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Not enough time has passed to gain much perspective on a decision as momentous as *Bush v. Gore*.[1] Already, however, one can detect certain interpretive themes, or at least axes of debate. One controversy centers on the question whether the ruling is anomalous. Some see the ruling as ungrounded, as literally unprecedented.[2] Others find firm doctrinal foundations.[3] I agree with both assessments. As I will explain, *Bush v. Gore*, and especially the three-Justice concurrence on which this article focuses, exhibits certain elements that align the decision with the major jurisprudential themes of the Rehnquist Court. In this respect, *Bush v. Gore* comes closer to paradigm than anomaly. The doctrine into which the case fits snugly, however, represents a major break from fifty years of settled law. The concurrence illustrates the Rehnquist Court's suspicion of specific features of the post-New Deal activist state and its rejection of central aspects of the post-New Deal jurisprudence. The ruling is a paradigm within an anomaly. The ultimate characterization of the decision thus depends on whether the perspective is within or without the Rehnquist revolution.[4]

The Article II theory advanced in the concurrence of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, deserves study not only because it reveals important themes of the Rehnquist Court but

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

2. *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, 55–93 (2001) (discussing the misapplication of the Equal Protection Clause).

3. *See, e.g.*, Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002) (discussing the majority opinion as a straightforward application of the Equal Protection Clause).

4. For a characterization of the Rehnquist Court as revolutionary, see, for example, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1061 (2001); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 474 (2002).

also because it has received significant academic support. Under the Article II theory, the United States Constitution prevents state courts from misinterpreting state election law pertaining to presidential elections. The concurrence concluded that the recounts mandated by the Florida Supreme Court constituted this kind of prohibited judicial malpractice.[5] The Article II theory has proved appealing because it avoids some of the apparent weaknesses of the equal protection framework on which the majority relied. The equal protection approach depends on arguments that charitably could be called innovative;[6] the Court's decision to remedy the putative equal protection violation by ending, rather than mending, the recount charitably could be termed extremely pragmatic;[7] and the composition of the majority endorsing the equal protection theory charitably could be termed surprising.[8] Champions of the result in the case have found the Article II theory to present an attractive alternative. Notable supporters of the concurrence include Judge Richard Posner,[9] Professor Richard Epstein,[10] and former judge—and now professor—Robert Bork.[11] The Article II theory thus has served a critical legitimating function. For those commentators who reject broad equal protection interpretations in general, or the specific application in the majority opinion, the concurrence provided a way to support the Court's decision without endorsing its rationale. Commentators could celebrate the ruling, as well as the resulting

5. *Bush*, 531 U.S. at 120–22 (Rehnquist, C.J., concurring).

6. *See, e.g.*, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 217 (2001) ("*Bush v. Gore* is an activist decision. It forges new doctrinal ground . . . ."); Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 119 (2001) (stating that the equal protection ruling was a doctrinal innovation).

7. *See* POSNER, *supra* note 6, at 150 (defending the pragmatism of the decision, but with regard to the remedy noting that "there can be such a thing as an excess of pragmatism").

8. *See, e.g.*, DERSHOWITZ, *supra* note 2, at 121–69; HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 189 (2001) ("The five justices in the *Bush v. Gore* majority . . . made a decision that was . . . inconsistent with what would have been predicted given their views in other cases.").

9. *See* POSNER, *supra* note 6, at 153 (describing the Article II theory as the "best rationale" for the decision).

10. *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, 635 (2001) (agreeing with the Article II argument set forth by the concurrence).

11. *See* Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION, 4, 5–6 (Mar. 2001); Robert H. Bork, Opening Remarks, Francis Boyer Lecture, Feb. 13, 2001, *at* http://www.aei.org/boyer/2001intro.htm (last visited Nov. 29, 2002) [hereinafter Bork, Opening Remarks] ("The per curiam opinion joined by five Justices does have major problems. But the concurring opinion . . . rests upon solid ground.").

presidency, unhindered by the doctrinal peculiarities of the per curiam opinion.[12]

This article seeks to expose the key underpinnings of the Article II theory. Various commentators have contended that the Rehnquist Court's jurisprudence reflects a return to a pre-1937 conception of the state. Some both on and off the Court have found similarities to the limited conception of government characteristic of the *Lochner v. New York*[13] decision.[14] The interpretive principles evident in the concurrence, I argue, similarly demonstrate a pre-1937 sensibility. Here, *Swift v. Tyson*,[15] rather than *Lochner*, provides the clearest parallel. I will argue that the interpretive approach of the concurrence hearkens back to the Supreme Court's attitude toward state law in the period before *Erie Railroad v. Tompkins*[16] overruled *Swift*. *Erie* was one of several Supreme Court decisions in 1937 and 1938 that validated the modern, activist state. By putting the concurrence's interpretive strategy in historical context, I seek to place *Bush v. Gore* in the broader sweep of the Rehnquist Court's assault on certain aspects of the post-New Deal constitutional order.

I. THE ARTICLE II THEORY

Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President.[17] This "manner directed" clause suggests a variety of possible interpretations. The concurrence adopted a strong reading of the clause, with both substantive and interpretive implications. The concurrence contended that the clause dictates both what counts as state law governing presidential elections and how that law must be construed.[18] Under this reading, Article II gives special authority to a single source of state law—the command of the state legislature. In addition, Article II prescribes interpretive precepts for how courts should construe the legislative directive. Both the substantive and the

12. *See* Bork, Opening Remarks, *supra* note 11 ("The rationale offered by the concurring opinion was absolutely correct, and George W. Bush is our legitimate President.").

13. Lochner v. New York, 198 U.S. 45 (1905).

14. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 605–09 (1995) (Souter, J., dissenting) (noting the similarity of the Court's approach to that characteristic of the *Lochner* era); Dolan v. City of Tigard, 512 U.S. 374, 406–10 (1994) (Stevens, J., dissenting) (same); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1146–48 (2002) (same).

15. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

16. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

17. U.S. CONST. art. II, § 1, cl. 2.

18. Bush v. Gore, 531 U.S. 98, 112–16 (2000) (Rehnquist, C.J., concurring).

interpretive dimensions of the theory proved necessary to reversing the judgment of the Florida Supreme Court and ending any further recounts in the 2000 election.

A. The Substance of Article II

In one view, the "manner directed" clause merely grants authority to the states, as opposed to the national government, to designate the method for choosing presidential electors. According to this view, the clause does not impose any restrictions on the state process of selecting electors. Rather, the constitutional reference to "the Legislature" denotes the lawmaking power of the state, as that is customarily exercised.[19] The contrasting view, advanced by the concurrence, stresses that Article II refers to the state *legislature*, not the state generally.[20] Accordingly, the concurrence contended that the state legislature exercises special plenary authority in dictating presidential election procedures.[21] Under this reading, Article II confers a federal shield on the state legislature's command. Specifically, Article II embodies an anti-distortion rule, barring the state courts from misinterpreting the legislative directive. Such an error could occur if the state courts relied on external sources of authority, such as the state constitution, or if the state courts simply misconstrued the state statutory scheme. In either case, the state courts would be thwarting the legislative will in violation of Article II. Because Article II confers power specifically on the state legislature, state courts' misinterpretation of state statutes would represent an unconstitutional interference with legislative prerogative.[22]

For the concurrence, the "manner directed" clause creates a choice-of-law principle of far reaching implications in presidential election disputes. This choice-of-law rule inverts the normal hierarchy of state (and federal) law. State legislation, not the state constitution, constitutes the ultimate state authority governing presidential elections. Further, federal law distinguishes between state legislation, which

19. *See id.* at 123–24 (Stevens, J., dissenting) (rejecting the concurrence's interpretation of Article II).

20. *See id.* at 112–13 (Rehnquist, C.J., concurring) (emphasizing constitutional reference to "Legislature").

21. *See id.* at 113 (Rehnquist, C.J., concurring) (discussing the Court's determination in *McPherson v. Blacker*, 146 U.S. 1 (1892), that Article II "conveys the broadest power of determination" regarding presidential election procedures to the state legislature).

22. *See id.* at 114 (Rehnquist, C.J., concurring) (explaining the need to examine "whether a state court has infringed upon the legislature's authority").

reigns supreme, and mere judicial interpretation of that legislation, which may stray from the legislative command.

As understood by the concurrence, the "manner directed" clause thus prescribed the unusual role for the Supreme Court of deciding whether a state court properly interpreted state law. The Constitution mandated federal scrutiny to determine if the state court had misconstrued the state statutes. According to the concurrence, Article II required the United States Supreme Court to undertake "an independent, if still deferential, analysis of state law."[23] The question that remained was how the federal court should engage in this analysis of state law. For the concurrence, Article II required that the federal court engage in an independent exercise of statutory construction. As has become abundantly clear through recent academic and judicial debates, however, statutes can be construed in many ways. Different approaches to statutory interpretation can yield divergent conclusions as to the meaning of a statute. Which approach should federal courts adopt?

B. Article II as Interpretive Theory

The concurrence did not explicitly address this question of interpretive theory. The opinion demonstrated, however, an implicit but unmistakable preference for textualism. In its attempt to drive a wedge between the state statutes themselves and their interpretation by the Florida Supreme Court, the concurrence emphasized the statutory text as the principal source of authority. The concurrence contended that the "manner directed" clause established that "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[24] The concurrence thus linked Article II to a textual approach to statutory construction.[25] The concurrence then attempted to demonstrate that the Florida Supreme Court's interpretation departed from the statutory language.

In its initial opinion extending the recount period, the Florida Supreme Court had used language suggesting that it would not employ a strict textual approach. The court stated that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be our

23. *Id.* (Rehnquist, C.J., concurring). Elsewhere, I have questioned the coherence of a standard of review that claims to be both "independent" and "deferential," as those terms generally designate alternative modes of review. *See* Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 673 & n.56 (2001) (noting the "oxymoronic quality" of the concurrence's standard of review).

24. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

25. *See* RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 63 (4th ed. Supp. 2001).

guiding principle in election cases."[26] This passage, along with several other references to the right to vote, proved a source of controversy in the argument of the appeal before the United States Supreme Court.[27] Irrespective of its potential reference to the Florida Constitution, the passage does reflect the Florida Supreme Court's adoption of a purposive, rather than a strictly textual, approach. In avowing its fealty to legislative intent, the Florida Supreme Court noted that plain meaning provided the best indication of legislative intent.[28] The court, however, found too much ambiguity to allow a plain meaning approach.

Bush v. Gore reflected the tension between the textualism of the concurrence and the purposivism of the Florida Supreme Court. The decision focused on the fate of "undervotes," ballots that did not register a vote when processed by the tabulating machines. Some of these undervotes had marks, such as "hanging" or "dimpled" chads, that might have been an indication that the voter intended to vote for a particular candidate. The dispute turned in large part on whether to count such undervotes from which the voter's intent might be discerned. In addressing this question, the Florida Supreme Court did engage in textual analysis. However, the court made clear that it sought to follow the overall policy embodied in the statutes, not just the language of each particular section. The court's approach accorded with its earlier decisions, which had endorsed purposivism. In *State v. Webb*, for example, the court stated, "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute."[29] In this instance, the Florida Supreme Court insisted that the election code, taken as a whole, reflected a legislative mandate to count every vote.[30] This view of legislative policy guided the court's decision that for purposes of the

26. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227 (Fla.) (per curiam), *vacated per curiam sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1046 (2000).

27. Tr. of Oral Argument, Dec. 1, 2000, at 16, 56–61, 73, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), *available at* 2000 U.S. Trans LEXIS 70. After the remand from the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*, the Florida Supreme Court reissued its judgment in an opinion similar in most respects to its initial opinion. However, the revised opinion omitted the passage exalting the "will of the people" over the "hyper-technical" reliance on the statutory language. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1227 (per curiam).

28. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1234 (per curiam).

29. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

30. *See* Gore v. Harris, 772 So. 2d 1243, 1254 (Fla.) (per curiam), *rev'd per curiam sub nom.* Bush v. Gore, 531 U.S. 98 (2000) ("The clear message from this legislative policy is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.").

contest statute, the term "legal vote" should be interpreted broadly to include any ballot from which the voter's intent could be discerned.[31] That determination led to the conclusion that the voting machines had failed to count many "legal votes." Accordingly, the court ordered a manual count.

The concurrence of Chief Justice Rehnquist rejected this interpretation. His concurrence insisted that undervotes occurred because voters failed to mark their ballots correctly and that improperly marked ballots could not be considered "legal votes." The Chief Justice did not expressly deprecate the Florida Supreme Court's reliance on overall legislative purpose. The Chief Justice, however, did imply that the Florida court had undervalued the statutory text. He asserted that "there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows."[32] The controversy surrounding the import of section 101.5614(5) of the Election Code illustrates the division between the concurrence and the opinion of the Florida Supreme Court. That section apparently relates to the counting of ballots that cannot be tabulated by machine because they are "damaged or defective." The section declares that "[n]o vote shall be declared invalid" if the intent of the voter can be ascertained.[33] In his dissent in the Florida Supreme Court, Chief Justice Wells insisted that section 101.5614(5) applied only in cases of "damaged or defective" ballots and could not support the majority's decision to count all undervotes.[34] Chief Justice Rehnquist's concurrence echoed the assertion that section 101.5614(5) was "entirely irrelevant."[35] From the perspective of the Florida Supreme Court, however, the section was extremely relevant to clarify the legislative policy. The Florida Supreme Court relied on section 101.5614(5), together with section

31. *See id.* at 1256–57 (per curiam).

32. Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring).

33. FLA. STAT. ch. 101.5614(5) (2001) (amended 2002) ("No vote shall be declared invalid or void if there is a clear indication on the ballot that the voter has made a definite choice as determined by the canvassing board.").

34. Gore v. Harris, 772 So. 2d at 1267 (Wells, C.J., dissenting).

35. *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

101.5614(6)[36] and section 102.166(6),[37] to derive the overall statutory purpose to count every ballot from which the intent of the voter could be ascertained.[38] That policy informed the interpretation of the contest statute, even if section 101.5614(5) did not itself apply.

Some commentators have claimed that the Florida Supreme Court did properly interpret the text of section 101.5614(5) and that it was Chief Justices Wells and Rehnquist who misread the statutory language.[39] It is clear, though, that whether successful or not, Chief Justice Rehnquist attempted a textual assault on the Florida Supreme Court's opinion.[40] He focused on the state court's reading of the statutory language, and he ignored the Florida Supreme Court's arguments based on statutory purpose. It was this text-based approach that supported the concurrence's attack on the Florida Supreme Court's interpretation as

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36. Section 101.5614(6) states:

> If an elector marks more names than there are persons to be elected to an office or if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office, but the ballot shall not be invalidated as to those names which are properly marked.

FLA. STAT. ch. 101.5614(6) (2001).

37. Procedures for a manual recount are as follows:

> (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
>
> (b) If a counting team is unable to determine whether the ballot contains a clear indication that the voter has made a definite choice, the ballot shall be presented to the county canvassing board for a determination.

FLA. STAT. ch. 102.166(6) (2001).

38. *See* Gore v. Harris, 772 So. 2d at 1256–57 (per curiam) (finding that sections 101.5614(5), 101.5614(6), and 102.166(6) indicate a "legislative policy . . . that every citizen's vote be counted whenever possible"); *id.* at 1256 (per curiam) (relying on these sections to discern a "legislative emphasis on discerning the voter's intent"); *see also Bush*, 531 U.S. at 131 (Souter, J., dissenting) (asserting that the Florida Supreme Court found in section 101.5614(5) the "objective" of looking to the voter's intent and used that "objective" to guide its interpretation of "legal vote").

39. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1425 (2001) ("When one actually works through the complaints that Rehnquist makes about the Florida Supreme Court, it becomes clear that his own interpretations are not superior to theirs; in some cases his readings are markedly worse."); Laurence H. Tribe, eroG .v hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 199 (2001) ("Chief Justice Rehnquist adopted this objection wholesale without any independent analysis of the statutory text.").

40. *See* Tribe, *supra* note 39, at 199 (discussing the "text-based criticism of the Florida Supreme Court's reading of the statutory language").

"absurd"[41] and "peculiar"[42] and one that "no reasonable person"[43] could share.[44]

II. THE CONCURRENCE'S SUPPORT FOR THE ARTICLE II THEORY

Chief Justice Rehnquist's concurrence advanced a robust reading of Article II, combined with an aggressive approach to reviewing state courts' interpretations of state laws. The concurrence understood Article II to establish a federal rule that prohibited state courts from adopting unreasonable interpretations of state presidential election codes.[45] At the same time, the concurrence undertook an independent evaluation of state law, with a heavy emphasis on textualist modes of interpretation.[46] This part reviews the bases for the concurrence's approach. I contend that neither the language of Article II, nor the limited cases prior to *Bush v. Gore* interpreting Article II, supports the concurrence. Other precedents do provide a foundation for federal courts to undertake independent interpretation of state law so as to prevent state courts from frustrating legitimate expectations. These cases also bolster the use of textualist modes of interpretation. On closer examination, however, these cases differ in significant ways from *Bush v. Gore* and serve to highlight the weaknesses of the concurrence's argument.

A. Text and Article II Precedent

For its understanding of Article II, the concurrence relied primarily on the text of the "manner directed" clause and on the obscure precedent of *McPherson v. Blacker*.[47] These sources offer little support to the concurrence.

The concurrence placed great weight on the language of Article II, stating that "Article II, § 1, cl. 2, provides that '[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors

41. *Bush*, 531 U.S. at 119 (Rehnquist, C.J., concurring).

42. *Id.* (Rehnquist, C.J., concurring).

43. *Id.* (Rehnquist, C.J., concurring).

44. *See* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 721 (2001) (noting the conflict between purposivism of the Florida Supreme Court and textualism of Chief Justice Rehnquist's concurrence); *see also* Epstein, *supra* note 10, at 635 ("Any Article II attack on the decision of the Florida Court would itself be quite unintelligible if statutory text did not limit, and limit sharply, the range of interpretive options open to a court.").

45. *Bush*, 531 U.S. at 119 (Rehnquist, C.J., concurring).

46. *Id.* (Rehnquist, C.J., concurring).

47. McPherson v. Blacker, 146 U.S. 1 (1892).

for President and Vice President."[48] The concurrence seemed to view this language as an unambiguous grant of special authority to the state legislature. As commentators have argued, that meaning is certainly not self-evident.[49] The clause could constitute a reference to state law, as that law commonly is made, involving the usual interplay of state statutes, the state constitution, and judicial interpretations. The United States Supreme Court previously adopted such an interpretation of similar language in Article I, Section 4 of the Constitution. That provision states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."[50] In *Smiley v. Holm*,[51] the United States Supreme Court expressly rejected the idea that this language endowed the state legislature with special authority.[52]

However, the concept that the constitutional reference to the "legislature" entails special legislative prerogative does carry some precedential support. In the context of state ratification of constitutional amendments, the United States Supreme Court has found a direct grant of authority to the state legislature. Under Article V, one method of ratifying constitutional amendments is approval by "the Legislatures of three fourths of the several States."[53] In two cases in the 1920s the Court rejected state-law challenges to the validity of legislative ratification. The Court emphasized the distinction between ratification and legislation, and it asserted that ratification represented an exercise of a federal function that could not be impeded by other state-law provisions.[54] One can argue that in selecting presidential electors, the state legislature performs a federal function analogous to its role in ratifying constitutional amendments. On the other hand, unlike ratifying constitutional amendments, setting procedures for presidential

48. *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (alteration in original) (quoting U.S. CONST. art. II, § 1, cl. 2).

49. *See* Schapiro, *supra* note 23, at 665–69; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 743–58 (2001) (discussing the original understanding of the Article II independent legislature doctrine).

50. U.S. CONST. art. I, § 4, cl. 1.

51. Smiley v. Holm, 285 U.S. 355 (1932).

52. *See id.* at 367–69 ("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."). In an earlier case, litigants had claimed that subjecting a legislative reapportionment plan to a popular referendum violated Article I, Section 4. The Supreme Court rejected the challenge on justiciability grounds. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916).

53. U.S. CONST. art. V.

54. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922); Hawke v. Smith, 253 U.S. 221, 229–31 (1920).

elections appears to be a traditional act of legislation, more akin to setting the time, place, and manner for selecting representatives to the United States Congress.[55] In any event, the language of Article II certainly does not compel the plenary power interpretation advanced by the concurrence.

The main case addressing the "manner directed" clause, *McPherson v. Blacker*, offers no firm guidance on the scope of state legislative authority.[56] Some passages in the opinion suggest the existence of special legislative power in designating how presidential electors will be chosen.[57] Other passages offer contrary indications.[58] The strongest support for the plenary power position appears in a Senate Report, quoted in *Blacker*, which analyzes a proposed constitutional amendment designed to reform the presidential election system.[59] The Senate Report posits broad state legislative authority as part of its argument for the necessity of a constitutional amendment to remedy the defects of the Electoral College.[60] In this context, the language of the Senate Report offers neither precedential nor especially persuasive support for the plenary power theory.

Judge Posner, a chief advocate of the Article II theory of the concurrence, has candidly acknowledged the tepid support for this theory in text and precedent: "The interpretation that I am suggesting is not compelled by case law, legislative history, or constitutional language."[61] If the case law of Article II and similar constitutional provisions lend little support to the concurrence's approach, what about other areas of law? As the next section discusses, in certain instances federal courts have scrutinized state courts' interpretations of state law and have indeed emphasized a textual approach. On closer

55. *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."); *see also* Schapiro, *supra* note 23, at 668–69 (reviewing arguments).

56. *See* McPherson v. Blacker, 146 U.S. 1 (1892).

57. *See, e.g.*, *id.* at 27 (asserting that the United States Constitution "leaves it to the legislature exclusively to define the method" of selecting presidential electors); *id.* at 35 (referring to the "plenary power of the state legislatures in the matter of appointing electors").

58. *See, e.g.*, *id.* at 25 ("The legislative power is the supreme authority, except as limited by the constitution of the state . . . ."); *id.* at 33 (indicating that in Colorado the state constitution set the manner for selecting presidential electors).

59. *See id.* at 35 (quoting S. REP. NO. 43-395, at 9 (1874)) ("This power [to choose presidential electors] 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 . . . .").

60. S. REP. NO. 43-395, at 9 (1874).

61. POSNER, *supra* note 6, at 156.

examination, though, these cases do not support the kind of review adopted by the concurrence in *Bush v. Gore*.

B. Textual Review of State Court Decisions

In support of its interpretive approach, the main precedents on which the concurrence relied were *Bouie v. City of Columbia*[62] and *NAACP v. Alabama ex rel. Patterson*.[63] These cases do indeed fit into a discernable group of decisions in which the Supreme Court has refused to be bound by state court constructions of state statutes, when these interpretations deviate substantially from the statutory text. Such cases, however, all fit into a particular template: They involve individuals who are prejudiced by relying, to their detriment, on clear legal guidelines. The federal courts understand fundamental principles of due process to safeguard these legitimate expectations. The Supreme Court has held that citizens have a right to rely on the law as it exists and that they should not suffer as a result of such reasonable reliance.[64] Enforcing this doctrine requires federal scrutiny of state law. The cases stand for the general principle that one should be able to trust the government, that due process prohibits a governmental "bait and switch." After reviewing the different substantive areas in which these due process principles find elaboration, the contrast to *Bush v. Gore* becomes apparent.

1. *Bouie* and Fair Notice

Bouie v. City of Columbia, decided by the United States Supreme Court in 1964, concerned the criminal prosecution of civil rights protestors demonstrating against a racially segregated lunch counter.[65] To affirm the convictions of the protestors, the South Carolina Supreme Court had adopted a new construction of a criminal trespass statute.[66] The United States Supreme Court held that the state court could not retroactively alter its criminal laws in a way that deprived the defendants of fair notice.[67] The United States Supreme Court emphasized that the South Carolina court's construction of the law

62. Bouie v. City of Columbia, 378 U.S. 347 (1964).

63. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

64. *See infra* text accompanying notes 65–100 (discussing *Bouie* and the election cases); *see also* Reich v. Collins, 513 U.S. 106, 111 (1994) (holding that due process prohibited states from engaging in "bait and switch" by revoking post-deprivation remedy after opportunity for pre-deprivation relief had passed).

65. *Bouie*, 378 U.S. at 347.

66. *Id.* at 356–57.

67. *Id.* at 361–63.

diverged from the statutory text.[68] Indeed, the Court endorsed textualism as a preferred method for construing criminal statutes.[69] In support of this interpretive approach, the Court quoted from Chief Justice John Marshall's opinion in *United States v. Wiltberger*[70]: "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."[71]

NAACP v. Alabama ex rel. Patterson presented an analogous instance of detrimental reliance.[72] The case concerned a contempt citation against the NAACP for refusing to divulge its membership lists.[73] 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.[74] The Supreme Court emphasized the "justified reliance" of the NAACP on a prior course of appellate practice.[75] The case presented an especially appropriate context for federal scrutiny of state law. Under the United States Supreme Court's jurisdictional doctrine, the Court may not review a state judgment resting on independent and adequate nonfederal grounds.[76] The question whether an asserted state-law basis for a judgment constitutes an independent and adequate foundation clearly presents a federal issue.[77] The Court answered this federal question by reference to principles of fair notice and justifiable reliance.[78]

The civil rights setting of *Bouie* and *Patterson* served to elicit skepticism about the fair application of state law.[79] Later cases shared

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68. *See id.* at 356.

69. *See id.* at 359–60.

70. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820)

71. *Bouie*, 378 U.S. at 362–63 (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 96) (internal quotation marks omitted).

72. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

73. *Id.* at 451.

74. *See id.*

75. *Id.* at 457–58.

76. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874).

77. *See* Howlett v. Rose, 496 U.S. 356, 366 (1990); Henry v. Mississippi, 379 U.S. 443, 447 (1965); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4021 (2d ed. 2002).

78. *Patterson*, 357 U.S. at 454–58.

79. *See* Bush v. Gore, 531 U.S. 98, 150 (2000) (Breyer, J., dissenting); 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) (discussing the Supreme Court's reconsideration of state court decisions).

this concern about potential judicial vindictiveness.[80] In addition to concerns about state court impartiality, the principle of fair notice remains an essential element of the *Bouie* doctrine.[81]

2. Election Cases and Detrimental Reliance

The election context itself provides another example of due process protecting justified reliance. In various election cases, lower federal courts scrutinized state law to determine the legitimate expectations of voters. The courts examined state law to see if voters were misled.[82]

In *Roe v. Alabama*,[83] the Court of Appeals for the Eleventh Circuit addressed a disputed Alabama election. The controversy arose from absentee ballots that did not comply with statutory requirements.[84] The Eleventh Circuit initially certified to the Alabama Supreme Court the question whether the disputed absentee ballots should be counted as a matter of state law.[85] The Alabama Supreme Court decided that the ballots should be counted even if they were not in technical compliance with the law.[86] The Eleventh Circuit then ordered the federal district court to hold a hearing to make findings of fact on the question whether the state law, as declared by the Alabama Supreme Court, comported with prior practice in Alabama elections.[87] After receiving extensive evidence, the federal district court concluded that counting the ballots would deviate from prior practice.[88] The district court further held that such a deviation violated the Due Process Clause.[89] The Eleventh Circuit affirmed.[90] In explaining the constitutional violation, the

80. *See* Krent, *supra* note 79, at 74 (surveying recent appellate court decisions addressing *Bouie* claims).

81. In a recent case addressing a *Bouie* question, the Justices were divided over the application of the doctrine but agreed that fair warning to the defendant was the key *Bouie* concern. *See* Rogers v. Tennessee, 532 U.S. 451, 459 (2001); *id.* at 469–70 (Scalia, J., dissenting); *id.* at 481–82 (Breyer, J., dissenting).

82. The following discussion draws on the analysis of Professor Pildes. *See* Pildes, *supra* note 44, at 702–06 (discussing the issue of "new law" that sometimes arises during elections and in election disputes).

83. Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995) [hereinafter *Roe III*]; Roe v. Alabama, 52 F.3d 300 (11th Cir. 1995) [hereinafter *Roe II*]; Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) [hereinafter *Roe I*].

84. *Roe I*, 43 F.3d at 578.

85. *Id.* at 582.

86. Roe v. Mobile County Appointment Bd., 676 So. 2d 1206, 1226 (Ala. 1995), *overruled on other grounds by* Williamson v. Indianapolis Life Ins. Co., 741 So. 2d 1057 (Ala. 1999).

87. *Roe II*, 52 F.3d at 301–03.

88. Roe v. Mobile County Appointing Bd., 904 F. Supp. 1315, 1318–34 (S.D. Ala.), *aff'd sub nom. Roe III*, 68 F.3d 404 (11th Cir. 1995).

89. *Id.* at 1335.

90. *Roe III*, 68 F.3d at 409.

Eleventh Circuit emphasized that if voters had known that they did not need to comply with statutory formalities, they might have been more likely to cast absentee ballots.[91] Given this focus on the expectations of voters, the court emphasized the importance of the plain text of the election code, as well as consistent administrative interpretation that confirmed this textualist interpretation: "We consider it unreasonable to expect average voters and candidates to question the Secretary's, the Attorney General's, and the election officials' interpretation and application of the statute, especially in light of its plain language."[92] In the face of this established administrative construction, candidates and voters were entitled to rely on the language of the statute.[93] The Due Process Clause protected against this kind of detrimental reliance.[94]

In *Griffin v. Burns*,[95] the Court of Appeals for the First Circuit intervened in a state election dispute to protect the justified reliance of voters. The controversy again focused on absentee ballots.[96] In *Griffin*, following prior practice, state officials had offered absentee ballots in a primary election.[97] After the election, the state court invalidated those ballots, interpreting the state election law as authorizing absentee voting only in general elections.[98] The First Circuit held that this change frustrated the legitimate expectations of voters, who relied on the representations of state officials that they could vote absentee.[99] The court noted that the text of the statute did not contradict this established practice: "The statute on its face did not prohibit such ballots . . . ."[100]

Roe and *Griffin* illustrate the federal principle of protecting the legitimate expectations of voters. In keeping with the perspective of the average voter, the cases look to the text of the election statute, as well as to prior administrative practice.

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91. *Roe I*, 43 F.3d 574, 582 (11th Cir. 1995) ("We believe that, had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and supporters of [other candidates] who did not vote would have voted absentee.").

92. *Id.* at 581.

93. *Id.* at 581-83.

94. *Id.* at 580.

95. Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978).

96. *Id.* at 1067.

97. *Id.*

98. *Id.* at 1068.

99. *Id.* at 1076.

100. *Id.* at 1075.

C. *Detrimental Reliance and the External Perspective*

The cases discussed above share a related set of factors that might be denominated as doctrinal, institutional, and interpretive. From a doctrinal perspective, the cases all recognize principles of reasonable reliance on an understanding of the state of the law. The decisions focus not so much on the correctness of state court rulings, as on their predictability. Would a citizen have understood the law to be that declared by the state court? Given this perspective, the institutional role of the federal courts as external to the state court system is not a hindrance. The federal courts' potential unfamiliarity with state law does not undermine, and indeed might enhance, the protection of individuals' reasonable expectations of governmental conduct. These doctrinal and institutional factors underlie the courts' interpretive emphasis on statutory text.

Bouie and the election cases focus on judicial decisions that frustrate justified expectations.[101] Detrimental reliance constitutes an essential element of all of them. The core concept appears central to any system characterized by the rule of law. Certainly, the idea that government should not engage in a "bait and switch" scheme and the fear that governments may be tempted to do so are well rooted in our constitutional tradition. The contracts and ex post facto clauses[102] establish specific prohibitions against such conduct, and the Due Process Clause recognizes a more general principle that citizens should be able to organize their lives in reliance on justifiable expectations.

In keeping with this substantive concern of honoring legitimate expectations, the perspective that the cases adopt is what might be called an external perspective, the perspective of a citizen who has a right to rely on the law. In *Bouie*, the question was whether people could have been expected to know that their conduct was illegal.[103] In the election decisions, the question was whether people could have been expected to know what kinds of ballots would be counted.[104] In these cases, the federal courts generally defer to state court declarations of the current content of state law. From the perspective of the federal due process inquiry, the key question is not what state law is, but what people could believe state law to be. It is these legitimate expectations that the federal courts protect through the Due Process Clause. The

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101. *See supra* Part II.B (discussing *Bouie* and the election cases).

102. "No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

103. Bouie v. City of Columbia, 378 U.S. 347, 349–51 (1964).

104. *See* Bush v. Gore, 531 U.S. 98, 103–06 (2000) (per curiam).

cases do not challenge the role of state courts as the definitive expositors of state law. The federal courts do not sit as super-appellate courts on matters of state law, second-guessing the interpretations of state courts. The federal courts accept the state courts' construction of state law and ask instead whether applying that law would frustrate citizens' legitimate expectations. In this way, the federal courts adopt a perspective external to the state court system, the perspective of the reasonable person. The federal courts determine what people could reasonably believe the law to be, and then they assess the difference between those expectations and what state law actually is—as definitively declared by the state courts.

This external perspective provides institutional support for the federal courts' intervention. State courts will generally be more familiar with state law. The federal courts' relative lack of familiarity with state law might counsel hesitation before a federal court rejects a state court's resolution of a state-law issue. When the question is not what state law is, but what it could be understood to be, the situation changes dramatically. In divining the expectations of the average citizen, the federal court's potential unfamiliarity with state law poses no obstacle. Standing outside of the state legal system may help, or at least not hinder, the exploration of the question of reasonable reliance on state law.

This external perspective also undergirds the courts' concern with statutory text. The words of a statute provide one important index of the justifiable expectations of citizens. Scholars have debated whether a formalist, plain meaning approach to interpretation is a better way to ensure predictability in the law than a purposive approach.[105] Regardless of one's position in this debate, the arguments for plain meaning are certainly stronger when the perspective is the reliance interest of the average citizen. Even scholars who question whether plain meaning generally enhances predictability agree that the arguments for plain meaning have the most force in statutes addressed to individuals, rather than to governmental bodies.[106] Administrative

105. *See, e.g.*, Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 552–53 (1992) (arguing that formalism provides citizens with greater legal stability); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 581–82 (1992) (contrasting statutes that are directed largely to governmental actors with those that apply to both government and private citizens); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 732 (1992) (discussing plain meaning interpretations).

106. *See* Rubin, *supra* note 105, at 585–86 (noting the importance of giving words their ordinary meaning in a statute that speaks directly to private persons); *see also* Farber, *supra* note

agencies and other repeat players can rely on understandings of legislative purpose developed over time. Citizens, however, might have more difficulty in ascertaining purpose. The textualist approach may also be easier to employ for courts not immersed in state law. Given the outsider perspective, it might be difficult for federal courts to apply an interpretive framework requiring reference to broader sources. As Frederick Schauer, one scholar of statutory interpretation, has observed, "Context is not for dabblers . . . ."[107]

D. Distinguishing Bush v. Gore

These doctrinal, institutional, and interpretive concerns place *Bush v. Gore* outside the context of *Bouie* and the election cases. The factors that supported federal court scrutiny of state law in those cases do not apply in *Bush v. Gore*. The prior decisions do not support the kind of intrusive federal review undertaken by the concurrence.

Whatever one thinks of the Florida Supreme Court's ordering of a statewide recount, that decision did not present an instance of detrimental reliance. Decisions about whether to hold a recount could not frustrate the legitimate expectations of voters. One could imagine arguments for reliance, such as a Florida voter claiming, "When I saw that my ballot had hanging chads, I knew the machine would not count it. So I threw it out and did not revote"; or, "I tried to detach the hanging chads. In so doing, I accidentally damaged the ballot and did not bother to revote." Perhaps a party representative could argue, "We spent resources educating voters to make sure that their chads were fully detached. If we had known that ballots not readable by machine would be counted, we would have spent our money getting votes in other ways." One could imagine such arguments, but one could not imagine making such arguments in court with a straight face. No voters or parties could claim that in their pre-election conduct, they acted in reliance on a contrary interpretation of the Florida election statutes. No one could credibly cry "bait and switch."

Unlike the federal courts in *Bouie* and the election cases, the concurrence in *Bush v. Gore* did not adopt an external perspective. The concurrence did not merely give its opinion on what a reasonable voter might have understood the law to be. Rather, the concurrence sought to overrule the Florida Supreme Court's interpretation of the current state

105, at 552–53 (discussing the argument that formalism in statutory construction provides greater legal stability).

107. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 253.

of Florida law.[108] The concurrence did not contend that a change in law tricked the voters. Instead, the concurrence asserted that the Florida Supreme Court just got the law wrong.[109] For the concurrence, Article II meant that the United States Supreme Court, not the Florida Supreme Court, was the authoritative interpreter of the state statute.[110]

In this context, the textual approach to statutory construction enjoys no special priority. Once one departs from the perspective of the reasonable voter, arguments for the plain meaning approach weaken. The election contest statute is addressed to other governmental bodies, not to individual citizens. Further, the institutional position of the federal courts now becomes a major hurdle. When the case turns directly on the interpretation of state law, rather than on the expectation of citizens, the federal courts' potential unfamiliarity with state law poses substantial obstacles. The concurrence created this kind of difficult interpretive problem for itself. Of course, federal courts often must interpret state law. In this instance, though, the concurrence eschewed the usual polestar for such a federal voyage—the contemporaneous construction by the state's highest court. The course that the concurrence charted was especially difficult because of its interpretation of Article II as creating a *sui generis* issue of statutory construction. The concurrence understood the "manner directed" clause as prohibiting reliance on the state constitution or other external sources of interpretive guidance. The concurrence thus set out to answer a question that had never before arisen.

III. A COMMON LAW OF STATUTORY CONSTRUCTION

Part II argued that the concurrence's approach to state law does not find support in the Court's *Bouie* or election cases. These decisions did undertake federal scrutiny of state law and even endorsed a textual approach. The circumstances of these cases, however, differed greatly from those in *Bush v. Gore*. The lack of detrimental reliance distinguishes the situations and removes an essential pillar in the textualist argument. The question remains whether the concurrence's interpretive premises can find some other conceptual foundation. This section explores and rejects two other possibilities, state law and a common law of interpretation.

One source of interpretive guidance could be the law of Florida. One might assume that, absent some clear indication, the legislature intended

108. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

109. *Id.* at 118–22 (Rehnquist, C.J., concurring).

110. *Id.* at 112–13 (Rehnquist, C.J., concurring).

courts to interpret presidential election statutes as they interpret other statutes. The concurrence did not make this assumption. Florida law does not express a clear preference for textual modes of interpretation. Rather, Florida cases suggest that purposive approaches may be appropriate.[111] Perhaps reference to the state courts' interpretive approach fails because the state courts have arrogated too much power to themselves. During the oral argument in *Bush v. Palm Beach County Canvassing Board*,[112] Justice Scalia suggested that the state legislature should not be deemed to have acquiesced to review under the state constitution.[113] Justice Scalia implied that the legislature accepted judicial review only because usually it had no choice.[114] However, under the plenary power theory, legislatures enjoy special immunities with regard to presidential election laws. Generally accepted principles of judicial review, Justice Scalia indicated, should not be applied to this unusual area of legislative supremacy.[115] Similarly, one could argue that judicially fashioned rules of interpretation should not be applied to this area.

If interpretive principles developed by Florida courts are rejected, then what rules should apply? Of the various modes of statutory construction, why should the United States Supreme Court insist on a textual approach? If honoring the intent of the legislature constitutes the key criterion, textualism is not the leading candidate. Textualism might not be the best way to discern the intent of legislature. As I have discussed elsewhere, textualism often is contrasted with other modes of interpretation that focus more directly on the intention of the legislature.[116] Textualism also functions as a mode of disciplining the legislature, of forcing it to act more responsibly. Whatever the merits of such a disciplinary approach, it hardly seems to follow from the postulate of plenary legislative power.

The concurrence did not explicitly address the issue of choosing a particular interpretive approach. Instead, it appeared to assume a common mode of interpretation. Like federal courts before *Erie*, the

111. *See, e.g.*, State v. Webb, 398 So. 2d 820, 824 (Fla. 1981) ("It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute.").

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

113. Tr. of Oral Argument, Dec. 1, 2000, at 66–67, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), *available at* 2000 U.S. Trans LEXIS 70.

114. *Id.*

115. *Id.*

116. *See* Schapiro, *supra* note 23, at 686–87 (noting that the application of a textualist approach might entail "contravening the intent of the enacting body in a specific instance").

concurrence proceeded as if some general common law of interpretation existed. The concurrence showed no awareness of having to choose a particular method. Instead, it simply deployed textualism as an apparently natural, common approach. However, no general theory of statutory construction exists. Moreover, theories of statutory interpretation depend on conceptions of separation of powers. Separation of powers differs both among the states and between the states and the national government.[117]

The concurrence also relied on the principle of deferring to administrative agencies. Under this theory, the Florida Supreme Court should have been bound by the interpretation of the Secretary of State. Again, the concurrence seemed to assume some general principle of administrative deference. The concurrence did cite one opinion of the Florida Supreme Court.[118] That decision, however, did not establish a rigid principle of deference.[119] Nor is there some universal principle of administrative deference that stands as "a brooding omnipresence" over all American law.[120]

In sum, in its review of the decision of the Florida Supreme Court, the concurrence relied on general principles of interpretation. This approach hearkens back to the reign of *Swift v. Tyson*, when federal courts invoked general common law, rather than the law of a particular state, to decide certain nonfederal disputes.[121]

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117. For a discussion of the differences between separation of powers principles at the state and national levels, see Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998).

118. *See* Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring) (citing Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844 (Fla. 1993)).

119. *See Take Back Tampa Political Comm.*, 625 So. 2d at 844 ("[A]lthough not binding judicial precedent, advisory opinions of affected agency heads are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency of government."); *see also* Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 850–51 (2001) ("[T]he issue of how much deference the judiciary owes to administrative interpretations of law is as elusive in Florida law as it is in federal law."); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1743 & n.113 (2001) (noting the "generally uncertain standard of judicial deference to agency legal interpretations called for by Florida administrative law"). I am grateful to Louis Michael Seidman for bringing this issue to my attention.

120. *Cf.* Tribe, *supra* note 39, at 205 (criticizing Richard Posner's account of the litigation for assuming some generalized principles of administrative law that stand as "a brooding omnipresence in some technocratic world").

121. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

IV. THE CONCURRENCE'S SWIFTIAN APPROACH

The concurrence evidences the spirit of *Swift* not only in its assumption of a common law of statutory interpretation. The concurrence's approach to state law and its attitude toward state courts find close analogies in the decisions of federal courts in the pre-*Erie* period. During this era, 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.[122] Some pre-*Erie* cases protected the justified expectations of investors. For example, the federal courts generally did not feel bound by state court decisions that altered the law to the detriment of pre-existing creditors.[123] These kinds of cases, particularly the ones concerning municipal bond repudiations, guarded against detrimental reliance. The cases thus align with the *Bouie* and election decisions canvassed above.[124] The federal courts refused to interpret state law so as to bless "bait and switch" plans.[125] In other instances, though, federal courts refused to defer to state court decisions even in the absence of detrimental reliance.[126] These latter decisions stand as doctrinal forebearers of Chief Justice Rehnquist's concurrence.

A. *Detrimental Reliance: Bond Repudiation in the Pre-*Erie *Era*

In the *Swift* era, 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.[127] Such cases often arose as a result of the repudiation of municipal bonds. Many municipalities issued bonds that they hoped to repay through

122. *See* Michael G. Collins, *Before* Lochner*–Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1281–82 (2000) (noting that federal courts sometimes gave their own reading of state statutes, even absent state court decisions from which subsequent decisions deviated); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 118–22 (1998) (discussing the Supreme Court's refusal to follow several state court rulings).

123. R. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 73–75 (1977) (noting examples of how the federal courts have engaged in independent interpretation in statutory cases so as to protect the expectations of the parties).

124. *See supra* notes 65–99 and accompanying text (discussing *Bouie* and the election cases).

125. BRIDWELL & WHITTEN, *supra* note 123, at 73–75

126. *See generally id.* at 76–78; Gardner, *supra* note 122, at 118–22.

127. *See* Collins, *supra* note 122, at 1269–72 (discussing cases involving the Contracts Clause).

commercial development spawned by railroads. When the anticipated returns did not materialize, the issuers sought to avoid payment. The municipalities frequently argued that the bonds had been issued in violation of state law and were therefore void.[128] State courts often upheld these defenses.[129] Seeking a more hospitable forum, bondholders who lived out of state invoked the diversity jurisdiction of the federal courts in an attempt to collect. Siding with the creditors, the federal courts commonly refused to follow state court precedent voiding the obligations.[130]

In the classic case of *Gelpcke v. City of Dubuque*,[131] an out-of-state creditor sought payment on bonds issued to help fund railroad construction. The city defended on the ground that the state constitution prohibited the issuance. In a then recent case, the Iowa Supreme Court had construed the state constitution as voiding bonds of this nature.[132] The United States Supreme Court refused to follow this state court authority, asserting that it was not bound to follow the latest case, which deviated from prior state-court precedent. Justice Swayne memorably declared, "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."[133]

In *Gelpcke* and similar cases, the United States Supreme Court engaged in an independent interpretation of state law in order to protect the justified expectations of commercial parties. Indeed, one of the justifications for federal courts' generally deferring to state court constructions of state statutes was that the existence of statutory text put parties on clear notice that local rules, rather than general commercial law, applied to the transactions at issue.[134] In such circumstances, following state precedents would not frustrate legitimate expectations. Applying post hoc changes in state decisional authority, by contrast, would undercut justified reliance. Bondholders had a right to rely on the state of the law at the time the instruments were issued. Federal courts did not consider themselves bound to follow subsequent state court deviations. Cases like *Gelpcke* recognize the same kind of principle as *Bouie* and the election cases. In certain situations, federal

128. TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 58 (1981).

129. *Id.*

130. For a discussion of bond repudiation cases, see FREYER, *supra* note 128, at 58–61.

131. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).

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

133. *Gelpcke*, 68 U.S. (1 Wall.) at 206–07.

134. *See* BRIDWELL & WHITTEN, *supra* note 123, at 73.

courts may review state law to vindicate legitimate reliance interests. As discussed above, this tradition does not support the concurrence's review of state law in *Bush v. Gore*.

B. Non-detrimental Reliance Cases

Another line of cases from the *Swift* period provides a closer analogy to the concurrence's approach. In these cases, federal courts sometimes refused to abide by state courts' interpretations of state statutes and constitutions, even in the absence of prior contrary authority. In these instances, the federal courts safeguarded commercial rights more generally, rather than merely protecting against detrimental reliance.[135]

In the course of setting forth commercial law principles, federal courts closely scrutinized state courts' interpretations of state statutes and constitutions. The federal courts found justifications for not deferring to state courts if the state decisions did not cover the precise point at issue or if the decision could be interpreted as not actually an exercise of statutory construction.[136] That is, the federal courts insisted that only if the state court were really interpreting the statute, rather than relying on general law, did its conclusion merit deference. In *Findlay's Executors v. Bank of the United States*,[137] for example, the federal court addressed a state statute that previously had been interpreted by the Ohio Supreme Court. In explaining its refusal to follow the state court's construction of the statute, the federal court emphasized the state court's reference to the "spirit" of the statute.[138] The federal court quoted the state court's statement that "although this case, as it now stands, is not within . . . [the] letter [of the statute], it is within its spirit."[139] Because the state court's construction failed to heed the "letter of the statute," the federal court declined to follow it.[140]

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135. *See* Watson v. Tarpley, 59 U.S. (18 How.) 517 (1855); Collins, *supra* note 122, at 1281, 1301 (noting that federal courts would ignore a state court's reading of a previously unconstrued statute if it upset settled contractual expectations).

136. For a discussion of situations where federal courts would not defer to state courts' interpretations of state statutes, see ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 563–65 (1928).

137. Findlay's Ex'rs v. Bank of the United States, 9 F. Cas. 62 (C.C.D. Ohio 1839) (No. 4791) (McLean, Circuit Justice).

138. *Id.* at 65.

139. *Id.* (quoting Dixon & Hawke v. Ewing's Adm'rs, 3 Ohio 280, 281 (1827) (internal quotation marks omitted)).

140. *Id.* ("This decision rests upon general principles, and not upon the construction of a statute. If it involved the construction of a statute of the state, it would, under our practice, constitute a rule of decision for this court."); *see also* Collins, *supra* note 122, at 1280 & n.87 (citing sources).

The invocation of general common law often had the effect of protecting commercial interests from unfavorable state court decisions. In this manner, general common law in the *Swift* era functioned like substantive due process in the *Lochner* era. Both doctrines allowed the federal courts to protect businesses from state regulation.[141] *Lochner* protected against legislative activism, while *Swift* protected against judicial activism. Indeed, some scholars have argued that the development of general common law under *Swift* provided an important foundation for the growth of doctrines concerning economic due process.[142]

C. Bush v. Gore *and the Return of* Swift

The Article II theory advanced by the concurrence in *Bush v. Gore* exhibits striking similarities to the approach employed by the United States Supreme Court during the reign of *Swift*. In terms of interpretive method, apparent motivation, and destabilizing effects, the concurrence follows closely in *Swift*'s footsteps.

As an initial matter, both the concurrence and *Swift* rely on ambiguous textual justification to derive special federal rules of hierarchy for nonfederal law. For *Swift*, the key text was the Rules of Decision Act, which commanded that federal courts treat as rules of decision the "laws of the several states."[143] *Swift* understood this language to require that federal courts defer to state courts with regard to the interpretation of local law, generally embodied in statutes or state constitutions, but not with regard to the interpretation of general common law.[144] The federal court's judgment as to the particular state-law ground for the decision thereby assumed tremendous significance.

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141. *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 62 (1992) ("The federal common law and substantive due process were obverse sides of the same coin of federal judicial activism and centralization, and they both seemed to make the federal courts the protectors of corporate interests."); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 701 (1999) (characterizing general common law under *Swift* as the "sibling" of economic due process under *Lochner*).

142. *See* Collins, *supra* note 122, at 1321 (discussing the ability of federal courts to rely on state constitutional provisions to protect property rights); Tony A. Freyer, *Brandeis and the Progressive Constitution:* Erie, *the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America*, 18 CONST. COMMENT. 267, 287 (2001) (book review) (arguing that the *Swift* doctrine "facilitated the rise of the pro-corporate due process constitutionalism associated with . . . *Lochner*").

143. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2000)).

144. *Swift*, 41 U.S. (16 Pet.) at 18–19.

As illustrated by such cases as *Findlay's Executors*,[145] federal courts differentiated between state court decisions that really construed statutes and those that merely cited statutes but rested on broader tenets. Only the former merited deference. So, too, the concurrence in *Bush v. Gore* treated Article II as creating a hierarchy of state law in presidential election cases. State courts remained the authoritative interpreters of state law only so long as their decisions rested on reasonable constructions of statutes, rather than relying on the state constitution or general principles of justice. Both *Swift* and Chief Justice Rehnquist's concurrence gave federal courts the duty to scrutinize state court interpretations of state law and license to reject those interpretations, depending on the source of state law.[146]

Further, the *Swift* doctrine and the concurrence both stemmed in part from distrust of activist state courts. Federal courts sitting in diversity functioned to protect commercial interests from unfriendly state court decisions.[147] The *Gelpcke* line of bond repudiation cases clearly offered a federal alternative to state courts that were seen as frustrating the justified expectations of creditors. Federal common law more generally functioned to establish reliable commercial principles not subject to state court manipulation. Similarly, as the dissent in *Bush v. Gore* pointed out, the Justices in the majority apparently did not have faith in the capacity of the Florida Supreme Court to give fair and reasonable interpretations of Florida law.[148] The concurrence's acerbic treatment of the state court's opinion suggests a skepticism about either the ability or the impartiality of the state judges.[149]

The Article II theory of the concurrence threatens to destabilize election law in the manner that ultimately contributed to the downfall of *Swift*. The *Swift* system hoped to achieve interstate uniformity in commercial matters. By instituting fair and predictable rules for business transactions, the federal courts could establish a national commercial code. Such a code would aid the developing national

145. *Findlay's Ex'rs*, 9 F. Cas. at 62; *see also supra* notes 138–40 and accompanying text (discussing Findlay's Executors v. Bank of the United States).

146. *Cf.* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 642 (2001) (commenting with regard to *Bush v. Palm Beach County Canvassing Board* and the concurrence in *Bush v. Gore* that "[p]erhaps not since *Erie v. Tompkins* overruled *Swift v. Tyson* has a decision turned so heavily on the question of the source of state law." (footnotes omitted)).

147. *See* FREYER, *supra* note 128, at 58; PURCELL, *supra* note 141, at 62–63.

148. *See* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (citing the majority's "endorsement" of the petitioners' "lack of confidence in the impartiality and capacity" of state judges who would supervise recount procedures).

149. *See id.* at 119 (Stevens, J., dissenting) (describing the Florida Supreme Court's interpretation as "absurd" and "peculiar" and one that "no reasonable person" could share).

economy. Local variance in basic principles of negotiable instruments or in other essential commercial matters threatened predictability and fairness.[150] To achieve interstate uniformity, *Swift* accepted intrastate variation. The law effectively governing a transaction would vary depending on whether a dispute was litigated in the state courts or federal courts of a given state. Litigants took tactical advantage of this lack of uniformity. They sought to structure disputes so as to place their cases in a particular court.[151] Rather than ensuring uniformity, then, *Swift* ultimately caused disparity in results based merely on the citizenship of the parties. In overruling *Swift*, *Erie* opted for intrastate uniformity. Nonfederal law would in theory be the same whether the suit was filed in state court or federal court. Access to diversity jurisdiction would not translate into access to a different substantive legal regime.

Like *Swift*, the Article II theory also seeks to achieve interstate uniformity at the cost of intrastate divergence. The concurrence established a federal rule governing the interpretation of presidential election codes. One can understand the national interest implicated in presidential election disputes.[152] However, as the Florida controversy illustrated, legislatures usually create general laws governing all elections. They do not create special procedures to control any possible dispute in presidential elections. The Article II theory fragments state election law into two categories. In presidential election disputes, and only in those disputes, state law operates with a federal overlay. The interpretive principles that apply in other election controversies do not necessarily apply in presidential elections. The Article II theory detaches presidential election disputes from general state court precedent. As presidential election disputes represent a minuscule fraction of all election disputes, the Article II approach leaves presidential election cases unmoored from substantial bodies of precedent. Presidential disputes always will be highly contentious and partisan. The best guarantee of fair adjudication comes from relying on well-established principles developed in less highly freighted controversies. Such principles may not always be available, but if they are, they should be welcomed. The concurrence, however, undermines the authority of any such precedents. Litigants can undercut prior authority by claiming it relies on sources, such as state constitutions or

150. *See* FREYER, *supra* note 128, at 40–41; PURCELL, *supra* note 141, at 63.

151. *See* FREYER, *supra* note 128, at 102; PURCELL, *supra* note 141, at 226–27.

152. For a discussion of the federal interests that are and are not implicated in state election procedures, see Schapiro, *supra* note 23, at 677–88.

unreasonable interpretations of state statutes, that federal law prohibits from influencing decisions in presidential disputes.

This deprecation of precedent would be perilous, but if it were confined to controversies involving presidential elections, the harm would be limited. Perhaps presidential election disputes will never be anything but *sui generis*. At least they will be rare. However, litigants might be able to manipulate claims in other election disputes to try to take advantage of an Article II argument. As a practical matter, some procedures must be uniform for all elections held at a particular time. The voting mechanism, the procedures for opening and closing polls, the process of identifying voters, and a myriad of other features must be unitary. Polling places would be hard-pressed to use one machine for presidential elections and another for all others. The Article II theory federalizes any state-law challenge to such procedures. Many state court decisions on voting issues could have an impact on presidential election practices. Under the theory of the concurrence, any such ruling would be subject to challenge as a distortion of the state legislature's command. The extent to which the state constitution could influence any election decision would be a matter of great confusion.

In the *Bush v. Gore* litigation, the courts interpreted the laws after the election, and each decision clearly benefited one side or the other. A veil of ignorance was no longer possible. Perhaps the temptation for judicial usurpation in such a situation motivated federal court intervention. Though such sentiments are understandable, they do not justify the Article II solution. First, the partisan effects of many decisions will be clear, or assumed to be so, even if made before elections. Witness the continual partisan sparring over the easing or tightening of the requirements for voting.[153] Further, some disputes will inevitably arise after an election. Having one body of law for pre-election disputes and another for post-election controversies would heighten legitimacy concerns. Most importantly, the Article II theory is not limited to post-election litigation. The plenary power arguments apply equally to challenges in any time frame. Under the Article II theory, any state court interpretation of the state election code that can affect presidential elections potentially raises a federal question. Indeed, while state court decisions could be challenged under the Article II theory only by appeal to the United States Supreme Court, the decisions of state administrative officials would presumably raise

153. *See, e.g.*, Robert Pear, *Senate Democrats Drop Voter Sign-In at Polls*, N.Y. TIMES, Mar. 2, 2002, at A11, *available at* LEXIS, News Library, The New York Times File (noting the "increasingly partisan" dispute about legislation setting identification requirements for voting).

federal questions conferring jurisdiction on the federal district courts. A litigant could thus challenge the decision made by any election official on the ground that it distorted the legislative command in a manner prohibited by Article II.

D. The Rehnquist Court and the Return of Swift

The analogy to the *Swift* era helps to illuminate the concern with state judicial activism apparent in Chief Justice Rehnquist's concurrence. From this perspective, *Bush v. Gore* illustrates a central theme of the Rehnquist Court. The concern for state judicial activism places *Bush v. Gore* in the position of paradigm, rather than anomaly, in the structure of the Court's current jurisprudence. Various commentators have accused the Court of adopting an anti-regulatory stance hearkening back to the *Lochner* period.[154] The Court's limiting of congressional power and scrutiny of certain exercises of administrative authority has restricted governmental power in a variety of respects.[155] As in the *Swift* period, however, state courts also have become targets of Supreme Court doctrine. With regard to preemption and punitive damages in particular, the Court has sought to limit the regulatory effect of state court decisions. The Court has federalized these areas in a manner reminiscent of its concern with state judicial activism in the pre-*Erie* period. The doctrine the Court employs has shifted. *Erie* marked the end of general common law. The Court now invokes a kind of federal common law that limits state court power directly. The new federal common law applies in state courts, not just in federal courts sitting in diversity.

1. Preemption of Common Law Decisions

Federal legislation may have express or implied preemptive force, limiting the ability of states to regulate conduct. In *Cipollone v. Liggett Group, Inc.*,[156] for example, the Court made clear that state-law tort suits, as well as state statutes or administrative regulations, could run into a preemption barrier. In *Cipollone* and later cases, the Court treated state tort judgments as a form of regulation, subject to federal

154. *See supra* note 14 and accompanying text (discussing the limited conception of government characteristic of the *Lochner* era).

155. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Morrison, 529 U.S. 598 (2000); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); United States v. Lopez, 514 U.S. 549 (1995).

156. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

preemption.[157] Though *Cipollone* suggested an attempt to limit preemption, later decisions have expanded the concept.[158] Cases such as *Geier v. American Honda Motor Company*[159] demonstrate that the Court will not hesitate to preempt state tort suits. Commentators have noted the tension between the Court's aggressive approach to federal preemption and its asserted concern for protecting state autonomy.[160] Preemption of state common-law tort actions provides a way for the Court to check perceived state court activism. The doctrine entails federal scrutiny of regulatory activity undertaken by state courts under state law.

2. Federal Law of Punitive Damages

Punitive damages awards by state courts also have attracted the attention of the United States Supreme Court. The Court has developed federal doctrines to limit awards of "excessive" punitive damages. In this area, the Court has found awards of punitive damages to constitute a kind of state regulation subject to federal oversight under the Due Process Clause.[161] *Bush v. Gore* thus resembles the other *Gore* case, *BMW of North America, Inc. v. Gore*.[162] Gore lost that one, too. In *BMW of North America, Inc. v. Gore*, the Court set aside a state court

157. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (finding certain common law claims preempted); *Cipollone*, 505 U.S. at 522–23.

158. *Compare Cipollone*, 505 U.S. at 517 (suggesting that implied preemption would not be found in statutes containing express preemption provisions), *with* Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995) (noting that an express preemption provision did not foreclose the finding of implied preemption), *and Geier*, 529 U.S. at 869 (same).

159. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

160. *See, e.g.*, Alexander K. Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence:* Geier v. American Honda Motor Co., 89 CAL. L. REV. 1927, 1943–47 (2001) (noting that *Geier* expands preemption in areas of traditional state control); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 526 n.203 (2002) (discussing the Supreme Court's "promiscuous use of 'conflict' and 'occupation of field' preemption").

161. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 717 (2002) ("[T]he Supreme Court's willingness to police the limits of punitive damages awarded under state tort law strongly suggests that, at least in some circumstances, the ghost of economic due process continues to haunt the pages of the United States Reports."). In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Supreme Court declined to fashion a federal common law rule of punitive damages applicable to suits in federal courts. *Browning-Ferris* did not raise the question of substantive review under the Due Process Clause of the Fourteenth Amendment. The excessiveness doctrine that the Court has developed in cases such as *BMW of North America, Inc. v. Gore* constitutes a kind of federal common law of punitive damages, rooted in the Constitution.

162. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

award of punitive damages in favor of Dr. Ira Gore, Jr.[163] The two *Gore* cases share a federal concern with state court applications of state law that may have broad effects on the polity and the economy. So too, both cases invoke quite modest textual support to justify federal intrusion into state-law based proceedings in state court.

V. CONCLUSION

Bush v. Gore illustrates the Rehnquist Court's concern about state court activism. Rehnquist Court opinions striking down governmental action frequently have gone forth under the label of federalism. The more pervasive theme, however, is limitation of all government, state and federal. Federalism often aligns with the concept of restricting governmental power. Holding federal legislation unconstitutional as exceeding the enumerated powers of Congress vindicates both federalist and anti-regulatory principles. When federal courts review exercises of state authority, however, the concept of state administrative integrity may conflict with the tenet of limiting governmental power. As the preemption and punitive damages cases illustrate, the Rehnquist Court does not hesitate to set aside state regulation it finds excessive,[164] even when the regulation is accomplished through judicial decision. *Bush v. Gore* presents another such example. The concurrence sought to federalize a body of law so as to counteract state court activism. In this regard, the concurrence, and the overall judgment, align closely with the themes of the Rehnquist Court. As the concurrence illustrates, however, this concern for federal scrutiny of state regulation also aligns closely with the themes of the *Swift* Court. In *Erie* and other decisions in the post-1937 period, the United States Supreme Court disavowed this federal supervision over state court construction of law. The Court would no longer displace state judicial interpretation as a means of restricting state regulatory authority. *Bush v. Gore* fits comfortably into the trajectory of the Rehnquist Court, and this fit indicates how far the Rehnquist trajectory has diverged from that of the modern post-New Deal Court.

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163. *Id.* at 583–86.

164. The takings doctrine represents another area in which the Rehnquist Court has restricted state regulatory authority. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 383–86 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1987); *see also* Krotoszynski, *supra* note 161, at 717 (noting the criticism of recent cases as an attempt "to transform the Takings Clause into a new source of *Lochner*-esque restrictions on federal and state health, safety, and welfare regulations").