevailing litigant was anything but politically marginalized and had access to virtually every possible political weapon. Accordingly, the case for extraordinary judicial action is far weaker.[54] This is a fair point. Undoubtedly, the courts should be especially vigilant when the rights and interests of vulnerable groups are at stake. This does not mean, however, that extraordinary judicial intervention is inappropriate in all other circumstances. Factors other than the identities of the litigants may cry out for special judicial action, and certainly if there were such a case, *Bush v. Gore* would clearly have to be at the top of anyone's list.

Consider just *some* of the amazing confluence of events that surrounded the case. The presidential election depended on the twenty-five electoral votes of the state of Florida. In the initial vote count in Florida, Bush led Gore by 1,784 votes out of a total of over six million.[55] Outside of Florida, Gore led in electoral votes and had won the popular vote.[56]

The Florida Supreme Court, which had authorized a recount to occur, was controlled by Democrats.[57] The Florida Legislature, which was empowered to submit its own slate of delegates, was controlled by Republicans.[58]

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53. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

54. Of course, if the Court was concerned with protecting the interests of political minorities then maybe it did reach the correct result. After all, the Bush side did receive fewer votes.

55. Because this margin represented less than one-half of one percent of the total number of votes cast, Florida law required a machine recount, which subsequently narrowed Bush's lead to 930 votes. Following manual recounts ordered by the Florida Supreme Court, the final certified tally on November 26 (the date set by the court and twelve days after the statutory deadline) found Bush with 2,912,790 votes and Gore with 2,912,253—a difference of 537. The Florida Supreme Court then allowed late submissions from Palm Beach and Miami-Dade Counties, which narrowed Bush's lead to only 154 votes. *See, e.g.*, Bush v. Gore 531 U.S. 98, 100-03 (2000); Richard A. Ryan, *Bush Declares Victory; Gore Contests Results*, DET. NEWS, Nov. 27, 2000, at 1.

56. By the time the U.S. Supreme Court intervened, Gore held 267 electoral votes to Bush's 246 and 50,158,094 popular votes to Bush's 49,820,518 (a margin of 337,536). *See* Marc Sandalow, *Bush Pledges Unity/Analysis: Partisan Passions Won't Be Dispelled Easily*, S.F. CHRON., Dec. 14, 2000, at A1. A later *Washington Post* analysis that accounted for late-tallied absentee ballots in all fifty states put Gore's popular-vote lead at 540,539. *See* Charles Babington, *Electors Reassert Their Role; Bush Wins Vote; Protest Costs Gore*, WASH. POST, Dec. 19, 2001, at A1.

57. All seven members of the court are Democratic appointees (one was jointly appointed by Lawton Chiles and Jeb Bush). Six are registered Democrats, one a Republican. *See* Lisa Getter & Mitchell Landsberg, *America Waits—Florida Top Court is in Glare of Spotlight*, L.A. TIMES, Nov. 16, 2000, at A27.

58. Republicans held a 77 to 43 majority in the House and a 25 to 15 majority in the Senate, and Democrats openly acknowledged they did not have the votes to stop Republicans from naming a slate of electors. *See, e.g.*, David Barstow & Somini Sengupta, *Jeb*

The Constitution requires that if there are two or more slates of electors presented from a given state, the decision of which slate will be recognized will be made by the Congress.[59] The Republicans controlled the House of Representatives.[60] The Senate was divided 50-50, but the Democrats would control it for purposes of ruling on an election challenge because the extant Vice President, who is empowered to cast the tie-breaking vote, was a Democrat.[61] That Vice President was Gore. Federal law provides that if the Congress cannot agree on a slate of electors that decision will devolve to the Governor of the state with the contested slate.[62] The Governor of Florida was Bush's brother.

The one thing that is clear from this scenario is that the voters of 2000 unknowingly created the definitive blueprint for stalemate. Unless any of the political players were to rise above their own partisan interest, any decision resulting from this chaos would necessarily reek of partisanship and self-dealing. And it was clear that none of the players were prepared to abandon their partisan battle stations.[63] Accordingly, any result achieved by either side would necessarily be clouded by claims of illegitimacy.

Against this background, the United States Supreme Court may have been the only institution that could be seen to be sufficiently above the partisan fray to achieve a fair result. As John Yoo wrote, "the United States Supreme Court may [have been] the only institution left that enjoy[ed] the legitimacy to bring the partisan struggle over the presidential election to a final, if not infallible, conclusion."[64]

Bush Is Said to Be Willing to Sign Bill Ensuring Republican Victory in Florida, N.Y. TIMES, Nov. 28, 2000, at A25.

59. U.S. CONST. art. II, § 1, cl. 3.

60. Following the November elections, 221 Republicans, 211 Democrats, and 2 Independents comprised the House. *See, e.g.*, Eliza Newlin Carney, David Baumann, & Bill Ghent, *A House Divided*, 32 NAT'L J. 3555 (2000). The score is now 222 to 210 to 2, following a mid-June election in Virginia to fill a seat vacated by the March death of an incumbent. One Massachusetts seat remains vacant. *See, e.g.*, Tyler Whitley, *Forbes Victorious in 4th, GOP Adds Seat to Majority in House as Lucas Loses Bitter Race by 4 Points*, RICHMOND TIMES-DISPATCH, June 20, 2001, at A1.

61. *See* U.S. CONST. art. II, § 1, cl. 3.

62. *See* 3 U.S.C. § 15 (1994).

63. One notable exception was Senator Chuck Hagel of Nebraska who wrote:

> At some point this prolonged election will come to an end. One man will be declared president. The outcome must be seen as legitimate and honest, so the new president has the credibility and validation to lead. Both parties will have to come together and work with the president to govern. We cannot shove that responsibility aside and wait for better results from another election. The challenges facing our nation are too great to be deferred.

Chuck Hagel, *The Stakes Are Higher Than a Partisan Victory*, WASH. POST, Dec. 10, 2000, at B07.

64. John Yoo, *The Right Moment for Judicial Power*, N.Y. TIMES, Nov. 25, 2000, at A19.

Arguably in fact, the Gore forces may have needed Supreme Court intervention even more than the Bush side. The way the battle was shaping, a state judicially ordered election resulting in a Gore slate of electors would have been met with a slate of Bush electors chosen by the Florida Legislature.[65] The United States House of Representatives had made clear that it was going to recognize the Bush slate and had begun a rhetorical campaign suggesting that any other result would be akin to a stealing of the election.[66] Republican House forces had begun a concerted campaign decrying the impermissible "judicial activism" of the Democratic Florida Supreme Court[67] and had made clear that any result not favorable to Bush would be treated as fraudulent.[68] This strategy set up an inevitable political fight for the mantle of legitimacy between the two potential slates, and it was a fight that, at the time of the Supreme Court's decision,

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65. *See, e.g.*, David Barstow, *Lawmakers Move Closer to Special Florida Session for Naming Bush Electors*, N.Y. TIMES, Dec. 1, 2000, at A27; Ronald Brownstein, *Rivals Down to Heavy Artillery*, L.A. TIMES, Nov. 27, 2000, at A1; Gail Russell Chaddock, *Congress Prepares for Plot Twists—if the Electoral College Tally is Ultimately Disputed, Lawmakers Could Have a Say in Who's President*, CHRISTIAN SCI. MONITOR, Nov. 22, 2000, at 1; Adam Cohen, *The Legal Challenges*, TIME, Dec. 4, 2000, at 42; Ann McFeatters, *Edgy Congress Worries Over a Range of What-ifs*, PITT. POST-GAZETTE, Nov. 22, 2000, at A8.

66. *See* Dana Milbank, *Are We There Yet? Fascism? Theft in Progress? It's Looking Ugly, but the Bonds Won't Break*, WASH. POST, Dec. 3, 2000, at B01 (citing House Majority Whip Tom DeLay's description of Gore's recount pursuit as a "theft in progress" and the declaration from Christopher Shays, "a normally sober Connecticut Republican," that "[r]eally, what they're trying to do is steal the election"); Blake Morrison, *Recount Rhetoric Reminds Some of Impeachment—Observers Concerned that Partisan Charges are "Spinning out of Control*," USA TODAY, Nov. 27, 2000, at A04.

> "This thing is rigged," Rep. David Hobson, R-Ohio, declared. "It is a joke on our democracy." And this about Gore from Rep. J.C. Watts, R-Okla. [and Chairman of the House Republican Conference]: "This is a candidate who will not win or lose honorably but will instead employ the cutthroat tactics that eight years under President Clinton have taught him."

Id.; McFeatters, *supra* note 65 ("House Majority Whip Tom DeLay . . . has sent around a two-page memo noting that since Republicans control both houses—even though by a scant majority—his party could make Bush president by firmly rejecting a state's electoral votes on the basis that members think such votes are tainted."); Press Release, House Majority Leader Dick Armey, Gore Team Will Do Anything to Win (Nov. 22, 2000), *available at* http://www.freedom.gov/library/presidency/gore.asp ("The Florida Legislature has a duty to step in and restore honesty and the rule of law to the election process. For the sake of America's democracy, they can do no less.").

67. Press Release, Representative Tom DeLay, DeLay Criticizes Florida Supreme Court Decision (Nov. 17, 2000); *see also* Press Release, Representative Tom DeLay, DeLay on Latest Florida Supreme Court Decision: "Blatant and Extraordinary Abuse of Judicial Power" (Nov. 21, 2000) ("[A] collection of liberal activists has arbitrarily swept away thoughtfully designed statutes ensuring free and fair elections and replaced them with their own political opinions."); Armey, *supra* note 66 ("[Gore has] enlisted the Florida Supreme Court to rewrite the laws of Florida.").

68. *See* Press Release, Representative Tom DeLay, Statement of Majority Whip Tom DeLay on Latest Florida Supreme Court Decision (Dec. 8, 2000) ("The Florida Supreme Court has squandered its credibility and violated the trust of the people of Florida in an attempt to manipulate the results of a fair and free election. This judicial aggression must not stand.").

the Republicans were winning.[69] Polls indicated that most Americans believed Bush had prevailed in Florida and that Gore's reluctance to concede was evidence that he was a sore loser.[70] Against this background, the moral authority of the United States Supreme Court may have been the only weapon available to the Gore forces to combat this campaign.[71] A recount based only upon a constantly attacked decision of the Florida Supreme Court might not have been able to give the Gore forces the legitimacy they would need to assume the Presidency. The imprimatur of the United States Supreme Court intervention would be critical.

II. DID THE COURT REACH THE RIGHT RESULT?

Concluding that Supreme Court intervention was appropriate, or at least justifiable, does not mean that the Court's ultimate decision was correct. The case must also be made that notions of rough justice required a ruling for Bush.

As noted earlier, there are at least three concerns that may have led the Court to rule for Bush. First, the Court may have believed that its decision was necessary to avoid the constitutional crisis that would have inevitably occurred had the matter been referred to the Congress. Second, the Court may have believed that its intervention was necessary because the Gore forces were in effect manipulating the vote totals so as to win the election. Third, the Court may have felt its intervention necessary to reverse an ill-advised state court decision. These arguments are discussed below.

A. The Ruling for Bush Was Necessary to Avoid a Constitutional Crisis

The exigency of intervening to avoid the political chaos that might follow if the matter were referred to the Congress has, as discussed above, obvious appeal.[72] The stalemate created by the election was

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69. *See* William Safire, *The Coming Together*, N.Y. TIMES, Dec. 14, 2000, at A39.

70. An NBC News poll conducted on November 27, 2000, by Robert Teeter, a Republican pollster, and Peter Hart, a Democratic pollster, found nearly sixty percent of those polled believe that Bush won; while the poll was evenly split on whether Gore should concede immediately. Nearly half of those polled were more likely to find Gore's legal appeals symptomatic of a "sore loser" than of a candidate pursuing reasonable action. A USA Today/CNN poll taken the following day found that thirty-six percent of Gore supporters—a new high at the time—were ready for the Vice President to concede. *See* Bill Lambrecht, *Polls Showing Loss of Support for Gore Are Coming Under Fire: Pollsters Say Many People Aren't Offered Choices on What They Really Believe*, ST. LOUIS POST-DISPATCH, Nov. 29, 2000, at A7.

71. *See* Yoo, *supra* note 64, at A19; *see also* Brownstein, *supra* note 65, at A1 (citing observations by Harvard's Heather Gerken and the Brookings Institution's Thomas Mann that the Court "may be the one institution with enough prestige to impose a widely accepted solution on the controversy").

72. *See supra* notes 63-64 and accompanying text.

not likely to lead to any result that would be free of claims of foul and illegitimacy, and the Supreme Court may have been the only institution with enough authority to impose a result that would have more than partisan acceptance.

This does not mean, of course, that the intervention was not problematic from a legal standpoint. After all, if deferring the election to the political branches was a blueprint for political disaster, it was a blueprint nonetheless that came directly from the Constitution.[73] Supreme Court intervention expressly to avoid a matter within the constitutional design, therefore, might be criticized as particularly activist. Nevertheless, as we have seen, the fears that political wrangling alone could not lead to a result that would command sufficient legitimacy without Court intervention were more than simply plausible. Court intervention was likely to be necessary.

The constitutional crisis argument at this point, however, speaks only in favor of Supreme Court intervention; it does not automatically support intervention favoring Bush. Such arguments are, however, available. The most obvious is that, as William Safire and others noted, the Republicans were poised to win the eventual battle.[74] Supreme Court intervention, accordingly, would not change the result; it would only allow the country to avoid the agony that would otherwise occur if resort to the political branches were to follow.

Seen in this light, ruling for Bush was the more limited ruling because it best complied with the political realities. As Safire argued:

> Were it not for the court's willingness to take the case and the heat, internecine mud-wrestling would have gone on for at least another month. If Gore had edged ahead in the counting of "undervotes," Bush would have contested unexamined "overvotes." If the Florida Supremes had named a Gore slate of electors, the Florida Legislature would have named its own; some electors in other states may then have been seduced into faithlessness; ultimately, the ever-more-angry dispute would have wound up in Congress. At the end, with the G.O.P. in control of the clear majority of states, we would have ended up exactly where we are today: with President-elect Bush. Along the way, many now-reasonable opponents would have become implacable enemies, and the electorate would have been not just evenly divided but angrily polarized. The Supreme Court, at some cost to its own serenity but not to its historic reputation, saved us from that.[75]

On closer examination, however, Safire's argument is subject to serious critique. First, the reason that the Florida Legislature was choosing its own slate was because it was intending not to honor a

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73. U.S. CONST. amend. XII.
74. *See* Safire, *supra* note 69, at A39.
75. *Id.*

judicial decision.[76] If the United States Supreme Court's decision to short-circuit the political process was based upon its reaction to this tactic, it was thus in effect giving in to (and therefore rewarding) extreme political strategies.[77] Indeed it would be submitting to tactics that were expressly designed to threaten judicial independence and chill judicial decisionmaking—exactly the types of actions to which the Supreme Court should be most wary of succumbing.[78]

Second, a closer examination of the costs in allowing the political processes to proceed in pursuit of an eventual Bush victory is also warranted. Clearly Safire is right in part.[79] Animosity between the sides would increase as the days dragged on and the country would suffer polarization. The eventual Bush Presidency may also have been weakened and the Court may have been interested in preserving the presidential institution.[80] As the Court stated in *Nixon v. Fitzgerald*,[81] there is a need "to maintain prestige as an element of Presidential influence."[82] But assuming an eventual Bush victory, the most obvious losers would be the Republicans. Had the Republicans

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76. The November 22, 2000, statement from Tom Feeney, Speaker of the Florida House of Representatives, following the Florida Supreme Court's ruling in *Palm Beach Canvassing Board v. Harris*, indicated that the legislature wanted, above all, to nullify the court's decision and squelch the growing electoral din:

> In my view, the court's ruling indicated the tremendous lack of respect that the Florida Supreme Court has for the laws of the state of Florida and the legislature. The court continues to supplant its personal preferences over the statutory law of Florida, which was passed by the elected members of the legislature. Yesterday, if the court had merely enforced firm and clear statutory deadlines, the Florida Supreme Court could have given us a resolution. Instead, I fear, it has given us a potential constitutional crisis.
>
> The people of Florida have elected 160 members of the legislature and charged us with the creation and the protection of their laws. In my view, the judicial branch has clearly overstepped their powers.

Federal News Service, *Statement by Tom Feeney (R-FL), Speaker of the House, Florida Legislature Re: Florida Supreme Court's Ruling on Manual Recounts*, Nov. 22, 2000, LEXIS News Group File; *see also* David Cox, *Lawmakers Join Bush's Case, House Speaker Tom Feeney Said Legislators Want Justices to Know They Might Take Action*, ORLANDO SENTINEL, Nov. 25, 2000, at A14 (quoting Speaker Feeney: "The Legislature's participation is intended to make the United States Supreme Court aware of the Legislature's concerns and the possible consequences that may flow from the state judicial action to date.").

77. *See* Barber & Fleming, *supra* note 14, at 10 ("The party that threatened institutional meltdown won *because* it threatened institutional meltdown.").

78. *See* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. . . . The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land.

Id.

79. *See* Safire, *supra* note 69, at A39.

80. *But see* Clinton v. Jones, 520 U.S. 681 (1997).

81. 457 U.S. 731 (1982).

82. *Id*. at 757.

strong-armed the political result by systematically rejecting a judicially ordered recount, they would have risked serious political backlash and would have undoubtedly lost significant political capital. Whether the Supreme Court should have intervened to serve these partisan interests seems less apparent.

Of course, there may be an alternative explanation. There also may have been another constitutional crisis the Court may have wished to avoid. While most assume that the constitutional crisis to be avoided would be the political fight in Congress,[83] the actual constitutional crisis the Court may have wished to avoid may have been its own. Ruling for Bush may also have been the best way for the Court to protect its own institutional capital. This is because of the scenario that may have resulted if the recount had proceeded and a Gore slate was elected. In that circumstance, as noted before, there would likely have been two conflicting slates of electors. A divided Congress presumably would not have been able to decide on a victor.[84] In that circumstance, federal law suggests that the governor of the disputed state may choose the slate of electors.[85] Presumably, Governor Jeb Bush would choose his brother but also presumably the Gore forces would seek an order from the Florida courts ordering Jeb Bush to pick the Gore slate. The Republicans, however, were poised to dismiss any unfavorable decision, meaning that an order of the Florida court to Jeb Bush ordering him to certify the Gore slate may well have been ignored. The inevitable result, of course, is that the matter would be returned to the Supreme Court. At this point, the Court's decision would have been even starker than was the one it faced in November and December. The Court would be asked, at considerable political risk to itself, to either require Jeb Bush to certify the Gore slate (and thus create a Gore victory) or allow Jeb Bush to reject the Florida court order (and thus create a Bush victory). The Supreme Court, in short, would be forced to directly determine who would be President. Seen in this light, *Bush v. Gore* was not an exercise in judicial courage, it was an exercise in judicial self-preservation.

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83. *See generally* Barber & Fleming, *supra* note 14, at 2 (exploring the possibility that, given the looming chaos, *Bush v. Gore* amounts to an "act of judicial statesmanship").

84. *See, e.g.*, Matthew Vita & Juliet Eilperin, *Congress Braces for Battle Over Electoral Votes*, WASH. POST, Nov. 22, 2000, at A19 (noting the lengthy list of obstacles to congressional resolution: partisan wrangling over a potential "confrontation that members of both parties say they [did] not want," widespread acknowledgement of a lack of constitutional precedent, the threat that Florida's votes might not be counted, and the possibility that Gore himself might preside over a joint session of Congress convened to determine the election's winner); McFeatters, *supra* note 65, at A8 (noting that some members of Congress, including then Minority Leader Tom Daschle, were "already talking about appointing a 'blue-ribbon' panel" rather than "send the whole mess to a deeply divided new Congress").

85. *See* 3 U.S.C. § 15 (1994).

B. The Gore Forces Were Manipulating the Recount

The Court may have also intervened because it believed that the Gore forces were improperly manipulating the recount to achieve victory. In at least one sense, intervening for this purpose would seem less objectionable than intervening to avoid a constitutional crisis because, as noted previously, the potential crisis was a product of the express design of the Constitution. Intervening to prevent an injustice, however, seems more in line with the motivations that may have led to the Court's actions in cases like *Sullivan* and *Henry*.

On the other hand, intervening for this purpose did not necessarily require ruling for Bush. It only required preventing any improper manipulation. Remember, the key problem in the way the count was proceeding was not that there were any colorable allegations of fraud. Rather, the claim was that the various counties had differing standards in a way that would lead to a Gore victory. An appropriately fashioned remedy, however, could have easily cured this harm. Ordering the Florida courts to impose a uniform standard and requiring that the standards be effectively policed[86] would have resolved this potential problem.[87]

Moreover, if intervention to avoid an unjust result was truly the motivating force in this case, then it would seem that in addition to reacting to concerns about potential fraud the Court should have also examined where the equities of a fair resolution of this matter lay. In this respect, two other factors seem particularly significant.

First, Gore won the electoral vote count outside of Florida. Given the closeness of the election in Florida and the numerous ballot and tabulation controversies surrounding the election, any result, no matter how it was achieved, would be open to subsequent question.[88] In effect, no result from Florida could ever be assumed to be accurate. Certainly, in balancing the equities, it would seem relevant to determine who would have won if the Florida votes were simply

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86. Given the public attention given to the ongoing vote recounts, there was likely very little chance that actual ballot tampering could take place.

87. It may also have supplied the recount process with a legitimacy the Gore forces desperately needed. Although there were no colorable allegations of actual fraud in the recount process, media attention and Republican attacks had created an impression of malfeasance. Supreme Court affirmation of the recount process might have done much to eliminate this perception.

88. Undoubtedly, this realization may have been a factor in the Court's decision to put the matter to rest. There would be no reason to assume that any method of counting would be a better method in determining who won Florida than any other. Accepting the initial results, then, might be seen as simply adopting a default position designed to end what could otherwise be an endless process. But why should the happenstance of Bush's 537-vote lead at the time of certification be the default position? The equities of Gore winning the electoral vote outside of Florida, as well as likely having had more people intend to vote for him in Florida, would suggest that allowing a recount to proceed and, in effect, create a new default position may have been the fairest way to proceed.

taken off the table. The answer, of course, was Gore. In an election in which Florida's votes are not counted, Gore wins the Presidency.

Second, and perhaps most importantly, virtually no one was disputing that more people in Florida had intended to vote for Gore than for Bush. The problems with the butterfly ballot, for example, although not remediable through court challenge, nevertheless clearly indicated that many people who thought they had voted for Gore had actually voted for Buchanan. Adding these numbers to the Gore total would have clearly given him a numerical lead over Bush.

None of these factors (nor the fact that Gore won the popular vote),[89] needed to lead the Court to rule that Gore had won the election. They do, however, make a case for the argument that Gore's losing the Presidency because of fewer than 600 votes in a state where the election results were at best highly uncertain had profound elements of injustice. And in this respect, it is critical to reemphasize that the question facing the Court was not determining who had won. It was only whether a recount should be allowed to proceed. Given his electoral-vote advantage and the likelihood that more voters in Florida intended to vote for him than Bush, the equities favored at least allowing Gore the chance to establish by a more complete vote count that he may have actually won Florida.

C. The Florida Court's Decision Required Reversal

The final reason the Court may have intervened and ruled for Bush is because it believed the Florida Supreme Court decision was so lawless and unfounded that it required reversal. If this indeed was the reason, then the Court's action again has pedigree. Similar concerns undoubtedly influenced the Court in cases like *Ward v. Love County*[90] and others in which the Supreme Court rejected a state's manipulative construction of its own law in a manner designed to avoid federal court review and promote an unjust result.[91]

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89. Some may also suggest that the fact Gore won the national popular vote should also be relevant in the weighing of equities. I agree with the comments of John McGinnis in rejecting that view. *See* John O. McGinnis, *Popular Sovereignty and the Electoral College*, 29 FLA. ST. U. L. REV. 995, 995-96 (2001). The political campaigns of both parties were aimed at winning electoral, not popular, votes. *Id.* at 996. The Bush campaign, for example, did not need to expend campaign resources in states such as Texas, Virginia, and Oklahoma, because it was virtually guaranteed that he would win those states. If popular votes were at issue, on the other hand, his campaign would have undoubtedly chosen to devote time and financial resources to those states in order to maximize overall vote counts. Gore's strategy with respect to motivating and turning out the vote in his safe states, similarly, would have changed had it been known that winning the popular vote would be a cognizable factor in winning the election.

90. 253 U.S. 17 (1920).

91. In the inaptly named *Love County* case, the state coerced American Indians to pay a tax from which they had claimed a federal immunity by threatening to sell their lands if the tax was not paid. *Id.* at 20. The state courts then held that the Indians were barred

Protecting litigants from abusive state courts also, of course, motivated the Court in cases like *Sullivan*.[92] The Alabama courts in that case were clearly acting with a political agenda[93] and the United States Supreme Court stepped in to prevent that political agenda from becoming an injustice. Unlike *Sullivan*, however, the Court in *Bush v. Gore* may have missed a step. Concluding that a decision has been improperly reached does not mean its result is unjust. Even if the Florida court's actions were "lawless," an independent examination of whether its result was nevertheless unjust would seem necessary before reversal—particularly if the Court's guiding principle was "rough justice."

Certainly, as with the decision of the Supreme Court, the opinion of the Florida Supreme Court in *Gore v. Harris* was not a model of clarity or judicial craftsmanship. It may be soundly criticized on numerous points including, most tellingly, for its creation of a new deadline for which the counties must certify their results to the Secretary of State.[94] However, the conclusion that the Florida court's decision was not soundly based in legal doctrine does not necessarily mean that it should be reversed. For example, Judge Posner excuses the doctrinal weaknesses of the United States Supreme Court opinion on the grounds that it may have involved a "judgment in advance of doctrine," by which he means that the Court may have understood which direction it should go before it worked out the legal niceties of how to get there.[95] But the same might be said about the decision of the Florida Supreme Court. If the United States Supreme Court was empowered to try and effectuate rough justice, why should the same not be true for the Florida Supreme Court? If the United States Supreme Court should be excused from authoring an opinion not soundly based on legal doctrine, why should the Florida Supreme Court also not be similarly excused?

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from challenging the legality of the tax because they had paid it "voluntarily." *Id.* at 21. The Supreme Court rejected the sham and held that the Indians' ability to challenge the tax was not foreclosed. *Id.* at 24-25. *Love County* is a powerful example of the Court's ability to pierce the veil of a lower court decision in order to prevent the state court from manipulating its own law in order to shield itself from constitutional scrutiny.

92. *See* SMOLLA, *supra* note 25, at 44-45.

93. *See id.* Any criticism of the Florida Supreme Court for acting on partisan grounds must be tempered by the fact that in key cases the Court actually ruled for Bush when holding otherwise would have inevitably led to a Gore victory. Conversely, its decision in *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), only gave Gore the chance of eventually prevailing through a recount. For example, a favorable decision for Gore on the butterfly ballots (including a statistically based remedy) could have resulted in the switch of enough votes from the Buchanan column to the Gore column to sway the election.

94. *See* Epstein, *supra* note 6, at 628-29. "I am aware of no general principle of equity that would allow a court to ride roughshod over a particular time limitation contained in a statute in favor of its own alternative date." *Id.* (citation omitted).

95. POSNER, *supra* note 7, at 23.

The Court, in short, also had the option to rehabilitate the Florida court's opinion, as well as to reverse it. And there were numerous avenues through which salvaging the Florida decision may have been possible. First, the Court could have been more deferential to the Florida court's efforts at statutory construction.[96] Indeed even if the Court disagreed with the Florida court's statutory construction efforts, it could have remanded for clarification.[97] Most importantly, the Court could have concluded that it was permissible for the Florida court to inform its statutory construction by reference to constitutional principles.[98] This would not be amending the law as the concurring opinion suggests,[99] rather it would be assuming, as is generally true in statutory construction, that laws are enacted with the legislative intent that it should be construed consistently with constitutional provisions.[100] Finally, the Court could have refused to be so hasty in determining that a recount could not proceed because of the alleged importance of the "safe harbor" provision to the construction of Florida law. At the least, the Court could have remanded the case to Florida to ascertain whether Florida law required a cessation of the vote count in order to comply with the safe harbor provision.[101]

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96. *See* Strauss, *supra* note 5, at 752 ("The Florida Supreme Court decision that was overturned in *Bush v. Gore* was consistent with the plain language of the principal statute involved—the Florida statute governing contests of election certifications—and neither the concurring opinion nor, as far as I am aware, anyone else, has seriously contended otherwise.").

It is also notable that the Florida court's expansion of the certification deadline—arguably its most jurisprudentially criticized action—was an action that did not meaningfully affect the legal interests of candidate Bush. *See* Michael W. McConnell, *Two-and-a Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657, 667-69 (noting that the certification deadline is "not absolute" because it merely represents the end of the "pre-certification" period, and that as such the Florida Supreme Court's deadline extension did not prevent "disenfranchisement" but rather had the "perverse" effect of adding "twelve days to a phase that had no real legal significance," at the expense of the contest period, "the time for obtaining genuine legal relief").

97. *See* Herb v. Pitcairn, 324 U.S. 117 (1945).

98. *See* Sunstein, *supra* note 4, at 766 (pointing out that under the broad equal protection principles espoused in *Bush v. Gore*, "manual recounts might even seem constitutionally compelled").

99. *See* Bush v. Gore, 31 U.S. 98, 118 (2000) (Rehnquist, C.J., concurring) ("[T]he [Florida] court's interpretation of 'legal vote,' and hence its decision to order a contest-period recount, plainly departed from the legislative scheme.").

100. *See* Strauss, *supra* note 5, at 749.

> The Florida Supreme Court did not declare that something the legislature had done was unconstitutional under the state constitution. At worst, the Florida Supreme Court relied on the state constitution for general principles of a kind that could easily be seen as part of the background against which the legislature knowingly enacted the Florida election laws—which is how the Florida Supreme Court explained its opinion on remand.

Id.

101. *See* Sunstein, *supra* note 4, at 767-68.

> [The U.S. Supreme Court] concluded that as a matter of Florida law, a continuation of the manual recount "could not be part of an 'appropriate' order authorized by" Florida law.

In fact three reasons would indicate that the Court should have deferred to the state court if at all possible. First, general federalism principles would suggest that the Court defer to the Florida court. Inelegant as its opinion may have been, the Florida Supreme Court was, after all, ultimately attempting to discern Florida law. Second, judicial comity would argue in favor of respecting a judicial decision rather than joining with those claiming that the judicial enterprise was illegitimate.[102] Third, and most importantly, the Florida Supreme Court decision was guided by the animating principle that all votes should be counted. This principle not only resonates in what may be "rough justice," it also resonates in the Constitution and in the essential vision of democracy. The animating principle of the United States Supreme Court in holding for Bush, on the other hand, is both far less clear and far less compelling. None of the rationales offered in defense of the Court's decision would seem to overcome the straightforward principle relied on by the Florida Supreme Court. The Florida court, in short, may have had the better sense of rough justice.

CONCLUSION

Bush v. Gore may be easily condemned for its doctrinal and theoretical shortcomings. These condemnations, however, miss the essential point. The case was not one about doctrine. Rather it was about rough justice. As such, the case was neither illegitimate nor unprecedented. Exceptional cases may demand exceptional solutions and *Bush v. Gore* was undoubtedly an exceptional case.

> This was a blunder. It is true that the Florida Supreme Court had emphasized the importance, for the Florida Legislature, of the safe harbor provision. But the Florida courts had never been asked to say whether they would interpret Florida law to require a cessation in the counting of votes, if the consequence of the counting would be to extend the choice of electors past December 12. In fact the Florida Court's pervasive emphasis on the need to ensure the inclusion of lawful votes would seem to indicate that if a choice must be made between the safe harbor and the inclusion of votes, the latter might have priority. It is not easy to explain the United States Supreme Court's failure to allow the Florida Supreme Court to consider this issue of Florida law.

Id.; Strauss, *supra* note 5, at 742.

> At the very least, it was uncertain what the Florida Supreme Court would have said if forced to choose between the safe harbor and continued counting. In the face of any uncertainty about the Florida Legislature's intentions, for the United States Supreme Court to attribute such an unlikely intention to the Florida Legislature without even remanding, to see what the Florida Supreme Court would say, is inexplicable—unless, of course, the United States Supreme Court simply did not trust the Florida Supreme Court to play it straight.

Id.

102. *See* Bush v. Gore, 531 U.S. at 128 (Stevens, J., dissenting) (noting that the Court sided with those attacking judicial legitimacy).

That the Court may have reached its eventual result by applying its own notions of rough justice thus should not be conclusive in evaluating the integrity of the decision. It does, however, suggest that the opinion may properly be held up to an examination of whether the decision actually effectuated the justice it was purportedly designed to serve. It is with respect to that inquiry, however, that the case comes up short. The ostensible motivating factors underlying the Court's decision, avoiding a prolonged constitutional crisis, preventing improper vote manipulation, and/or reversing an ostensibly lawless opinion, do not stand up under close scrutiny. The first rationale turns out primarily to be abdication to extremist political tactics. The second concern is a matter that could be resolved by judicial remedy. The third is little more than the pot calling the kettle. Both the United States and the Florida Supreme Courts were engaged in the same endeavor. Both were beleaguered courts attempting to achieve a fair and just result out of an impossible set of circumstances. Both issued opinions that were substantially less than legally compelling.

The Florida court's opinion, however, did have one relative virtue. Its animating principle, counting the votes, was clear and fundamental. Accordingly, when evaluating *Bush v. Gore* and its relationship to rough justice, it may be that the United States Supreme Court opinion was the one that should have been reversed.