Bush v. Gore, Federalism, and the Distrust of Politics

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The Supreme Court's per curiam decision in Bush v. Gore, *sparked a considerable amount of criticism and discussion. During this debate, many scholars have argued that the Court's decision was fundamentally incompatible with its previous federalism decisions. This article contends that this criticism is misplaced. It argues that while the per curiam opinion in* Bush v. Gore *decision embraced a novel and rather expansive understanding of equal protection that seems largely out of character for the Rehnquist Court, the Court's decision to intervene and resolve the election dispute was not inconsistent with its general approach to constitutional federalism.*

This article argues that the contention that the Bush v. Gore *decision is inconsistent with the core aspects of the Rehnquist Court's federalism jurisprudence is overdrawn in two important respects. First, it argues that to describe the Rehnquist Court's federalism decisions solely in terms of their solicitude for states political autonomy or "respecting states' rights" is too simplistic. Secondly, it argues that the* Bush v. Gore *decision is fully consistent with previous federal jurisprudence decisions that the Court should resolve any questions of constitutional meaning.*

I. INTRODUCTION

In *Bush v. Gore*,[1] the United States Supreme Court ended the legal dispute over the 2000 presidential election and effectively awarded the presidency to George W. Bush. In a per curiam opinion joined by five Justices, the Court reversed the December 8, 2000 judgment of the Florida Supreme Court that had ordered the manual counting of all "undervoted" ballots in the state.[2] The Court held that the procedures governing the manual count did "not satisfy the minimum requirement for nonarbitrary treatment of voters" under the Equal Protection Clause of the Fourteenth Amendment, leading to "unequal evaluation of ballots in various respects."[3] Specifically, the Florida Supreme Court had not specified a uniform standard for discerning the "intent of the voter"; some counties had manually counted both the overvoted and the undervoted ballots, while others were evaluating only the undervotes; and the certified vote total in at least one county included the results of a partially completed manual count.[4] The Court further held that, according Florida law, no election contest proceeding could continue past December 12, six days before the meeting of the Electoral College.[5] As the Court rendered its decision at 10 p.m. on December 12, Vice President Gore's contest of the certified vote totals could go no further, and Florida's twenty-five electoral votes were awarded to Bush.[6]

Although some commentators have defended the Court's analysis,[7] and a few others have defended the outcome,[8] most have denounced the decision as unprincipled and even lawless.[9] Criticisms have varied, but many are tinged with the accusation that the Court acted hypocritically.[10] The per curiam opinion embraced a novel application of the Equal Protection Clause to interfere with the traditional state function of running elections,[11] and the remedy that the Court ordered—ending the election contest—was based on its own interpretation of Florida election law, apparently encroaching on the Florida Supreme Court's authority to determine the meaning of Florida statutes.[12] Yet the five justices who joined that opinion have, on prior occasions, emphasized the importance of respecting "the autonomy, the decisionmaking ability, and the sovereign capacity of the States,"[13] and on that basis have declared several acts of Congress unconstitutional. The election decision's intrusion into "functions essential to [the separate] and independent existence" of the states,[14] many have suggested, is irreconcilable with the fact that "the Rehnquist Court has been built on the rock of respecting states' rights, not interfering with them."[15]

Whatever the merits of these criticisms on other grounds, the contention that *Bush v. Gore* is inconsistent with the core aspects of the Rehnquist Court's federalism jurisprudence is overdrawn in two important respects.[16] First, to describe the Rehnquist Court's federalism decisions solely in terms of their solicitude for states' political autonomy or "respecting states' rights" is too simplistic. Constitutional federalism has two sides: (1) the limits on Congress' powers, which protect the states from an overweening federal government, and (2) the limits on state power, which preserve federal supremacy where Congress is competent to regulate and protect the interests of the nation from parochial state interference.[17] To be sure, one of the hallmarks of the Rehnquist Court has been its reinvigoration of the federalism-based limits on congressional power. This Court has interpreted several constitutional provisions in a manner that has imposed new restrictions on Congress'

legislative authority, and these decisions have enhanced, at least modestly, states' political autonomy.

But the Rehnquist Court has not introduced similar changes to the other, "union-preserving" side of federalism: the structural limits on *state* authority.[18] Rather, the Court has enforced the Constitution's limitations on state power—principally those contained in the doctrine of preemption and the dormant Commerce Clause—quite vigorously, frequently striking down state exercises of the traditional police power because of their interference with competing national interests. Indeed, in federalism disputes not involving the breadth of Congress' powers, this Court has regularly favored federal policy priorities and the interests of the national economy over assertions of state sovereignty, even while acknowledging the implications of these decisions for the federal-state balance.[19] Thus, while the Rehnquist Court's "federalism revolution" has imposed new limits on Congress, and thereby modestly enhanced some aspects of state autonomy, it has not championed states' political independence more generally.

Second, *Bush v. Gore* is fully consistent with—indeed, it exemplifies—another important facet of the Rehnquist Court's federalism jurisprudence: the Court's assertion of primacy in resolving questions of constitutional meaning.[20] Although the explicit doctrinal effect of the Court's "new federalism" decisions has been to limit congressional authority vis-à-vis the states, an implicit (and perhaps more significant) consequence has concerned the separation of national powers between the judicial and legislative branches.[21] Specifically, these decisions have enhanced the power of the Court relative to Congress, making the judiciary the exclusive arbiter of constitutional questions that, at least for the past several generations, have been entrusted largely to the political process. For instance, the Court has ruled that only the judiciary can provide the final answers to whether Congress has exceeded its powers under the Commerce Clause, whether Congress has transgressed the restrictions imposed by the Tenth Amendment, and whether Congress has gone beyond its authority to enact "appropriate legislation" to enforce the Fourteenth Amendment. With respect to each of these issues, the Court has replaced substantial deference to the judgments of Congress with independent and fairly rigorous standards of judicial review. In some instances, the Court has expressly justified this aggressive review on the ground that Congress' institutional incentives render its determinations unworthy of deference—in other words, that Congress cannot be trusted to make principled judgments about the proper division of authority between the national government and the states.[22]

Bush v. Gore fits this pattern nicely. It is another instance of the Rehnquist Court asserting the judiciary's role (or, in its words, "unsought responsibility"[23]) to resolve the relevant constitutional questions rather than deferring to the political process.[24] For had the Court not ended the election dispute, it appeared likely that Congress would have been forced to decide whether the manual count of the undervoted ballots ordered by the Florida Supreme Court was consistent with the Equal Protection Clause and the "Manner directed" Clause of Article II.[25] Had Vice President Gore prevailed after the hand count, the Florida legislature almost certainly would have appointed a separate slate of Bush electors, and both sets of electoral votes would have been forwarded to Congress. Congress then would have been required to decide, according to the procedures set forth in the Electoral Count Act,[26] which set of electors had been lawfully appointed. By granting certiorari and deciding the case as it did, the Court determined that it was the proper institution to resolve these momentous questions of constitutional meaning to the exclusion of democratic politics.[27]

The point of this article is not to offer a normative assessment of the Rehnquist Court's federalism jurisprudence—to evaluate whether its differing approaches to the two sides of federalism can be reconciled, or to assess the wisdom of this shift in authority from Congress to the Court in the enforcement of the boundaries of federal power. Rather, my aim is simply to debunk the popular conception that *Bush v. Gore* is somehow fundamentally incompatible with this Court's prior federalism decisions.[28] Once one considers how this Court has decided federalism issues not involving the breadth of Congress' powers, and how it has viewed its role relative to Congress' in resolving constitutional questions implicating the federal-state balance, the election decision is largely consistent with what has come before. In fact, *Bush v. Gore* may be the quintessential example of the Rehnquist Court's unwillingness to defer to Congress—that is, its profound distrust of politics as an arbiter of constitutional meaning.

II. THE "UNION-PRESERVING" SIDE OF CONSTITUTIONAL FEDERALISM

Perhaps the single constitutional objective with which the Rehnquist Court has become most closely associated is the "[p]reservation of the States as independent and autonomous political entities."[29] The number of federal statutes that this Court has partially or completely invalidated in the name of protecting the "'residuary and inviolable sovereignty' reserved explicitly to the States"[30] is, in many respects, startling. The Court has invalidated the Gun-Free School Zones Act and the civil remedy provision of the Violence Against Women Act as beyond Congress' power to regulate interstate commerce,

finding them impermissible intrusions on the states' traditional police power.[31] It has held that the Clean Water Act and the federal arson statute do not reach substantial categories of conduct because the statutes might otherwise exceed Congress' commerce power.[32] It has invalidated provisions of the Low-Level Radioactive Waste Policy Amendments of 1985 and the Brady Handgun Violence Protection Act as inconsistent with the Tenth Amendment.[33] The Rehnquist Court has concluded in several important statutes, including the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), that Congress did not validly abrogate states' sovereign immunity from unconsented private suits for money damages.[34] And it has held that the ADA, the ADEA, the Religious Freedom Restoration Act, and the civil remedy provision of the Violence Against Women Act exceeded Congress' authority to enact enforcement legislation under section 5 of the Fourteenth Amendment.[35]

These "new federalism" decisions have enhanced the political independence of state governments, at least as a doctrinal matter. By limiting Congress' power to enact legislation under the Commerce Clause and sharply restricting its authority under section 5 of the Fourteenth Amendment, the Court has broadened the domain in which states have exclusive authority to regulate private conduct. By holding that Congress cannot "commandeer" state legislatures or executive officials into enacting or enforcing federal regulatory programs,[36] the Court has restricted the means by which the national government can control the conduct of state and local governments. And by holding that Congress can abrogate the sovereign immunity of states from unconsented private suits for money damages only through legislation validly enacted under section 5 of the Fourteenth Amendment, the Court has substantially curtailed a principal means for Congress to enforce federal law against the states. All else being equal, each of these results should mean greater autonomy for states in pursuing their own policy agendas.[37]

Given this apparent "revolution" in federalism, expressly grounded in a renewed emphasis on the status of states as sovereigns co-equal with the federal government, the Court's decision in *Bush v. Gore* might seem anomalous or, worse, hypocritical.[38] Relying on precedent addressing poll taxes and the systematic malapportionment of voting districts[39]—equality concerns qualitatively different from those presented in the election litigation[40]—the Court interpreted the Equal Protection Clause as imposing a number of procedural requirements on state election proceedings.[41] States must formulate standards for evaluating ballots that are more specific than the "intent of the voter": the manual counting of ballots cannot include undervoted ballots without also including overvoted ballots, and no jurisdiction within a state can include a partially completed hand count of the ballots meeting the criteria for reexamination.[42] These are significant new constraints on the discretion that states have traditionally enjoyed in running elections, presumably a core aspect of their sovereignty.[43]

More to the point, the remedy ordered by the Court was that the election contest must end—that "any recount seeking to meet the December 12 [deadline established by Florida law] will be unconstitutional."[44] But the Florida Supreme Court had not decided that December 12 was a firm deadline under Florida law.[45] To reach this conclusion, the United States Supreme Court itself interpreted Florida law as "requir[ing] that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12."[46] But whether Florida election law dictated that December 12 was a drop-dead date for the resolution of any election contest, no matter what had happened during the original election, was purely a question of state law, and one that the Florida Supreme Court had not yet addressed.[47] By deciding the issue itself, the United States Supreme Court seemed to disregard a fundamental aspect of Florida's status as a co-equal sovereign: Florida courts are the ultimate authority on the meaning of Florida law.[48] For these reasons, *Bush v. Gore* seems to contradict the Rehnquist Court's commitment to respecting the sovereignty and "dignity" interests of state governments.

There is a fair measure of truth in this assessment. In addition to enhancing states' political autonomy, many of the Rehnquist Court's federalism decisions have spoken in broad terms about the constitutional significance of the "separate" and "essential" sovereignty of the states.[49] But there is more to the structural edifice of federalism than the limits on Congress' legislative authority—the matter that these cases have generally addressed. The Constitution also places limits on *state* power, limits that are intended to preserve federal supremacy in those areas in which Congress is competent to act and to protect the national interest from parochial state interference. The two principal bases for this "union-preserving" aspect of federalism are the Supremacy Clause and the dormant Commerce Clause.[50] The Supremacy Clause, through the doctrine of preemption, dictates that validly enacted federal laws shall negate state laws with which they conflict. The dormant Commerce Clause generally nullifies state laws that place an undue burden on interstate commerce.

Once we acknowledge that these union-preserving limits on state authority are an important aspect of "constitutional federalism," the popular conception of the Rehnquist Court as a steadfast champion of state sovereignty becomes untenable.

Despite the sweeping language of some its more prominent federalism opinions, this Court's actual devotion to states' political autonomy has varied widely by context. Although the Rehnquist Court has stressed the importance of the states' status as co-equal sovereigns in cases addressing the breadth of Congress' legislative powers, its approach to preemption and dormant Commerce Clause questions has been quite different. If anything, this Court has tended to protect the prerogatives of the federal government and the interests of the national economy at the expense of states' independent policy choices. In this sense, although the expansive interpretation of the Equal Protection Clause embraced in *Bush v. Gore* seems uncharacteristic of the Rehnquist Court, the election decision simply does not contradict this Court's well-established federalism jurisprudence. In truth, this Court has regularly disregarded important state sovereignty interests in federalism cases not involving the limits on congressional authority.

A. *Preemption*

The most pervasive federalism-based limit on state power is preemption,[51] a doctrine derived from the Supremacy Clause.[52] Dating to *McCulloch v. Maryland*,[53] the Supreme Court has understood the Supremacy Clause to negate any state law conflicting with federal law.[54] As Chief Justice Marshall wrote in *Gibbons v. Ogden*,[55] the Supremacy Clause nullifies state laws that "interfere with, or are contrary to, the laws of Congress."[56] So long as Congress acts within its enumerated powers, it has the authority to displace state law addressing the same subject, and it can do so in express or implied terms. State law is expressly preempted when Congress explicitly states its intent to displace the type of state regulation at issue.[57] State law is impliedly preempted under any of three conditions: (1) federal law is so comprehensive in a particular field that it "make[s] reasonable the inference that Congress left no room for the States to supplement it";[58] (2) it is physically impossible to comply with both federal and state law;[59] or (3) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[60] Despite these distinct doctrinal categories, the essential question in every preemption case is the same: Has Congress intended to displace the type of state law at issue?[61]

As the Supreme Court has acknowledged, Congress' authority to preempt state law is "an extraordinary power"[62] that has enormous implications for the constitutional balance between the federal government and the states.[63] The fields regulated in some fashion by Congress have grown dramatically since the New Deal, particularly in the last thirty years. From crime to occupational safety to the environment, federal law pervasively governs private conduct that generally was subject only to state control for the United State's first 150 years. Consequently, the degree to which federal law is understood to displace state law addressing the same subject is of vital importance to the breadth and significance of states' residuary powers. As Justice Breyer recently noted:

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at the edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.[64]

The more readily courts find conflict between federal and state law, the greater the power of the federal government to establish exclusive policy in a given field, and the smaller the domain in which states can exercise their own political judgment. A Supreme Court intent on protecting the states' status as co-equal sovereigns—on reinvigorating the independent role of the states in light of the dramatic expansion of federal law since the New Deal—might therefore be expected to find such conflicts less frequently, hence narrowing preemption's scope.

Yet the Rehnquist Court has done no such thing.[65] First, the Court has not altered the formal law of preemption in a manner that would enhance states' political autonomy. Instead, it has left the doctrine that it inherited largely intact. This is perhaps most surprising with respect to implied "obstacle" preemption. Even where federal and state law could be construed as complementary, and where Congress has been silent with respect to its intent to displace state regulation, the doctrine of obstacle preemption empowers courts to infer from a federal statute's implicit objectives or overall structure an unstated congressional intent to displace state law. This gives the judiciary broad discretion to nullify exercises of traditional state police powers, and therefore has far-reaching implications for federalism.[66] It has also been the subject of substantial scholarly criticism, both for its tenuous theoretical foundation[67] and for its failure to afford sufficient respect for state sovereignty interests.[68] Yet the Rehnquist Court has continued to invoke obstacle preemption to set aside state regulation.

Indeed, the Court has held in all six cases raising obstacle preemption questions during the past two terms that the state laws at issue frustrated the purposes of federal law and were therefore preempted.[69]

To the extent that the Rehnquist Court has altered preemption doctrine, those changes appear to have modestly *undermined* state sovereignty. Consider the Court's holdings concerning the impact of a federal statute's express preemption clause on implied preemption analysis. In the 1992 case of *Cipollone v. Liggett Group, Inc.*,[70] which addressed whether the federal statutes governing cigarette labeling and advertising preempt state common-law tort claims, the Court indicated that the existence of an express preemption provision foreclosed implied preemption:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.[71]

But only three years later, in *Freightliner Corp. v. Myrick*,[72] the Court backtracked, stating that *Cipollone* established no "categorical rule precluding the co-existence of express and implied pre-emption."[73] Rather, *Cipollone* "[a]t best . . . supports an inference that an express pre-emption clause forecloses implied preemption."[74] In *Geier v. American Honda Motor Corp.*,[75] the Court discarded this remaining "inference" left by *Myrick*, holding that the existence of an "express pre-emption provision imposes no unusual, 'special burden' against pre-emption,"[76] and that "ordinary pre-emption principles" apply.[77] As if to extinguish any doubt, the Court stated this past term, in *Buckman Co. v. Plaintiffs' Legal Committee*, [78] that "[t]o the extent respondent posits that anything other than our ordinary pre-emption principles apply" because Congress included an express preemption provision, "that contention must fail."[79]

In recent terms, the Court has also slightly narrowed its traditional presumption against preemption, or at least clarified the presumption's contours in a way that makes preemption more likely. Since at least its 1947 decision in *Rice v. Santa Fe Elevator Corp.*,[80] the Court has consistently stated that there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such that the Court will assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[81]

The Rehnquist Court has continued to endorse this starting point for preemption analysis, invoking it on several occasions.[82] But the Court has recently emphasized the presumption's negative implication: where the subject is one that the states have *not* traditionally regulated, the presumption does not apply. For instance, *United States v. Locke*[83] involved regulations imposed by the State of Washington on oil tankers traveling in Puget Sound.[84] Unanimously concluding that the state regulations were preempted by the Federal Ports and Waterways Safety Act, the Court underscored that "an assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."[85] This past term, the Court held in *Buckman* that state tort actions based on the defendant's fraudulent disclosures to the Food and Drug Administration were preempted by the Food Drug and Cosmetic Act.[86] Even though the Court in several previous preemption decisions had recognized that states have "great latitude" to "exercise[ ] their police powers to protect the health and safety of their citizens,"[87] the Court emphasized in *Buckman* that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'"[88] Consequently, "no presumption against pre-emption obtain[ed]."[89]

Perhaps more tellingly, the Court has not applied preemption doctrine in a manner particularly protective of state sovereignty. A rough statistical analysis illustrates the point. Since the October 1991 Term, when Justice Thomas was confirmed and the so-called "new federalism" majority was formed, the Court has decided twenty cases in which it purported to resolve a split of authority among lower courts as to whether federal law preempted the type of state law at issue.[90] (A split among lower courts is at least a decent indication that the case is a close one, with plausible arguments both for and against preemption.) In twelve of those twenty cases, the Court held that the relevant state laws were entirely preempted,[91] and in two others the Court found that state law was partly preempted.[92] Since 1998, the pattern has been starker. Even as the Court has rendered some of its most significant decisions concerning the federalism-based limits on Congress' authority,

such as *Board of Trustees v. Garrett*,[93] *United States v. Morrison*,[94] and *Alden v. Maine*,[95] it has found preemption in all six cases resolving lower-court disagreements.[96]

The state policy choices displaced in these cases have not been trivial. Some have involved state laws that the Court itself has characterized as lying near the core of the states' independent sovereignty. For instance, in *Boggs v. Boggs*,[97] the Court addressed whether ERISA preempted an aspect of Louisiana's community property law that allowed a spouse who is not a plan participant to transfer, by testamentary instrument, her interest in undistributed pension plan benefits.[98] Writing for the Court, Justice Kennedy acknowledged the "central role community property laws play in the nine community property States,"[99] and that "Louisiana's community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States."[100] Nonetheless, the Court held that the Louisiana law was preempted because it undermined "ERISA's solicitude for the economic security of surviving spouses."[101]

Other preempted laws have expressed the sort of moral judgment that is central to a polity's independence. At issue in *Crosby v. National Foreign Trade Council*[102] was a Massachusetts selective purchasing law that made it more difficult for firms doing business in Burma to be awarded state public contracts. The law required state agencies, in evaluating competing bids, to increase by ten percent the price of offers made by firms that did more than a threshold level of business in Burma.[103] It was an attempt by the people of Massachusetts to avoid "collaborating with evil"—to prevent the use of their own tax dollars to support, even indirectly, a Burmese regime notorious for its human rights abuses.[104] Yet the Supreme Court unanimously held that the separate sanctions against Burma enacted by Congress impliedly preempted the Massachusetts law.[105] The Court could easily have seen the federal sanctions and the Massachusetts law as complements; there was no serious contention that the laws actually conflicted, and the Massachusetts law only governed the Commonwealth's proprietary activity of purchasing goods and services.[106] Nonetheless, the Court construed the purposes of the federal sanctions quite broadly, and it saw the Massachusetts law "as an obstacle to the accomplishment of Congress' full objectives" of giving the President discretion to control sanctions against Burma, limiting the sanctions to American firms, and creating a multilateral strategy.[107] The Court effectively inferred from Congress' enactment of a particular set of sanctions an intent to preclude anything else. The implications of this logic for the residuary power of the states are rather extraordinary.[108] Under *Crosby*'s reasoning, *every* state law that concerns a foreign nation—such as the South African divestiture laws of the 1980s, or even a state's decision to invest its pension funds in a "socially responsible" mutual fund—is preempted once the federal government has taken action (or even expressly decided not to take action) addressing the same country.

None of this is to say that the Court reached the wrong result in these cases, or that its approach to preemption is incompatible with its decisions concerning the limits on congressional authority. Moreover, because each preemption case turns on the specific language and structure of the federal statute at issue, the result in any particular case may be unrelated to the Court's vision of the proper federal-state balance. My point is only that, unlike the Rehnquist Court's decisions enforcing the federalism-based limits on Congress, its approach to preemption clearly has not emphasized the importance of the states' status as co-equal sovereigns. The Court has not altered preemption doctrine to provide greater protection to states' interests, nor has it applied that doctrine in a manner tending to preserve state autonomy. If anything, its preemption jurisprudence seems to have placed greater priority on the vindication of federal policy objectives than on protecting the states' capacity to exercise independent political judgment.

B. *Dormant Commerce Clause*

The other primary federalism-based limit on state authority is the "dormant" or "negative" Commerce Clause. On its face, the Commerce Clause is no more than an affirmative grant of power to Congress: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[109] But since at least 1873,[110] the Supreme Court has understood the Clause "of its own force" to impose substantive limitations on state laws affecting interstate commerce.[111] Specifically, the Court has construed the Clause to forbid state regulation that: (1) discriminates against interstate commerce, either expressly or in practical effect, unless the state has no other means to accomplish its legitimate objectives; (2) places an undue burden on interstate commerce—that is, a burden that outweighs the putative benefits to the state; or (3) attempts to regulate conduct beyond the state's borders.[112] Unlike preemption, the

dormant Commerce Clause negates state laws absent any federal legislation. It empowers courts to strike down state laws based purely on the Clause's negative implication.

The dormant Commerce Clause has long been the subject of controversy, and it has been recently the object of scathing attacks from Justices Scalia and Thomas, both of whom view the doctrine as illegitimate. To Justice Scalia, the negative Commerce Clause "is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution."[113] He believes that there is no "clear theoretical underpinning for judicial 'enforcement' of the Commerce Clause,"[114] that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce,"[115] and that the Court's "applications of the doctrine have, not to put too fine a point on the matter, made no sense."[116] Similarly, Justice Thomas has stated that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[117] Not only are "the underlying justifications for [the Court's] involvement in the negative aspects of the Commerce Clause . . . illusory," but the Court's jurisprudence in the area "undermines the delicate balance in what we have termed 'Our Federalism.'"[118]

These missives have not appeared in opinions for the Court, however, but in separate concurrences or dissents. As with preemption, the Rehnquist Court has done nothing to alter dormant Commerce Clause doctrine in a manner that would provide greater protection for state sovereignty. Indeed, the Court has rejected several invitations from state litigants to revise the law in the area to afford states greater leeway to pursue their own policy choices. For instance, in *Quill Corp. v. North Dakota*,[119] North Dakota asked the Court to overturn its 1967 decision, *National Bellas Hess, Inc. v. Department of Revenue*,[120] which had held that states cannot require out-of-state sellers to collect use taxes on sales to the taxing state's residents if the seller has no physical presence in the taxing state.[121] Changed circumstances arguably rendered the physical presence requirement obsolete. Advances in computer technology had made it much easier for sellers to collect use taxes on interstate sales, the Court had abandoned the physical presence requirement in its personal jurisdiction cases—instead requiring only that the defendant have "purposefully availed" itself of the jurisdiction, and the dramatic growth of the mail-order industry had increased the rule's financial burden on states in terms of lost tax revenue.[122] Still, in an 8-1 decision, the Court sustained *Bellas Hess*.[123] Conceding that the physical presence requirement was "artificial at its edges," the Court reasoned that this "artificiality" was outweighed by the benefits of reduced litigation, settled expectations—which would "foster[ ] investment by businesses and individuals"—and respect for the "substantial reliance" on the rule, which "has become part of the basic framework of a sizable industry."[124] To the Court, these practical benefits were of greater constitutional weight than the states' ability to close a large loophole in their sales tax structures—a loophole that now is of sizable significance given the growth of commerce over the Internet.[125]

In *Allied-Signal, Inc. v. Director, Division of Taxation*,[126] the State of New Jersey—supported by many states appearing as *amici curiae*—asked the Court to discard an aspect of its framework for analyzing state income taxes imposed on out-of-state businesses. Under established precedent, a state could tax an apportioned share of an out-of-state taxpayer's income so long as that income was earned as part of the taxpayer's "unitary business" operating in the taxing state.[127] Conversely, a state could not tax income derived from discrete business activities that were unrelated to the taxpayer's activities in the state.[128] New Jersey argued in *Allied-Signal* that this "unitary business principle" was an unjustified restraint on states' taxing power; it ignored economic reality because common ownership itself creates a flow of value between the different aspects of a business.[129] New Jersey therefore asked the Court to hold that all income earned by an out-of-state business could be taxed on an apportioned basis by a state in which the taxpayer did business.[130] But, as in *Quill*, the Court adhered to its dormant Commerce Clause precedent—in this case unanimously.[131] It reasoned that New Jersey had failed to demonstrate that the unitary business principle was either unsound in principle or unworkable in practice.[132]

Most recently, the State of Alabama, in defending its discriminatory capital stock tax, argued in *South Central Bell Telephone Co. v. Alabama*[133] that the Court's dormant Commerce Clause jurisprudence represented "an unconstitutional assumption of powers by the Courts of the United States . . ."[134] and "should be abandoned."[135] With respect to the federal-state balance, Alabama contended that "the Court's negative Commerce Clause jurisprudence simply does not comport with the central axiom underlying our federal system"[136] that "the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause."[137] Because Alabama had not

raised this argument until it filed its brief on the merits, the Court effectively treated it as waived and did not address it.[138] But Justice O'Connor wrote a separate, two-sentence concurring opinion to note specifically that "the State does nothing that would persuade me to reconsider or abandon our well-established body of negative Commerce Clause jurisprudence."[139]

If the Rehnquist Court has altered dormant Commerce Clause doctrine, it appears to have made federal encroachments on state sovereignty more likely. Consider the broad conception of "facial discrimination" embraced by the Court in *C & A Carbone, Inc. v. Clarkstown*,[140] which Justice Souter characterized in dissent as "greatly extending the Clause's dormant reach."[141] At issue was a "flow control" ordinance enacted by the Town of Clarkstown, New York, which required all solid wastes generated or brought into the municipality to be processed at a designated transfer station in the city.[142] The purpose was to guarantee the facility sufficient revenue to pay for its construction.[143] The ordinance did not favor local businesses as a class over out-of-state or nonlocal competitors but instead granted a monopoly in waste processing to a specific local transfer station.[144] The Court nevertheless held that the ordinance facially discriminated against interstate commerce because the favored facility was a local one.[145] "The only conceivable distinction" between this law and those drawing explicit lines between in-state and out-of-state interests, the Court reasoned, "is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute."[146]

Several other Rehnquist Court decisions have also modified dormant Commerce Clause doctrine, albeit modestly, to make the displacement of state regulation more likely. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[147] the Court extended the scope of dormant Commerce Clause scrutiny to include the state regulation of nonprofit organizations, striking down a Maine property tax provision that disadvantaged charitable institutions predominantly serving out-of-state residents.[148] In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*,[149] the Court extended its "internal consistency" test, which it had previously applied to determine whether a state tax was fairly apportioned, to its analysis of whether a state tax discriminated against interstate commerce.[150] It thus found that, although Washington's Business and Occupations Tax was fairly apportioned, it was nonetheless unconstitutional because it was internally inconsistent.[151] In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[152] the Court articulated an extremely stringent test that has made it virtually impossible, except in the rare case, for states to justify taxes that discriminate against out-of-state residents on the ground that they complement taxes imposed exclusively on state residents.[153] Applying this test, the Court held that Oregon's higher surcharge on the disposal of out-of-state waste could not be sustained as a complement to the burden of general taxation imposed on in-state waste producers.[154] In *West Lynn Creamery, Inc. v. Healy*,[155] the Court held that a Massachusetts combined tax and subsidy program designed to aid the state's dairy industry was impermissible, even though both the tax and the subsidy, had they been enacted separately, would likely have been constitutional.[156] And in *American Trucking Associations, Inc. v. Scheiner*,[157] the Court overruled a long line of precedent to hold that a flat axle tax imposed on truckers for the privilege of using the state's highways was unconstitutional.[158]

This is not an exhaustive catalogue of the Rehnquist Court's dormant Commerce Clause decisions, and certainly there are several cases in which this Court has rejected such challenges.[159] Moreover, to the extent these decisions have changed the relevant legal framework, they have only done so at the margins. Still, it is clear that the Rehnquist Court has not been particularly protective of state sovereignty interests. It has rejected invitations to rework its dormant Commerce Clause jurisprudence so as to afford states greater autonomy to pursue their own policy choices, and it has modestly altered the doctrine in the direction of *diminishing* state sovereignty. As with preemption, the Court has tended to be more interested in protecting the national economy from parochial interference than in preserving states' political independence.

Thus, the notion that the Rehnquist Court's federalism decisions have uniformly—or even predominantly—protected state sovereignty at the expense of competing national interests is a misconception. The so-called "federalism revolution" has generally been confined to cases addressing the limits on Congress' legislative powers, such as the breadth of the commerce power or the restrictions imposed by the Tenth and Eleventh Amendments. In the more frequent disputes over the structural limits on state power, the Rehnquist Court has regularly protected the national interests at stake, even when it has meant displacing important expressions of states' political autonomy.

In this sense, *Bush v. Gore* is largely typical of how the Rehnquist Court has balanced the imperative of protecting state sovereignty with the need to vindicate the interests of the nation as a whole. The election dispute concerned the consistency of a state judicial decision with the Equal Protection Clause and the "Manner directed" Clause of Article II—not the limits of Congress' legislative authority. It therefore should not be especially surprising that this Court found the national interests at

stake—what it perceived as the fairness and reliability of the presidential election result—more compelling than Florida's sovereignty interest in resolving its own election controversy. Of course, this is not to say that the Court's intervention was somehow predictable. But it is to say that *Bush v. Gore* fits the Rehnquist Court's pattern of taking a slightly nationalistic approach to federalism disputes that have not concerned the breadth of congressional power.

III. CONSTITUTIONAL FEDERALISM AND THE POWER OF THE COURT

Again, the essence of the Rehnquist Court's so-called "new federalism" has been a series of decisions reinvigorating the federalism-based limits on Congress' enumerated powers. In the past ten years, the Court has imposed new constraints on Congress' legislative authority both as to the subjects that it can regulate and the means at its disposal. Keeping all else constant, these decisions have at least modestly enhanced states' political independence. By limiting Congress' authority to regulate interstate commerce and to enforce the Fourteenth Amendment, the Court has preserved a broader range of private conduct that is the exclusive domain of the states' police power. By forbidding Congress from "commandeering" state legislatures or executive officials, the Court has protected states from having to enact or implement federal regulatory programs against their will. And by largely immunizing states from unconsented private suits for money damages in both federal and state court, the Court has removed from Congress a principal means for enforcing federal law against state governments.

But these decisions have not merely altered the relationship between the federal government and the states. Less explicitly, they have also revised the horizontal distribution of power among the branches of the federal government, creating a larger role for the Court in our constitutional scheme.[160] Only ten years ago, the boundaries of Congress' authority under the Commerce Clause, section 5 of the Fourteenth Amendment, the Tenth Amendment, and the Eleventh Amendment were left largely, if not entirely, to the political process. To the extent the Court addressed such questions, its review was quite deferential, asking generally whether Congress had a rational basis for concluding that the legislation fell within its enumerated powers. The Rehnquist Court has replaced this deference with independent and relatively aggressive scrutiny, asserting the judiciary's supremacy in delineating the Constitution's boundaries between federal and state power. In doing so, the Court has effectively removed several constitutional judgments from the political process and made them matters for judicial resolution.

Seen in this light, *Bush v. Gore* fits well with a central feature of the Rehnquist Court's federalism jurisprudence. Had the Court not intervened in the election dispute, it appeared likely that Florida would have forwarded to Congress competing slates of Bush and Gore electors. In deciding which electoral votes to recognize, Congress then would have been forced to render its own judgment as to whether the Florida Supreme Court's order to count the undervoted ballots manually was consistent with the Equal Protection Clause and Article II. *Bush v. Gore* effectively foreclosed any such political resolution.[161] As in many of its recent federalism decisions, the Court saw itself as the appropriate institution to provide the definitive constitutional answers, to the exclusion of democratic politics.

A. *State Autonomy or Judicial Supremacy?*

1. *Commerce Clause*

Consider, first, the Rehnquist Court's Commerce Clause decisions. From 1937 to 1995, the Supreme Court's review of claims that federal legislation exceeded the commerce power was extremely deferential to Congress—if the Court exercised such review at all. Following the New Deal crisis, in the watershed cases of *NLRB v. Jones & Laughlin Steel Corp.*,[162] *United States v. Darby*,[163] and *Wickard v. Filburn*,[164] the Court embraced a broad understanding of the commerce power (augmented by the Necessary and Proper Clause). The relevant legal question was whether the regulated activity, when aggregated across the national economy, had a substantial effect on interstate commerce.[165] Thus, even activities that were local and noncommercial in nature (such as growing wheat for personal consumption) fell within the commerce power if, in aggregate, they substantially affected the national economy.[166]

More important for present purposes, the Court did not assess the regulated activity's effect on interstate commerce independently of Congress' judgment. Rather, the Court only asked whether Congress had a rational basis for concluding that the activity had the requisite impact.[167] For instance, in *Heart of Atlanta Motel v. United States*,[168] where the Court upheld the application of the Civil Rights Act of 1964 to motels, the Court framed the case as presenting only two questions: "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[169] Additionally, in *Perez v.*

United States,[170] the Court held that Congress could regulate purely local loansharking activity because "[e]xtortionate credit transactions, though purely intrastate, may *in the judgment of Congress* affect interstate commerce."[171] Thus, the Court's role was decidedly modest. What mattered was not the Court's independent view of the regulated activity's effects on interstate commerce, but the reasonableness of Congress' judgment. As the Court stated in *Katzenbach v. McClung*,[172] "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[173]

In fact, in the 1985 decision of *Garcia v. Metropolitan Transportation Authority*,[174] the Court essentially held that the federalism-based limits on Congress' legislative authority are not subject to judicial review at all. *Garcia* was not itself a traditional Commerce Clause case, instead addressing the related issue of states' immunity from federal regulation (in that case, the Fair Labor Standards Act's minimum-wage and maximum-hour requirements).[175] But the Court spoke in broad terms about the respective roles of the Court and the political process in policing the constitutional boundaries of federalism. It reasoned that the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[176] Consequently, "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[177] Whether federal legislation violated the Commerce Clause was therefore a political question. Congress and the political process, not the Court, were to resolve the constitutional issues. [178]

The Rehnquist Court's decisions in *United States v. Lopez*[179] and *United States v. Morrison*[180] have overruled the rationale of *Garcia*, repudiating its reliance on the "political safeguards" of federalism.[181] In *Lopez*, the Court struck down a federal statute as exceeding Congress' commerce power for the first time since 1936, declaring the Gun-Free School Zones Act unconstitutional.[182] *Morrison* held that the civil remedy provision of the Violence Against Women Act, which permitted the victims of gender-motivated violence to sue their attackers for damages, also went beyond the authority conferred by the Commerce Clause.[183] In reaching these results, the Court stated, in no uncertain terms, that it is the judiciary's responsibility to police the federalism-based limits on congressional authority. While "the political branches have a role in interpreting and applying the Constitution," since *Marbury v. Madison*,[184] the Supreme Court "has remained the ultimate expositor of the constitutional text."[185] Indeed, it is "a permanent and indispensable feature of our constitutional system that the federal judiciary is supreme in the exposition of the law of the Constitution."[186] The breadth of Congress' commerce power is therefore "ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[187]

Not only did *Lopez* and *Morrison* emphasize the centrality of the Court's role in determining the breadth of the commerce power, but they declined to defer to Congress' own judgment as to the regulated activity's effect on interstate commerce. At no point in either opinion did the Court ask whether Congress had a rational basis for determining that the relevant activities substantially affected interstate commerce. Rather, the analysis in both cases proceeded from the assumption that this was a decision for the Court *de novo*. More pointedly, the Court in *Morrison* rejected Congress' extensive findings concerning the effects of gender-motivated violence on interstate commerce. Based on four years of hearings, eight committee reports, twenty-one state task force reports, and thousands of pages of data,[188] Congress concluded that:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.[189]

But the Court found that these findings were "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[190] It therefore dismissed the findings as irrelevant.[191]

In addition, the malleability of the doctrine created by the Rehnquist Court for evaluating Commerce Clause questions has given the Court fairly broad discretion in passing on the validity of federal legislation. Specifically, the Court's application of the "substantial effects" test in *Lopez* and *Morrison* did not actually address whether the regulated activities, as an empirical matter, substantially affected interstate commerce. (In truth, *every* activity that Congress would bother to regulate—including

gun possession near schools and gender-motivated violence—has a substantial effect on interstate commerce as that phrase is commonly understood.)[192] Instead, the Court has used the "substantial effects" heading to take up two other inquiries: (1) whether the regulated activity is "commercial" or "economic in nature,"[193] and (2) whether the regulation of that activity has historically "been the province of the States."[194] Measured by these standards, the Court found the legislation in *Lopez* and *Morrison* invalid because neither gun possession near schools nor gender-motivated violence is, "in any sense of the phrase, economic activity,"[195] and "the suppression of violent crime" is an essential aspect of the police power.[196]

These standards, however, are rather vague and capacious. Consider the Court's recent decision in *Solid Waste Agency v. United States Army Corps of Engineers*.[197] There, the Court invoked the canon of constitutional avoidance to construe the Clean Water Act as not reaching isolated, non-navigable ponds, and thus invalidated the Army Corps of Engineers' so-called "migratory bird rule."[198] Chief Justice Rehnquist reasoned that if the Act were construed to reach such waters, it would raise a serious question as to whether Congress had exceeded its commerce power, as it "would result in a significant impingement of the States' traditional and primary power over land and water use."[199] It is unclear, however, why the Court saw the province of the migratory bird rule as "land and water use" rather than "environmental protection," an area that historically has been as much the responsibility of Congress as of the states. By the same token, it is unclear why the civil remedy provision of the Violence Against Women Act fell within the province of "the suppression of violent crime" rather than the "protection of civil rights," a domain in which the federal government (dating to the Civil War) has historically taken the lead.

Further, it is uncertain what makes an activity "commercial" or "economic" in nature.[200] Common definitions of "economic" include: (1) "[o]f or relating to the production, development, and management of material wealth;" (2) "[o]f or relating to the practical necessities of life;" and (3) "[f]inancially rewarding."[201] Almost any activity that Congress might regulate could fit one of these descriptions. Certainly, possessing a firearm near a school or filling in wetlands might plausibly be characterized as "relating to the practical necessities of life" or "financially rewarding." Indeed, the plaintiff in *Solid Waste Agency* intended to fill the isolated ponds on its property to develop a commercial waste disposal site.[202]

To be sure, the narrowing of Congress' commerce power effected by *Lopez* and *Morrison* should not be overstated: Congress retains broad authority to regulate most realms of private conduct in the United States.[203] Still, the Court's decisions represent an important shift in the respective roles played by the Court and Congress in defining this constitutional boundary. The Rehnquist Court has determined that the judiciary alone is entitled to determine the breadth of Congress' commerce power; it has refused to defer to Congress' judgment concerning the regulated activity's effect on interstate commerce; and it has created a doctrinal framework that gives the Court broad discretion to determine the validity of federal legislation. In each respect, the Court has replaced a regime that relied largely on the political process to resolve the relevant constitutional questions with one in which the Court plays the principal role.

2. *Tenth Amendment*

The Rehnquist Court's decisions addressing the Tenth Amendment follow a similar pattern. After the 1930s, the Supreme Court for many years understood the Tenth Amendment to "state[ ] but a truism that all is retained which has not been surrendered."[204] In other words, the amendment generally imposed no independent constraints on Congress' legislative authority beyond those inherent in the limited scope of Congress' enumerated powers. As the Court stated in *United States v. Darby*:

> There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[205]

In 1976, the Court briefly revived the Tenth Amendment as an independent constraint on congressional authority in *National League of Cities v. Usery*,[206] holding that states enjoy an immunity from federal regulation "in areas of traditional governmental functions."[207] But *Garcia* overruled *National League of Cities* only nine years later, ruling that Congress could enforce the NLRA's minimum-wage and maximum-hour requirements against the states.[208] More broadly, *Garcia* held that the judiciary had no role in enforcing the limits imposed on Congress by the Tenth Amendment. The independent sovereignty of the states is "more properly protected by procedural safeguards inherent in the structure of the federal system

than by judicially created limitations on federal power."[209]

Again, the Rehnquist Court has rejected *Garcia*'s basic premise—that the Constitution leaves enforcement of the boundaries of constitutional federalism to the political process.[210] What *Lopez* and *Morrison* have done in establishing the Court's central role in determining the breadth of the commerce power, *New York v. United States*[211] and *Printz v. United States*[212] have done in establishing the same role for the Court in enforcing the Tenth Amendment. In *New York*, the Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments of 1985, which directed states either to regulate low-level radioactive waste according to specific federal directives or take title to the waste generated within their borders, exceeded Congress' powers.[213] Although Congress could regulate the disposal of radioactive waste itself, it could not "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[214] In *Printz*, the Court likewise struck down an aspect of the Brady Handgun Violence Prevention Act of 1995 that required local law enforcement officers to perform background checks on all handgun purchasers.[215] Just as Congress cannot compel state legislatures to enact federal programs, it "cannot circumvent that prohibition by conscripting the States' officers directly."[216] *New York* and *Printz* have thus established, contra *Garcia*, that the Tenth Amendment imposes independent limits on Congress' legislative authority that, like the limits of the commerce power, must be enforced by the Court.

Whatever one thinks of this anti-commandeering principle,[217] these decisions have plainly given the Court an authority that previously rested with Congress. Much like *Lopez* and *Morrison*, *New York* and *Printz* have replaced deference to the political process with independent judicial review. In fact, the Court's opinions in both cases expressly questioned the capacity of elected officials to abide by the Constitution's structural boundaries. The Court in *New York* reasoned that:

> [P]owerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority.[218]

The Court's analysis in *Printz* was similar. Revealing a deep skepticism about the ability of the political process to adhere to constitutional norms, the Court stated that any leeway afforded Congress might well be used cynically to accomplish unpopular policy objectives while eluding political responsibility:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.[219]

These passages seem to epitomize the Rehnquist Court's view of Congress and the political process as arbiters of the constitutional balance between federal and state power.[220] Rather than seeing Congress as a co-equal branch that is equally charged with the obligation to interpret the Constitution,[221] the Rehnquist Court has evinced a fair measure of distrust.[222] In the eyes of the Court, Congress' political accountability, instead of being an asset, undermines its institutional capacity to resolve these questions of constitutional federalism in a principled fashion. By holding that the judiciary is the ultimate expositor of the meaning of the Tenth Amendment, the Rehnquist Court has again enhanced its own role in resolving disputes over constitutional meaning.

3. *Section 5 of the Fourteenth Amendment*

Probably the most prominent example of the Rehnquist Court's assertion of the judiciary's primacy in determining the

boundaries of Congress' power has been its decisions construing section 5 of the Fourteenth Amendment. S ection 5 grants Congress the authority "to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment,[223] the most significant of these provisions being the Due Process and Equal Protection Clauses. Before 1997, the precise contours of Congress' section 5 power were unsettled.[224] Yet it was evident that, under existing precedent, the Court would afford Congress broad deference in the use of its section 5 authority.[225]

First, as to the permissible ends of section 5, the Court's precedent before 1997 established that Congress was not limited to prohibiting only that conduct which the judicial branch was prepared to declare unconstitutional.[226] As the Court stated in *Katzenbach v. Morgan*,[227] a "construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."[228] Moreover, the Court's prior decisions suggested that, in using its section 5 power, Congress might have the authority to interpret the substantive prohibitions of the Fourteenth Amendment independently of the judiciary.[229] That is, Congress potentially could enact legislation enforcing *its* understanding of the Fourteenth Amendment, regardless of the Court's interpretations in case law. The idea was not that Congress could change the meaning of the Fourteenth Amendment by ordinary legislation.[230] But, as a branch of the national government coequal with the Court, Congress could reach an independent interpretive conclusion and ascribe a different meaning to the text in enacting enforcement legislation pursuant to section 5.[231]

Second, with respect to the permissible means and justifications for section 5 legislation, the law as of 1997 was quite clear, and the Court's approach was likewise decidedly deferential.[232] Dating to the 1879 decision of *Ex parte Virginia*,[233] the standard for assessing whether section 5 legislation was "appropriate" had been the same as that governing whether legislation enacted pursuant to any of Congress' Article I powers was "Necessary and Proper."[234] This is the standard famously articulated by Chief Justice Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, [sic] and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, [sic] are constitutional."[235] As has long been recognized, this is a quite relaxed standard of means-ends scrutiny; Congress need not be precise in tailoring its legislation to its legitimate objectives.[236] Thus, in applying this standard, the Court has never inquired into whether Congress had less restrictive means available to accomplish its putative ends, nor has it asked whether the problem that Congress sought to address was sufficiently serious to warrant federal legislation.[237] Under *Ex parte Virginia* and *Morgan*, then, Congress' discretion in determining the appropriateness of legislation to enforce the Fourteenth Amendment was equally broad. Any law "adapted to carry out the objects the [Reconstruction] amendments have in view," or that "tends to enforce submission to the prohibitions they contain," was "within the domain of congressional power."[238]

In a series of decisions beginning in 1997 with *City of Boerne v. Flores*,[239] the Rehnquist Court has rejected this deferential approach and adopted a more restrictive view of Congress' authority under section 5.[240] First, the Court has emphatically held that only the judiciary can decree the meaning of the Fourteenth Amendment's substantive prohibitions. As the Court succinctly stated in *Board of Trustees v. Garrett*[241] (in words reminiscent of *Lopez* and *Morrison*), "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[242] Because "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch,"[243] Congress has no authority to read the text of the Fourteenth Amendment differently than the Court.

This interpretive supremacy extends to determinations of the appropriate legal framework for evaluating Fourteenth Amendment questions (e.g., the proper standard of scrutiny for assessing particular types of state action), as well as the application of that framework to the specific problem that Congress has sought to remedy. Consider the Court's decisions in *Garrett* and *Kimel v. Florida Board of Regents*,[244] which involved the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), respectively.[245] According to the Court's prior decisions, neither disability nor age is a suspect or quasi-suspect classification under the Equal Protection Clause.[246] The Court has therefore refused to strike down state discrimination on the basis of age or disability so long as the state had a rational basis for its classification.[247] One might have seen the ADA and the ADEA as accepting this legal framework but nonetheless

expressing Congress' independent view that most instances of disability and age discrimination are, in fact, irrational. But the Rehnquist Court conceded no such authority to Congress in *Garrett* or *Kimel*. The relevant question was whether these forms of discrimination were irrational *under the Court's precedent*.[248] Because the Court itself had previously held that disability and age discrimination were "entirely rational (and therefore constitutional)" in most circumstances,[249] Congress could not take a contrary view.[250]

Second, the Rehnquist Court's decisions have clearly broken with precedent by demanding a relatively tight means-ends fit in section 5 legislation, overruling the more relaxed standard of *Ex parte Virginia* and *Katzenbach v. Morgan*.[251] Specifically, the Court has held "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[252] In applying this "congruence and proportionality" test, the Court has imposed two distinct requirements. First, a substantial percentage of the conduct regulated or prohibited by section 5 legislation must be unconstitutional (again, according to the Court's reading of the Constitution). Although "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,"[253] it does not extend too far beyond "the metes and bounds of the constitutional right in question."[254] The smaller the proportion of regulated activity that is unconstitutional, the less likely the Court will find the legislation "congruent and proportional."[255] Thus, the Religious Freedom Restoration Act (RFRA), struck down by the Court in *City of Boerne*, was problematic because "[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry" and thus unconstitutional.[256] Similarly, the ADEA failed the "congruence and proportionality" test in *Kimel* because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[257] And the civil remedy provision of the Violence Against Women Act at issue in *Morrison* was beyond Congress' section 5 power because it was directed exclusively at private individuals who had committed acts of gender-motivated violence and thus did not regulate any conduct that the Fourteenth Amendment itself proscribes.[258]

By demanding that Congress not regulate or prohibit too much conduct that the judiciary would find constitutional, the Rehnquist Court has imposed on section 5 legislation something akin to a "narrow tailoring" requirement characteristic of intermediate or strict scrutiny.[259] In effect, the Court has asked whether Congress could have employed means that would impinge less on constitutional conduct.[260] Prior to 1997, such judgments about the overinclusiveness of section 5 legislation were committed to Congress' discretion. For instance, in upholding Congress' prohibition on literacy tests for voters completing the sixth grade in a Puerto Rican school, the Court reasoned in *Morgan* that:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[261]

In replacing this deference with a more rigorous, less-restrictive-means scrutiny, the Rehnquist Court has removed these judgments from the realm of democratic politics and made them matters for the judiciary.

Finally, the Rehnquist Court's application of the "congruence and proportionality" test has also required Congress to justify its invocation of the section 5 power by demonstrating that it had identified a sufficient number of constitutional violations. In other words, for legislation enforcing the Fourteenth Amendment to be "appropriate," Congress must have documented "a history of 'widespread and persisting deprivation of constitutional rights.'"[262] Thus, the Court found the Patent Remedy Act wanting in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[263] because "the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law."[264] The Court held in *Kimel* that the ADEA could not be justified as an exercise of the section 5 power because "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[265] And the Court concluded in *Garrett* that the ADA was not appropriate section 5 legislation because "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[266]

By requiring Congress to demonstrate that the targeted "constitutional problem" is genuine—that it rises to some level of

sufficient magnitude—the Rehnquist Court has made the need for particular statutory remedies a matter for judicial judgment. If Congress has failed to document a pattern of widespread constitutional violations, then section 5 legislation cannot be considered "appropriate." Prior to *City of Boerne*, this was precisely the type of determination that the Court left entirely to Congress. Under the Necessary and Proper Clause (and thus *Ex parte Virginia* and *Morgan*), where "the means adopted are really calculated to attain the end, the degree of their necessity, [and] the extent to which they conduce to the end . . . are matters for congressional determination alone."[267] As Chief Justice Marshall stated in *McCulloch*, "to inquire into the degree of [the law's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[268]

Thus, as in its cases addressing the commerce power and the Tenth Amendment, the Rehnquist Court's section 5 decisions—particularly in their application of the "congruence and proportionality" test—have substantially augmented the role of the judiciary in policing the boundaries of federalism. The Court has replaced deference to Congress' judgment as to the propriety of section 5 legislation with rigorous judicial review. In fact, in all six cases since 1997 where a federal law was challenged as being beyond Congress' section 5 power, the Court has held that the statute was not appropriate enforcement legislation under the Fourteenth Amendment.[269] Hence, in addition to readjusting the balance of power between the federal government and the states, the Rehnquist Court's "new federalism" decisions have had a significant impact on the distribution of authority between the judicial and legislative branches of the national government. They have made the judiciary the final arbiter of several constitutional questions that were previously settled in the realm of democratic politics.

B. Bush v. Gore *Revisited*

If the Rehnquist Court's "federalism revolution" has been as much about the Court's supremacy in determining the meaning of the Constitution as about the proper federal-state balance, then *Bush v. Gore* becomes the seminal case. For when the political stakes were highest, and the risks to the Court's institutional legitimacy the gravest, the Rehnquist Court decided that it was the Court's responsibility to provide the definitive constitutional answers. As with the breadth of Congress' enumerated powers, the constitutionality of Florida's election was to be decided by the Court, not the political process.

A brief review of the events surrounding the election contest may be helpful. At approximately 7:30 p.m. on November 26, 2000, Florida Secretary of State Katherine Harris declared George W. Bush the certified winner of Florida's presidential election by the slim margin of 537 votes.[270] The next day, Vice President Gore filed suit in Leon County Circuit Court contesting the certified totals, alleging (as is relevant here) that they excluded legal votes.[271] Specifically, Gore challenged Miami-Dade County's refusal to count its ballots manually; Palm Beach County's failure to complete a manual count and its use of a more stringent "intent" standard for evaluating uncounted ballots; and the exclusion of legal votes identified by the partially completed manual counts in Miami-Dade and Palm Beach Counties.[272] Following a brief trial, Circuit Judge N. Sanders Sauls rejected each of Gore's claims on December 4.[273] Judge Sauls concluded that Gore had failed to establish any illegality in the balloting or counting processes, or that the alleged irregularities created a reasonable probability that the election result would have been different.[274] (Incidentally, also on December 4, the United States Supreme Court issued its unanimous decision in *Bush v. Palm Beach County Canvassing Board*,[275] which vacated and remanded the Florida Supreme Court's decision concerning Gore's pre-certification protest action.[276] It was unclear how this first United States Supreme Court decision affected Gore's now-initiated election contest, if at all.[277])

Gore immediately appealed Judge Sauls' ruling to the Florida Supreme Court, which set the case for argument on December 7.[278] On Friday, December 8, a divided Florida Supreme Court reversed the circuit court, ordering an immediate manual count of all undervoted ballots in the state.[279] The Florida Supreme Court concluded that, under Florida election law, "a legal vote is one in which there is a 'clear indication of the intent of the voter.'"[280] Because Gore had identified over 9000 ballots in Miami-Dade County that had not registered a vote for president, he had established that "legal votes sufficient to place in doubt the election results ha[d] been rejected."[281] Florida law therefore required a manual count of the undervoted ballots, but it was "absolutely essential" that the count be conducted in all counties in which there had been undervoted ballots, not just those that Gore had contested.[282] The court thus remanded the case to Leon County Circuit Court to tabulate the legal votes contained in the Miami-Dade undervotes (which were now in the circuit court's custody) and to issue such orders as were necessary to carry out the statewide tabulation, with the governing standard being a "clear indication of the intent of the voter."[283] It also ordered that the legal votes identified by the partially completed manual

counts in Miami-Dade and Palm Beach counties be included in the certified totals.[284] The inclusion of these votes reduced Bush's margin over Gore to somewhere between 150 and 200 votes.[285]

Later that night, Bush filed an emergency application with the United States Supreme Court to stay the Florida Supreme Court's judgment.[286] He argued that the "selective, ever-shifting, and standardless hand-counting" of ballots "would seriously erode fundamental federal policies, including the right to vote" and the "fairness and finality of elections for federal office."[287] As Bush's application was pending, hand counting of the roughly 45,000 undervoted ballots commenced throughout Florida on Saturday morning.[288] According to orders from Circuit Judge Terry Lewis, eight county judges were evaluating the Miami-Dade ballots, and other county canvassing boards were proceeding under individual plans submitted to Judge Lewis.[289] By mid-afternoon, roughly thirteen of Florida's sixty-seven counties had started or completed the manual counting of their undervoted ballots.[290] Election officials were under court order not to reveal the results of these tabulations, but some observers were reporting that Gore was making up significant ground, possibly reducing the overall margin to fewer than 100 votes.[291] Then, at 2:45 p.m., the United States Supreme Court issued its order halting the manual count and granting certiorari, scheduling the case for argument at 11:00 a.m. Monday, December 11.[292]

As these judicial proceedings were unfolding, the Florida legislature was taking steps to appoint a separate slate of electors in the event Vice President Gore ultimately prevailed in his election contest. As early as November 22, Republican legislators began discussing the possibility of convening a special session to name electors who would support Bush in the Electoral College, superseding the results of the popular vote.[293] That week, Florida House Speaker Tom Feeney and Florida Senate President John McKay created a "Select Joint Committee on the Manner of the Appointment of Presidential Electors," which heard two days of testimony concerning the legislature's obligation to appoint its own slate of electors.[294] On November 30, the select committee recommended that the legislature convene for this purpose "as soon as practicable."[295] A week later, Feeney and McKay signed a joint proclamation calling for a special session, which convened December 8.[296] And on December 12, just hours before the United States Supreme Court issued its ruling in *Bush v. Gore*, the Florida House adopted a resolution appointing twenty-five Bush electors.[297] The Florida Senate was scheduled to vote on the resolution the next day, but McKay delayed any action pending Gore's remarks that evening.[298] The Vice President's concession made the whole endeavor moot.[299]

Thus, as the Justices deliberated over whether to intervene in the contest proceeding—and, once they did, how to decide the case—the following scenario lay before them: If the Court allowed the manual count to go forward, it appeared likely that Gore would overtake Bush and be declared the winner of Florida's popular vote. Indeed, this was precisely the irreparable harm that Justice Scalia believed justified the Court's halting the manual count, as Gore's taking the lead would have "cast[ ] a cloud upon what [Bush] claims to be the legitimacy of his election."[300] Assuming Secretary Harris and Governor Jeb Bush abided by the Florida Supreme Court's orders, Gore then would have been certified as the winner of the state's twenty-five electoral votes.[301] In response, or even if the popular vote had not been settled by December 12, both houses of the Florida legislature would have passed a resolution appointing twenty-five electors pledged to support George W. Bush, and these electors too would have been certified by the Secretary of State and the Governor.[302] Article II and the Twelfth Amendment dictate that, after the states' electoral votes have been certified and sent to Washington, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[303] Congress, then, would have convened on January 6, 2001, to decide which set of electoral votes to recognize.[304]

The Electoral Count Act, enacted in 1887 in the wake of the disputed 1876 presidential election, sets down a procedure for Congress to resolve precisely such a dispute. Section 15 of the Act provides that where a state submits multiple sets of electoral votes, "those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in [3 U.S.C. § 5] to have been appointed."[305] Section 5 is the now-famous "safe harbor" provision. It provides that if a state has determined "any controversy or contest concerning the appointment" of its electors "at least six days before the time fixed for the meeting of the electors," and that determination was "made pursuant to" state "laws enacted prior to the day fixed for the appointment of the electors," then the determination "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated."[306] But even if one (or both) of the slates had been appointed by the safe-harbor deadline, 3 U.S.C. § 15 still dictates that Congress only recognize those electoral votes that "have been regularly given by electors whose appointment has been lawfully

certified."[307] And whether the competing slates had been "regularly given" and "lawfully certified" would have turned on the constitutionality of the hand count ordered by the Florida Supreme Court and the appointment of Bush electors by the Florida legislature. When a dispute arises as to whether competing slates of electors meet these criteria, 3 U.S.C. § 15 states that Congress shall count those electors "whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law."[308] If the House and Senate disagree as to which slate to recognize, "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted."[309]

The Act obviously leaves important gaps.[310] For instance, it is unclear how Congress should determine which slate of electors was "certified by the executive of the State."[311] Presumably, both the Bush and Gore slates could have had such certification, the former by voluntary act and the latter perhaps under orders from the Florida Supreme Court. Moreover, it is uncertain what is to happen if a state executive unlawfully refuses to certify a slate of electors, a clear possibility if the hand count had gone forward. Nonetheless, the Act establishes some broad parameters for Congress' deliberations, and it represents a considered decision to commit the dispute to the political process rather than the judiciary.[312] As Professors Pamela Karlan and Samuel Issacharoff have noted, when Congress passed the Act, it expressly considered and rejected the alternative of submitting such controversies to the Supreme Court.[313] The Act's sponsor, Senator Sherman of Ohio, explained during debate on the Senate floor that a plan had been proposed "to allow questions of this kind to be certified at once to the Supreme Court for its decisions in case of a division between the two Houses."[314] But the proposal had "not met with much favor" because "there is a feeling in this country that we ought not to mingle our great judicial tribunal with political questions."[315] He continued that:

> It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after all has to sit upon the life and property of all the people of the United States.[316]

Of course, resolution by Congress also offered the significant benefit of investing a decision of significant political importance in a body that, unlike the Court, is politically accountable.[317]

This is not to say that, all things considered, the nation would have been better off had Congress resolved Florida's election dispute, an empirical question that could never be answered definitively. Certainly, the debate would have been messy and intensely political, and it might have produced a true deadlock. If the House and Senate split over which slate of electors to recognize, Congress would have been forced to decide which slate was "certified by the executive of the State" of Florida, a question that likely would have lacked a clear answer.[318] Moreover, had the political process become paralyzed, the Court, having stayed its hand in November and December, could well have been powerless to intervene; there is a strong argument that any dispute concerning how Congress is to count electoral votes would be a nonjusticiable "political question."[319] Perhaps, as some have contended, leaving the decision to Congress would have precipitated a genuine constitutional crisis.[320]

But the relevant point here is that, as the Court was considering whether to intervene, the most likely scenario if the Court had permitted the hand count to go forward was for the dispute to be resolved in Congress. In early January, members of Congress would have been required to render their own judgments as to which slate of electors had been lawfully appointed, a matter that subsumed the question whether the manual counting of the undervoted ballots ordered by the Florida Supreme Court violated the Equal Protection Clause or the "Manner directed" Clause of Article II. Through its decision in *Bush v. Gore*, the Rehnquist Court did precisely what it has done throughout its major federalism decisions, from *Lopez* to *Printz* to *Morrison* to *Garrett*.[321] Namely, the Court determined that these important questions of constitutional meaning must be resolved by the judiciary, not the political process.[322] To paraphrase the Chief Justice, the lawfulness of the manual count ordered by the Florida Supreme Court was "ultimately a judicial rather than a legislative question, and [could] be settled finally only by this Court."[323] Once again—and in the most dramatic fashion possible—the Court found itself responsible for providing the definitive constitutional answers.

IV. CONCLUSION

The per curiam opinion in *Bush v. Gore* embraced a novel and rather expansive understanding of equal protection that

seems largely out of character for the Rehnquist Court. But the decision to intervene and resolve the election dispute was not inconsistent with this Court's general approach to constitutional federalism. When the breadth of congressional authority has not been at issue, the Rehnquist Court has not been especially protective of state sovereignty interests. In fact, in its decisions concerning the principal constitutional limits on state power—namely, the doctrine of preemption and the dormant Commerce Clause—the Rehnquist Court has tended to favor the prerogatives of the federal government and the needs of the national economy over the preservation of states' political independence. Moreover, the Rehnquist Court's "new federalism" decisions have been as much about establishing the judiciary's primacy over Congress in determining the Constitution's meaning as they have been about reinvigorating the federalism-based limits on Congress' authority. Its decisions addressing the commerce power, the Tenth Amendment, and section 5 of the Fourteenth Amendment all have taken constitutional judgments that were previously left largely to the political process and made them matters for the Court, finally and exclusively, to resolve.

Bush v. Gore fits these patterns nicely. The election dispute did not involve the limits on Congress' legislative powers, thus it is unsurprising that the Court did not fixate on Florida's sovereignty interests. In fact, the Rehnquist Court has found it necessary to intrude into the sensitive area of how states run their elections on several occasions. It has overturned Connecticut's closed primary system, which restricted participation in primary elections to the parties' registered members,[324] as well as California's so-called "blanket" primary, which permitted voters to cross party lines and vote for members of different parties in contests for different offices.[325] It has prohibited states from limiting the terms of their congressional representatives[326] or from indicating on their ballots whether candidates had supported term limits while in office (or pledged to do so once elected).[327] And it has repeatedly invalidated states' congressional districting plans, wading into the thicket of assessing state legislators' true motives in making these intensely political decisions.[328] The manual count ordered by the Florida Supreme Court was another incident of state election law that the Rehnquist Court felt obliged to overturn to protect the national interests at stake, despite the obvious implications for "the autonomy, the decisionmaking ability, and the sovereign capacity of the States."[329]

Bush v. Gore also exemplifies the Rehnquist Court's rather expansive view of the role of the federal judiciary. Intervening in the election dispute posed great risks for the Court, especially given the chance that its decision would divide along predictable ideological lines. Procedures were in place, as set out in the Electoral Count Act, for Congress to resolve the election dispute, and to many, Congress' political accountability made it the more appropriate institution for deciding the most political of controversies. But this Court instead saw it proper to resolve the matter itself. As in many of its federalism decisions, the Court determined that the relevant constitutional questions had to be answered outside the caldron of democratic politics.

In the final paragraph of the per curiam opinion, the Court staked its claim to the mantle of judicial restraint: "None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere."[330] But the Justices' decisions to grant certiorari and to end the election dispute belie a true deference to politics. Right or wrong, *Bush v. Gore* was a very activist decision.[331] Although the Rehnquist Court may be better known for its attention to the boundary between federal and state power, its "new federalism" has also substantially altered the allocation of authority between the Court and Congress—between the judiciary and the political process. This Court has removed several judgments of constitutional meaning from the realm of politics and made them matters for judicial resolution. Rather than an aberration, *Bush v. Gore* might ultimately be the centerpiece of the Rehnquist Court's legacy: a movement towards a more court-centered view of our constitutional scheme, and an ingrained distrust of politics as an arbiter of constitutional meaning.

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[1] 531 U.S. 98 (2000) (per curiam).

[2] *Id.* at 111. The "undervoted" ballots were those for which vote-counting machines registered no vote for president, and "overvoted" ballots were those registering multiple votes for president. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 9–10 (2001).

[3] *Bush v. Gore*, 531 U.S. at 105–06.

[4] *Id.* at 105–09.

[5] *Id.* at 110.

[6] *See* Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

[7] *See, e.g.*, Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U. CHI. L. REV. 657 (2001) (approving of the Court's holding that the recount proceeding violated the Equal Protection Clause but finding that the remedy of ending the election contest was difficult to defend); Note, Non Sub Homine? *A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170 (2001); Charles Fried, *"A Badly Flawed Election": An Exchange*, N.Y. REV. BOOKS, Feb. 22, 2001, at 8.

[8] *See* POSNER, *supra* note 2, at 9–10 (defending the Court's two election decisions, not based on their legal analysis, but as "a pragmatically defensible series of responses to a looming political and constitutional crisis"); Richard Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*, 68 U. CHI. L. REV. 613, 614 (2001) (finding the Article II grounds for Chief Justice Rehnquist's concurring opinion persuasive, but dismissing the per curiam opinion's equal protection analysis "as a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it").

[9] *See, e.g.*, Jack M. Balkin, Bush v Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 77 (Cass R. Sunstein & Richard A. Epstein eds., 2001), *available at* http://www.thevotebook.com; Michael J. Klarman, Bush v Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming 2001) (on file with author); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001); David A. Strauss, Bush v Gore: *What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. BOOKS, Feb. 8, 2001, at 3; Renata Adler, *Irreparable Harm*, NEW REPUBLIC, July 30, 2001, at 29; Akhil Amar, *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1; Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53; Henry T. Greely, *Court's Intervention Breaks the Faith*, S.J. MERC. NEWS, Dec. 15, 2000, at B7; Neal Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35; Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18; *Unsafe Harbor*, NEW REPUBLIC, Dec. 25, 2000, at 9.

[10] *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIGHJACKED ELECTION 2000 121–72 (2001); Frank Goodman, *The Supreme Court's Federalism: Real or Imagined—Preface*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 14 (2001); Klarman, *supra* note 9, at 5; Katyal, *supra* note 9, at A35. I particularly enjoyed Dahlia Lithwick's description:

> In public, [the Rehnquist Court] struts and frets about the 'balance of powers' and federalism and its role in the big picture. But look at what happened in Florida. It was the All You Can Eat Breakfast Buffet at the Bellagio down there. States' rights went the way of the shrimp platter, and federalism was the bowl of guacamole.

Dahlia Lithwick, *The High Court's Eating Disorder*, SLATE, July 3, 2001, *available at* http://Slate.msn.com/court/entries/01-07-03_111437.asp.

[11] *See* Strauss, *supra* note 9, at 739–40; Sunstein, *supra* note 9, at 764–65.

[12] *See* Goodman, *supra* note 10, at 14; Strauss, *supra* note 9, at 742; Sunstein, *supra* note 9, at 767–68.

[13] Alden v. Maine, 527 U.S. 706, 750 (1999).

[14] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[15] Katyal, *supra* note 9, at A35; *see also* Balkin, *supra* note 9, at 1426 ("It is ironic that the extension" of federal constitutional principles into state election procedures "is being carried out by the Justices most committed to protecting state sovereign prerogatives against federal intrusion."); Goodman, *supra* note 10, at 14–15 ("One would have expected the five conservative justices to be the first, not the last, to adhere to the well-established principle that a state supreme court is the final authority on the meaning of state law."); Klarman, *supra* note 9, at 5 ("[t]hese Justices' oft-professed commitment to federalism and to judicial restraint logically should have led them to the opposite result."); *cf.* POSNER, *supra* note 2, at 218 ("The decision deals a blow to states' rights by overriding a state supreme court's interpretation of its own state's statute.").

[16] By "Rehnquist Court," I mean no particular set of Justices but instead the Court as an institution during William Rehnquist's tenure as Chief Justice. Thus, several of the characteristics I attribute to the Rehnquist Court are the product of different majorities of Justices.

[17] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-1, at 1021 (3d ed. 2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 135 n.22; Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 103 (1995).

[18] The term "union-preserving" comes from TRIBE, *supra* note 17, at § 6-1, at 1021.

[19] *See, e.g.*, Boggs v. Boggs, 520 U.S. 833, 840 (1997) (holding that aspect of Louisiana community property law was preempted by ERISA despite acknowledging the "central role community property laws play in the nine community property states," and that community property laws "implement policies and values lying within the traditional domain of the States").

[20] *See, e.g.*, Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, March 3, 2001, at A13; Jeffrey Rosen, *The End of Deference*, NEW REPUBLIC, Nov. 6, 2000, at 38.

[21] *See* Larry Kramer, *The Arrogance of the Court*, WASH. POST, May 23, 2000, at A29.

[22] *See infra* text accompanying notes 211–14.

[23] Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).

[24] *See* Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 14, 2000, at A33; Charles Lane, *Laying Down the Law, Justices Ruled With Confidence: From* Bush v. Gore *Onward, Activism Marked Past Term*, WASH. POST, July 1, 2001, at A6 (quoting Walter Dellinger as stating that the Court "assumes that it is more qualified than Congress to resolve disputed electoral votes, more entitled than the president's agencies to fill gaps in federal law and better equipped than the professional golf association to determine the rules of golf").

[25] *See* Sunstein, *supra* note 9, at 768–69. Article II, § 1, clause 2 of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2. In his concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concluded that the Florida Supreme Court's decision ordering a hand count of the undervoted ballots had so misconstrued Florida election law as to disregard the instructions of the Florida legislature, thus violating the "Manner directed" Clause. Bush v. Gore, 531 U.S. 98, 111–22 (Rehnquist, C.J., concurring).

[26] Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified at 3 U.S.C. §§ 5, 6, 15 (1994)).

[27] *See* Karlan, *supra* note 9, at 92 ("Once again, . . . the Court intervened to short-circuit the normal, albeit potentially contentious and messy, process of self-government.").

[28] Relatedly, Professor Richard Pildes has contended that *Bush v. Gore* is consistent with the Rehnquist Court's "cultural" attitude toward democracy—"the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy." Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 696 (2001). Specifically, Pildes suggests that, consistent with several of the Rehnquist Court's other decisions concerning the regulation of elections, *Bush v. Gore* might be explained by a "cultural view, not a narrowly partisan preference, that 'democracy' required judicially-ensured order, stability, and certainty, rather than judicial acceptance of the 'crisis' that partisan political resolution might be feared by some to have entailed." *Id.* at 715.

[29] Printz v. United States, 521 U.S. 898, 919 (1997); *see, e.g.*, Stephen G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001) ("Perhaps the most striking feature of the Rehnquist Court's jurisprudence has been the revival over the last 5–10 years of doctrines of constitutional federalism."); Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity, and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1283 (2000) ("When constitutional historians look back at the Rehnquist Court, they undoubtedly will say that its most significant changes in constitutional law were in the area of federalism."); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 783 (2001) ("Federalism has become the defining issue of the Rehnquist Court.").

[30] New York v. United States, 505 U.S. 144, 188 (1992) (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)) (citation omitted).

[31] United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act).

[32] Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (Clean Water Act); Jones v. United States, 529 U.S. 848 (2000) (arson statute).

[33] New York v. United States, 505 U.S. 144 (1992) (Low-Level Radioactive Waste Policy Amendments of 1985); *Printz*, 521 U.S. at 898 (Brady Handgun Violence Protection Act).

[34] Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (ADA); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (ADEA).

[35] *Garrett*, 121 S. Ct. at 955 (ADA); *Morrison*, 529 U.S. at 598 (Violence Against Women Act); *Kimel*, 528 U.S. at 62 (ADEA); City of Boerne v. Flores, 521 U.S. at 507 (1997) (Religious Freedom Restoration Act).

[36] *New York*, 505 U.S. at 161.

[37] Whether these decisions ultimately will enhance the political independence of the states, or whether they instead will prompt the Federal Government to regulate more itself instead of through state governments, remains to be seen. *See id.* at 210 (White, J., dissenting) ("The ultimate irony of the decision today is that in its formalistically rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer the wishes of state officials in achieving local solutions to local problems.").

[38] As Justice Ginsburg wrote in her dissenting opinion, "[w]ere the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court." Bush v. Gore, 531 U.S. 98, 142–43 (2000) (Ginsburg, J., dissenting).

[39] Specifically, the Court cited *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

[40] *See* Sunstein, *supra* note 9, at 764 (characterizing *Harper* and *Reynolds* as "entirely far afield").

[41] *Bush v. Gore*, 531 U.S. at 105–09.

[42] *Id.*

[43] *See* POSNER, *supra* note 2, at 128 (stating that the Court's equal protection analysis "portends an ambitious program of federal judicial intervention in the electoral process").

[44] *Bush v. Gore*, 531 U.S. at 110.

[45] *See* Sunstein, *supra* note 9, at 767–68.

[46] *Bush v. Gore*, 531 U.S. at 110.

[47] *See* Goodman, *supra* note 10, at 14; Klarman, *supra* note 9, at 14; Sunstein, *supra* note 9, at 767–68; *cf.* Johnson v. Frankell, 520 U.S. 911, 916 (1997) (stating that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State," and that "[t]his proposition" is "fundamental to our system of federalism").

[48] *See* Goodman, *supra* note 10, at 14 ("[T]he attribution of that drop-dead date to the legislature seems a clear usurpation of the interpretive

authority of the Florida Supreme Court."); Strauss, *supra* note 9, at 742. Strauss states:

> 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.

Sunstein, *supra* note 9, at 768 ("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.").

[49] Alden v. Maine, 527 U.S. 706, 748–49 (1999).

[50] *See* Lessig, *supra* note 17, at 155.

[51] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (calling preemption "almost certainly the most frequently used doctrine of constitutional law in practice").

[52] The Supremacy Clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[53] 17 U.S. (4 Wheat.) 316 (1819).

[54] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

[55] 22 U.S. (9 Wheat.) 1 (1824).

[56] *Id.* at 209.

[57] For instance, a section of the Employee Retirement Income Security Act (ERISA) provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1998).

[58] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[59] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

[60] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[61] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 96 (1992).

[62] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

[63] *See, e.g.*, Johnson v. Frankell, 520 U.S. 911, 922 (1997) ("When pre-emption of state law is at issue, we must respect the 'principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.'") (quoting Howlett v. Rose, 496 U.S. 356, 372–73 (1990)); United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[T]his Court has participated in maintaining the federal balance through judicial exposition of . . . the whole jurisprudence of pre-emption."); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000).

[64] Egelhoff v. Egelhoff *ex rel*. Breiner, 121 S. Ct. 1322, 1335 (2001) (Breyer, J., dissenting) (citations omitted).

[65] *See* Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (2001) ("Strikingly, in recent terms, even as the Supreme Court has begun to prune the scope of some federal powers, it has aggressively employed preemption doctrine to immunize a variety of business activities from state regulation.").

[66] As Justice Kennedy observed in *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

[67] *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265–90 (2000) (arguing that there is no constitutional basis for "obstacle" preemption); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 71 (1988) ("obstacle" preemption doctrine "forces the courts either to search quixotically for the 'spirit' of a statute, or to choose between two doctrinally deficient theories of preemption").

[68] *See, e.g.*, KENNETH STARR ET AL., THE LAW OF PREEMPTION 47, 56 (1991); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687 (1991) ("Federal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens' public values and ideas—state and local governments—and have concomitantly undermined citizens' rights to participate directly in governing themselves."); Wolfson, *supra* note 67, at 114 ("The current jurisprudence of preemption . . . fails to protect the political and judicial safeguards of federalism.").

[69] *See Egelhoff*, 121 S. Ct. at 1322 (2001); Buckman Co. v. Plaintiffs' Legal Comm., 121 S. Ct. 1012 (2001); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Geier v. American Honda Motor Corp., 529 U.S. 861 (2000); Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344 (2000); United States v. Locke, 529 U.S. 89 (2000).

[70] 505 U.S. 504 (1992).

[71] *Id.* at 517 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978), and California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)) (citations omitted).

[72] 514 U.S. 280 (1995).

[73] *Id.* at 288.

[74] *Id.* at 289.

[75] 529 U.S. 861 (2000).

[76] *Id.* at 873.

[77] *Id.* at 874.

[78] 121 S. Ct. 1012 (2001).

[79] *Id.* at 1019. In *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001), one of the last decisions of the 2000 Term, Justice O'Connor wrote for the Court that "an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters." *Id.* at 2414 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)). Justice O'Connor ultimately found that the state law was preempted. *Id.* This statement seems to contradict the quoted language from *Buckman* of only four months earlier, which Justice O'Connor herself joined. The precise state of the law on this point is therefore unclear. At a minimum, the Court has discarded the reasoning of *Cipollone*, and the more considered discussions of the point in *Geier* and *Buckman* seem of greater import than the dictum in *Lorillard*.

[80] 331 U.S. 218 (1947).

[81] California v. ARC America Corp., 490 U.S. 93, 101 (1989) (quoting *Rice*, 331 U.S. at 230).

[82] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2414 (2001); Egelhoff v. Egelhoff *ex rel*. Breiner, 121 S. Ct. 1322, 1330 (2001); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992).

[83] 529 U.S. 89 (2000).

[84] *See id.* at 97, 117–19.

[85] *Id.* at 90.

[86] Buckman Co. v. Plaintiffs' Legal Comm., 121 S. Ct. 1012, 1020 (2001).

[87] *Medtronic*, 518 U.S. at 475 (internal quotation marks omitted).

[88] *Buckman*, 121 S. Ct. at 1017 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[89] *Id.*

[90] Those cases are Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001); Egelhoff v. Egelhoff *ex rel*. Breiner, 121 S. Ct. 1322 (2001); *Buckman*, 121 S. Ct. 1012; Geier v. Am. Honda Motor Corp., 529 U.S. 861 (2000); Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000); El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999); Johnson v. Frankell, 520 U.S. 911 (1997); Boggs v. Boggs, 520 U.S. 833 (1997); California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316 (1997); Atherton v. F.D.I.C., 519 U.S. 213 (1997); *Medtronic*, 518 U.S. at 470; Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); U.S. Dept. of Treasury v. Fabe, 508 U.S. 491 (1993); CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992). This list may exclude additional preemption cases where the Court resolved a split of authority but did not acknowledge the split in its opinion.

[91] *See Lorillard*, 121 S. Ct. at 2404; *Egelhoff*, 121 S. Ct. at 1322; *Buckman*, 121 S. Ct. at 1012; *Geier*, 529 U.S. at 861; *Norfolk Southern*, 529 U.S. at 344; *El Al Israel Airlines*, 525 U.S. at 155; *Boggs*, 520 U.S. at 833; *Smiley*, 517 U.S. at 735; *Barnett Bank*, 517 U.S. at 25; *Fabe*, 508 U.S. at 491; *Greater Washington Bd. of Trade*, 506 U.S. at 125; *Gade*, 505 U.S. at 88.

[92] *See Easterwood*, 507 U.S. 658; *Cipollone*, 505 U.S. 504.

[93] 121 S. Ct. 955 (2001).

[94] 529 U.S. 598 (2000).

[95] 527 U.S. 706 (1999).

[96] *See Lorillard Tobacco*, 121 S. Ct. at 2404; *Egelhoff*, 121 S. Ct. at 1322; *Buckman*, 121 S. Ct. at 1020; *Geier*, 529 U.S. at 861; *Norfolk S. Ry.*, 529 U.S. at 344; *El Al Israel Airlines*, 525 U.S. at 155.

[97] 520 U.S. 833 (1997).

[98] *Id.* at 835–36.

[99] *Id.* at 840.

[100] *Id.*

[101] *Id.* at 843; *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (holding that the Occupational Safety and Health Act preempted an Illinois scheme for licensing workers at hazardous waste facilities even though "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions") (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).

[102] 530 U.S. 363 (2000).

[103] *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 46 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

[104] *See* Sanford Levinson, *Compelling Collaboration with Evil? A Comment on* Crosby v. National Foreign Trade Council, 69 FORDHAM L. REV. 2189, 2191 (2001) ("Generating the Massachusetts Act was, presumably, a repulsion by the people of Massachusetts, as represented by the legislature, at the prospect of collaborating even indirectly with the notably tyrannical regime that currently controls Burma.").

[105] *Crosby*, 530 U.S. at 388.

[106] *See* Levinson, *supra* note 104, at 2192.

[107] *Crosby*, 530 U.S. at 373–74.

[108] *Cf.* Levinson, *supra* note 104, at 2194 (contending that the Court's willingness to accept the federal government's claim that vital national security interests were at stake, "and to use it as the underlying basis for limiting the power of Massachusetts to cordon itself off from collaboration with this evil regime, bespeaks a view of national power that is absolutely astonishing").

[109] U.S. CONST. art. I, § 8, cls. 1, 3.

[110] *See* Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873).

[111] Dennis v. Higgins, 498 U.S. 439, 450 (1991); Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

[112] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 788–89 (2001).

[113] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring).

[114] Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

[115] *Id.* at 263.

[116] *Id.* at 260; *see also id.* at 265 (the Court's enforcement of the dormant Commerce Clause has been "an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well"). *See generally* Walter Hellerstein, *Justice Scalia and the Commerce Clause: Reflections of a State Tax Lawyer (The Jurisprudence of Justice Antonin Scalia)*, 12 CARDOZO L. REV. 1763 (1991).

[117] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

[118] *Id.* at 612; *see also id.* at 618 (Court has used the dormant Commerce Clause "to make policy-laden judgments that we are ill equipped and arguably unauthorized to make").

[119] 504 U.S. 298 (1992).

[120] 386 U.S. 753 (1967).

[121] *Id.* at 758–60.

[122] *Quill*, 504 U.S. at 303–04.

[123] *Id.* at 314–19.

[124] *Id.* at 315–17.

[125] Presently, the Federal Internet Tax Freedom Act, Pub. L. No. 105-277, §§ 1101–04, 112 Stat. 2681–719 (1998), prohibits states from imposing any "multiple or discriminatory taxes on electronic commerce." *Id.* § 1101(a)(2). But requiring out-of-state sellers to collect use taxes on interstate sales would be neither a multiple nor a discriminatory tax as it would merely extend the existing tax burden on in-state sales to all retailers regardless of their physical location. Walter Hellerstein, *Internet Tax Freedom Act Limits States' Power to Tax Internet Access and Electronic Commerce*, 90 J. TAX'N 5 (1999). Thus, it is *Quill* that prevents states from being able to apply their sales and use taxes equally to purchases from in-state and out-of-state retailers. Wade Anderson & Christine Mozingo, *Taxing Electronic Commerce*, 20 ST. TAX NOTES 521 (2000). A recent study estimated that the inability to tax sales from out-of-state retailers with no physical presence in the taxing state will cost state and local governments $13.3 billion in foregone tax revenue in 2001, $45.2 billion in 2006, and $54.8 billion in 2011. Donald Bruce & William F. Fox, *State and Local Tax Revenue Losses from E-Commerce: Updated Estimates*, 22 ST. TAX NOTES 203, 203 (2001).

[126] 504 U.S. 768 (1992).

[127] *Id.* at 772.

[128] *Id.* at 773.

[129] *Id.* at 784.

[130] *Id.* at 777, 784.

[131] *Id.* at 784–88. Four Justices dissented from the Court's decision in *Allied-Signal*, but the dissenters agreed with the majority that the unitary business principle should be retained. *Id.* at 790 (O'Connor, J., dissenting) ("I agree with the Court that we cannot adopt New Jersey's suggestion that the unitary business principle be replaced by a rule allowing a State to tax a proportionate share of all the income generated by any corporation doing business there.").

[132] *Id.* at 777–88.

[133] 526 U.S. 160 (1999).

[134] Brief for Respondent at 7, *S. Cent. Bell*, 526 U.S. at 160 (quoting Erie R.R. Co. v. Thompkins, 340 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

[135] Brief for Respondent at 28, *S. Cent. Bell Tel.*, 526 U.S. at 160.

[136] *Id.* at 42.

[137] *Id.* at 28.

[138] *S. Cent. Bell*, 526 U.S. at 171.

[139] *Id.* (O'Connor, J., concurring).

[140] 511 U.S. 383 (1994).

[141] *Id.* at 411 (Souter, J., dissenting).

[142] *Id.* at 386.

[143] *Id.* at 387, 393.

[144] *Id.* at 402–03 (O'Connor, J., concurring).

[145] *Id.* at 391.

[146] *Id.* at 392.

[147] 520 U.S. 564 (1997).

[148] *Id.* at 583–88, 595.

[149] 483 U.S. 232 (1987).

[150] *Id.* at 241–42.

[151] *Id.* at 248, 251.

[152] 511 U.S. 93 (1994).

[153] Specifically, the Court stated:

> To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, "identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate." Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other.

Id. at 103 (citations omitted) (citing Maryland v. Louisiana, 451 U.S. 725, 758 (1981); Armco Inc. v. Hardesty, 467 U.S. 638, 643 (1984)).

[154] *Id.* at 104–05.

[155] 512 U.S. 186 (1994).

[156] *Id.* at 194–95, 199.

[157] 483 U.S. 266 (1987).

[158] *Id.* at 292–97 (overruling Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950), Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs, 332 U.S. 495 (1947), and Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935)).

[159] *See, e.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) (upholding Oklahoma's unapportioned sales tax imposed on the purchase of bus tickets for interstate travel); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) (rejecting dormant Commerce Clause challenge to California's worldwide combined income reporting system for affiliated corporations); Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) (sustaining Michigan's apportioned value added tax, even as applied to value added through manufacturing activities that occurred outside the state); Amerada Hess Corp. v. Dir., Div. of Taxation, 490 U.S. 66 (1989) (upholding New Jersey's denial of deduction for federal windfall profits tax imposed on oil producers even though taxpayers did not produce oil in New Jersey); Goldberg v. Sweet, 488 U.S. 252 (1989) (sustaining Illinois' unapportioned gross receipts tax on all telecommunications that were billed to a service address in Illinois and were initiated or terminated in the state).

[160] Kramer, *supra* note 20, at A13 (the Court's decision in *Garrett* is "but the latest example of the court's assertion of the primacy of its views over those of Congress"); Rosen, *supra* note 20, at 38 ("[T]he Rehnquist Court's federalism opinions are suffused with a refusal to acknowledge Congress' legitimacy as a representative of national authority.").

[161] As Judge Posner has explained, the Court's decision in *Bush v. Gore* did not technically remove from Congress the ultimate decision of whether to count Bush's electoral votes. POSNER, *supra* note 2, at 185. *Bush v. Gore* did not command Congress to count the twenty-five votes for Bush stemming from the November 26 vote totals certified by Florida Secretary of State Katherine Harris. Thus, when Congress convened on January 6, 2001, it could have rejected the twenty-five votes for Bush, giving Gore a majority (or perhaps a plurality) of the electoral votes. *Id.* In fact, a group of House Democrats formally raised twenty objections to Florida's votes, but because no Senator would sign onto their objections, they were not cognizable under the Electoral Count Act. Edward Walsh & Juliet Eilperin, *Gore Presides as Congress Tallies Votes Electing Bush: Black*

Caucus Members Object as Fla. Numbers Are Accepted, WASH. POST, Jan. 7, 2001, at A1. As a practical matter, however, *Bush v. Gore* did remove the judgment from Congress as it eliminated any politically salient objection to the Bush electors. POSNER, *supra* note 2, at 185–86.

[162] 301 U.S. 1 (1937).

[163] 312 U.S. 100 (1941).

[164] 317 U.S. 111 (1942).

[165] TRIBE, *supra* note 17, § 5-4, at 811–16.

[166] *Wickard*, 317 U.S. at 128–29; TRIBE, *supra* note 17, § 5–4, at 813.

[167] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964); *Heart of Atlanta*, 379 U.S. at 258.

[168] 379 U.S. 241 (1964).

[169] *Id.* at 258–59.

[170] 402 U.S. 146 (1971).

[171] *Id.* at 154 (emphasis added).

[172] 379 U.S. 294 (1964).

[173] *Id.* at 303–04.

[174] 469 U.S. 528 (1985).

[175] *Id.* at 533.

[176] *Id.* at 550.

[177] *Id.* at 556.

[178] *See id.* ("The political process ensures that laws that unduly burden the States will not be promulgated.").

[179] 514 U.S. 549 (1995).

[180] 529 U.S. 598 (2000).

[181] *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 SO. CAL. L. REV. 1311, 1334 (1997).

[182] *Lopez*, 514 U.S. at 567–68.

[183] *Morrison*, 529 U.S. at 617–19.

[184] 5 U.S. (1 Cranch) 137 (1803).

[185] *Morrison*, 529 U.S. at 616 n.7.

[186] *Id.* (internal quotation marks omitted).

[187] *Id.* at 614 (quoting *Lopez*, 514 U.S. at 557 n.2).

[188] *See id.* at 628–31 (Souter, J., dissenting).

[189] *Id.* at 634 (quoting H.R. CONF. REP. No. 103-711, at 385 (1994)).

[190] *Id.* at 615.

[191] *Id.*

[192] The Court effectively conceded this point in both *Lopez* and *Morrison*. In both opinions, after reciting the government's contentions as to why the regulated activity substantially affected interstate commerce, the Court responded by stating that accepting the government's position would mean that there were no judicially enforceable limits on the commerce power. *See id.* at 615–16; United States v. Lopez, 514 U.S. 549, 564–66 (1995). Conspicuously, the Court never disputed the government's empirical arguments that gun possession near schools and gender-motivated violence have substantial impacts on interstate commerce.

[193] *See Morrison*, 529 U.S. at 613.

[194] *Id.* at 618.

[195] *Id.* at 613.

[196] *Id.* at 618.

[197] 531 U.S. 159 (2001).

[198] *Id.* at 172–74.

[199] *Id.* at 174.

[200] *See* Lessig, *supra* note 17, at 205–06.

[201] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 583 (3d ed. 1992).

[202] *Solid Waste Agency*, 531 U.S. at 163.

[203] *See* Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001) ("Despite the clamor over the Court's new federalism doctrine, it has in fact only modestly trimmed congressional power."); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1129 (2001) ("[I]t remains unclear just how significant a reduction in the scope of Congress' Commerce Clause power these recent precedents portend.").

[204] United States v. Darby, 312 U.S. 100, 124 (1941).

[205] *Id.*

[206] 426 U.S. 833 (1976).

[207] *Id.* at 852.

[208] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985).

[209] *Id.* at 552.

[210] *See supra* text accompanying notes 176–84.

[211] 505 U.S. 144 (1992).

[212] 521 U.S. 898 (1997).

[213] *New York*, 505 U.S. at 174–77.

[214] *Id.* at 176 (quoting Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

[215] *Printz*, 521 U.S. at 933.

[216] *Id.* at 935.

[217] There are many varying views. *See, e.g.*, Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 168 (2001) (supporting the results in *New York* and *Printz* but arguing that "considerations of state sovereignty justify some enforceable rule other than an anti-commandeering rule"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2246–59 (1998); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 819 (1994) (endorsing the anti-commandeering principle, but arguing that it is rooted in the Guarantee Clause and "the notion of republican government"); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 593 (1995) (defending the anti-commandeering principle but assigning it to the Necessary and Proper Clause rather than the Tenth Amendment).

[218] *New York*, 505 U.S. at 182–83.

[219] *Printz*, 521 U.S. at 930.

[220] The Justices have expressed similar views in their unofficial capacities. At an academic symposium in April 2000, Justice Scalia reportedly commented:

> Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution . . . . My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. . . . But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.

Stuart Taylor Jr., *The Tipping Point*, NAT'L J., June 10, 2000, at 1810–11.

[221] *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution.").

[222] According to Jeffrey Rosen: "the most distinctive quality of the conservative justices of the Rehnquist Court seems to be a general disdain for the political branches—for Congress, for the president, for the administrative agencies, even for juries." Rosen, *supra* note 20, at 42; *see also* Karlan, *supra* note 9, at 97 ("The most notable thing about the newest equal protection and the enforcement clause, however, is the Court's repeatedly articulated skepticism of Congress' motives and its competence.").

[223] U.S. CONST. amend. XIV, § 5.

[224] *See* Caminker, *supra* note 203, at 1147 (noting that the scope of permissible ends that Congress could pursue under its section 5 power was arguably ambiguous before 1997).

[225] *See id.* at 1134–43.

[226] *See* Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

[227] 384 U.S. 641 (1966).

[228] *Id.* at 648.

[229] *See* City of Boerne v. Flores, 521 U.S. 507, 527–28 (1997) ("There is language in our opinion in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment.").

[230] *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171

(1997) (under this view, "Congress is not free to pass legislation based solely on its legislative judgment about what rights people should have, but is limited to good faith interpretations of the meaning of the Fourteenth Amendment, just as the judiciary is").

[231] *See id.*; John Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1455 (2000).

[232] *See* Caminker, *supra* note 203, at 1141–43.

[233] 100 U.S. 339, 345–46 (1879).

[234] *Katzenbach*, 384 U.S. at 651 ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment.").

[235] *Id.* at 650 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[236] *See, e.g.*, Burroughs v. United States, 290 U.S. 534, 547–48 (1934); Stephenson v. Binford, 287 U.S. 251, 272 (1932); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 542 (1870); Caminker, *supra* note 203, at 1136–38.

[237] *See* Caminker, *supra* note 203, at 1136–40.

[238] *Katzenbach*, 384 U.S. at 650 (quoting *Ex Parte* Virginia, 100 U.S. 339, 345–46 (1879)).

[239] 521 U.S. 507 (1997).

[240] *See* Caminker, *supra* note 203, at 1143–58.

[241] 121 S. Ct. 955 (2001).

[242] Board of Trustees v. Garrett, 121 S. Ct. 955, 963 (2001).

[243] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000).

[244] 528 U.S. 62 (2000).

[245] The precise question in both cases was whether Congress had validly abrogated states' Eleventh Amendment immunity from unconsented private suits for damages. *See Garrett*, 121 S. Ct. at 960; *Kimel*, 528 U.S. at 66–67. But because the Court held, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress could accomplish such abrogation only pursuant to its section 5 power, the essential question in both cases was whether the laws were justifiable exercises of Congress' section 5 authority. *See Garrett*, 121 S. Ct. at 962; *Kimel*, 528 U.S. at 80.

[246] *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985) (disability); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (per curiam) (age).

[247] *See Garrett*, 121 S. Ct. at 963 (holding that legislation discriminating on the basis of disability "incurs only the minimum 'rational-basis' review applicable to general social and economic legislation"); *Kimel*, 528 U.S. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

[248] *See Garrett*, 121 S. Ct. at 965 (assessing whether instances of alleged disability discrimination in the ADA's legislative record "were irrational under our decision in *Cleburne*").

[249] *Garrett*, 121 S. Ct. at 966; *see also Kimel*, 528 U.S. at 83 ("Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'") (quoting *Cleburne*, 473 U.S. at 440).

[250] As Walter Dellinger and Jonathan Hacker have explained, this approach to section 5 questions arguably turns the original justification for the rational basis test on its head. *See* Walter Dellinger & Jonathan Hacker, *14th Amendment Is Real Issue in Federalism Cases*, NAT'L L.J., Aug. 7, 2000, at A28. The judiciary devised rational basis scrutiny largely to afford legislatures broad deference in drawing classifications that do not involve "suspect" or "quasi-suspect" groups; absent classifications based on race, gender, ethnicity, or the like, courts will defer to the legislature's judgment if it can be called rational. *See id.* In its section 5 decisions, however, the Rehnquist Court has used the rational basis test to severely restrict the powers of Congress, requiring that Congress demonstrate not just widespread discrimination, but *irrational* discrimination (and hence unconstitutional). *See id.*

[251] *See* Caminker, *supra* note 203, at 1143 (noting Rehnquist Court has "departed sharply from the longstanding tradition of deferential means-ends scrutiny").

[252] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[253] *Kimel*, 528 U.S. at 81 (2000).

[254] *Garrett*, 121 S. Ct. at 964.

[255] *See* Caminker, *supra* note 203, at 1154 ("In general, the greater the ratio of statutory applications to actual constitutional violations proscribed, the more cause for concern.").

[256] *City of Boerne*, 521 U.S. at 535.

[257] *Kimel*, 528 U.S. at 86.

[258] United States v. Morrison, 529 U.S. 598, 626 (2000).

[259] *See* TRIBE, *supra* note 17, § 5-16, at 959 (describing the standard as "something between intermediate and strict scrutiny"); McConnell, *supra* note 230, at 166 (explaining *City of Boerne* replaced "something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical

of intermediate scrutiny"); Robert C. Post & Reva B. Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 477 (2000) (observing the Rehnquist Court has used "the congruence and proportionality test to fasten tight restrictions on the exercise of otherwise legitimate section 5 legislation, restrictions that seem analogous to the narrow tailoring required by strict scrutiny").

[260] *See* Caminker, *supra* note 203, at 1155 (noting that this aspect of the congruence and proportionality test "impose[s] a presumptive 'less restrictive alternative' requirement").

[261] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

[262] Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 645 (1999) (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997)).

[263] 527 U.S. 627 (1999).

[264] *Id.* at 646.

[265] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000).

[266] Bd. of Trustees v. Garrett, 121 S. Ct. 955, 965 (2001).

[267] Burroughs v. United States, 290 U.S. 534, 547–48 (1934).

[268] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

[269] *See Garrett*, 121 S. Ct. 955; United States v. Morrison, 529 U.S. 598 (2000); *Kimel*, 528 U.S. 62; Coll. Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[270] *See* Todd S. Purdum, *Bush Is Declared Winner in Florida, But Gore Vows to Contest Results*, N.Y. TIMES, Nov. 27, 2000, at A1.

[271] *See* David Firestone, *Florida Judge Is Asked to Declare Gore the Winner*, N.Y. TIMES, Nov. 28, 2000, at A1.

[272] Complaint to Contest Election, Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Nov. 27, 2000), *available at* http://news.findlaw.com/cnn/docs/election2000/goreelectcmplnt1127.pdf. Gore also contended that Nassau County, by submitting its original election night totals rather than the results of its machine recount, had counted illegal votes. *See id.* But the Florida Supreme Court ultimately rejected this argument. *See* Gore v. Harris, 772 So. 2d 1243, 1260 (Fla. 2000), *rev'd*, 531 U.S. 98 (2000) (per curiam).

[273] *See* David Firestone, *Gore Loses Florida Recount Case, Puts Last Hope in State High Court*, N.Y. TIMES, Dec. 5, 2000, at A1.

[274] Gore v. Harris, No. 00–2808, 2000 WL 1790621 (Fla. Cir. Ct. Dec. 3, 2000), *aff'd in part and rev'd in part*, 772 So. 2d 1243 (Fla. 2000), *rev'd*, 531 U.S. 98 (2000) (per curiam).

[275] 531 U.S. 70 (2001) (per curiam).

[276] *Id.* at 478.

[277] *See* Cass R. Sunstein, *The Broad Virtue in a Modest Ruling*, N.Y. TIMES, Dec. 5, 2000, at A29.

[278] *See* David Firestone, *Florida Supreme Court Moves Quickly to Hear Gore Contest of Presidential Election*, N.Y. TIMES, Dec. 6, 2000, at A27.

[279] *See* David Firestone, *Florida Court Backs Recount; Bush Appealing to U.S. Justices*, N.Y. TIMES, Dec. 9, 2000, at A1.

[280] Gore v. Harris, 772 So. 2d 1243, 1257 (Fla. 2000) (quoting FLA. STAT. ANN. § 101.5614(5) (West 2000)), *rev'd*, 531 U.S. 98 (2000) (per curiam).

[281] *Id.*

[282] *Id.* at 1253.

[283] *Id.* at 1262.

[284] *Id.*

[285] *See* POSNER, *supra* note 2, at 121.

[286] Linda Greenhouse, *Bush Had Sought Stay—Hearing Is Tomorrow*, N.Y. TIMES, Dec. 10, 2000, at A1.

[287] Emergency Application for Stay, Bush v. Gore, No. 00-949 (Dec. 8, 2000), Bush v. Gore, 531 U.S. 98 (2000) *available at* http://news.findlaw.com/cnn/docs/election2000/ usscbushmotstay1208.pdf.

[288] Dexter Filkins & Dana Canedy, *U.S. Supreme Court's Ruling Stops Florida's Election Workers in Their Tracks*, N.Y. TIMES, Dec. 10, 2000, at A43.

[289] Filkens & Canedy, *supra* note 288, at A43; David Firestone, *Supreme Court, Split 5-4, Halts Florida Count in Blow to Gore*, N.Y. TIMES, Dec. 10, 2000, at A1.

[290] *See* Firestone, *supra* note 289, at A1.

[291] *See id.*; Filkins & Canedy, *supra* note 288, at A43.

[292] Bush v. Gore, 121 S. Ct. 512 (2000) (granting of stay and writ of certiorari).

[293] David Barstow & Somini Sengupta, *Florida Legislators Consider Options to Aid Bush*, N.Y. TIMES, Nov. 23, 2000, at A1.

[294] David Barstow, *Florida Lawmakers Moving to Bypass Courts for Bush; Judge Bars a Quick Recount*, N.Y. TIMES, Nov. 29, 2000, at A1.

[295] *See* David Barstow, *Lawmakers Move Closer to Special Session for Naming Bush Electors*, N.Y. TIMES, Dec. 1, 2000, at A27.

[296] *See* Dana Canedy & David Barstow, *Florida Lawmakers to Convene Special Session Tomorrow*, N.Y. TIMES, Dec. 7, 2000, at A35.

[297] *See* Dana Canedy, *House Adopts Bush Electors, But Act May Be Moot*, N.Y. TIMES, Dec. 13, 2000, at A26.

[298] *See* Dana Canedy, *Oh, That Appointed Slate? Lawmakers Are Glad to Forget It*, N.Y. TIMES, Dec. 14, 2000, at A30.

[299] *See id.*

[300] Bush v. Gore, 121 S. Ct. 512, 512 (2000) (granting stay and writ of certiorari) (Scalia, J., concurring).

[301] *But see* POSNER, *supra* note 2, at 155 (noting that there was no guarantee that Florida executive officers would have complied with the Florida Supreme Court's orders under such circumstances); Sunstein, *supra* note 9, at 768–69 (same).

[302] *See* Sunstein, *supra* note 9, at 768.

[303] U.S. CONST. amend. XII; *see also* U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."); POSNER, *supra* note 2, at 184; Balkin, *supra* note 9, at 1432.

[304] *See* 3 U.S.C. § 15 (2000) (designating January 6 for Members of Congress to meet in the House of Representatives to open and tabulate the electoral votes for president and vice president).

[305] *Id.*

[306] 3 U.S.C. § 5 (2000).

[307] 3 U.S.C. § 15 (2000). Moreover, if Congress had attempted to apply the safe harbor deadline, it would have had to determine whether the respective slates had been "determin[ed] . . . pursuant to" Florida "laws enacted prior to the day fixed for the appointment of the electors," a question essentially identical to the Article II issue. 3 U.S.C. § 5 (2000).

[308] 3 U.S.C. § 15 (2000).

[309] *Id.*

[310] *See* Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE AND THE SUPREME COURT, *supra* note 9, at 38, 50–51.

[311] *See* Sunstein, *supra* note 9, at 769.

[312] *See* Bush v. Gore, 531 U.S. 98, 154 (2000) (Breyer, J., dissenting) ("The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts."); Garrett, *supra* note 310, at 50–51; Samuel Issacharoff, *Bush v Gore: Political Judgments*, 68 U. CHI. L. REV. 637, 650–53 (2001); Jeffrey Rosen, *The Recount Is in, and the Supreme Court Loses*, N.Y. TIMES, July 17, 2001, at A19.

[313] Issacharoff, *supra* note 312, at 652; Pamela S. Karlan, *Equal Protection:* Bush v. Gore *and the Making of a Precedent*, *in* THE UNFINISHED ELECTION OF 2001 (Jack Rakove ed., 2001).

[314] 17 CONG. REC. S817 (daily ed. Jan. 21, 1886) (statement of Sen. Sherman).

[315] *Id.* at S817–18.

[316] *Id.*

[317] As Justice Breyer stated in dissent, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about." Bush v. Gore, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting); *see also* Balkin, *supra* note 9, at 1432; Garrett, *supra* note 310, at 51–54; Issacharoff, *supra* note 312, at 653 ("But why is it either surprising or alarming that an electoral deadlock should be resolved by political officials and bodies elected by the same voters?"); Rosen, *supra* note 312, at A19 ("Congress is better equipped than the courts to make inherently partisan and subjective decisions about which presidential ballots to count in the event of a dispute."). *But see* POSNER, *supra* note 2, at 145 ("A hurry-up congressional trial of Bush Florida electors versus Gore Florida electors in January 2001 would have been a travesty of dispute resolution.").

[318] *See* Sunstein, *supra* note 9, at 769.

[319] *See* POSNER, *supra* note 2, at 141–47.

[320] *See id.* at 161 (stating that it "seems likely" that "without the Court's intervention the deadlock would have mushroomed into a genuine crisis"); Sunstein, *supra* note 9, at 769 ("[a] genuine constitutional crisis might have arisen."). *But see* Balkin, *supra* note 9, at 1437–41 (arguing that fears of a constitutional crisis were overblown); Garrett, *supra* note 310, at 50 ("There was no crisis, nor was one likely to arise.").

[321] *See* Karlan, *supra* note 9, at 97 (noting that, "[g]iven the Court's general attitude" towards politics, "it is hardly surprising that it declined to leave the question of who Florida's electors should be to Congress to resolve under the Electoral Count Act").

[322] Again, *Bush v. Gore* did not technically remove these judgments from Congress, but it did so as a practical matter. *See supra* note 161.

[323] United States v. Morrison, 529 U.S. 598, 614 (2000) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

[324] Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

[325] Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

[326] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that Arkansas constitutional provision that prohibited name of otherwise eligible candidate for Congress from appearing on general election ballot if he or she had already served three terms in the House of Representatives or two terms in the Senate violated the Qualifications Clauses of Article I).

[327] Cook v. Gralike, 121 S. Ct. 1029 (2001) (invalidating Missouri law requiring that statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" appear on ballot next to name of incumbents who failed to take certain measures in office, and "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" next to challengers who would not sign specific pledge).

[328] *See* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[329] Alden v. Maine, 527 U.S. 706, 750 (1999).

[330] Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam).

[331] *See* POSNER, *supra* note 2, at 258–59; Balkin, *supra* note 9, at 1433 ("*Bush v. Gore* is almost a parody of the Bickelian notion of judicial restraint.").