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ARTICLES

IS THERE A FIRST AMENDMENT DEFENSE FOR *BUSH V. GORE*?

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"[W]holly unmoored from well-established legal doctrine"[1]

"[P]atently unprincipled"[2]

"[N]o one takes [it] seriously as constitutional law"[3]

"[L]awless"[4]

"[I]nexplicable except on grounds that concede its legitimacy"[5]

"[N]ot only exceedingly ambitious, but also embarrassingly weak"[6]

"[N]o constitutional warrant"[7]

"[O]utside the boundaries of acceptable argument"[8]

"What I find most interesting about [it] isn't just how wrong its legal reasoning seems"[9]

"[T]oo salient an example of judicial misbehavior for many legal academics to swallow"[10]

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1 JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 3 (2003).

2 Michel Rosenfeld, Bush v. Gore*: Three Strikes for the Constitution, the Court, and Democracy, but There Is Always Next Season*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000, at 111, 111 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002) [hereinafter THE LONGEST NIGHT].

3 Stephen Holmes, *Afterword: Can a Coin-Toss Election Trigger a Constitutional Earthquake?*, *in* THE UNFINISHED ELECTION OF 2000, at 235, 246 (Jack N. Rakove ed., 2001).

4 ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 3 (2001).

5 Ronald Dworkin, *Introduction* to A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY 1, 2 (Ronald Dworkin ed., 2002) [hereinafter A BADLY FLAWED ELECTION].

6 Cass R. Sunstein, *Lawless Order and Hot Cases*, *in* A BADLY FLAWED ELECTION, *supra* note 5, at 75, 76.

7 Owen Fiss, *The Fallibility of Reason*, *in BUSH V. GORE*: THE QUESTION OF LEGITIMACY 84, 89 (Bruce Ackerman ed., 2002) [hereinafter THE QUESTION OF LEGITIMACY].

8 Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore *?*, *in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 110, 117.

9 Laurence H. Tribe, eroG v. hsuB *and its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 179 (2001).

10 Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001).

INTRODUCTION

Could so many well-established scholars be wrong? Is it possible that *Bush v. Gore*[11] is defensible, after all? The two pillars of the decision—the Equal Protection Clause justification for the merits holding[12] and the "safe harbor" remedial ruling[13]—indeed seem weak. The alternative merits view—that the Florida Supreme Court had engaged in statutory amendment under the guise of statutory interpretation, thus violating Article II of the federal Constitution—runs aground against the plausible (albeit not necessarily correct) readings of the state high court.[14] If one agrees that these merits and remedial arguments are indefensible, then mustn't one agree with the critics and be compelled to view *Bush v. Gore* as a brazen act of politics masquerading as constitutional law?

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11 531 U.S. 98 (2000) (per curiam).

12 For a critique of the Equal Protection Clause justification, see HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 142, 186 (2001); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 128–29 (2001) [hereinafter POSNER, BREAKING THE DEADLOCK]; JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION 265 (2001); Balkin, *supra* note 10, at 1427; Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 360–62 (2001); Dworkin, *supra* note 5, at 7, 10; Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 13, 13–19 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter THE VOTE]; Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1472 (2002); Holmes, *supra* note 3, at 239, 243–44; Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1727–31 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 40–41 [hereinafter Posner, *Florida 2000*]; Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 605 (2001); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 552 (2001); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2489–90 (2003); Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENT. 571, 579, 582 (2002). *But see* Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 432, 454 (2004); Nelson Lund, *"Equal Protection, My Ass!"?* Bush v. Gore *and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT. 543, 549 (2002) [hereinafter Lund, *Equal Protection, My Ass!*]; Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1244 (2002) [hereinafter Lund, *Unbearable Rightness*].

13 For discussion of the safe harbor ruling, see Appendix B. *See also infra* text accompanying notes 223–25.

14 For discussion of the Article II argument, see Appendix A.

I think not. In my book, *Understanding the 2000 Election*,[15] I offered a brief alternative justification for the merits holding of *Bush v. Gore*.[16] I suggested that even if there is no Equal Protection Clause requirement that votes be counted (or recounted) in the same way across a state, and even if we reject the Article II arguments offered by concurring Chief Justice Rehnquist, there is still something deeply, powerfully, and constitutionally problematic about Florida's statutory system for recounting ballots. Simply put, the argument is this: In a long line of free speech and free press cases, the Supreme Court has invalidated statutes that give unguided discretion to local officials to pass on applications for parade permits and public space meeting licenses. States may regulate the use of public space under content-neutral time, place, or manner regulations, to assure egress and ingress, security, and other legitimate governmental ends not related to the message or idea being conveyed. But when the statutory discretion is not constrained by objective criteria, the risk is too high that political officials will use that discretion to help their friends and harm their enemies. Furthermore, case-by-case, as-applied challenges have long been considered insufficient to capture such bias. Instead, the Court allows facial challenges to these statutes, and invalidates them when objective cabining criteria are absent.

Similarly, the Florida statutes for recounting votes asked local officials to determine "voter intent." This vague statutory standard—and the absence of more specific, objective statutory substandards—opened the door to the possibility of partisan abuse, either through partisan application of the vague standard or through different counties setting substandards in different ways, ways that the elected county officials might believe would help their favorite candidate or harm a disfavored candidate. Just as rights of political participation are at stake in the speech and press cases, so are rights of political participation at stake in vote counting cases such as *Bush v. Gore*. Just as we believe as-applied challenges are insufficient in the speech and press cases, so should we believe they will fail to capture low-level, partisan discrimination in the vote counting setting. In this way, the well-established line of First Amendment doctrine could have been brought to bear on the situation in Florida during the 2000 presidential election, to invalidate the vague, discretionary "voter intent" instruction for recounting ballots by hand.

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15 ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001).

16 *See id.* at 132–33.

But I made this argument only briefly, in a few pages in a book otherwise meant as a general, layperson's guide to the complex set of legal issues involved in the 2000 election. Many scholars have ignored the First Amendment defense for *Bush v. Gore.* Some have raised concerns about the broad discretion immanent in the "voter intent" standard briefly, or elliptically, and usually without pointing to the First Amendment line of cases.[17] Only a handful have backed these concerns with an argument,[18] and only one, Daniel Tokaji, has attempted a more complete working-out of the analogy between the First Amendment cases and the vote counting setting.[19] Although Tokaji and I generally agree on the approach to take here, his commendable writing in this field does not sufficiently develop the prima facie case for the analogy nor does it respond to important criticisms of using the speech and press cases in this setting. Thus, although a presidential election cycle has now come and gone since 2000, *Bush v. Gore*—one of the most (in)famous opinions ever issued by the Court—remains fragile as a principled, legal ruling.

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17 *See* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 130–31; Bruce Ackerman, *Anatomy of a Constitutional Coup* [hereinafter Ackerman, *Anatomy*], *in* THE LONGEST NIGHT, *supra* note 2, at 227, 234; Bruce Ackerman, *Off Balance* [hereinafter Ackerman, *Off Balance*], *in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 192, 195; Berkowitz & Wittes, *supra* note 12, at 458–59 & n.113; Epstein, *supra* note 12, at 251; Holmes, *supra* note 3, at 248 ("After proposing manual recounts according to the loosest possible standards in heavily Democratic counties—not to mention floating the idea of a special election in Palm Beach county—the Gore camp was unable to protest credibly against loaded dice.") (that Holmes sees this is intriguing given his otherwise excoriating attitude toward the holding in *Bush v. Gore*, *see id.* at 239, 243–44, 246); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE, *supra* note 12, at 98, 106; Jed Rubenfeld, *Not as Bad as* Plessy. *Worse., in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 20, 26; David A. Strauss, Bush v. Gore*: What Were They Thinking?, in* THE VOTE, *supra* note 12, at 184, 198; Cass R. Sunstein, *Order Without Law, in* THE VOTE, *supra* note 12, at 205, 218.

18 *See* Einer Elhauge, *The Lessons of Florida 2000*, POL'Y REV., Dec. 2001 & Jan. 2002, at 15, 20–21; Burt Neuborne, *Notes for the Unpublished Supplemental Separate Opinions in* Bush v. Gore, *in* THE LONGEST NIGHT, *supra* note 2, at 212, 213 (creating a hypothetical opinion by Justices O'Connor and Kennedy); Richard H. Pildes, *Constitutionalizing Democratic Politics, in* A BADLY FLAWED ELECTION, *supra* note 5, at 155, 179–80; Roy A. Schotland, *In* Bush v. Gore*: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211, 212, 224, 234 (2002); Geoffrey R. Stone, *Equal Protection? The Supreme Court's Decision in* Bush v. Gore (May 23, 2001), *available at* http://www.fathom.com/feature/122240; Daniel P. Tokaji, *Political Equality After* Bush v. Gore*: A First Amendment Approach to Voting Rights, in* FINAL ARBITER: THE CONSEQUENCES OF *BUSH V. GORE* FOR LAW AND POLITICS (Chris Banks et al. eds., forthcoming 2005) (manuscript at 120–21, on file with author). *See generally* Tokaji, *supra* note 12.

19 *See* Tokaji, *supra* note 12; Tokaji, *supra* note 18.

This Article defends the merits holding of *Bush v. Gore* by analogy to the First Amendment cases involving political officials making determinations regarding rights of political participation without adequate statutory constraint. After describing the *Bush v. Gore* merits holding in Part I, the Article offers, in Parts II.A and B, a rare reexamination of the speech and press cases on which the analogy rests—the "*Lovell* doctrine," after the seminal case, *Lovell v. Griffin*.[20] If one is to defend the merits holding of *Bush v. Gore* by analogy to the *Lovell* doctrine, one must first carefully understand what that doctrine is, and what it isn't. Thus, after setting forth some background, I correct a misperception that the parade permit cases are generally covered by the collateral bar rule, whether the permit was denied by an administrative official or whether the speech act in question was subject to a judicial injunction. In fact, the Court has applied the collateral bar rule in the latter setting only. This becomes relevant later, because there is no order to be disobeyed in *Bush v. Gore* and thus no opportunity for the collateral bar rule to be invoked. If the *Lovell* doctrine were shot through with collateral bar rule implications, that might be a reason to distinguish it from the vote counting setting. But it is not, and it thus remains a valuable analogue for *Bush v. Gore*.

Next, I correct another misperception, namely, that the *Lovell* doctrine is part of First Amendment overbreadth doctrine, allowing facial challenges by those constitutionally regulable, in part as a device to ward off the risk of chilling the speech of those who are not constitutionally regulable. Although the *Lovell* doctrine indeed allows facial challenges rather than insisting on as-applied challenges, the doctrine is not, despite the views of some, properly considered part of overbreadth doctrine. This too becomes relevant later, because overbreadth doctrine relies on a "chilling effect" argument, there is no similar chilling effect in the *Bush v. Gore* setting, and hence if the *Lovell* doctrine were part of the universe of chilling effect cases, then the relevance of the *Lovell* doctrine to the vote counting setting would be properly questioned. But as I will show, the *Lovell* doctrine has nothing to do with chilling effect, and thus its relevance for *Bush v. Gore* remains intact. I make a similar argument to disentangle the *Lovell* doctrine and *Bush v. Gore* from those vagueness cases that, relying on a version of the chilling effect argument, are essentially concerned with providing adequate notice to citizens.

After the detailed picture of the *Lovell* doctrine, we are ready, in Part II.C, for the analogy to the "voter intent" problem with the Florida statutes. As with the parade permit cases, the problem with the

20 303 U.S. 444 (1938).

Florida statutes was with the vagueness of the delegation to partisan officials to make determinations regarding citizens' rights of political participation. I discuss two ways in which bias can occur in this setting (applying "voter intent" to individual ballots and setting substandards for the application of "voter intent" by local political officials), distinguish other possible problems with the Florida system, show how Bush properly had standing, and explore the ramifications of applying the *Lovell* doctrine to election law. I then respond to several objections to extending the *Lovell* doctrine to the *Bush v. Gore* setting: that *Lovell* should not extend to the domain of government administration of vote counting, that we often put up with vague standards, that "voter intent" is a workable standard, and that importing *Lovell* here displays improper distrust of local officials.

Finally, in Part III, I turn to two important—and related—challenges, both initially proposed by Justice Stevens in his *Bush v. Gore* dissent. First, even if delegating unfettered discretion to elected officials to determine voter intent is constitutionally problematic, the presence of a "single impartial magistrate" reviewing the millions of recounted ballots would effectively serve as a systemic cure.[21] I explore this challenge in detail, and although there is no analytically satisfactory rejection of it, there are various doctrinal and practical reasons to believe it cannot overcome the strength of the analogy to the *Lovell* line of cases. Second, the Court should have remanded to the state high court so that court could set uniform substandards for recounting ballots. This argument too is not impeachable analytically, but here too several factors point against such a remedy.

In the end, the case for analogizing the *Bush v. Gore* "voter intent" problem to the *Lovell* doctrine is powerful. Adopting this reading of *Bush v. Gore* would render it a powerful yet narrow precedent, invalidating only those state laws that give similar unguided discretion to elected officials to determine what counts as a vote, while leaving intact other "mechanical" statewide variations in vote tabulation. One ramification of this argument is that the Ninth Circuit's initial panel decision in the California gubernatorial recall case—holding, pursuant to *Bush v. Gore*, that mechanical county variations in vote tabulation violated the Constitution[22]—was wrong on the merits.

Although it is normally unnecessary to reveal one's political stripes in a constitutional law article, writing about *Bush v. Gore* may be an exception. I am going to treat it as such, because for Democrats to

21 Bush v. Gore, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

22 Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882, *withdrawn upon decision to rehear en banc*, 344 F.3d 914 (9th Cir. 2003).

attack *Bush v. Gore* or for Republicans to support it perhaps weakens the credibility of the argument. That should not be so, but in this explosive instance of the intersection of law and politics, it seems to be the case. So: I am a liberal Democrat, was a strong supporter of Al Gore, and believed that some of the GOP strategy during the Florida recount was indefensible. Yet . . . giving elected officials the unguided discretion to determine what counts as "voter intent" should trouble all of us, and if the analogy to the *Lovell* doctrine holds, we should be comfortable deeming the Florida system unconstitutional.

Three final points before proceeding to the argument. First, this Article offers a justification for the merits holding of *Bush v. Gore.* That is, it supports the Court's conclusion that the Florida recount system was unconstitutional. Although there are traces of the concern with unfettered local discretion in the Court's opinion, I am not ultimately defending what the Court wrote. Second, this Article does not discuss the Justices' motives for their votes, and therefore I take no position on whether individual Justices were or were not acting according to principle. There is, of course, much discussion in the literature on this point.[23] Third, whatever one thinks about the merits holding of the case, perhaps the Court should have stayed out of the fracas.[24] This is an important issue, but it is not something I treat in this Article.

I. *BUSH V. GORE*: WHAT IT SAID

After Florida Secretary of State Katherine Harris certified that George W. Bush had carried the state, Al Gore contested that certification in the Florida courts and won. Bush appealed that ruling to the U.S. Supreme Court, which held that the "standardless manual recounts"[25] that would ensue under the Florida remedial order constituted an equal protection violation. The Florida high court had added some votes to Gore's total (from Palm Beach County and Miami-Dade County) and it had ordered a statewide manual recount of all ballots for which machines had not been able to detect a vote for President (i.e., the "undervotes"). The recount would be supervised by a state court judge (Judge Terry Lewis, after Judge N. Sanders Sauls recused himself), who would have power to review the determinations of the local county canvassing boards (with eventual review at the Florida Supreme Court). The state high court followed Florida law in di-

23 *See, e.g.*, DERSHOWITZ, *supra* note 4.

24 *See, e.g.*, 531 U.S. at 152–58 (Breyer, J., dissenting).

25 *Id.* at 103.

recting the local boards to determine "the voter's intent,"[26] and as was the case with recounting up to that point, it appeared that different boards would use different substandards to determine voter intent.

Recall that in counties using punch card ballots, voters used a pointed tool, or stylus, to punch a small piece of cardboard, or chad, for each candidate selected.[27] The vote counting machines had to see through the hole to count the vote; if the chad was not fully detached, sometimes the machine would see no hole punched and count no vote. In the recounting process, the question throughout the election was how to determine voter intent (the Florida statutory standard) from not-fully-punched chads. Counties varied in their approaches. For example, Broward County counted, as evidence of voter intent, hanging chads (attached at one corner, detached at three); swinging chads (attached at two corners, detached at two); and indented, or dimpled, chads (which bear the impression of the voting tool but are not detached at all from the ballot).[28] Palm Beach County, on the contrary, counted dimpled chads only if the voter had indented chads in other races on the ballot (thus demonstrating a consistent difficulty with using the stylus),[29] although some reports suggest that Palm Beach didn't count dimpled chads at all.[30] The Supreme Court's

26 FLA. STAT. § 102.166(7)(b) (2000). (All cites are to Florida law applicable to the 2000 election unless otherwise specified.) Another section directs officials to look for a "clear indication of the intent of the voter." *Id.* § 101.5614(5). Although these standards differ slightly (looking for a "clear indication" is a higher standard than simply looking for intent), nothing turned on this difference during the litigation.

27 For a detailed discussion of punch card ballots and recounts, see GREENE, *supra* note 15, at 29–42, 56–57.

28 *See id.* at 56 (suggesting that Broward counted dimpled chads only with corroborating evidence that the voter had voted a straight Democratic or Republican ticket); POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 56–57; *Cast and Chronology*, *in* THE LONGEST NIGHT, *supra* note 2, at 21, 31 [hereinafter *Cast and Chronology*]; McConnell, *supra* note 17, at 114; Richard A. Posner, Bush v. Gore*: Prolegomenon to an Assessment*, *in* THE VOTE, *supra* note 12, at 165, 167. For a discussion of the loosening of the substandards in Broward, see TOOBIN, *supra* note 12, at 160–63; Steve Bickerstaff, *Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 LOY. U. CHI. L.J. 149, 185 (2002).

29 *See* GREENE, *supra* note 15, at 56–57; POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 56–57; *Cast and Chronology*, *supra* note 28, at 33–34; Posner, *supra* note 28, at 168.

30 *See* GILLMAN, *supra* note 12, at 64 & n.50; TOOBIN, *supra* note 12, at 85–88, 164–68 (describing a *Palm Beach Post* report that if Palm Beach had used Broward substandards, Gore would have won the election); Bickerstaff, *supra* note 28, at 182 n.140.

opinion identifies other instances of variations in county substandards.[31]

Although it never cited the *Lovell* doctrine, the Court was concerned about county variations in substandards.[32] "The problem inheres," the Court wrote, "in the absence of specific standards to ensure [the] equal application [of the voter intent standard]. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary."[33] In sum, the Court held:

> The recount process . . . is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. . . . The question . . . is not whether local entities . . . may develop different systems for implementing elec-

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31 *See* Bush v. Gore, 531 U.S. 98, 106–07 (2000).

32 Bush's brief raised the issue in one sentence, not referencing the *Lovell* doctrine. *See* Brief for Petitioners at 48 (No. 00-949) ("With humans making subjective determinations about an absent voter's intent, without standards established by law, there is a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result."). The petition for certiorari in the earlier case arising out of the Florida recount raised the issue, but the Court denied certiorari on this question, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000). *See* Petition for a Writ of Certiorari at i (No. 00-836) (third question presented was "[w]hether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment"). The same question was raised in a certiorari petition arising out of parallel litigation in the Eleventh Circuit, *see* Petition for a Writ of Certiorari at i, 531 U.S. 1005 (No. 00-837); the Court denied certiorari, Siegel v. LePore, 531 U.S. 1005 (2000). When the Eleventh Circuit finally decided the case, rejecting Bush's claim for a preliminary injunction against manual recounts, Judge Birch made the *Lovell* argument. *See* Siegel v. LePore, 234 F.3d 1163, 1191 (11th Cir. 2000) (en banc) (Birch, J., dissenting); *see also* Touchston v. McDermott, 234 F.3d 1133, 1158–60 (11th Cir. 2000) (en banc) (Birch, J., dissenting) (casting it as a voting rights argument), *cert. denied*, 531 U.S. 1061 (2001). *But see* 234 F.3d at 1189 n.14 (Anderson, C.J., concurring specially) (rejecting the *Lovell* argument—cast as an equal protection argument—because the Florida statute "contains constitutionally sufficient standards to constrain the discretion of canvassing board officials").

33 531 U.S. at 106. Although they ultimately dissented over the failure to order an appropriate remedy, Justices Souter and Breyer shared the Court's concern regarding the lack of uniform rules for the recount. *See id.* at 134 (Souter, J., dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."); *id.* at 145–46 (Breyer, J., dissenting) (noting that "the use of different standards could favor one or the other of the candidates" and concluding that "basic principles of fairness should have counseled the adoption of a uniform standard to address the problem").

> tions. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.[34]

The Court had virtually no precedential support for its Equal Protection Clause reasoning and what support it had was weak.[35] The Court cited two voting rights cases in which it had invalidated state election provisions because of differential treatment of voters based on county residence. In one, a citizen's vote counted for less as the size of the citizen's county of residence increased.[36] In the other, the "county-based procedure . . . diluted the influence of citizens in larger counties in the nominating process."[37] These cases were not really on point, though, because (a) the Florida system did not expressly value votes differently based on county of residence, and (b) the main problem with the Florida system (as the Court said in the quotations above) was the differential application of a vague standard. Although there is some scholarly support for the Equal Protection Clause holding,[38] most are critical of it, because there was no proof of discriminatory intent[39] and because county-by-county differences in vote counting (and a cognate issue, state-by-state differences in vote counting) had never been thought to be an equal protection problem but, on the contrary, had generally been seen as part of "Our Federalism," even in a national election.[40]

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34 *Id.* at 109. I omit from the textual quotation a line many have derided: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* This indeed was an unfortunate sentence, but whether *Bush v. Gore* has legs or not, and what sort of legs it has, will be borne out over time, regardless of what the Court said in that dictum sentence.

35 *See* GREENE, *supra* note 15, at 131–32; Epstein, *supra* note 12, at 14–19; Tokaji, *supra* note 12, at 2489; Tribe, *supra* note 12, at 582.

36 Gray v. Sanders, 372 U.S. 368, 379–81 (1963).

37 531 U.S. at 107 (citing Moore v. Ogilvie, 394 U.S. 814 (1969)).

38 *See* Berkowitz & Wittes, *supra* note 12, at 432, 454; Lund, *Equal Protection, My Ass!*, *supra* note 12, at 549; Lund, *Unbearable Rightness*, *supra* note 12, at 1244–45.

39 *See* Balkin, *supra* note 10, at 1427; Briffault, *supra* note 12, at 360–62; Epstein, *supra* note 12, at 14–19; Fiss, *supra* note 7, at 89; Shane, *supra* note 12, at 552; Tribe, *supra* note 12, at 579. *But see* Lund, *Equal Protection, My Ass!*, *supra* note 12, at 549; Lund, *Unbearable Rightness*, *supra* note 12, at 1244–45.

40 *See* GILLMAN, *supra* note 12, at 142; Dworkin, *supra* note 5, at 10; Larry D. Kramer, *The Supreme Court in Politics*, *in* THE UNFINISHED ELECTION OF 2000, *supra* note 3, at 105, 147; Posner, *Florida 2000*, *supra* note 12, at 41.

II. A First Amendment Defense for *Bush v. Gore*

The combination of factors present in the Florida recount setting—the existence of a vague statutory standard, left to the discretionary administration of elected officials, in the area of a core right of political participation—was similar to the factors present in a line of First Amendment cases dealing with parade and meeting permits and licenses. Understanding the merits holding of *Bush v. Gore* by analogy to these First Amendment cases offers several powerful advantages. First, the line of cases—the *Lovell* doctrine—is long standing and consistently followed. Second, the principle behind the cases—that unguided discretion in the hands of political officials to make decisions about citizens' rights of political participation is unconstitutional because of the risk of bias and the inability of as-applied challenges to capture the constitutional torts—is a sound principle. Third, the *Bush v. Gore* merits holding could then be seen as narrow, but powerful, invalidating only those state statutory provisions that grant similar unguided discretion to political officials in the vote counting setting.

This argument should be appealing across the political spectrum and will, I predict, with time, come to be seen as the proper justification for the merits holding in *Bush v. Gore.* But although the analogy between the *Lovell* doctrine and *Bush v. Gore* seems strong, much work remains to establish that it is a correct analogy. Accordingly, I explore the *Lovell* doctrine in detail, explaining what it is and what it isn't. This treatment itself fills a gap in the academic literature, for although scholars have discussed various aspects of the *Lovell* line of cases, there is little extended discussion of the cases, and misconceptions persist about precisely how to understand the doctrine. I will attempt to clear those up on the way toward establishing the doctrine as a proper foundation for *Bush v. Gore,* and then I will play out the analogy and respond to some key objections.

A. Some Background

The type of law at stake in the *Lovell* line of cases is a first cousin to the licensing laws that some argue were at the heart of American opposition to prior restraints on speech, and thus to the adoption of the First Amendment (or at least to the Free Press Clause). Under this early form of licensing law in England, "nothing could be printed without the approval of the state or church authorities."[41] This form of licensing, which prevailed until 1695, is often considered the histor-

41 Laurence H. Tribe, American Constitutional Law 1039 (2d ed. 1988).

ical paradigm[42] for prior, or previous, restraints on speech, the conceptual point being that one had to pass one's speech through censors prior to publication, rather than publishing first and awaiting possible prosecution afterward. Although such blanket licensing requirements no longer exist, smaller versions of them do, and the Court generally upholds them so long as sufficient criteria exist to guide administrative discretion and provide for meaningful judicial review, and so long as such judicial review is promptly available.[43] In these cases, the government is engaged in content-based censorship, but the Court upholds such censorship if the regulation satisfies established doctrinal tests, such as those for obscenity and child pornography.[44] The earliest form of licensing prior restraints, and the modern-day analogues, are, though, unnecessary; i.e., the government need not regulate such speech, for the regulation is based on a contested theory of harm.

On the contrary, parade permit ordinances are necessary.[45] It would be impossible for productive civic life in a city or town to exist if anyone could have any size parade at any time down any street. Similarly, although somewhat less clearly so, meeting permits for public spaces, often parks, are also necessary to avoid conflicting multiple uses. One could quibble with my terms "necessary" and "unnecessary" in describing parade permit systems, on the one hand, and obscenity licensing systems, on the other.[46] Perhaps one might argue that for jurisdictions that choose to regulate obscenity, it is just as necessary to prevent the harm from dissemination of obscene materials as it is to regulate the use of public thoroughfares. It is not important that I convince you I am right here; the main point is that at least in the parade permit setting, government's role is uncontroversial. Moreover, the regulation in this setting is content neutral; i.e., parade licensing systems are not about screening out disfavored ideas, as is the case with obscenity licensing (although the justification in the latter setting is that whatever ideational content obscenity has is outweighed by the

42 *See* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 544 (1977); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650–52 (1955).

43 *See, e.g.*, City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2223–24 (2004); Freedman v. Maryland, 380 U.S. 51, 52–55 (1965).

44 *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) (child pornography); Miller v. California, 413 U.S. 15, 24–25 (1973) (obscenity).

45 *See* TRIBE, *supra* note 41, at 1051.

46 For a similar distinction, see *City of Littleton*, 124 S. Ct. at 2226 (Stevens, J., concurring in part and concurring in the judgment).

government's need to prevent the harm obscenity causes).[47] Rather, the point of parade and meeting permit ordinances is to provide for the orderly, productive use of public streets and parks, regardless of the content of the message in the various parades and meetings.[48]

B. The Trouble with Parade Permit Laws

If parade permit laws are, in theory, uncontroversial—because they are content neutral and necessary for order in civil society—then why are there so many Supreme Court cases invalidating such laws? What is the trouble with parade permit laws? This discussion will be elaborate, in part because the cases have received generally gentle and sometimes erroneous treatment in the literature, and in part because if one is to argue for the merits holding in *Bush v. Gore* based on this line of cases, it's important to know precisely the terms of the analogy.

First let me set forth a few examples of how these ordinances are challenged, and what the Court does in response. The cases generally arise in one of two ways: either via a criminal prosecution for speaking without a license or via an affirmative suit to declare a permit ordinance invalid. As an example of the former, let's look at *Lovell v. Griffin* itself.[49] The City of Griffin, Georgia, required anyone seeking to distribute literature to obtain written permission from the City Manager. Failure to obtain such permission constituted a criminal offense. Lovell distributed written material without seeking such a permit, and the Court entertained her First Amendment argument as a defense to the prosecution. This is not a quintessential parade case, and part of the Court's concern with the ordinance was its wide scope, not limited to "the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."[50] But it is still seen as, and useful as, the first in a line of cases expressing a separate concern: subjecting the press to "license and censorship."[51] In several other cases, the Court like-

47 I should note that I find the line of cases upholding governmental power to regulate obscenity, at least regarding consenting adults, to be unjustified. But that's an argument for another day.

48 For excellent discussion of the distinction between content-based and content-neutral regulation, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

49 303 U.S. 444 (1938).

50 *Id.* at 451.

51 *Id.*

wise relied on the First Amendment to reverse convictions for speaking without a permit.[52]

Other cases involve affirmative suits to declare permit ordinances invalid. As an example, consider the first such case, *Hague v. Committee for Industrial Organization*.[53] Jersey City law required permission from the Director of Public Safety before one could use virtually any public space for parade or assembly. Plaintiffs, who had been denied meeting permits several times, brought suit alleging violation of their First Amendment rights. The Court voided the law on its face.[54] Other cases have awarded similar relief in response to affirmative suits.[55]

I will use the phrase "the *Lovell* doctrine" to refer—in either type of litigation (criminal defense or affirmative suit)—to the Court's invalidation of parade permit laws, as well as to its invalidation of similar grants of unguided discretion to political officials to determine speech and press rights. In almost all instances, the regulation involves otherwise valid and perhaps socially necessary content-neutral time, place, or manner concerns. Thus, we return to the question: If such traffic control ordinances are generally socially desirable, what precisely is it about such ordinances that has led to so many invalidations?

1. The Argument that Parade Permit Laws Are Prior Restraints

One possible argument against parade permit ordinances—and thus in favor of the *Lovell* doctrine—is that they are prior restraints, and as such, specially problematic under the First Amendment. To consider this argument, we first need to understand what prior restraints are and why they are specially problematic. Then we can ex-

52 *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969); Staub v. City of Baxley, 355 U.S. 313, 325 (1958); Kunz v. New York, 340 U.S. 290, 293 (1951); Niemotko v. Maryland, 340 U.S. 268, 271–72 (1951); Saia v. New York, 334 U.S. 558, 559–62 (1948); Largent v. Texas, 318 U.S. 418, 422 (1943); Cantwell v. Connecticut, 310 U.S. 296, 300–05 (1940); Schneider v. New Jersey, 308 U.S. 147, 160 (1939); *see also* Freedman v. Maryland, 380 U.S. 51, 52–53 (1965) (overturning a criminal conviction for failing to seek a permit in the film licensing setting).

53 307 U.S. 496 (1939).

54 *Id.* at 516. *Hague* is also considered the seminal case supporting a general public right of speech access in quintessential public forums, such as streets and parks, subject to legitimate content-neutral time, place, or manner regulation. *See id.* at 515–16.

55 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 137 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 752 (1988); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) (holding that the system for screening productions for a municipal theater lacked sufficient procedural safeguards).

amine the way that parade permit ordinances operate, to see if they share whatever quality it is that makes prior restraints specially problematic.

The quintessential prior restraint would involve a government official placing a gag over someone's mouth or seizing someone's printing press. Those actions would physically stop speech before it occurs. On the opposite side would be the classic example of an ex post restraint—criminal prosecution for a speech act. Although the statute would have to exist prior to the act (to satisfy the Ex Post Facto Clause[56] and more general rule of law concerns), it is not considered a prior restraint because the government doesn't focus its attention on the speaker until after the speech act. The existence of a criminal statute certainly has a deterrent effect on speech, but that is not what makes a statute a prior restraint.

Most of the cases and literature on prior restraints are about a different form of government action from either physical stopping of speech (which is clearly a prior restraint) or garden variety criminal statutes (which just as clearly are not). Administrative permit systems and judicial injunctions constitute the bulk of what we consider prior restraints. Neither physically stops speech, however; that is, one can choose to disregard the permit system or disobey the injunction and engage in the speech act (and, as discussed below, possibly incur a sanction). But permit systems and injunctions involve specific government officials focusing on specific proposed speech acts, and the ramifications of such specificity—in contrast with the generality of legislation, where the legislature is thinking about policy and not any individual speech act—might be enough to render such governmental actions specially problematic.

Before considering whether this is so, note that if prior restraints are specially problematic, it *must be* because of a structural, rather than substantive, concern. If the law in question violated some substantive conception of the First Amendment—say, regulating political advocacy of unlawful action without satisfying the *Brandenburg* test,[57] or laying down a sweeping content-neutral time, place, or manner law in a way that is out of proportion to the government's goals[58]—then the law would be unconstitutional regardless of whether it operated as a prior restraint or as an ex post criminal penalty. So the task in think-

56 *See* U.S. CONST. art I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

57 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

58 *See, e.g.*, Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831 (1992) (per curiam); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 690–92 (1992) (O'Connor, J., concurring); *id.* at 703 (Kennedy, J., concurring); Schneider v. New Jersey, 308 U.S. 147, 162–63 (1939).

ing about whether prior restraints are specially problematic is to examine whether there is something about their structure—about the fact of focused attention by government officials on specific proposed speech acts—that renders them problematic even if they are not otherwise substantively invalid.

The scholarship is divided on whether the classic forms of prior restraint raise special First Amendment concerns. The arguments that they do include: officials take control over the timing of one's speech and often delay is involved;[59] in the permit (though not injunction) setting, officials who respond to political pressure are making the decisions;[60] censors exist to censor;[61] decisions are often made under the radar screen;[62] decisions are made in the abstract, because the speech has not yet occurred;[63] judicial review tends to be limited and deferential;[64] and, because of the focused, personal nature of official attention, flouting of official decisions is more likely to be prosecuted than is disobedience of a criminal statute.[65] Most of these arguments are based on unproven empirical assumptions, as the arguments against viewing prior restraints as specially problematic point out. Those arguments include: many of the same problems exist with ex post sanctions;[66] a prior restraint system might provide more assurance and accordingly be less deterring of speech than an ex post system;[67] only substantively regulable speech is at issue and thus there's no special First Amendment harm from substantively proper prescreening;[68] there's not a clear difference between procedural protec-

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59 *See* Emerson, *supra* note 42, at 657.

60 *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 150 (1982) [hereinafter SCHAUER, FREE SPEECH]; Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 726 (1978) [hereinafter Schauer, *Fear, Risk*].

61 *See* SCHAUER, FREE SPEECH, *supra* note 60, at 150; Emerson, *supra* note 42, at 658; Schauer, *Fear, Risk, supra* note 60, at 726.

62 *See* SCHAUER, FREE SPEECH, *supra* note 60, at 150; Emerson, *supra* note 42, at 658; Schauer, *Fear, Risk, supra* note 60, at 727.

63 *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49–54 (1981).

64 *See* Emerson, *supra* note 42, at 657–58.

65 *See* SCHAUER, FREE SPEECH, *supra* note 60, at 150–51; Blasi, *supra* note 63, at 54–63; Schauer, *Fear, Risk, supra* note 60, at 727.

66 *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 59–72 (1984); Schauer, *Fear, Risk, supra* note 60, at 727.

67 *See* SCHAUER, FREE SPEECH, *supra* note 60, at 151; TRIBE, *supra* note 41, at 1041 n.16; Blasi, *supra* note 63, at 26–47; John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 428–30 (1983); Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 186 (1981); Schauer, *Fear, Risk, supra* note 60, at 728–29.

68 *See* Redish, *supra* note 66, at 59; Schauer, *Fear, Risk, supra* note 60, at 729.

tions given to prior restraints and those given to ex post sanctions;[69] and the abstractness of a prior restraint determination might cut against the government because harm will be harder to show.[70]

This debate seems difficult to resolve without detailed empirical work. And what precisely would such empirical work be measuring? The questions would probably boil down to two: (1) Is there a comparative deterrent effect from prior restraints, in excess of what we would consider appropriate deterrence of regulable speech? If so, then we might say prior restraints improperly chill[71] nonregulable speech along with regulable speech in excess of how criminal statutes operate. This is a complex question, undoubtedly hard to measure. (2) Is there a greater error rate from the administration of otherwise valid prior restraints, apart from the chilling effect concern? Here we would have to see whether the focused attention prior to speech is more or less likely to get facts correct and to apply various doctrinal tests properly. Again, a difficult measurement.

There is one aspect of prior restraints, however, that virtually all agree makes them different from, and more problematic than, ex post sanctions. That is the "collateral bar rule." The classic Supreme Court statement of the collateral bar rule came in *Walker v. City of Birmingham*.[72] The basic rule is this: If a court issues an injunction against a speech act, you must appeal the injunction to raise your First Amendment claims.[73] If instead you violate the injunction and engage in the speech act, and you are prosecuted for contempt, you will not be permitted to raise your First Amendment claims. The rule is one about preserving order—once a court with appropriate jurisdiction[74] has focused its attention on you and issued an order, to allow disobedience of the order to have no effect on the arguments you may raise would mean there is no comparative deterrent for violating a court order, and thus a kind of chaos of disobedience would ensue. Remember that if one disobeys a criminal statute regulating speech, one may always raise a First Amendment defense.[75] Thus, the doc-

69 *See* Redish, *supra* note 66, at 63–64.

70 *See id.* at 67.

71 If a law constitutionally regulates speech, we should say it "deters" such speech. If a law constitutionally regulates some speech but in addition deters people from engaging in protected speech, then we should say it "chills" that protected speech. For a helpful discussion, see Schauer, *Fear, Risk*, *supra* note 60.

72 388 U.S. 307 (1967).

73 *See* Hugh B. Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 86 (1948).

74 *See* TRIBE, *supra* note 41, at 1044; Cox, *supra* note 73, at 86.

75 *See* TRIBE, *supra* note 41, at 1043; Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 540 (1970). *But see* Redish, *supra* note 66, at 94 (argu-

trine treats disobeying a court order differently from disobeying a statute—in the former, one is disobeying a court that has focused its attention on one's case, and the concern for disorder from such disobedience is high; in the latter, one is disobeying a statute whose drafters have not focused their attention on one's case, and accordingly the concern for disorder is lower.

The collateral bar rule indeed makes prior restraints specially problematic as a structural matter. It poses a trilemma for the speaker—either obey the injunction and forego one's speech; appeal and risk losing valuable time, especially if the speech is time sensitive; or disobey the injunction, speak, and risk a contempt prosecution where one will be stripped of the First Amendment defense.[76] To appreciate the problem fully, one must put aside the assumption under which this discussion of prior restraints has been operating, namely, that we are in the realm of regulable speech. If we assume that, then we might not be concerned about the trilemma. Instead, we must remember that from the point of view of the speaker against whom an injunction has just issued, whether the speech is constitutionally regulable must be considered the question and not taken as an assumption. With such uncertainty in place, we can see that the trilemma created by the collateral bar rule does make prior restraints more stifling than the ex post operation of criminal statutes.

The collateral bar rule has been oft criticized and is sometimes said to be on shaky ground.[77] Various exceptions are mentioned[78]

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ing that "[d]isrespect of the law is equally encouraged when we allow a defendant to challenge a law's constitutionality after he has violated it"). Many cases in the *Lovell* line arose when someone violated a criminal statute, rather than a court order or an administrative denial, and in each instance the Court permitted a First Amendment defense to the criminal charge. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (involving a complex fact pattern with no formal permit denial but clear indications from officials that one would not be forthcoming); Staub v. City of Baxley, 355 U.S. 313, 315 (1958) ("without applying for permits"; holding for State on First Amendment claim); Kovacs v. Cooper, 336 U.S. 77, 78, 81 (1949); Largent v. Texas, 318 U.S. 418, 419 (1943) ("without making application for a permit"); Cox v. New Hampshire, 312 U.S. 569, 572 (1941) ("Defendants did not apply for a permit"; holding for State on First Amendment claim); Cantwell v. Connecticut, 310 U.S. 296, 300–05 (1940); Schneider v. New Jersey, 308 U.S. 147, 159 (1939) ("did not apply for . . . a permit"); Lovell v. City of Griffin, 303 U.S. 444, 447 (1938) ("did not apply for a permit").

76 *See* Barnett, *supra* note 42, at 550–53; Jeffries, *supra* note 67, at 431.

77 *See, e.g.*, TRIBE, *supra* note 41, at 1043.

78 *See* Walker v. City of Birmingham, 388 U.S. 307, 315 (1967); *see also* TRIBE, *supra* note 41, at 1045 (suggesting an exception for judicial review delay and tracking *Walker*'s mention of an exception for a "transparently invalid" judicial order); Barnett, *supra* note 42, at 556 (suggesting an exception for delay); Cox, *supra* note 73, at 113

and sometimes applied.[79] But the Supreme Court has not reversed *Walker*, and the basic principle behind the rule—that one must appeal an injunction rather than disobey it if one wants to get substantive relief—is sound in any government that operates through a judiciary administering the rule of law. If the collateral bar rule applies in the parade permit setting as well as in the injunction setting, however, then one could argue that the trouble (or a problem) with parade permit laws is that they are prior restraints. Although we might be willing to tolerate the collateral bar rule trilemma in the judicial injunction setting, we might be critical of it in the administrative permit setting, for there is less reason to believe that administrative officials are acting in a truly disinterested fashion, and thus perhaps we should be less deferential to the "order" created from administrative than from judicial process.[80]

Does the collateral bar rule apply in the parade permit setting as it does in the judicial injunction setting? Some scholars draw this conclusion. The scholarship in the area is somewhat muddled, conflating two scenarios: (1) engaging in a speech act without applying for a permit, and (2) engaging in a speech act after a permit denial. For example, Vincent Blasi, in an article devoted to showing the conceptual linkage between judicial injunctions and administrative permit systems as prior restraints, maintains that "licensing systems also restrict the use of self-help by would-be speakers."[81] He adds: "Under a licensing system, speakers who proceed without a required permit can be punished for that act alone. They might have had a permit for the asking, but if they didn't ask they can be punished. No first amendment defense will be heard."[82] To the extent that Blasi is arguing that the collateral bar rule applies in scenario (1), he is wrong; as I demonstrated above, there is a sturdy line of cases permitting the First Amendment defense to be raised if the citizen engages in the speech act without seeking a permit. This is fairly straightforward, and

(suggesting an exception if "the litigant has exhausted all normal methods of appellate review and if obedience to the order will substantially and irrevocably injure legal interests of the litigant that are not remote and abstract in character"); Jeffries, *supra* note 67, at 432–33 (supporting exceptions both for "transparently invalid" and delay).

79 *See In re* Providence Journal Co., 820 F.2d 1342, 1344 (1st Cir. 1986) (applying the "transparently invalid" exception), *addendum on rehearing en banc without vacating panel opinion*, 820 F.2d 1354 (1st Cir.), *cert. granted sub nom.* United States v. Providence Journal Co., 484 U.S. 814 (1987), *and cert. dismissed*, 485 U.S. 693 (1988).

80 For general discussions of the need for judicial rather than administrative determination regarding First Amendment rights, see Monaghan, *supra* note 75; Redish, *supra* note 66.

81 Blasi, *supra* note 63, at 21; *see also id.* at 83.

82 *Id.* at 84; *see also id.* at 20.

matches the general understanding that violation of a statute is less of a harm to orderly process than is violation of a focused official denial. But Blasi also can be read to suggest, more plausibly as a matter of theory, that if one marches in the face of a permit denial (scenario (2)), then the collateral bar rule applies, because such a speech act is deemed a greater threat to order, since it represents disobedience of a focused governmental denial.[83]

Perhaps surprisingly, Supreme Court precedent fails to support this position. When one examines the core set of Supreme Court cases that arose in precisely this fact pattern, one sees the Court entertaining the substantive First Amendment argument even though the citizen had spoken in the face of an administrative permit denial. There are three such cases, each involving a facial challenge to a law or practice vesting in political officials unguided discretion to pass on speech permits.

First, *Saia v. New York*.[84] The City of Lockport, New York, forbade the use of sound amplification devices except with permission from the Chief of Police. Saia's permit to use sound equipment expired, and "he applied for another one but was refused on the ground that complaints had been made. Appellant nevertheless used his equipment as planned on four occasions, but without a permit."[85] Despite the fact that Saia did not appeal the permit denial, and did not file an affirmative suit challenging the ordinance, but instead spoke in defiance of the permit denial, the Court went straight to the First Amendment merits (and invalidated the ordinance under the *Lovell* doctrine).[86]

Second, *Niemotko v. Maryland*.[87] The City of Havre de Grace, Maryland, forbade public park meetings without the permission of the Park Commissioner. Niemotko's application was denied, and the denial was affirmed on appeal to the City Council. Rather than pursuing judicial review or filing an affirmative suit, Niemotko's group held its meeting in the park. The Court again considered the First Amendment challenge (and invalidated what in this case was local custom, rather than an ordinance, under the *Lovell* doctrine).[88]

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83 Thomas Emerson also suggests that the collateral bar rule applies in both scenarios. *See* Emerson, *supra* note 42, at 655.

84 334 U.S. 558 (1948).

85 *Id.* at 559.

86 *Id.* at 559–60.

87 340 U.S. 268 (1951).

88 *Id.* at 273.

Third, *Kunz v. New York*.[89] New York City forbade public worship meetings in the streets without a permit from the City Police Commissioner. Kunz's initial permit was revoked and he did not seek review of the revocation. He then "applied for another permit in 1947, and again in 1948, but was notified each time that his application was 'disapproved.'"[90] Again without seeking judicial review (and without filing affirmative suit), Kunz spoke in the face of the permit denial. Again, the Court considered the First Amendment challenge (and again applied the *Lovell* doctrine in favor of the citizen).[91]

Thus, it appears that so long as the citizen's challenge is to the law on its face and not to the specific application,[92] the Court will overlook the concerns with order and obedience that otherwise animate it in the judicial injunction setting. This conclusion must be tempered, however, by the fact that the state courts in *Saia*, *Niemotko*, and *Kunz* had not imposed a collateral bar to the First Amendment arguments, and thus the Court was not asked to either accept or reject such a bar as a matter of federal constitutional law. One can, though, use the three decisions to make the weaker claim that the Court has been willing to reach the merits in permit denial cases, that the Court does not insist on a collateral bar rule in this setting, and that the

89 340 U.S. 290 (1951).

90 *Id.* at 292.

91 *Id.* at 294–95.

92 In *Poulos v. New Hampshire*, 345 U.S. 395 (1953), the Court applied a version of the collateral bar rule. Prior litigation had validated the ordinance in question. *See* Cox v. New Hampshire, 312 U.S. 569 (1941). The main question in dispute was whether Poulos should be able to challenge as unlawful the specific permit denial, when he spoke in disobedience of such denial. The Court said "no," applying a version of the collateral bar rule. *Poulos*, 345 U.S. at 409; *see* TRIBE, *supra* note 41, at 1044. For a critique of *Poulos*, see Monaghan, *supra* note 75, at 542–43. Blasi notes the distinction between a facial and an as-applied challenge in the permit setting, *see* Blasi, *supra* note 63, at 61, but otherwise makes the arguments in the text above, suggesting that the collateral bar rule applies both to speech acts without seeking a required permit and to those in the face of a permit denial. In an earlier article, Blasi also noted the distinction between facial and as-applied challenges in the permit setting, and at times seemed to say what I say in the text, namely, that the collateral bar rule appears not to apply in the facial challenge setting, even when the speaker is speaking in the face of a permit denial. *See* Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1555, 1557 (1970). Yet, the article reflects Blasi's discomfort with this conclusion, apparently as a doctrinal as well as normative matter. *See id.* at 1556 ("[*Poulos*] may very well stand for the broad proposition that an unlawful permit refusal may never be tested by demonstrating without the permit."); *id.* at 1559 ("[T]here should be a general presumption, in both the injunction and permit application context, against self-help."); *id.* at 1571–72 ("[A] strict exhaustion requirement should govern regardless of whether the prior restraint is an injunction or a permit requirement . . . .").

Court did not even mention such a possible concern in the three opinions.

The best reading of the caselaw, as it stands, is that the *Lovell* doctrine cannot be justified by any special concern regarding prior restraints, for the strongest explanation for why prior restraints are thought to impose a distinctive burden—the trilemma created by the collateral bar rule—does not apply (or has not yet been applied by the Court) in the *Lovell* doctrine setting. One may petition for a speech permit, be denied by an administrative official, engage in the speech act anyway, and raise one's substantive First Amendment defense (as a facial challenge) if prosecuted.[93] That is no different from what one may do if one doesn't apply at all, but rather treats the existence of a speech permit statute as a criminal statute whose sanctions operate ex post. Thus, to understand the *Lovell* doctrine—to grasp why the Court has a long-standing concern with parade permit ordinances—we must look elsewhere.

2. The Argument that Parade Permit Laws Present Too Great a Risk of Administrative Bias

The other possible argument against parade permit ordinances—and thus in favor of the *Lovell* doctrine—is that when they vest broad discretion in political officials, the risk of unconstitutional administrative bias is too high. Without the constraint of specific, objective standards (or "substandards," to distinguish them from the vague, broad "standards" of the ordinances), the officials can grant or deny speech permits because of like or dislike of the ideas or messages or content of the speech acts in question. Permit denials based in such content-based bias would clearly violate the First Amendment. Perhaps we could police this problem through as-applied challenges, insisting that people denied speech permits appeal such denials on the ground of bias or bring affirmative constitutional tort suits alleging the same. Under the *Lovell* doctrine, however, the Court has consistently allowed facial challenges to parade permit ordinances. That is, it allows both (a) defenses to criminal prosecution for speaking without a permit, not based on proof of bias, but based on the risk of bias from vague statutory standards,[94] and (b) affirmative constitutional litiga-

93 *See* WILLIAM COHEN, THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE 57 (2003).

94 *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 159–64 (1969); Staub v. City of Baxley, 355 U.S. 313, 325 (1958); *Kunz*, 340 U.S. at 294–95; Niemotko v. Maryland, 340 U.S. 268, 289 (1951); Saia v. New York, 334 U.S. 558, 559–62 (1948); Largent v. Texas, 318 U.S. 418, 422 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04

tion alleging the same risk of bias, again without showing any specific incidence of actual bias.[95] To understand precisely how the *Lovell* doctrine operates, and to justify that doctrine normatively—both tasks necessary as a predicate for using the *Lovell* doctrine to understand and justify the merits holding of *Bush v. Gore*—we must understand and justify the use of facial challenges generally, and in this setting.

The *Lovell* doctrine constitutes a prophylactic rule—it protects against the risk of a constitutional violation, rather than remedying an extant constitutional violation. And as a type of facial challenge, the *Lovell* doctrine is sometimes referred to as a version of First Amendment overbreadth doctrine. I will first set forth the basic claim in favor of *Lovell* as a prophylactic rule, and discuss and critique three important articles on prophylactic rules. Then I will analyze the literature that deems *Lovell* claims to be overbreadth claims, arguing that this literature is mistaken. Finally, having argued that the *Lovell* doctrine is justified neither on any special prior restraint concern (in the prior section) nor on any special overbreadth concern (in this one), I will conclude that if the prophylactic *Lovell* doctrine is justified at all, it must be because of a structural argument regarding the relationship between vague delegations of power to political officials and the judicial protection of rights of political participation. The *Lovell* doctrine, thus, is underdetermined rather than overdetermined—that is, although at first glance several constitutional principles seem to support the *Lovell* doctrine, upon close inspection only one does.

a. The *Lovell* Doctrine as a Prophylactic Rule

Some constitutional violations seem too difficult to capture on a case-by-case basis. Or at least we don't believe our adjudicatory system can reliably capture them. So we establish broader rules to protect the constitutional right. The choice may be seen as overenforcement versus underenforcement—if we operate case-by-case, we will capture some violations, but miss too many, and thus have a kind of underenforcement; if we establish a prophylactic rule to ward off the underlying constitutional violation, we will place broader restrictions on

(1940); Schneider v. New Jersey, 308 U.S. 147, 150–51 (1939); Lovell v. City of Griffin, 303 U.S. 444, 450–52 (1938); *see also* Kovacs v. Cooper, 336 U.S. 77, 87–90 (1949) (entertaining a facial challenge in a criminal defense, but ruling for the government); *Cox*, 312 U.S. at 576–78 (doing the same).

95 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 129–30 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757–59 (1988); Hague v. CIO, 307 U.S. 496, 516–17 (1939); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 793–96 (1989) (entertaining a facial challenge in affirmative litigation, but ruling for the government).

government than the constitutional norm actually requires, thus achieving a kind of overenforcement. I will first lay out the classic examples of prophylactic rules, then justify the overenforcement that they represent, and then explain why I don't go as far as some who view all (or most) of constitutional law as prophylactic or who claim there is no analytic distinction between rights and remedies.

The *Miranda* warnings are a prophylactic rule.[96] The Fifth Amendment to the Constitution says, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself."[97] Compelling a person to confess outside the courtroom doesn't violate the Fifth Amendment, but introducing such a compelled confession against a defendant in a criminal case does violate the Fifth Amendment.[98] For some time the Court sought to protect this right by an all-things-considered, "voluntariness" test, which would examine all relevant factors of custodial interrogation to determine whether the resultant confession was "compelled" or voluntary.[99] The *Miranda* case and the familiar warnings from that case represent the Court's concession that the voluntariness test was insufficient to capture the Fifth

96 *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) ("[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . ."); *id.* at 457 (referring to "safeguards" to protect the Fifth Amendment privilege); *see also* United States v. Patane, 124 S. Ct. 2620, 2626–27 (2004) (plurality opinion); Missouri v. Seibert, 124 S. Ct. 2601, 2607–08 (2004) (plurality opinion); Dickerson v. United States, 530 U.S. 428, 437 (2000). For a comprehensive discussion of this point, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 18–25, 114–35 (2004). *See also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). Michael Dorf and Barry Friedman disagree, arguing that "*Miranda* can be explained without resort to prophylaxis." Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 76. To the extent that Dorf and Friedman are arguing that *Miranda* warnings or something equally effective are needed to protect against compelled confessions, we are not really disagreeing. To the extent that Dorf and Friedman are arguing that apart from the underenforcement risk, the Fifth Amendment independently requires warnings (or something equally effective), then we are disagreeing. It may be that Dorf and Friedman's principal reason for moving away from the "prophylactic" description of *Miranda* is to move away from the idea that Congress has power to displace the *Miranda* warnings virtually at will. For a brief discussion of why calling a constitutional rule "prophylactic" does not entail broad legislative override power, see *infra* text accompanying note 124.

97 U.S. CONST. amend. V.

98 *See* Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (plurality opinion); *id.* at 777–79 (Souter, J., concurring in the judgment).

99 *See, e.g.*, *Miranda*, 384 U.S. at 502 (Clark, J., dissenting); Haynes v. Washington, 373 U.S. 503, 514 (1963).

Amendment violations. Custodial interrogation usually takes place in a private unmonitored setting, and it is hard for defendants to show that a confession was involuntary. Requiring the government to provide warnings before engaging in custodial interrogation helps ensure that resulting confessions are voluntary. To stick with the voluntariness test would have been to underenforce the constitutional right. By requiring "more" than the Constitution requires, *Miranda* overenforces the right by excluding from evidence some unwarned but voluntary confessions.

Similarly, the *Lovell* doctrine is a prophylactic rule.[100] The First Amendment prevents, among other things, government decisions based on like or dislike of ideas, or messages, or speech content.[101] To be sure, there are some narrowly circumscribed areas of speech in which the government may regulate based on content, according to certain "definitional balancing" tests,[102] but otherwise the government must satisfy strict scrutiny to regulate based on speech content. Denying a speech permit because the administrator dislikes the speech content clearly violates the First Amendment, and there's nothing the government can offer that will satisfy strict scrutiny. But when officials administer ordinances that give them broad, vague discretion, without specific objective criteria to guide their discretion, it is easy for those officials to deny permits based on speech content without revealing the unconstitutional purpose behind the denials. And there will usually be an insufficient record to show such bias. If we require case-by-case proof of unconstitutional permit denials, we will underenforce the First Amendment. So, the *Lovell* doctrine allows parade permit ordinances to be challenged on their face, without requiring proof of as-applied bias. If an ordinance doesn't state specific, objective substandards satisfactory to cabin administrative discretion and hence to ward off the risk of bias and to provide standards for judicial review, then the Court will invalidate the ordinance on its face. Such invalidations overenforce the First Amendment right, by invalidating statutes

100 *See* TRIBE, *supra* note 41, at 1056–57; Blasi, *supra* note 63, at 57; Elhauge, *supra* note 18, at 22; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 (1991); Jeffries, *supra* note 67, at 423; Monaghan, *supra* note 75, at 543; Strauss, *supra* note 96, at 195–97; Tokaji, *supra* note 12, at 2442; Tokaji, *supra* note 18, at 132, 136–38.

101 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Police Dep't v. Mosley, 408 U.S. 92 (1971); Cohen v. California, 403 U.S. 15 (1971).

102 *See, e.g.*, Miller v. California, 413 U.S. 15, 24–25 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

that do not themselves reflect bias, or in situations in which there was in fact no administrative bias.

An objection to prophylactic rules is that they are perhaps legitimate if put in place legislatively, but illegitimate if commanded by the judiciary.[103] Legislatures may (sometimes, with certain qualifications not necessary here) overenforce constitutional norms, because in so doing they are checking themselves, not being checked by another branch.[104] But if a court trumps the action of a political branch, the court may do so only if the Constitution forbids the political action in question. Insofar as they overenforce constitutional rights, prophylactic rules are thus, according to some, illegitimate, beyond the power of the courts.

Much excellent scholarship has demonstrated the poverty of this view. The principal argument is straightforward: Prophylactic rules are justified and legitimate, even if they go beyond what the Constitution requires, even if they overenforce rights, because otherwise the rights in question would be underprotected, underenforced.[105] If the judiciary correctly believes that direct monitoring of whether a right has been infringed would result in underenforcement, then nothing in the Constitution requires such direct monitoring. If the choice is between underenforcement and overenforcement, then overenforcement—and sometimes prophylactic rules as a version of overenforcement—is permitted. Of course for every given prophylactic rule it is a fair question whether the rule is needed to correct for underenforcement, but that question is always, one might say, a "retail" one, requiring detailed analysis of the way in which the right is infringed and why as-applied adjudication fails to capture such infringement. As a "wholesale" matter, overenforcement acknowledges the error costs

103 *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (Scalia, J., dissenting); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 129 (1985). But see *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761–62 (1988), where Justice Scalia joins the majority opinion adhering to the *Lovell* doctrine, which is a prophylactic rule.

104 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 526–27, 532–33 (1997) (discussing Fourteenth Amendment, section 5 caselaw).

105 *See* Berman, *supra* note 96, at 30–50; Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926–27 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 899–904 (1999); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21 (1975); Strauss, *supra* note 96, at 192, 207; *see also* United States v. Patane, 124 S. Ct. 2620, 2628–29 (2004) (plurality opinion); Dickerson v. United States, 530 U.S. 428, 437–40, 440 n.3, 444 (2000) (both decisions acknowledging that the prophylactic *Miranda* decision nonetheless announces a "constitutional rule"); Miranda v. Arizona, 384 U.S. 436, 439, 457 (1966).

that sometimes come with case-by-case adjudication and legitimately corrects for such error costs, even if the error costs now swing in the opposite direction. There is no constitutional requirement that adjudicative error underenforce rather than overenforce constitutional rights.

David Strauss and Daryl Levinson have written significant articles addressing prophylactic rules. While each advances arguments similar to those I just made, each takes the point further than I think appropriate. Strauss's article, *The Ubiquity of Prophylactic Rules*,[106] argues that much of constitutional adjudication—beyond even those doctrines that we commonly consider prophylactic—accounts for "institutional capacities and propensities"[107] and can properly be deemed prophylactic rules. Surely there are areas other than those governed by *Miranda* and *Lovell* in which the risk of underenforcement from as-applied adjudication gives way to the overenforcement of a prophylactic rule. But Strauss extends the argument, conflating the way some rights are overenforced through prophylactic rules with the way other rights are protected if plaintiff can make out a prima facie case for their violation but then "un"protected if government can rebut with a sufficient showing of state interest. Let me explain.

After discussing *Miranda* and *Lovell* as quintessential examples of prophylactic rules, Strauss makes the more ambitious claim that much of the content-based doctrine of the First Amendment is similarly prophylactic. For example, he says, consider *Police Department v. Mosley*.[108] The Court struck down a city ordinance because it permitted only labor picketing near a school during school hours, forbidding other types of picketing. This textual statutory preference for one subject matter of speech over others was thus a kind of content-based speech discriminatory law, and the government could not satisfy the resulting strict scrutiny burden of rebuttal. Strauss argues that this familiar, seemingly straightforward litigation pattern—plaintiff shows that the statute is content based, government fails to satisfy strict scrutiny—itself reflects a kind of prophylactic rule, overenforcing the First Amendment. Here's what he says:

> A content-based measure is viewed with suspicion because it is too likely to have been influenced by the legislature's hostility to the speech in question. . . . Moreover, it is very difficult for a court to ascertain whether such an impermissible motive was at work; that is why the Court views all content-based measures with suspicion, with-

106 Strauss, *supra* note 96.

107 *Id.* at 207.

108 408 U.S. 92 (1972).

> out inquiring into whether each one was prompted by hostility to the point of view in question.
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> . . . .
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> . . . If the city was telling the truth in *Mosley*—if it really made a good faith judgment that labor-related speech is less prone to violence—then the real First Amendment was not violated.[109]

First note that this argument reflects an arguable proposition about the First Amendment—that it is concerned principally with "bad" government purpose. If Strauss is wrong about that, then the whole argument runs aground, but I don't mean to take him up on that point. Let's assume he's right.[110] On his view, the "real" violation is bad purpose, the content-based face of a statute is just an adjudicative mechanism we use to get at such bad purpose, sometimes this mechanism deems a statute unconstitutional even when in fact there was no bad purpose, and thus the mechanism is a prophylactic rule, overenforcing the right just as *Miranda* and *Lovell* do.

This argument is erroneous. In the standard content-based speech case—say, *Mosley*—we deem the content-based face of the statute to be prima facie evidence of the constitutional violation (here, of bad purpose). It is like the res ipsa loquitur doctrine in tort law. Just as a heavy bag of grain falling out of a shop window is strong prima facie evidence of negligence, rebuttable by defendant (though with great difficulty),[111] so is a content-based statute strong prima facie evidence of bad governmental purpose, rebuttable by the government (though with great difficulty). In *Miranda*, a failure to give the warnings isn't prima facie evidence of the constitutional violation (if introduced at trial) of a compelled custodial confession. In *Lovell*, a vague permit ordinance that fails to specify objective criteria isn't prima facie evidence of the constitutional violation of administrative bias. True prophylactic rules operate as *prophylaxes*—they are risk-prevention devices, not evidentiary rules that permit one side to show the dispositive legal point through indirect evidence. After all, Strauss's contention about the First Amendment could be extended to any legal claim where we allow plaintiff to make out a prima facie case through indirect or circumstantial evidence, subject to rebuttal. But when plaintiff makes out a prima facie case of intent in a fraud case or careless conduct in a negligence case, subject to rebuttal by defen-

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109 Strauss, *supra* note 96, at 200–02.

110 *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001). *But see* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002).

111 *See* Byrne v. Boadle, 159 Eng. Rep. 299, 300 (Ex. Ch. 1863).

dant, we don't think that we are somehow setting up a prophylactic rule. Rather, we are recognizing that various types of evidence are strong though imperfect indicators of the matter to be proved. Although it might be proper to think of imperfect evidentiary rules as overenforcing the rights in question—because we allow plaintiff's verdicts on evidence short of 100% certainty—that is a far cry from saying such rules operate as prophylactic devices. In short, prophylactic rules ward off the risk that plaintiff won't be able to present sufficient evidence of the actual rights violation, but they are not rules regarding the type of prima facie evidence plaintiffs may use to prove such violation.[112]

Levinson's article, *Rights Essentialism and Remedial Equilibration*,[113] argues that "rights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[114] Although scholars such as Larry Sager (on underenforcement)[115] and Henry Monaghan (on overenforcement)[116] appropriately account for comparative institutional competency issues, they both insist, says Levinson, that we can think analytically about rights first and remedies second. This is "rights essentialism,"[117] says Levinson, and he claims it is erroneous, both descriptively and normatively. He discusses three types of interplay between rights and remedies; for each, he maintains that courts think about the two in an intertwined fashion and that conceptually this is necessary. So, under "remedial deterrence," Levinson shows how courts sometimes pare back the scope of a right because of concern about a floodgate of violations otherwise.[118] Under

112 Another way of putting this is that in *Mosley* (and similar cases that begin with plaintiff showing a content-based statutory text), proof that the statute is facially content based is proof that the government's purpose was to disfavor Mosley's ideas and thus proof of a constitutional violation. That we give the government an opportunity to rebut this proof—and that the standard for rebuttal is high ("strict scrutiny") so as to allocate error costs against the government—does not convert the proof pattern into one dedicated to warding off the risk of hard-to-detect rights violations. For whereas in *Miranda* we deem case-by-case proof of involuntariness too difficult, and whereas in *Lovell* we deem case-by-case proof of administrative bias too difficult, in *Mosley* proof of the content-based statutory text itself constitutes proof of the constitutional violation.

113 Levinson, *supra* note 105.

114 *Id.* at 858.

115 *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

116 *See* Monaghan, *supra* note 105.

117 *See* Levinson, *supra* note 105, at 867–70.

118 *See id.* at 889–99.

"remedial incorporation," he discusses prophylactic rules.[119] Under "remedial substantiation," he talks about how the value of a right is often no more than what a body with enforcement authority would do if the right were violated.[120]

Levinson's is a complex argument, and many of his observations seem accurate. But the conceptual point seems wrong, and it seems wrong specifically in the area of "remedial incorporation," which is relevant for the current discussion. When the Court lays down the *Miranda* doctrine or the *Lovell* doctrine, the right and remedy are not inextricably intertwined. We can, and do, meaningfully think in a two-step process, rights first, remedies second. We can, and do, say something like the following: One has a constitutional right as a criminal defendant against introduction at trial of a compelled confession, and one has a constitutional right against administrative bias in rejecting one's parade permit application. We then can, and do, say something like the following: Because these rights are not adequately enforceable through case-by-case adjudication, and because we deem underenforcement more problematic than overenforcement, we establish prophylactic rules that are a type of remedial scheme to ward off the risk of the rights violation.[121] Levinson's insistence that it is meaningless to talk about a "pure right" apart from how the right is protected, thus, is incorrect, at least for the types of case we are discussing here.

Finally, a word about Monaghan's seminal scholarship in the area of prophylactic rules. In his *Harvard Law Review* foreword, *Constitutional Common Law*, Monaghan argues that "a wide variety of Supreme Court pronouncements are subject to modification and even reversal through ordinary political processes."[122] Much of constitutional law is "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."[123] Prophy-

119 *See id.* at 899–904.

120 *See id.* at 904–11.

121 For an intricate discussion of this kind of point—that constitutional law involves both determination of rights and doctrinal rules for enforcing those rights that account for various institutional factors—see Berman, *supra* note 96. He refers to "constitutional operative propositions," which are "constitutional doctrines that represent the judiciary's understanding of the proper meaning of a constitutional power, right, duty or other sort of provision," and "constitutional decision rules," which are "doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied." *Id.* at 9.

122 Monaghan, *supra* note 105, at 2.

123 *Id.* at 2–3.

lactic rules are one such example, contends Monaghan, and because these rules are based on prudential considerations (regarding the difficulty of case-by-case adjudication, often because the constitutional tort occurs behind closed doors or otherwise without an adequate evidentiary trail), and because they overenforce rights, we should consider them a type of constitutional common law, displaceable by Congress. Seeing prophylactic rules in this way allows us to overcome what some perceive as a legitimacy problem with courts overenforcing constitutional rights because of prudential considerations.

There are two problems—and a third point that merits a brief aside—with Monaghan's argument for prophylactic rules as constitutional common law. First, as I argued above, that prophylactic rules overenforce constitutional rights does not render them even presumptively illegitimate, for they operate in a realm in which the alternative is underenforcement of such rights. Second, that prophylactic rules rely in part on prudential considerations does not make them different from much of constitutional law that we don't consider prophylactic. Law is about applying norms to conduct; legal doctrine always accounts for prudential considerations. That doesn't mean, as per my discussion of Levinson, that rights are inextricably intertwined with remedies or other patently prudential matters. It does mean that when a court thinks about "due process" or "equal protection" or "freedom of speech," it is thinking about these rights in a deep social context rather than as abstract objective entities. Finally, if Congress seeks to displace *Miranda* or *Lovell* based on a legislative view of how to protect against compelled confessions or administrative speech bias, then the Court should pay close attention to the proffered legislative method, but the fact that *Miranda* and *Lovell* turn on prudential considerations and overenforce constitutional rights does not necessarily mean that Congress may displace the Court in the way that state legislatures displace state court rulings in the common law tradition. The proper relationship between the Court and Congress in enforcing constitutional rights is a complex matter, on which I shall remain agnostic, at least here.[124]

124 For some writing on this question of interbranch interpretive dialogue, see SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Dorf & Friedman, *supra* note 96; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 FORDHAM L. REV. 1401, 1407–08 (2005); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). I do not take the Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), invalidating Congress's attempt to replace the *Mi-*

b. Is the *Lovell* Doctrine a Type of Overbreadth Challenge?

First Amendment overbreadth doctrine permits someone whose conduct is constitutionally regulable to argue that because a statute has substantially more unconstitutional applications than constitutional, it should be invalidated on its face.[125] Although there is a debate in the scholarship about whether overbreadth doctrine establishes a special standing rule, the mainstream view is that it does, by allowing one to assert the rights of others, not before the court.[126] Overbreadth facial challenges depend on persuading the court that the statute in question has many unconstitutional applications beyond the claimant's own situation. For example, in *Massachusetts v. Oakes*,[127] a state law prohibited taking nude photos of persons under

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randa warnings with an all-things-considered voluntariness test, to mean that Congress has no role in enforcing constitutional rights. The best way of reading *Dickerson* is that the congressional choice at issue in that case was unconstitutional because it would have returned us to a regime of underenforcement of the Fifth Amendment privilege. Whether there are other legislative alternatives to the *Miranda* warnings that might adequately protect the privilege is an open question.

125 For statements of the overbreadth test (albeit in cases upholding statutes), see *New York v. Ferber*, 458 U.S. 747, 771–73 (1982), and *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

126 The debate is between those who view overbreadth challenges as involving special standing rules, asserting the rights of others not before the court, and those who view overbreadth challenges as an instance of the principle that one's case must be governed by a constitutionally valid rule. *Compare* TRIBE, *supra* note 41, at 1023 (overbreadth is concerned with chilling effects), Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 553 (1985) (same), *and* Fallon, *supra* note 100, at 855, 867, 884 (same), *with* TRIBE, *supra* note 41, at 1023 (overbreadth is concerned with there being a constitutionally valid rule), *and* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (same). *See also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238, 263–64 (1994) (discussing both concerns). Under the latter view, if a law is unconstitutionally overbroad, then the law is invalid and no one may be subject to it. The problem with the latter view is that statutes are sometimes severable into constitutional and unconstitutional applications, and indeed much of the scholarship in this area engages in complex analyses of the severability doctrine and the extent to which substantive constitutional norms—such as the First Amendment—restrict the reach of severability. My discussion in the text of the difference between *Lovell* doctrine facial challenges and overbreadth facial challenges, and my critique of some scholarship that seems to collapse the two, are predicated on the more standard view of overbreadth doctrine as a relaxation of third-party standing rules to diminish chilling effects. The Court, too, seems to take this view of overbreadth, most significantly in its most recent pronouncement on the subject. *See* Sabri v. United States, 124 S. Ct. 1941, 1948 (2004) (discouraging overbreadth facial challenges, in large part because they "call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand").

127 491 U.S. 576 (1989).

the age of eighteen. The statute had some applications that most would deem constitutional—photos of adolescents taken with clear sexual intent—but also had some applications that most would deem unconstitutional—vacation beach baby photos. Whether the law was substantially overbroad was a close and interesting question,[128] but for current purposes the point is that even though Oakes's photographs fell into the former (regulable) rather than latter (not regulable) category, he was permitted to argue that the statute was facially invalid, through and through.[129] The conventional way of understanding this is that we are concerned about the chilling effect on other persons, not before the court, i.e., on the parents who want to take vacation beach baby photos and who might be unconstitutionally deterred (i.e., "chilled") from taking those photos because of the existence of the statute.

Overbreadth challenges and *Lovell* doctrine challenges share an attribute: they are both facial challenges; neither requires showing that a statute is unconstitutional as applied to the facts of the claimant's situation. But the reasons differ. We allow overbreadth facial challenges to combat the chilling effect on persons not before the court; we allow *Lovell* doctrine facial challenges to diminish the risk of discrimination by administrative officials. The former focuses on law as a conduct rule for citizens; the latter, on law as a limitation of power delegated to officials. Some scholarship, though, has failed to distinguish these two concerns. After accurately describing the prophylactic nature of the *Lovell* doctrine, John Jeffries continues:

> This is, of course, a familiar argument. It goes under the name of the overbreadth doctrine . . . . A rule of special hostility to administrative preclearance is just another way of saying that determinations under the overbreadth doctrine should take account not only of the substance of the law but also of the structure of the administration.[130]

But overbreadth is not the correct way of viewing the vague, discretionary ordinances at play in the *Lovell* line of cases.[131] Parade permit ordinances that lack objective criteria do not sweep too far in the sense of having substantially more unconstitutional applications than

128 *See id.* at 588–90 (Scalia, J., concurring) (arguing against overbreadth); *id.* at 590–99 (Brennan, J., dissenting) (arguing for overbreadth).

129 Only five Justices, however, reached the overbreadth question. The other four accepted the state legislature's narrowing construction of the statute (although it came after Oakes's primary conduct) and did not reach the overbreadth question.

130 Jeffries, *supra* note 67, at 425.

131 Daniel Tokaji also conflates overbreadth and *Lovell* facial challenges. *See* Tokaji, *supra* note 12, at 2446 n.209, 2447, 2491–92; Tokaji, *supra* note 18, at 136.

constitutional ones. There isn't an identifiable set of regulable versus nonregulable speech acts in the *Lovell* setting as there is in the overbreadth setting. Moreover, the problem with such ordinances is not that people are chilled in their primary conduct, afraid to engage in speech acts that they otherwise have a right to engage in. Permit ordinances are not regulations of primary conduct, and thus can't chill such conduct.[132]

c. The Proper, Structural Understanding of the *Lovell* Doctrine

Thus, the *Lovell* doctrine is a type of facial challenge and is a prophylactic rule to ward off the risk of administrative bias that is too hard to show on a case-by-case basis. It is not a type of overbreadth challenge, because it does not depend on a division between regulable and nonregulable conduct and it does not use claimants in the former category to protect the rights of claimants in the latter category.[133] The better analogy for the *Lovell*-type facial challenge is to vagueness cases, although even here we must be careful to limit the analogy. Vagueness claims are of two sorts, both versions of due process claims. One type of vagueness-due process claim, in the First Amendment and elsewhere, reflects a concern with fair notice. If the terms of a law are insufficiently clear to guide a reasonable person in her conduct, then the law will overdeter, stopping people from engaging in conduct because they are unsure of the law's sweep.

But the *Lovell* doctrine is not about the notice aspect of due process. Rather, it is about the delegation aspect of due process, which is the second type of vagueness claim. Parade permit ordinances do not regulate primary conduct; even if the criteria for granting permits are vague, people are not unsure of which primary conduct they may engage in and which not.[134] Rather, the vagueness problem with ordi-

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132 Furthermore, it seems wholly speculative whether people will be less likely to apply for permits because the criteria are vague. *See* Blasi, *supra* note 63, at 33. Neither does it seem likely that there is a chilling effect from possible delay in judicial review of a rejected application.

133 *See* TRIBE, *supra* note 41, at 1035–36.

134 In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court justified the *Lovell* doctrine in two ways. One I agree with and endorse in the text: "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759. Note that the ordinance in *Lakewood*, as in the other *Lovell* doctrine cases, was a content-neutral time, place, or manner ordinance; the risk was that the administrative official would engage in "content-based censorship." Here is the other *Lakewood* justification for the *Lovell* doctrine: "[T]he mere existence of the licensor's unfettered

nances in the *Lovell* line of cases is a structural concern about providing guidance norms for officials, not for citizens, and the concomitant concern with providing adequate criteria for meaningful judicial review. *Lovell* is, thus, similar to the delegation doctrine (except that *Lovell* enforces the relevant constitutional norms, whereas the delegation doctrine, at least at the federal level, is notoriously underenforced[135]). Both *Lovell* and the delegation doctrine seek to ensure that legislators rather than administrators make key policy choices. And both *Lovell* and the delegation doctrine are concerned with cabining official discretion and with making political officials accountable to the judiciary, which is impossible if standards provide carte blanche authority for the officials.[136]

If the *Lovell* doctrine is not justifiable by a special concern with prior restraints (because the collateral bar rule almost never applies), and if it is not justifiable as a type of overbreadth challenge (because it is not about preventing unconstitutional deterrence of third-party speech), and if it is not justifiable by the notice concerns of vagueness doctrine (because it is not about preventing unconstitutional deterrence of the claimant's speech), then it is a fair question whether the remaining structural justification is sufficient to warrant facial rather than as-applied challenges. The answer must be based in a combination of the nature of the rights at stake and the difficulty of protecting those rights. As to the latter, I will simply share the assumption of the long line of cases that relying on as-applied challenges in this setting would underenforce the right against content-based administrative discretion. As to the former: The rights at stake are rights of political

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discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. This suggestion that the mere existence of unfettered official discretion will deter people from applying for permits is (a) wholly speculative and (b) not the kind of chilling effect with which First Amendment doctrine is usually concerned (i.e., chill of either third-party or first-party primary conduct by either overbroad or vague laws). In sum, it seems wrong to link the *Lovell* doctrine to any kind of chilling effects concern. (And, since the Court here mentions "coupled with the power of prior restraint," also consider my objection to thinking of *Lovell* doctrine ordinances as specially problematic on the ground that they are prior restraints. *See supra* text accompanying notes 56–93.)

135 *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

136 *See* Emerson, *supra* note 42, at 670. For First Amendment cases upholding content-neutral speech permit ordinances as providing sufficiently objective criteria for administrative judgment, see *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), *Kovacs v. Cooper*, 336 U.S. 77 (1949), and *Cox v. New Hampshire*, 312 U.S. 569 (1941).

participation, of speech[137] and of press[138] (and sometimes of religion),[139] in public spaces, and it is precisely this sort of right that we must be especially vigilant to protect from impressionable, capturable, local political officials. It is commonplace to invoke footnote 4 from *Carolene Products*[140] and John Ely's masterful exegesis of it,[141] but this is a perfect spot to put footnote 4 and Ely to use. If we allow local political officials to determine who may speak in public areas and who may not, with no objective criteria governing such determinations and thus no meaningful standards for judicial review, we will be risking a substantial amount of keeping the ins in and keeping the outs out.[142] *Lovell* facial challenges—and their long standing pedigree at the Court—are a testament to our commitment to avoiding the risk of such partisan shenanigans and the effect such partisanship has on blocking the channels of political change.

C. Applying the Lovell *Doctrine to* Bush v. Gore

1. The Analogy

Having examined the *Lovell* doctrine in detail, we are now in position to assess whether it properly applies to *Bush v. Gore.* Two aspects of the Florida statutory scheme (extant in 2000) are relevant:

(1) Manual recounts are conducted on a county-by-county basis under the supervision of the county canvassing boards. Each board is

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137 The *Lovell* doctrine free speech cases are *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), *Staub v. City of Baxley*, 355 U.S. 313 (1958), *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Saia v. New York*, 334 U.S. 558 (1948), and *Hague v. CIO*, 307 U.S. 496 (1939).

138 The *Lovell* doctrine free press cases are *Lakewood*, 486 U.S. 750, *Largent v. Texas*, 318 U.S. 418 (1943) (the Court also mentioned freedom of religion and speech), *Schneider v. New Jersey*, 308 U.S. 147 (1939), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (the case involved religious literature, but the Court treated it as a free press case).

139 Freedom of religion is not always a right of political participation, but in the *Lovell* doctrine freedom of religion cases, it is. *See* Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940). Free exercise of religion appears to be the principal ground of decision in *Cantwell* and in *Kunz*, but these are also free speech (both) and press (*Cantwell*) cases.

140 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

141 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

142 For a similar concern in the partisan gerrymandering setting, see *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1798 (2004) (Kennedy, J., concurring in the judgment) and *id.* at 1803–04 (Stevens, J., dissenting). In the political patronage setting, see *Rutan v. Republican Party*, 497 U.S. 62 (1990), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976).

"composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners."[143] All three are elected positions.[144] Although it is possible to think of even an elected judge as disinterested (although harder than if she is appointed), in this setting the judge is not adjudicating cases but rather is engaged in vote counting, a politically laden act. It is fair to say that county canvassing boards are subject to the kinds of partisan pulls and tugs that mayors and other officials are considered subject to throughout the *Lovell* line of cases.

(2) Two statutory standards are arguably relevant for the recounts.[145] The section of Florida law that the Florida high court cited for its contest-phase holding describes a process for hand-counting ballots that are "damaged or defective" and therefore "cannot be counted properly by the automatic tabulating equipment."[146] In such cases, the law says the ballots should be counted by hand and adds: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."[147] The section of the Florida statute setting procedures for manual recounts states: "If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."[148] Requiring a "clear indication" of voter intent is a higher standard than merely looking for "the voter's intent," but this difference was not a serious issue during the litigation.

Thus, the Florida recount put political, often partisan officials in charge of administering manual recounts under a "voter intent" stan-

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143 FLA. STAT. § 102.141(1) (2000).

144 *See* FLA. CONST. art. VIII, § 1(d) (providing for the election of the supervisor of elections); *id.* art. V, § 10(b)(2) (preserving the election of county court judges unless the electorate moves to a system of judicial appointments, which no jurisdiction had done as of the 2000 election, *see* Howard Troxler, *Merit-Based Selections Didn't Fly, Rightly So*, ST. PETERSBURG TIMES, Nov. 20, 2000, at 1B); FLA. STAT. § 124.01(2) (providing for the election of county commissioners); *id.* § 98.015(1) (providing for the election of the county supervisor of elections). County court judges are also subject to retention votes. *See* FLA. CONST. art. V, § 10(a); *see also* Fla. State Courts Adm'r, *Florida State Courts*, *at* http://www.flcourts.org (last visited Feb. 26, 2005). Note that in one county, Miami-Dade, the supervisor of elections is an appointed position. *See* TOOBIN, *supra* note 12, at 148; U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION ch. 3 (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/ch3.htm#_ftnref7.

145 *See* GREENE, *supra* note 15, at 65–66.

146 FLA. STAT. § 101.5614(5).

147 *Id.*

148 *Id.* § 102.166(7)(b).

dard that specified no substandards. As discussed earlier, there are many ways to examine ballots for evidence of voter intent, and under the Florida statutory structure each county canvassing board was deciding on its own how to determine voter intent. As the Court pointed out, "each of the counties used varying standards to determine what was a legal vote."[149] This raises the *Lovell* problem: administrative officials making decisions affecting rights of political participation under a vague discretionary statutory standard.

Before examining the *Lovell* analogy more closely, consider that the Florida system does not raise special prior restraint, overbreadth, or vagueness-notice concerns. If these were the concerns buttressing the *Lovell* doctrine, then the analogy between *Lovell* and *Bush v. Gore* would falter. But these concerns are inapposite to both the *Lovell* doctrine and the Florida recount system:

Prior restraint: The relevant primary conduct in Florida was voting. There were no permits being granted or denied, and thus no denials that could be the subject of citizen disobedience. If the *Lovell* doctrine were justified by a special concern with prior restraints based on the collateral bar rule, then the *Lovell* doctrine would be inapposite to *Bush v. Gore*. But as I argued earlier, the Court has not applied the collateral bar rule to disobedience of permit denials,[150] and thus the *Lovell* doctrine is not based on a special concern with prior restraints.

Overbreadth: There is no division in the Florida voting scenario between citizens whose conduct may be constitutionally regulated and those whose conduct may not. Thus, there would be no opportunity for the invocation of overbreadth doctrine to challenge the "voter intent" provisions facially. If the *Lovell* doctrine were justified by the need for facial challenges to prevent a chilling effect on third parties, then the *Lovell* doctrine would be inapposite to *Bush v. Gore*.[151] But as I argued earlier, *Lovell* doctrine facial challenges are not overbreadth challenges, since the statutory standards in those cases do not set conduct rules for citizens.[152]

Vagueness-notice: The Florida "voter intent" standard is vague, but it is not the sort of vagueness that implicates the notice aspect of due process, since it does not set standards for citizen conduct. If the *Lovell* doctrine were justified by the need for facial challenges because

149 Bush v. Gore, 531 U.S. 98, 107 (2000).

150 *See supra* text accompanying notes 84–93.

151 *See* Tribe, *supra* note 9, at 241 (noting that there was no chill on voters to "conform their speech").

152 *See supra* text accompanying notes 125–32. *But see* Tokaji, *supra* note 18, at 142 (suggesting that the chilling effect concern might exist in the *Lovell* line of cases, although it does not exist in the *Bush v. Gore* setting).

of the absence of fair statutory notice of what's expected of citizens, then the *Lovell* doctrine would be inapposite to *Bush v. Gore*.[153] But as I argued earlier, *Lovell* doctrine facial challenges do not rely on the vagueness-notice justification, since the statutory standards in those cases do not set conduct rules for citizens.[154]

Understanding the precise contours of the *Lovell* doctrine allows us to conclude that the core problem with the Florida recount system is the core problem with the ordinances in the *Lovell* line of cases. Just as it is hard to monitor on a case-by-case basis the broad discretion that parade permit ordinances vest in local political officials, so it is hard to monitor on either a case-by-case or county-by-county basis the broad discretion that the Florida "voter intent" provisions vest in local political officials. Requiring the substandards to be set in the statute—in this setting as in the *Lovell* line of cases—helps to ensure against this hard-to-prove bias. Allowing facial challenges to the statutes, in both settings, is a prophylactic check against the hard-to-prove bias.[155]

There are two ways in which the "voter intent" standard might have been subject to the risk of partisan abuse during the 2000 Florida recount. If the county boards were acting ultra vires in the setting of substandards—that is, if they should have applied the "voter intent" provision to each ballot without saying anything further about how to ascertain voter intent[156]—then the *Lovell* problem would have shifted

153 *See* James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 626 (2001). Gardner then mistakenly says the only issue left is one of nondelegation, which is a matter of state law. *See id.* at 627, 656–68. Gardner misses the "other" vagueness concern, about cabining administrative discretion, which, although related to nondelegation concerns, also raises the political rights issues present in the *Lovell* doctrine, which are not merely a matter of state law.

154 *See supra* text accompanying notes 133–36.

155 *See* Tokaji, *supra* note 18, at 135.

156 During the recount, Florida courts consistently held that county boards should follow the "voter intent" standard from the statute. The courts refused to set substandards and refused to approve specific substandards that county boards had set. *See* Gore v. Harris, 773 So. 2d 524, 526 (Fla.), *on remand from* Bush v. Gore, 531 U.S. 98 (2000); Gore v. Harris, 772 So. 2d 1243, 1256–57, 1262 (Fla.), *rev'd and remanded on other grounds*, Bush v. Gore, 531 U.S. 98 (2000); Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Dec. 9, 2000) (Lewis, J.) (order on remand), *available at* http://www.jurist.law.pitt.edu/election/Declaratory_Order.pdf; Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL 00-11078AB (Fla. Cir. Ct. Nov. 22, 2000) (LaBarga, J.) (order granting Plaintiff's emergency motion to clarify declaratory order of November 15, 2000), *available at* http://www.jurist.law.pitt.edu/election/ballot.pdf; Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL 00-11078AB (Fla. Cir. Ct. Nov. 15, 2000) (LaBarga, J.) (declaratory order), *available at*

from the setting of substandards by local political officials subject to partisan bias, to the application of the vague, discretionary "voter intent" command on a ballot-by-ballot basis, also by local political officials subject to partisan bias.[157] Although many people would be counting the ballots initially, the hard cases would be presented to the county board. Granted, the sunshine provisions of Florida law[158] would make these county board determinations observable, but the risk of ballot-by-ballot discrimination in this setting seems just as great as—if not greater than—the risk of substandard-by-substandard discrimination and certainly raises the same type of *Lovell* problem.

The other risk of partisan abuse of the "voter intent" standard involved county canvassing boards setting substandards without any statutory guidance. Some critics argue that it would have been too difficult for the county canvassing boards to use such discretion in a biased fashion, that they would have been unable to predict which chad-counting methods would help which candidates.[159] Granted, in the *Lovell* line of cases administrative bias is easy to execute—the offi-

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http://www.jurist.law.pitt.edu/election/Declaratory_Order.pdf; *Cast and Chronology*, *supra* note 28, at 22, 30 (discussing Circuit Judge John Miller's ruling of December 17, 2000, regarding Broward County); *see also* GILLMAN, *supra* note 12, at 43, 120; Dworkin, *supra* note 5, at 11; Ronald A. Klain & Jeremy B. Bash, *The Labor of Sisyphus: The Gore Recount Perspective*, *in* OVERTIME! THE ELECTION 2000 THRILLER 157, 164 & n.10 (Larry J. Sabato ed., 2002) [hereinafter OVERTIME!]; McConnell, *supra* note 17, at 114; Tribe, *supra* note 9, at 234. For a discussion of the possible Catch-22 explanation for this, see *infra* text accompanying notes 254–59.

Given the Florida courts' insistence that the county boards follow the statutory "voter intent" standards and reluctance either to specify substandards or to authorize the substandards that the boards were specifying, one might argue (as a matter of state law) that the county boards were acting ultra vires in applying any substandards, and instead should have applied the "voter intent" standard ballot-by-ballot. Yet, counties were specifying substandards (which varied), and the Supreme Court seemed particularly troubled by these varying county substandards. In the text, throughout, I argue that a *Lovell* problem exists either if counties apply "voter intent" ballot-by-ballot or if they use their uncabined discretion to set preferred substandards.

157 *See* Elhauge, *supra* note 18, at 18 (pointing out partisan discrepancies in ballot counting); *see also* Dan Keating, *Resolving the Dispute Over Dimples*, WASH. POST, Nov. 12, 2001, at A10 (reporting on a media consortium review of the Florida ballots and noting significant disagreement among ballot counters regarding marks on punch card ballots).

158 *See* FLA. STAT. §§ 102.166(6), (7)(a) (2000).

159 *See* Ronald Dworkin, *A Badly Flawed Election* [hereinafter Dworkin, *Badly Flawed*], *in* THE LONGEST NIGHT, *supra* note 2, at 89, 92; Ronald Dworkin, *Early Responses* [hereinafter Dworkin, *Early Responses*], *in* A BADLY FLAWED ELECTION, *supra* note 5, at 57, 65; Ronald Dworkin, *Reply to Charles Fried* [hereinafter Dworkin, *Reply to Charles Fried*], *in* THE LONGEST NIGHT, *supra* note 2, at 104, 105; George P. Fletcher, *The Many Faces of* Bush v. Gore, *in* THE LONGEST NIGHT, *supra* note 2, at 236, 239;

cial simply denies the permit to a disfavored speaker. One might say this is bias at the "retail" level. The problem of administrative discretion posed by varying county substandards was of a different sort, involving bias at the "wholesale" level. But it is easy to imagine a Democratic-controlled county canvassing board adopting a broad chad-counting substandard, surmising (for example) that the mostly Democratic elderly voters in the county would have trouble with the voting tool and thus that most votes recovered through hand counting would be for the Democratic candidate.[160] One could imagine the converse scenario with a Republican-controlled county canvassing board. Indeed, the vote recovery (substantially favoring Gore) was significantly higher in Broward County, which used a more capacious substandard, than in Palm Beach County, which used a narrower substandard.[161] Moreover, there is reason to believe that if Palm Beach had used Broward substandards, Gore would have won the election.[162] As Richard Posner points out, "the Democrats . . . were avid for Broward rules (without which Gore would be unlikely to overtake Bush)."[163] That the press consortium reports, having examined ballots under various substandards, did not necessarily match these predictions[164] does not dispel the real possibility that county boards operating under the discretionary "voter intent" standard would seek to impose substandards that they believed would help their favorite candidate or harm their disfavored candidate.[165] That they might guess wrong does differentiate the *Lovell* cases, but it only diminishes the degree of certainty with which local officials can exercise their bias; it doesn't detract from the risk of such bias, and it doesn't change the structural fact that the Florida statutes gave local officials

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Frank I. Michelman, *Suspicion, or the New Prince*, *in* THE VOTE, *supra* note 12, at 123, 135–36.

160 *See* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 57–58, 136; McConnell, *supra* note 17, at 106; Posner, *Florida 2000*, *supra* note 12, at 4, 6.

161 *See* Bush v. Gore, 531 U.S. 98, 107 (2000); Henry E. Brady, *Equal Protection for Votes*, *in* THE LONGEST NIGHT, *supra* note 2, at 47, 48; Epstein, *supra* note 12, at 17; McConnell, *supra* note 17, at 114; *supra* text accompanying notes 28–30.

162 *See* TOOBIN, *supra* note 12, at 85–88, 164–68; Bickerstaff, *supra* note 28, at 182 n.140.

163 POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 136.

164 *See* GILLMAN, *supra* note 12, at 166; TOOBIN, *supra* note 12, at 277–80; Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1; *see also* Dworkin, *supra* note 5, at 12–13.

165 Remember, too, that the press consortium counting is also subject to error. *See* Keating, *supra* note 157.

the opportunity to play politics under the guise of setting substandards for ballot counting.

One must distinguish two other possible problems with the Florida recounting system: setting substandards after election day, and discrimination in the counting of individual ballots after substandards were set. As to the former, some scholars focus on the fact that counties adopted chad-counting substandards after election day, as the need for a recount became apparent.[166] This gives the boards too much room for partisan politics, say the scholars; if the substandards were in place prior to election day, argue some, then the constitutional concern would be alleviated.[167] I agree that setting substandards after election day increases the risk that county officials would skew substandards based on knowledge about how the balloting went or how the machines operated. But the *Lovell* problem is not eliminated by insisting that substandards be set prior to election day. County officials might still set substandards that they believe will help their friends and hurt their enemies.[168]

As to the problem of discrimination in individual ballot counting: Assuming arguendo that substandards are in place and that they are not the product of partisan bias, some argue that it still is possible that individual ballot counting teams or the county board in examining disputed ballots might count ballots with ambiguous markings one way or the other depending upon political preference.[169] This possibility could lead to two conclusions: One might argue that because the risk of this type of discrimination is itself too high, all manual recounts should be unconstitutional.[170] Or one might argue that this ballot-by-ballot discrimination is the true analogue for the *Lovell* doctrine, where the risk of discrimination is permit-by-permit, and thus that the concern with discrimination in the setting of substandards doesn't find a true analogue in the *Lovell* cases. As to the former, suggesting that manual recounts are unconstitutional even under objective sub-

166 *See* Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, *in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 3, 15; Tokaji, *supra* note 12, at 2493.

167 *See* Elhauge, *supra* note 18, at 21–22; Schotland, *supra* note 18, at 234.

168 A similar problem, to which I would respond with a similar argument, involves evidence that some counties altered their substandards during the recount process. *See* Bush v. Gore, 531 U.S. 98, 106–07 (2000) (discussing Palm Beach County shifting its standard); Bickerstaff, *supra* note 28, at 185 (discussing Broward County shifting its standard); Schotland, *supra* note 18, at 220–22.

169 *See* GILLMAN, *supra* note 12, at 175; Briffault, *supra* note 12, at 358; Lund, *Unbearable Rightness*, *supra* note 12, at 1229.

170 For a hint in this direction, see POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 99.

standards is excessive. Florida law has many "sunshine" provisions; in particular, statutes require ballot counting to be done publicly and allow representatives from both major parties to observe the counting.[171] Both diminish the risk of as-applied discrimination, especially when objective substandards, and not a vague "voter intent" standard, are being applied. Also, there will be substantially more easy cases than hard cases once a clear, objective substandard is in place, so the opportunity for ballot-by-ballot discrimination will be limited to the smaller number of hard cases. As to the argument that the *Lovell* doctrine is a better match for ballot-by-ballot discrimination than for substandard-setting discrimination, the possibility of discrimination in the setting of substandards still exists. Moreover, ballot-by-ballot discrimination, after objective substandards have been set, is arguably less of a good fit for the *Lovell* doctrine, since the *Lovell* line cases uphold statutes with sufficiently objective criteria, even though permit-by-permit discrimination could still occur.

Appreciating this analogy between the *Lovell* doctrine and the problem with the Florida "voter intent" provisions has the added benefit of solving the standing problem in *Bush v. Gore.* Considered as an Equal Protection Clause argument, Bush's standing was shaky.[172] As Pamela Karlan has argued, Bush "was not being treated differently in any way from similarly situated individuals, namely, other candidates

171 *See supra* note 158; *see also* Tribe, *supra* note 9, at 212, 234, 242; Laurence H. Tribe, *Freeing* eroG v. hsuB *from Its Hall of Mirrors, in* A BADLY FLAWED ELECTION, *supra* note 5, at 105, 120.

172 Gore, not Bush, brought the election contest case in state court. If there was an Article III standing issue for Bush, therefore, it must have been about his right to bring an appeal to the Supreme Court. Standing requirements apply in every federal court. *See* U.S. CONST. art. III, §§ 1, 2. In one sense, then, the case for standing is easy: Bush was injured by the Florida high court's ruling, which stripped him, at least temporarily, of his certification as winner of Florida's electoral votes. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 611–12 (1989) (permitting standing in the Supreme Court by a party injured by a state court ruling). The discussion in the text following, therefore, perhaps better explains why the *Lovell* argument was a better fit for Bush than the equal protection argument, and less about why he satisfies Article III standing rules. The "at least temporarily" qualification suggests that perhaps Bush's problem was not really standing, but rather finality. *See* 28 U.S.C. § 1257 (2000) (permitting review in Supreme Court of state court "[f]inal judgments or decrees"). But the Court has been notoriously loose with the rule that it may consider only final judgments from state high courts. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 476–85 (1975) (describing a complex set of exceptions to the final judgment rule); Gayle Gerson, Note, *A Return to Practicality: Reforming the Fourth* Cox *Exception to the Final Judgment Rule Governing Supreme Court Certiorari Review of State Court Judgments,* 73 FORDHAM L. REV. 789 (2004).

for president."[173] But one does not have to prove, or even allege, unequal or discriminatory treatment to bring a facial *Lovell* doctrine challenge.[174] Any candidate on the ballot would have standing to argue that the risk of discrimination at the county board level in the setting of substandards (or in the ballot-by-ballot application of the "voter intent" standard) was too high, that the chance of proving discrimination on an as-applied basis was too low, and accordingly that the "voter intent" provisions should be invalidated on their face as granting too much discretion to political officials. Remember that *Lovell* doctrine claimants include both criminal defendants (who clearly have standing) and those bringing affirmative constitutional tort suits. The latter have not yet been injured, but are permitted to allege as injury the unmonitorable risk of administrative bias. The same was true for Bush, in the 2000 election.[175] Additionally, although using a *Lovell*

173 Pamela S. Karlan, *Equal Protection:* Bush v. Gore *and the Making of a Precedent, in* THE UNFINISHED ELECTION OF 2000, *supra* note 3, at 159, 179 [hereinafter Karlan, *Equal Protection*]; *see also* DERSHOWITZ, *supra* note 4, at 73–81; RASKIN, *supra* note 1, at 14–15; TOOBIN, *supra* note 12, at 265; Dworkin, *supra* note 5, at 11; Karlan, *Equal Protection*, *supra*, at 179; Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in* THE VOTE, *supra* note 12, at 77, 83–90 [hereinafter Karlan, *The Newest Equal Protection*]; Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1357–60 (2001) [hereinafter Karlan, *Nothing Personal*].

174 *See* Erwin Chemerinsky, Bush v. Gore *and Federalism, in* RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM 91, 94–96 (Ann N. Crigler et al. eds., 2004) [hereinafter RETHINKING THE VOTE] (noting correctly that the Court treated Bush's challenge as a facial challenge, but arguing incorrectly that this was wrong because Bush's claim was really an as-applied Equal Protection Clause challenge).

175 *Cf.* Pushaw, *supra* note 12, at 622 n.110. Remember that although in overbreadth cases and vagueness cases concerned with notice the injury is the chilling effect (on third parties in the overbreadth setting, on the claimant in the vagueness-notice setting), in vagueness cases concerned with delegation—which is what the *Lovell* doctrine cases and *Bush v. Gore* are—the injury is the risk of administrative bias. *See* City of Chicago v. Morales, 527 U.S. 41, 70–73 (1999) (Breyer, J., concurring in part and concurring in the judgment) (explaining that in a vagueness-delegation case, there is no need for any special principle of third-party standing and distinguishing vagueness-notice cases, where sometimes third-party standing principles are necessary); *see also id.* at 55 n.22 (plurality opinion) (applying third-party standing principles to an ordinance under the vagueness-notice line of reasoning). These are different sorts of injury. Daniel Tokaji's otherwise fine piece that discusses the linkage of the *Lovell* doctrine and *Bush v. Gore* makes the mistake of arguing for standing in *Bush v. Gore* on overbreadth type grounds by referring to laws that "impinge upon the protected speech of others not before the court" and by arguing that "without a broad standing rule, the rights of others—either to have their voices heard or to have their votes counted—will be denied." Tokaji, *supra* note 12, at 2491–92; *see also* Tokaji, *supra* note 18, at 136.

argument would allow any candidate for the office in question to challenge the "voter intent" provisions facially, voters, too, would have standing to bring such a challenge. The rights of political participation at stake are those of both the candidates and the voters.

If we accept my reading of *Bush v. Gore*, the case would stand as a narrow but potent extension of the *Lovell* doctrine to vote counting and recounting.[176] Statutes that grant political officials the unguided discretion to determine voter intent—either by setting substandards on their own or by applying a "voter intent" standard ballot-by-ballot with no statutory guidance—would be invalidated.[177] Statutes with specific, objective criteria constraining the discretion of ballot counters would be sustained.[178] And since we would not be reading *Bush v.*

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176 *See* Posner, *Florida 2000*, *supra* note 12, at 42; Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 122 (2001).

177 Thus, for example, the Texas statute (signed into law by Governor George W. Bush) would, despite its attempt at specificity, nonetheless be unconstitutional:

> (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
>
> (1) at least two corners of the chad are detached;
>
> (2) light is visible through the hole;
>
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or
>
> (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.
>
> (e) Subsection (d) does not supersede any clearly ascertainable intent of the voter.

TEX. ELEC. CODE ANN. § 127.130(d)–(e) (Vernon 2003). The presence of the unconstrained "clearly ascertainable intent" three times in this statute renders the statutory specificity illusory. *See* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 245. Many other state statutes would be unconstitutional under my reading of *Bush v. Gore*, for they lack any objective criteria constraining the discretion of ballot counters. For discussions of, or cites to, state statutes that either instruct ballot counters to look at voter intent or something similar, or provide no standards, see GREENE, *supra* note 15, at 34–42, 186–87 & nn.5–26 (citing state statutes and state court decisions); Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 444, 459 (2001); Bickerstaff, *supra* note 28, at 160–61; Tribe, *supra* note 9, at 246 n.313; *see also In re* McDonough, 816 A.2d 1022, 1031 (N.H. 2003) (McGuire and Arnold, JJ., concurring specially) (noting that a uniform rule of ballot interpretation follows from *Bush v. Gore*); *cf.* Shane, *supra* note 12, at 565 n.143 (citing manual recount provisions in twenty-eight states).

178 For Indiana's set of objective criteria for manual ballot counting, see IND. CODE ANN. § 3-12-1-9.5 (Lexis 2002).

In the wake of the 2000 election, Florida eliminated punch card balloting, *see* FLA. STAT. ANN. § 101.5606(15) (West 2002), and provided that during a manual recount of other types of ballots (for example, optical scan ballots), "[a] vote for a

Gore for an expansive equal protection principle,[179] state election administration that allows, say, different types of voting machines with different error rates in different counties would not be unconstitutional, or at least not under this line of caselaw.[180] This is so because the *Lovell* doctrine applies to county-by-county variation in vote counting connected to unguided discretion in the hands of local officials, not to those variations that we might deem simply mechanical. Machines don't discriminate, even if they make errors.[181] Thus, for ex-

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candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice," *id.* § 102.166(5)(a). Somewhat problematically, rather than legislatively prescribing substandards, the statutes instruct the Department of State to

> adopt specific rules for each certified voting system prescribing what constitutes a "clear indication on the ballot that the voter has made a definite choice." The rules may not:
>
> 1. Exclusively provide that the voter must properly mark or designate his or her choice on the ballot; or
> 2. Contain a catch-all provision that fails to identify specific standards, such as "any other mark or indication clearly indicating that the voter has made a definite choice."

id. § 102.166(5)(b). The Department of State has promulgated a detailed set of substandards for determining, during a manual recount of optical-scan ballots, "that the voter has made a definite choice." *See* FLA. ADMIN. CODE ANN. r. 1S-2.027 (2004). Since 2000, other states have also added substandards. *See, e.g.*, OHIO REV. CODE ANN. § 3515.04 (Anderson Supp. 2003); 33 Pa. Bull. 3935 (2003). And the federal Help America Vote Act of 2002 requires, as of January 1, 2006, that "[e]ach State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." Help America Vote Act of 2002 § 301 (a)(6), 42 U.S.C.A. § 15481 (West Supp. 2004).

179 For those who would read *Bush v. Gore* as stating a broadly reaching equal protection principle, see DERSHOWITZ, *supra* note 4, at 82; POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 128–29; Balkin, *supra* note 10, at 1426; Chemerinsky, *supra* note 174, at 100; Erwin Chemerinsky, *How Should We Think About* Bush v. Gore *?*, 34 LOY. U. CHI. L.J. 1, 17 (2002); Dworkin, *supra* note 5, at 10; Richard L. Hasen, *After the Storm: The Uses, Normative Implications, and Unintended Consequences of Voting Reform Research in Post-*Bush v. Gore *Equal Protection Challenges*, *in* RETHINKING THE VOTE, *supra* note 174, at 185, 193; Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 379, 393 (2001); Holmes, *supra* note 3, at 244; Samuel Issacharoff, *Political Judgments*, *in* THE VOTE, *supra* note 12, at 55, 69–70; Klarman, *supra* note 12, at 1728; Kramer, *supra* note 40, at 147; Lund, *Unbearable Rightness*, *supra* note 12, at 1264; Neuborne, *supra* note 18, at 216–17 (creating a hypothetical opinion by Justices Souter and Breyer); Richard A. Posner, Bush v. Gore *as Pragmatic Adjudication*, *in* A BADLY FLAWED ELECTION, *supra* note 5, at 187, 208–09; Posner, *Florida 2000*, *supra* note 12, at 41; Pushaw, *supra* note 12, at 619; Sunstein, *supra* note 6, at 83–87; Tushnet, *supra* note 176, at 123–24.

180 *See* Tokaji, *supra* note 18, at 147.

181 As Justice Souter wrote in his *Bush v. Gore* dissent:

ample, the initial Ninth Circuit decision in the California gubernatorial recall case—which enjoined the recall election as unconstitutional, relying on a broad equal protection interpretation of *Bush v. Gore*, because of the higher error rate with punch card balloting[182]—would be clearly wrong.[183] Similar equal protection challenges to state election statutes that allow votes to be counted in different ways, with different error rates, would also not prevail, under the narrower reading of *Bush v. Gore*.[184] Whether there might be other ways of constructing equal protection challenges to such statutes I do not address here.[185]

2. Objections to the Analogy, and Responses

Here I outline four possible objections to importing the *Lovell* doctrine into the *Bush v. Gore* setting and respond to each. The first objection is that *Lovell* should not extend to this "constitutional domain,"[186] i.e., to government administration of vote counting. The second is that we should be no more concerned with vagueness here than we are in many other areas of law. The third is that "voter intent" is a workable standard, or in any event not vague enough to

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> It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

Bush v. Gore, 531 U.S. 98, 134 (2000) (Souter, J., dissenting).

182 *See* Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 893–901 (9th Cir. 2003).

183 This opinion was withdrawn, pursuant to circuit practice, when the Ninth Circuit voted to rehear the case en banc. The en banc court allowed the recall election to occur, noting that reasonable minds could differ on how to apply *Bush v. Gore* in this setting. *See* Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

184 For cases rejecting the broader reading, consistently with my approach, see *Wexler v. Lepore*, 342 F. Supp. 2d 1097, 1106–08 (S.D. Fla. 2004), and *Stewart v. Blackwell*, No. 5:02 CV 2028, 2004 WL 3167279, at **4–15 (N.D. Ohio Dec. 14, 2004) (Mem.). For cases that support the broader reading, which my argument would not support, see *Black v. McGuffage*, 209 F. Supp. 2d 889, 897–99 (N.D. Ill. 2002), and *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1108–10 (C.D. Cal. 2001).

185 For example, an easy case for a challenge would be if one could show that state or local officials purposely use a voting machine with a higher spoiled vote rate in a county where those officials fear the voting majority will be for the opposing party. Whether such a challenge should also be sustainable by a showing of disparate impact I also do not address here.

186 *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

warrant judicial intervention. The fourth is that importing *Lovell* into this setting evinces an improper distrust of local officials.

(1) The first objection goes something like this:[187] Government intersects with the citizenry in various ways, three of which are relevant to this discussion: direct regulation of primary conduct (both of expressive and nonexpressive[188] forms of behavior), processing our requests to use public property, and counting our votes in elections for public office. *Lovell* properly applies to the former two settings, because it is in those settings that both the danger of government bias and the cost to liberty is high. But in the third setting, although the danger of government bias might still be high, no primary conduct is at stake—not regulation of such conduct, not decisions about licenses or permits to engage in such conduct. Rather, government is establishing and administering mechanisms for registering and aggregating citizen choices about finite sets of candidate options put before the citizenry on election day. This is, one might say, a fully governmental domain, and what we are ultimately evaluating is the government's internal machinery for churning out a winning candidate. *Lovell* need not apply in this latter domain.

This objection miscategorizes the act of voting and government's role in counting votes. My right to vote for representatives of my choosing is fundamental to securing my sovereignty as a citizen. Government plays an important gatekeeping role in this, by establishing various rules for elections, and I don't have a right to demand that a certain candidate be on the ballot, that a certain machine be used, etc.[189] I don't even have a right to demand 100% accuracy in vote counting. But when government officials are making, not decisions about the rules and mechanics of voting, but rather decisions about how to evaluate the specific manifestation of my sovereign citizen intention regarding which representatives I want governing me, the officials must be as machine-like as possible. Voting and the counting of votes is the quintessential crossing point between what we ordinarily

187 I am grateful to Larry Tribe for advancing this objection and for some of the formulation that follows, in correspondence.

188 One could limit the discussion here to expressive behavior, since that is what the *Lovell* cases address, but the full impact of the objection can be made by considering governmental regulation of both expressive and nonexpressive behavior. For application of something like the *Lovell* doctrine to nonexpressive behavior, see *City of Chicago v. Morales*, 527 U.S. 41 (1999).

189 *See* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (noting that the "government must play an active role in structuring elections" and that lower scrutiny applies if the election law provision in question imposes only "reasonable nondiscriminatory restrictions").

think of as primary conduct (speaking, running a business, recreating, engaging in intimate relations, etc.) and what we ordinarily think of as an internal governmental domain (processing various citizen inputs in complex administrative systems). The *Lovell*-type risk of bias and the need for prophylactic judicial intervention is at is highest precisely in this setting—where the primary conduct is of the person as citizen expressing his or her preference for the delegation of sovereign power; where the counters of such preference are elected officials; where the instructions for how those officials are to count votes (when machines fail) leave broad discretion, making it too easy for the officials to succumb to the temptation of favoring political friends and harming political opponents, without an easy way to check this on a case-by-case basis. My liberty as a citizen is just as much at risk when my primary conduct as voter is subject to partisan bias as it is when my primary conduct as speaker is subject to similar bias.

(2) One must also address whether it is appropriate to use the *Lovell* doctrine here, when so much of the law is rife with standards that lack objective substandards, and when the virtues of standards (over rules) are clear throughout much of the law.[190] For example, we allow juries and judges to apply standards such as "reasonableness" and "beyond a reasonable doubt," without insisting on substandards. But we must distinguish rights of political participation.[191] The *Lovell* doctrine demands that we not defer to the virtues of standards when rights of political participation are at stake. The kind of case-by-case judgment that standards allow and that rules reject might have signal virtues in many areas,[192] but when it comes to giving political officials

190 *See* Bush v. Gore, 531 U.S. 98, 125 (2000) (Stevens, J., dissenting); DERSHOWITZ, *supra* note 4, at 65; Mary Anne Case, *Are Plain Hamburgers Unconstitutional? The Equal Protection Clause Component of* Bush v. Gore *as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55, 61–62 (2003); Dworkin, *Badly Flawed*, *supra* note 159, at 106; Rosenfeld, *supra* note 2, at 128; Tribe, *supra* note 9, at 241; Tribe, *supra* note 12, at 582.

191 Occasionally, the Court invokes *Lovell*-like concerns with administrative discretion in other settings. *See, e.g.*, *Morales*, 527 U.S. at 60–64 (invalidating a local ordinance that gave police broad discretion to disperse persons thought to be loitering and, in a section of the holding joined by a majority rather than merely a plurality, finding "loitering" to be insufficiently defined and thus that the ordinance left too much discretion in the hands of police); *see also* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 192 (1999) (describing *Morales* as involving "structural due process").

192 *See* Dworkin, *Badly Flawed*, *supra* note 159, at 99 n.4, 106; Dworkin, *Early Responses*, *supra* note 159, at 65; Rosenfeld, *supra* note 2, at 129; Shane, *supra* note 12, at 576; Strauss, *supra* note 17, at 187; Sunstein, *supra* note 6, at 99, 106; Tribe, *supra* note 9, at 244–45, 256; Tribe, *supra* note 171, at 126–27; Tribe, *supra* note 12, at 587. *See*

the power to make determinations about one's political rights, the risk that such judgment will be abused outweighs the virtues of judgment. Or so the *Lovell* doctrine must be read to hold.[193] If anything, the argument for insisting on rules over standards in the vote counting setting is stronger than elsewhere, since voting and elections are at the core of one's rights of political participation, even more so than speech or press rights, and since, as the Court noted, objective criteria can be easily established for the evaluation of ballots-as-things, as opposed to the murkier subjectivity that other standards seek to grasp.[194]

Furthermore, the application of the *Lovell* doctrine to the election setting should be straightforward. The constitutional concern is a structural one, requiring objective criteria to constrain the judgment of local political officials making decisions affecting citizens' rights of political participation, as speakers, voters, or candidates. Whether one applies the various enumerated constitutional provisions involving voting and elections (and in this case, running for office), casts the argument as sounding in "structural due process"[195] or equal protection,[196] or believes that the First Amendment applies by its own force in this setting,[197] the result is the same. The First Amendment argument is not that voting is expressive behavior.[198] Rather, the con-

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generally Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 65–67 (2002).

193 *See* Overton, *supra* note 192, at 99; Pildes, *supra* note 18, at 175–76; Schotland, *supra* note 18, at 233, 241; Sunstein, *supra* note 6, at 98–99; Tokaji, *supra* note 12, at 2498; *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988) (stating that for *Lovell* facial challenges to apply, the "law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks"). Note that Justice Stevens, whose strong dissent in *Bush v. Gore* I will consider shortly, affirmed the validity of the *Lovell* doctrine with his dissent in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 683–95 (1998) (Stevens, J., dissenting).

194 *See* Bush v. Gore, 531 U.S. at 106; Elhauge, *supra* note 18, at 22; Charles Fried, *Exchange Between Ronald Dworkin and Charles Fried: Response to Ronald Dworkin*, A Badly Flawed Election, *in* THE LONGEST NIGHT, *supra* note 2, at 100, 102 [hereinafter Fried, *Response to Ronald Dworkin*].

195 *See* Tribe, *supra* note 191, at 192; *see also* Schotland, *supra* note 18.

196 *See* Tokaji, *supra* note 12.

197 For helpful suggestions that discrimination on the basis of political favoritism in the electoral setting has First Amendment implications, see *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1798 (2004) (Kennedy, J., concurring in the judgment); *id.* at 1803–04 (Stevens, J., dissenting). The political patronage cases—bringing the First Amendment and freedom of association to bear on political favoritism in the holding of public office—may also be useful here. *See* Rutan v. Republican Party, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

198 *See* Burdick v. Takushi, 504 U.S. 428, 438 (1992); *id.* at 445 (Kennedy, J., dissenting); Storer v. Brown, 415 U.S. 724, 735 (1974).

cern, here as well as in the gerrymandering and patronage cases, which also invoke the First Amendment,[199] is that those with political power will use it to favor their friends and harm their enemies—the constitutional values are those of equality (protecting against such bias) and due process (protecting against vague, broad delegations that open the door to such bias) in the setting of political affiliation and belief (thus bringing the First Amendment into the picture).

(3) A more specific version of the preceding objection is that we should distinguish the complete discretion of statutes in the *Lovell* cases—e.g., statutes basically vesting "do what you want" power in local officials—from the Florida "voter intent" standard, which is at least somewhat constraining. I have two responses to this objection, one doctrinal, and the other normative.

The doctrinal response is that although many invalidated ordinances in the *Lovell* line indeed vested complete discretion in local officials,[200] in several cases the Court invalidated statutes that had some constraining criteria, but criteria deemed too broad by the Court. Thus, in *Hague v. Committee of Industrial Organization*, the Court invalidated as granting too much discretion a statute that "enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.'"[201] Similarly, in *Schneider v. New Jersey*, the Court invalidated as granting too broad discretion an ordinance that, as construed below, required the applicant to "submit to [the] officer's judgment evidence as to [the applicant's] good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute."[202] Likewise, in *Cantwell v. Connecticut*, the relevant ordinance vested power in the Secretary of the Public Welfare Council to determine whether the cause for solicitation was a religious one. The Court invalidated this as granting too much discretion.[203] One could consider *Cantwell* primarily a freedom of religion case; the concern, vesting power in administrative officials to determine religious bona fides. But the Court linked this to problems surrounding permit sys-

199 *See supra* note 197.

200 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 132–33 (1992); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 753–54, 754 n.2, 769 (1988); Kunz v. New York, 340 U.S. 290, 291 n.1, 293, 295 (1951); Niemotko v. Maryland, 340 U.S. 268, 271–72 (1951); Saia v. New York, 334 U.S. 558, 558 n.1, 560, 562 (1948); Largent v. Texas, 318 U.S. 418, 419 n.1, 422 (1943); Lovell v. City of Griffin, 303 U.S. 444, 447, 451 (1938).

201 307 U.S. 496, 502 n.1, 516 (1939).

202 308 U.S. 147, 163–64 (1939).

203 310 U.S. 296, 301–02, 305–06 (1940).

tems, adding that "[t]he line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council."[204] In other words, even though the statute did not vest absolute "do what you want" discretion, it was nonetheless invalid. Next, in *Staub v. City of Baxley*, although the Court majority invalidated a statute as vesting totally uncontrolled discretion, the invalidated statute in fact stated the following criteria for administrative judgment: "character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley."[205] Finally, in *Shuttlesworth v. City of Birmingham*, the Court invalidated as vesting too much discretion an ordinance that instructed the City Commission to grant a parade permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[206] In sum, several cases in the *Lovell* line invoke concerns about the risk of unmonitorable administrative bias to invalidate facially ordinances that vest broad though not completely unguided discretion—just as the Florida "voter intent" provisions do.[207]

The normative response is that "voter intent" is too amorphous a benchmark in this setting. As we saw in Florida 2000, ascertaining voter intent is often a conflicting rather than cumulative enterprise, and there are numerous ways to ascertain voter intent. Both of these problems, which are related, pose a significant risk of partisan shenanigans. For example, consider dimpled ballots, i.e., ballots with evidence that the voter made a mark or marks with the voting tool but insufficient to puncture the ballot. Although the ballot evidence of a voter's intent might point in only one direction, often there are several reasonable arguments pointing in opposite or multiple directions for how to construe a ballot that the machine didn't read. Does a dimple mean the voter didn't press hard enough or that she had second thoughts? Furthermore, should we count a dimple (a) always, (b) only with other dimples in other races on the ballot, (c) only with

204 *Id.* at 306.

205 355 U.S. 313, 314 n.1, 322, 325 (1958).

206 394 U.S. 147, 149–50 (1969).

207 *See also* Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002) (describing the *Lovell* doctrine concern as arising when "the licensing official enjoys unduly broad discretion" and saying that the *Lovell* cases require "adequate standards"); City of Chicago v. Morales, 527 U.S. 41, 61–62 (1999) (invalidating an antiloitering ordinance as vesting too much discretion in police in a case where the ordinance contained some limits, but the Court considered them insufficient).

other dimples for candidates of the same party in other races, (d) only if the dimple is sufficiently clear, or (e) never? We should reject the notion that "voter intent" is a sufficiently constraining standard, because the risk of partisanship in human ballot counting and in the setting of substandards is high; the right at stake is at the core of political participation; the possibilities for deciding what counts as voter intent are multiple; and objective standards can easily be put into place, for unlike standards such as "beyond a reasonable doubt" or "reasonableness," here we are assessing objective physical manifestations of a voter's intent (punch card ballots) and can construct a limited set of objective substandards for evaluating the ballots.[208]

(4) Finally, there are those such as Larry Tribe who argue that importing the *Lovell* doctrine to the *Bush v. Gore* setting "lack[s] faith in the individuals designated by the Florida legislature to count votes manually on a regular basis."[209] Or, consider Tribe again: "Beyond the often hidden subjectivity inherent in deciding which rigid rules to adopt, the denunciation itself is, at bottom, an outcry against entrusting political power to fallible human beings who might at any moment abuse it—an outcry, in other words, against democracy itself."[210] The response is twofold. First, our constitutional structure is far from a perfect replica of democracy at work. Rather, it is riddled with structural devices—such as widespread and bicameral representation, separation of powers, federalism, and judicial review—that were devised precisely to protect against the fallibility of human beings.[211] Second, the *Lovell* doctrine is a specific line of Supreme Court caselaw based in distrust of political officials. Standards and all-things-considered case-by-case judgment have pride of place throughout much of law, but not when it comes to administrative officials making judgments about people's rights of political participation.

III. Two Challenges

Having completed the argument for applying the *Lovell* doctrine to the Florida recount system, we now must consider two important challenges, both initially raised by Justice Stevens in his *Bush v. Gore* dissent and then amplified in much of the scholarship on the case. Both involve the possibility that substandards could have been set and applied in a disinterested fashion by state judges.

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208 *See supra* text accompanying note 194.

209 Tribe, *supra* note 171, at 120.

210 Tribe, *supra* note 9, at 214; *see also* Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

211 *See* The Federalist No. 10 (James Madison).

A. "A Single Impartial Magistrate"

Here is Justice Stevens's first argument: "Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."[212]

In other words, by applying a single substandard (whatever that would be) to all disputed ballots, Judge Terry Lewis, who was supervising the statewide recount, would cure any prima facie constitutional violation that might have existed at the county level. Before I analyze this argument in detail, consider two things. One, the argument is similar to Justice Stevens's other argument, which I treat below, that the Florida high court should have been given a chance on remand to set uniform substandards. Both arguments involve judicial cure of an administrative-level problem, although technically the argument about the existence of a single impartial magistrate is that there was no constitutional violation in the system as it existed, whereas the argument about remanding to the Florida high court accepts that there was a systemic violation but chides the Supreme Court for not ordering a proper remedy. Two, Justice Stevens's argument that a single impartial magistrate would essentially nullify any constitutional error at the county board level is similar to the line of procedural due process cases (headed by *Parratt v. Taylor*)[213] that looks to the adequacy of a state's judicial procedures for reviewing and curing injuries caused by officials. This analogy is not surprising, since the concerns of the *Lovell* doctrine—and, as I have argued, with the Florida recount system—are of a structural sort, just as the *Parratt* line of procedural due process cases evaluates a state's administrative/judicial structure.

I have six points to make in response to Justice Stevens's argument. Although none of my rejoinders overcomes Justice Stevens's

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212 531 U.S. at 126 (Stevens, J., dissenting); *see also id.* at 128 (Stevens, J., dissenting) (discussing the "procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots"); Bickerstaff, *supra* note 177, at 452, 461; Bickerstaff, *supra* note 28, at 162; Chemerinsky, *supra* note 174, at 94–96; Dworkin, *supra* note 5, at 12–13; Karlan, *Equal Protection*, *supra* note 173, at 190–91; Shane, *supra* note 12, at 577; Tribe, *supra* note 9, at 212, 234; Tribe, *supra* note 171, at 120, 126; Tribe, *supra* note 12, at 582; *cf.* TRIBE, *supra* note 41, at 1054–55 (discussing the need for ultimate judicial determination in a prior restraint setting); Fallon, *supra* note 100, at 898 (discussing a similar need); Monaghan, *supra* note 75, at 520, 522–23 (discussing the same); Redish, *supra* note 66, at 57, 75–77 (discussing the same).

213 451 U.S. 527 (1981).

argument in a purely deductive or analytic way, I hope that the rejoinders taken together show that the single impartial magistrate solution will not suffice.

(1) The *Lovell* doctrine, which as I have argued is the precedential source of the problem with the Florida recount system, does not accept judicial review as an adequate substitute for objective statutory substandards that constrain administrative discretion. This is implicit in many of the cases, explicit in some.[214] But, one might respond, we don't see judicial review as adequate in the *Lovell* line of cases because case-by-case judicial review assumes we can ferret out administrative bias as it happens and the *Lovell* doctrine rejects that assumption. However, in the *Bush v. Gore* setting, one might continue, even if the magistrate would similarly be unable to detect administrative bias, he would be able to cure such bias by setting a single substandard to apply to all disputed ballots.

(2) My response: The *Lovell* line of cases could have relied on a parallel cure, by allowing judicial review to establish objective criteria for parade permits and then apply such criteria. But this solution is not present in the caselaw. One might argue that in the Florida recount setting the magistrate would have all the disputed ballots before him at once, and thus it is sensible to allow him to set a substandard and apply it all at once, whereas in the parade permit setting the cases arise over time. The relevant courts, or judges, taking cases from a given town or city, could, however, set a substandard and apply it over time to parade permit disputes. But the *Lovell* line of cases doesn't see that as a satisfactory answer to the problem.

The nonexistence of judicial review as a cure for possible administrative bias in the *Lovell* line of cases, hence, is a problem for Justice Stevens's argument. Of course one might say so much the worse for the *Lovell* line of cases, it's time to rethink them (which would be fairly dramatic, given their consistent reiteration by the Court). But there are more points to make here, both in favor of the caselaw refusal to accept judicial review as a cure and about further concerns that would have arisen in the Florida system. (3) Allowing a judge to set a single substandard leaves the unconstitutional discretionary statutory standard in place,[215] unless the judge's setting the substandard amends the statute, which seems an odd power to give to a lower court judge, even if the state high court might have such power. (4) It is too hopeful to believe that a single, impartial magistrate can cure the pos-

214 *See* Saia v. New York, 334 U.S. 558, 560 (1948); Cantwell v. Connecticut, 310 U.S. 296, 305–06 (1940).

215 *See Cantwell*, 310 U.S. at 306.

sibility of administrative bias in this setting.[216] There would have been thousands of disputed ballots; judges have a tendency toward deference to administrative process; there was a serious time shortage in this unusual setting of a presidential election; and, given that the judge himself stands for retention,[217] might we not be concerned about whether he can be truly impartial, especially in the hot political cauldron of a presidential election?[218] (5) The ballot review would have ended not with Judge Lewis but with appeals to the Florida Supreme Court. That body is not a single impartial magistrate but a seven-member bench. Even if a single judge can set a single substandard to apply to all ballots, how would a seven-member bench review the standard and its application? Perhaps the judges could vote first on a substandard and then apply it to all ballots. But judges notoriously vote on an outcome rather than issue basis.[219] That is, there are numerous cases from multi-member courts where the judges do not resolve a predicate issue first and then abide by that resolution when turning to subsequent issues. Rather, each judge resolves the case as he or she thinks fit, even if that involves application of a predicate issue in a way that is rejected by a majority of the panel.[220] Thus, even if a majority of the Florida high court established a specific substandard on review from Judge Lewis, dissenting members could still have applied their own substandards to disputed ballots. Thus, we might have lost the virtue of the "single" magistrate and his "single" substandard. Furthermore, the judges on the Florida Supreme Court stand

216 *See* Pildes, *supra* note 18, at 180 (noting that it is speculative whether a reviewing judge can "bring uniformity and consistency" if local officials are engaged in "partisan manipulation"); Schotland, *supra* note 18, at 234 n.119.

217 Florida circuit court judges, such as Judge Lewis, are generally elected to office. *See* FLA. CONST. art. V, § 10(b)(1) (preserving the election of circuit court judges unless the electorate moves to a system of judicial appointments, which no jurisdiction had done as of the 2000 election, Troxler, *supra* note 144). The Governor makes appointments to fill vacancies, however, *see* FLA. CONST. art. V, § 11(b), and that is how Judge Lewis was placed on the circuit court. *See* Cable News Network LP, *Florida Circuit Judge Terry Lewis, No Stranger to Controversial Cases, at* http://www.cnn.com/2000/ALLPOLITICS/stories/11/14/lewis.profile (Nov. 14, 2000). If a circuit court judge wishes to hold the seat when the appointed term expires, he must stand before the electorate, *see* FLA. CONST. art. V, § 11(b), and he is subject to a retention vote, *see id.* art. V, § 10(a). *See also* Fla. State Courts Adm'r, *supra* note 144.

218 *See* Klain & Bash, *supra* note 156, at 166; Tokaji, *supra* note 12, at 2494–95.

219 *See, e.g.*, David Post & Steven C. Salop, *Rowing Against the* Tidewater*: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992).

220 *See, e.g.*, NLRB v. Wyman-Gordon, 394 U.S. 759 (1969); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

for retention before the electorate,[221] and thus one might be concerned about the hopes for impartiality, again especially in light of the hot political cauldron of the presidential election.[222]

In sum, we must consider these points in understanding why judicial review is not an adequate cure of or substitute for objective statutory criteria to bind administrative discretion in both the *Lovell* and *Bush v. Gore* settings. And finally, point (6): It is a complex question of state law whether courts in general and a single impartial magistrate in particular have the power to adopt or set statutory substandards, when the Florida legislature itself had refused to do so, instead writing a statute directing vote recounters to the intent of the voter. I deal with this issue further in Part III.B.

B. Adopting Substandards as a Remedy

If we assume a constitutional violation with the Florida recount system, what should the Court have done? Before turning to the two principal suggestions—either that the Court specify substandards or that it remand for the Florida high court to do so[223]—we must look briefly at the most obvious obstacle to such a remedy, namely, the safe harbor issue. A provision of federal law gives states a safe harbor from

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221 The Florida Supreme Court Justices are initially appointed by the Governor from a list of between three and six qualified persons recommended by the Judicial Nominating Commission. A complex system of merit retention elections ensues, beginning in the next general election that occurs more than one year after a Justice's appointment. *See* FLA. CONST. art. V, §§ 10–11; *see also* Fla. State Courts Adm'r, *supra* note 144.

222 *See* Klain & Bash, *supra* note 156, at 166; Tribe, *supra* note 9, at 234; *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1158 (1999) (discussing the "boundary or tether on judicial decisionmaking" from "[t]he fact of judicial election"). *But see* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (noting the majority's "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed"). For a discussion of why we generally prefer that objective criteria for decisions about citizens' rights of political participation be set ex ante by legislatures, see *infra* text accompanying notes 248–52.

223 One method of arguing for at least some specification of substandards and recounting is to analogize to equal protection leveling-up remedies. *See* Karlan, *Equal Protection*, *supra* note 173, at 192; Karlan, *Nothing Personal*, *supra* note 173, at 1363–64. In equal protection cases, courts generally level up rather than down—i.e., rather than taking the thing in question away from everyone, which would be a kind of equality, instead everyone gets the thing in question. The analogy in the Florida recount setting is not exact, especially if we see the case in light of the *Lovell* doctrine. But one could argue that the opportunity for votes to be recounted under objective criteria represents leveling up, as opposed to reverting to a machine count, which represents leveling down.

challenge to their appointed presidential electors, if the state resolves any election contest at least six days prior to the time the Electoral College is scheduled to meet.[224] In 2000 the safe harbor date was December 12. The safe harbor is optional—states may forego it and risk a challenge to their appointed electors. The Court determined that Florida had opted for the safe harbor, and since the Court's decision was issued at 10:00 p.m. on December 12, a remand for further recounting would have been inconsistent with this desire. Thus, the Court refused to order such a remedy.[225] This aspect of the Court's opinion was particularly poorly constructed. Given the uncertainty of Florida's desires, the best recourse would have been to remand to the Florida high court for further consideration of the safe harbor issue and then possibly for further recounting. The safe harbor issue is complex, and I leave full treatment to Appendix B. I will assume for the remainder of this section that a remedy for recounting was at least possible, either immediately or after further consideration of the safe harbor issue in the state high court.

There were two ways for substandards to be specified as a remedy for application to the ballots in the 2000 presidential election. One was for the Court to set the substandards itself.[226] The other was for the Court to remand to the Florida high court with an order for that court to set the substandards. The former option seems clearly inappropriate. Florida statutes direct vote recounters to look at the intent of the voter. For any court to say the statutes mean something different—say, to count only hanging or swinging chads—would require the court to, in essence, rewrite the statute. Federal courts have no power to do this with state statutes, even as a remedial matter, unless there is evidence that this is what the state courts would do.[227] But the Florida courts had rejected several opportunities to specify sub-

224 *See* 3 U.S.C. § 5 (2000).

225 *See* 531 U.S. at 110–11.

226 *See* Pildes, *supra* note 18, at 181; *see also* Ackerman, *supra* note 17, at 195 (might be referring to the Supreme Court setting the substandards or might be referring to the Florida high court setting the substandards).

227 *See* City of Chicago v. Morales, 527 U.S. 41, 61 (1999); *id.* at 68 (O'Connor, J., concurring in part and concurring in the judgment); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 n.11 (1988) ("[W]hen a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits."); *see also* TRIBE, *supra* note 41, at 1032; *cf.* Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1408 (2000); Dorf, *supra* note 126, at 284; Fallon, *supra* note 100, at 854.

standards; they insisted that the statute meant what it said, that recounters had to look for voter intent.[228]

The *Lovell* doctrine is clear on this point—the Court does not rewrite overly discretionary permit ordinances; rather, it sends the matter back to the state for local fixing. In *Hague v. Committee of Industrial Organization*,[229] the lower federal court had enumerated conditions under which permits may be granted or denied. The Court rejected this, holding instead that claimants were "free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance . . . ."[230] Similarly, concurring Justice Frankfurter in *Kunz v. New York* wrote: "It is not for this Court to formulate with particularity the terms of a permit system which would satisfy [the Constitution]."[231] And in *City of Lakewood v. Plain Dealer Publishing Co.*, the Court held: "The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. This Court will not write nonbinding limits into a silent state statute."[232]

The other remedial argument is that the Court should have given the Florida high court a chance to correct any constitutional problem with the state recount system. Here, again, is Justice Stevens:

> Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. . . . [T]he appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.[233]

Similarly, dissenting Justice Souter suggested that the Court should remand "with instructions to establish uniform standards."[234] Ronald Dworkin has argued that the Court should have remanded for the Florida high court to "substitute"[235] objective criteria for vote recount-

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228 *See supra* note 156.

229 307 U.S. 496 (1939).

230 *Id.* at 518.

231 The concurrence in *Kunz* is found in the companion case, *Niemotko v. Maryland*, 340 U.S. 268, 285 (1951) (Frankfurter, J., concurring).

232 *Lakewood*, 486 U.S. at 770.

233 Bush v. Gore, 531 U.S. 98, 126–27 (2000) (Stevens, J., dissenting).

234 *Id.* at 134 (Souter, J., dissenting).

235 Dworkin, *Early Responses*, *supra* note 159, at 63; *see also* Dworkin, *supra* note 5, at 6.

ing. Other scholars echo the call.[236]

The principal objection to this argument is that it assumes that this is the kind of constitutional violation that can be remedied by a properly structured state court order. But the constitutional violation, properly seen through the lens of the *Lovell* doctrine, is with the Florida statute, which the state courts were merely implementing.[237] As evidence of this, the lower state courts and the state high court had several opportunities during the recount phase to "establish" or "substitute" objective criteria, but the courts did not do so.[238] This is not a case for construing a statute to avoid a constitutional problem, nor is it a case for severability. A court will often interpret a statute in a certain way, perhaps not even the most obvious way, to avoid either confronting a constitutional question or invalidating the statute.[239] And courts often sever statutes into constitutional and unconstitutional applications, saving the former and eliminating the latter.[240] Neither of these options seems appropriate for the Florida recount

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236 *See* GILLMAN, *supra* note 12, at 142; Ackerman, *supra* note 17, at 195–96; Epstein, *supra* note 12, at 14–19; Fiss, *supra* note 7, at 91; Klarman, *supra* note 12, at 1732; Kramer, *supra* note 40, at 145; Posner, *supra* note 179, at 192, 208–09; Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1422 (2001); Strauss, *supra* note 17, at 188; *cf.* Bickerstaff, *supra* note 28, at 183 (stating that a timely filed election contest "would have allowed Florida courts an opportunity to arrive at a standard for manual[ ] counting").

237 There might have been other constitutional problems with the Florida high court's remedial order, *see* 531 U.S. at 107–09 (noting the failure of the court order to grapple with the overvote problem, the inclusion of a partial vote total from one county, and the failure of the order to specify who would recount the ballots), which could have been fixed on remand by the high court, but any such fix would have failed to remedy the true problem with the Florida recount system: the discretionary, uncabined nature of the "voter intent" instruction in the Florida statutes. Moreover, fixing these other problems identified by the Supreme Court, in the context of the complexity of the many issues left to Judge Lewis by the remedial order, would have been difficult and time-consuming. *See* Bickerstaff, *supra* note 177, at 453–55.

238 *See supra* note 156. For a discussion of the possible Catch-22 explanation for this, see *infra* text accompanying notes 254–59.

239 *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988); Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366 (1909). For critiques of the "avoidance canon," see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71.

240 *See* Dorf, *supra* note 126; John Copeland Nagle, *Severability*, 72 N.C. L. REV. 2003 (1993).

problem.[241] The state statutes directed county canvassing boards to ascertain voter intent; the statutes didn't say anything about more precise, objective criteria; the county boards had practices of specifying criteria, but these criteria varied and were unconstrained by legislative mandate. Interpreting a statutory command to look for voter intent to mean, instead, to look for hanging chads, or swinging chads, or indented chads that are consistent across a ballot, etc., is better deemed statutory amendment than it is "construing to avoid" or "severing." So it is improper to assume that the Florida high court would have had the power under state law to establish or substitute objective criteria for the statutory "voter intent."[242]

Moreover, in the *Lovell* line of cases when the Court invalidates an ordinance as vesting unguided discretion in administrative officials, the matter is never remanded to state courts with instructions for those courts to establish or substitute proper standards. The Court is generally silent as to how the unconstitutional discretionary statutory language will be fixed at the state level. This is so whether the issue arises as a criminal defense or in affirmative constitutional litigation.[243]

All that said, it is possible that Florida gives its courts the power to amend statutes that vest overly broad discretion in local officials by giving its courts the power to write the objective criteria. Indeed, although not ordering a remedy, the U.S. Supreme Court majority stated (in describing the merits violation) that the Florida high court had the "power to assure uniformity" but had failed to exercise it.[244]

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241 *See* Tokaji, *supra* note 12, at 2492–93.

242 *See* Tokaji, *supra* note 18, at 130. Also consider that the Florida high court, in the sharp glare of the nation's attention, might not have been immune from partisanship in establishing substandards. *See* Epstein, *supra* note 12, at 14–19; Tokaji, *supra* note 12, at 2493–94; Tokaji, *supra* note 18, at 144; *supra* text accompanying notes 221–22.

243 For the issue arising in a criminal prosecution, see *supra* text accompanying notes 49–52. For the issue arising in affirmative constitutional litigation, see *supra* text accompanying notes 53–55. In two cases, the Court focused on whether the state courts had already provided sufficient narrowing criteria, but the issue in each was whether the criminal defendant was sufficiently on notice of such criteria at the time of his primary conduct, i.e., a notice/due process issue. *Compare* Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941) (allowing state court narrowing construction to apply to the defendant's antecedent conduct), *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153–59 (1969) (distinguishing *Cox* on the grounds that the state court narrowing construction was unforeseeable at the time of the defendant's primary conduct and that the local authorities at the time were not enforcing the ordinance in a narrowed fashion). *See* TRIBE, *supra* note 41, at 1042–43; Monaghan, *supra* note 75, at 540–41.

244 Bush v. Gore, 531 U.S. 98, 109 (2000).

But the Court cited to no Florida cases or statutory provisions. It is hard to know whether the state high court may cure a constitutional problem of the *Lovell* sort by itself establishing or substituting objective criteria for the "voter intent" direction the legislature had written into the statute. The more standard course would be for the legislature to amend the statute to account for the constitutional concerns expressed by the reviewing court. Indeed, in its final opinion in the 2000 election saga the Florida Supreme Court wrote: "[T]he development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature."[245]

In the parade permit setting, this means that the claimant gets its permit, and then the local government can establish objective criteria for future applications. In the *Bush v. Gore* setting, waiting for the Florida legislature to amend the statute to establish objective criteria would have meant that the recount would have ceased, because it could not go on under the vague discretionary standards. The machine count (or machine recount) would have been reinstated as the final count, for all manual recounts under the "voter intent" standard would have been invalid.[246] And that would have meant that many "easy case" ballots—the ones the machines couldn't read but that all counters would have agreed are votes for candidate *X* or candidate *Y*—would have been left uncounted.[247] (Along with the "hard case" ballots, but of course it's those ballots for which we need constitutional, uniform, objective criteria.) This is indeed a cost of invalidat-

245 Gore v. Harris, 773 So. 2d 524, 526 (Fla.), *on remand from* Bush v. Gore, 531 U.S. 98 (2000). And consider point (5) from my rejection of the "single impartial magistrate" solution, *supra* text accompanying notes 219–22.

246 After the Court's decision in *Bush v. Gore* effectively ended the election, the Florida vote stood as certified by Secretary of State Harris, including some manually recounted ballots. *See* GREENE, *supra* note 15, at 47 (Volusia recount completed), 56 (Broward recount completed). Although one might think reinstating the machine recount would eliminate any problem with discretionary human ballot counting, this might not be the case. There are various reports of election officials making some discretionary ballot-by-ballot decisions on election day, sometimes applying different standards from county to county. *See, e.g.*, John Mintz & Peter Slevin, *Human Factor Was at Core of Vote Fiasco*, WASH. POST, June 1, 2001, at A1 (describing different treatment among counties using optical scan technology of ballots where voters marked a candidate's oval and also wrote in the candidate's name and reporting that counties counting such ballots did so by manual review on election night); *see also* Bickerstaff, *supra* note 28, at 185 n.147 (describing manual review of optical scan ballots on election night in Gadsden County).

247 *See* Karlan, *Equal Protection*, *supra* note 173, at 191.

ing the Florida system without a remedy that includes the setting of constitutional standards.[248]

Does this mean that *Lovell* doesn't properly apply in the election setting? In the parade permit setting, invalidating the statute increases the liberty of the citizen—she gets her permit. In the election setting, invalidating the statute means some votes don't get counted—that seems an infringement of liberty. But if it is correct, under the arguments I have made throughout this Article, to apply the *Lovell* doctrine to ballot counting by partisan officials under vague standards, then liberty is advanced systemically by invalidating the statute and forcing the legislature to write objective substandards. Some votes indeed will not be recounted by the officials, but such a recount would be plagued by the risk of partisan bias both at the substandard-setting level and at the ballot-by-ballot level if "voter intent" were being directly applied. It's not so easy, thus, to say that liberty is advanced by *Lovell* invalidations in the parade permit setting but thwarted in the ballot counting setting.

Does leaving the setting of objective vote counting standards to legislative action move the *Lovell* problem back one level, raising the problem of partisan bias in the legislature? The answer is "no" for the following reasons. First, the *Lovell* cases allow and ask for legislative, statutory setting of objective substandards. Second, we should be less concerned about legislative partisan manipulation of substandards than we are about such manipulation by local officials, because there are more inputs into the legislative process, more monitoring, and greater ability for citizen checks (at least in theory). Third, by insisting on legislative action, we preserve the virtues of ex ante specification of substandards, for by allowing state courts (who are often elected or subject to retention votes[249]) to set the substandards after the election has occurred increases the risk of bias based on known information about how the balloting has gone. Fourth, if one could show that a legislature constructed substandards for parade permits or vote recounting with the purpose of helping the dominant party, that would be a constitutional violation. The political patronage cases[250] and Justice Kennedy's critical concurrence in the judgment in the

248 Perhaps this cost would have been a proper factor for the Florida high court to take into account if it had the opportunity on remand—and the power under state law—to take up the issue of specifying objective criteria.

249 *See supra* text accompanying notes 143–44, 217, 221.

250 *See* Rutan v. Republican Party, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

most recent gerrymandering case[251] support this idea, that purposeful use of politically dominant power to harm a less dominant party violates the Constitution, in particular, the First Amendment.[252]

In sum, although we must take seriously the objection that the Court should have remanded for the state high court to establish a constitutional system of uniform, objective vote recounting criteria, it is by no means clear that the state court had the power under state law to act in this fashion. If it did have such power, then a remand along the lines Justice Stevens suggests would have been appropriate.[253] (Or perhaps a remand would have been appropriate to allow the Florida high court to clarify whether it had the power under state law to establish substandards. However, given the several occasions on which the Florida courts had said that the statute means precisely what it says—ascertain voter intent—we should not be too quick to criticize the Court for failing to remand for clarification.) I must, though, reject the argument made by several scholars that there was a Catch-22 problem with the state high court specifying objective criteria.[254] The argument is this: On one reading of Article II, it is unconstitutional for state courts to change the statutory rules after a presidential election day.[255] Had the Florida high court effectively amended the statute by writing objective vote recounting criteria—either as the recount and the litigation were ongoing, or in response to a remand order from the Supreme Court—then it would have changed the statutory rules after election day, in violation of Article II.[256] In this way, the constitutional objection to the "voter intent" standard runs head-on into the prohibition of Article II.[257] But this is not a Catch-22; it's just an ex-

251 *See* Vieth v. Jubelirer, 124 S. Ct. 1769, 1798 (2004) (Kennedy, J., concurring in the judgment).

252 Accordingly, we should understand the First Amendment to limit the constitutional power of each house of Congress to be the "Judge of the Elections, Returns and Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1; *see* Powell v. McCormack, 395 U.S. 486, 549 (1969) (allowing judicial review of a House of Representatives decision not to seat a member, rejecting the political question doctrine).

253 It also would have had to deal with the safe harbor issue on remand. *See supra* text accompanying notes 223–25; *infra* Appendix B.

254 *See* DERSHOWITZ, *supra* note 4, at 45–46; GILLMAN, *supra* note 12, at 158–59; Briffault, *supra* note 12, at 329, 371; Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE, *supra* note 12, at 38, 46; Karlan, *Equal Protection*, *supra* note 173, at 181; Neuborne, *supra* note 18, at 217 (creating a hypothetical opinion by Justices Souter and Breyer); Scheppele, *supra* note 236, at 1412, 1422; Tribe, *supra* note 171, at 135.

255 *See* discussion *infra* Appendix A.

256 *See* George J. Terwilliger, III, *A Campout for Lawyers: The Bush Recount Perspective*, *in* OVERTIME!, *supra* note 156, at 177, 194.

257 Some argue that the Florida courts were themselves in the grip of this Catch-22 concern following the Supreme Court's remand in the protest-stage case, *Bush v. Palm*

ample of two constitutional provisions that might be in tension, and the tension must be resolved. If there's a constitutional problem with the "voter intent" standard that can be fixed by specifying objective criteria, then it's plausible to argue that such specification trumps any Article II concern.[258] After all, rights provisions trump structural provisions all the time. Or, if the Article II concern is properly read as trumping any attempt at specifying objective criteria after election day and applying them to this election, then any specification of standards would have to apply prospectively only, starting with future elections.[259]

CONCLUSION

There are many reasons to be critical of the Supreme Court's performance during the 2000 election. The stay order seems hard to justify, even in light of a strong merits argument against the Florida system, because, despite Justice Scalia's argument to the contrary, there appears to have been no irreparable harm to Bush had the vote

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Beach County Canvassing Bd., 531 U.S. 70 (2000), and thus that we must discount their refusal to specify substandards. *See* GILLMAN, *supra* note 12, at 159; Garrett, *supra* note 254, at 46; Scheppele, *supra* note 236, at 1412, 1422. Indeed, in its final opinion, on remand from *Bush v. Gore*, the Florida high court itself expressed the Catch-22 concern. *See* Gore v. Harris, 773 So. 2d 524, 526 (Fla.), *on remand from* Bush v. Gore, 531 U.S. 98 (2000). The problem with this argument is that other state courts had refused to specify substandards even before that remand. *See* Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL 00-11078AB (Fla. Cir. Ct. Nov. 22, 2000) (LaBarga, J.) (order granting Plaintiff's emergency motion to clarify declaratory order of November 15, 2000), *available at* http://www.jurist.law.pitt.edu/election/ballot.pdf; Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL 00-11078AB (Fla. Cir. Ct. Nov. 15, 2000) (LaBarga, J.) (declaratory order), *available at* http://www.jurist.law.pitt.edu/election/Declaratory_Order.pdf; *Cast and Chronology*, *supra* note 28, at 30 (discussing the November 17, 2000, ruling regarding Broward County by Judge Miller). Additionally, in its initial contest-stage opinion (which came after the remand from the Supreme Court in the protest-stage case), the Florida high court insisted that "voter intent" was the statutory standard, without any mention of a Catch-22 problem. *See* Gore v. Harris, 772 So. 2d 1243, 1256–57, 1262 (Fla.), *rev'd and remanded on other grounds sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

258 *See* Posner, *Florida 2000*, *supra* note 12, at 37.

259 Another way to avoid the Catch-22 conclusion is to see the Florida high court's specification of objective criteria as interpretation rather than amendment, thus raising no Article II problem. *See* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 123; Posner, *supra* note 28, at 181 (arguing that the court would have been "filling a gap in the statute [and] not rewriting the statute"); Posner, *Florida 2000*, *supra* note 12, at 37. But as I argued above, *see supra* text accompanying notes 237–42, had the Florida high court "established" or "substituted" objective substandards for the general "voter intent" standard, that would have been statutory amendment, not interpretation.

counting continued.[260] The grant of certiorari may well be questioned, too; again, even with a strong merits argument, perhaps the Court should have treated the matter as a political question, as Justice Breyer suggested.[261] The Court's equal protection analysis had little to go on, its handling of the safe harbor issue was sloppy, and the concurrence argument for an Article II violation was weak.

But at the core of the vote recounting, the *Lovell* issue was always lurking.[262] The evidence for all to see of how the county canvassing boards were struggling with (or monkeying with) substandards should have made us all—Democrats and Republicans alike—queasy about leaving such discretion to local political officials. Reading *Bush v. Gore* as an election law version of the *Lovell* doctrine allows us to make sense of the merits holding in the case. *Bush v. Gore*—at least on the merits (and perhaps on the remedy)—is defensible after all, but only under a strong line of First Amendment caselaw that, when carefully analyzed, fits well in the setting presented by the Florida recount in the 2000 presidential election.

260 *See* Bush v. Gore, 531 U.S. 1046 (2000) (granting certiorari and Bush's motion for stay); *id.* at 1046–47 (Scalia, J., concurring) (arguing that the stay was needed to prevent irreparable harm); *id.* at 1047–48 (Stevens, J., dissenting) (arguing to the contrary).

261 *See* Bush v. Gore, 531 U.S. 98, 152–58 (2000) (Breyer, J., dissenting).

262 *See supra* text accompanying note 32.

APPENDIX A. THE ARTICLE II ARGUMENT

I find the Article II argument unpersuasive, at least as applied to the acts of the Florida Supreme Court that were in question during the 2000 presidential election.[263] (Remember that the Article II argument was adopted on the Court only by Chief Justice Rehnquist and Justices Scalia and Thomas. The four dissenters disagreed; Justices O'Connor and Kennedy expressed no view.) The argument goes as follows. Article II, section 1, clause 2, of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[264] Although state judges will generally have, under state law, power to interpret state statutes, if the judges exceed the bounds of what we might fairly call "interpretation" and instead rewrite statutes to their own liking, that would violate the command of Article II that the state "legislature" may "direct" the "manner" of appointment of presidential electors. The core of the Article II argument in *Bush v. Gore* is that the Florida Supreme Court, in the contest phase of the election, so badly interpreted state election law that it essentially rewrote the statute, usurping the role of the state legislature, and thus violating Article II. Also embedded in the case are a few antecedent arguments from the protest phase of the election, making a similar point. Yet, each of the three purported acts of usurpation can easily be seen as acts of interpretation, whether or not they were "correct" as a matter of state law.[265] All of the following refer to Florida election law in place during the 2000 election.

(1) If an initial, limited recount in a given county "indicates an error in the vote tabulation which could affect the outcome of the

263 For support of the Article II argument generally, see POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 153–61; Berkowitz & Wittes, *supra* note 12, at 432, 469; Steven G. Calabresi, *A Political Question*, *in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 129, 136; Epstein, *supra* note 12; Lund, *Unbearable Rightness*, *supra* note 12, at 1224, 1267; Posner, *supra* note 179, at 210. For opposition generally, see DERSHOWITZ, *supra* note 4, at 84–89; Klarman, *supra* note 12, at 1733–47; Kramer, *supra* note 40, at 144; Tribe, *supra* note 171, at 113.

264 U.S. CONST. art. II, §1, cl. 2.

265 Thus, I adopt the view expressed by the four Supreme Court dissenters that to reject the Article II argument one need show only that the Florida high court's interpretation of state law was reasonable, not that it was correct. *See* Bush v. Gore, 531 U.S. at 127–28 (Stevens, J., dissenting); *id.* at 130–33 (Souter, J., dissenting); *id.* at 135–43 (Ginsburg, J., dissenting); *id.* at 147–52 (Breyer, J., dissenting). For a contrary view, arguing that the Supreme Court should have engaged in de novo statutory interpretation of Florida law to resolve the Article II issue, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1957–68 (2003).

election,"[266] then a county election board, or "canvassing" board, may choose to manually recount all ballots.[267] The Secretary of State (Katherine Harris), who under Florida law is initially responsible for interpreting election code provisions,[268] construed "error in the vote tabulation" to mean something wrong with the hardware or software used to count ballots.[269] The Attorney General (Bob Butterworth) opined that the phrase covers either that situation or a situation in which the machines fail to read votes that the human eye could read in the initial recount.[270] The Florida Supreme Court refused to defer to Harris, deeming her reading plainly incorrect, especially in light of the fact that the Florida legislature elsewhere in the same statute used the phrases "vote tabulation system" and "automatic tabulating equipment" when it wanted to refer to "the voting system rather than the vote count."[271] This is clearly a plausible reading of the statute, and thus cannot reasonably be deemed judicial legislation masquerading as interpretation.[272]

(2) Florida election law says that if a county's election returns aren't submitted by 5:00 p.m. a week after the election, the Secretary of State either shall, or may, ignore the returns.[273] Three counties failed to submit their returns by that time, and Secretary Harris chose to ignore them. The Florida Supreme Court held this an abuse of discretion, for several reasons, and extended the deadline for those counties to file their returns.[274] For now, the key is to see whether the court's resolution was within the bounds of interpretive reasonableness. Here is the main reason it was: Florida law allows a candidate to protest election returns in a given county "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever

266 FLA. STAT. § 102.166(5) (2000).

267 *See id.* § 102.166(5)(c).

268 *See id.* § 97.012(1); Calabresi, *supra* note 263, at 131–32 (referring to, but not citing, state court precedent); Epstein, *supra* note 12, at 15.

269 *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228–30 (Fla.), *vacated and remanded on other grounds sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, *on remand*, 772 So. 2d 1273, 1282–84 (Fla. 2000).

270 *See* GREENE, *supra* note 15, at 46.

271 *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1229.

272 *See* GREENE, *supra* note 15, at 46; Dworkin, *supra* note 5, at 22–26; McConnell, *supra* note 17, at 106. *But see* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 88, 96, 98, 109 n.34; Berkowitz & Wittes, *supra* note 12, at 474.

273 *See* FLA. STAT. §§ 102.111(1), 102.112(1). I discuss the issue of the statutory conflict between "shall" and "may" in GREENE, *supra* note 15, at 50–51.

274 *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1239–40. This was a complex issue, which I discuss more fully in GREENE, *supra* note 15, at 49–54.

occurs later."[275] Additionally, Florida law permits a candidate to request a manual recount in a given county "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later."[276] If a candidate may protest election returns and may request a manual recount as late as moments before the canvassing board certifies the result—which the statutes clearly allow with "prior to the time the canvassing board certifies the results" and "whichever occurs later"—then it would be bizarre to think the Florida legislature intended that protest and request for manual recount to become immediately moot. In other words, by writing both an apparent one-week deadline for certification and simultaneously giving candidates until the moment before certification to protest the election and start the manual recount process, Florida law may reasonably be construed as triggering a kind of automatic extension of the deadline, which is one way of reading what the state high court granted with its ruling. To deem the court's deadline extension a violation of the federal Constitution on the ground that it displaced the state legislature's function misunderstands how standard statutory interpretation works. Courts are always asked to reconcile apparently conflicting statutory provisions, and reconciling the Florida provisions to insist on an extension is garden variety judicial interpretation.[277]

(3) Finally, I turn to the issue most directly at stake in *Bush v. Gore*: the contest-phase question of what counts as a "rejection of . . . legal votes," for that is the state statutory standard for overturning a certified election.[278] Gore's argument, which the state high court accepted, was in many ways straightforward: he needn't show that any of the counties abused their discretion or made a legal error in, for example, refusing to recount ballots (as in Miami-Dade County) or in using too restrictive a counting standard (as in Palm Beach County). Rather, all he must show is that those counties rejected as votes ballots that were legally cast. That is, ballots that the machine didn't read, which the county board also refused to recount or refused to "see" with less restrictive standards, could be considered "legal votes" "re-

275 FLA. STAT. § 102.166(2).

276 *Id.* § 102.166(4)(b). *But see* GILLMAN, *supra* note 12, at 27 (mistakenly stating that Gore had only seventy-two hours from election night to ask for manual recounts); TOOBIN, *supra* note 12, at 35 (same); McConnell, *supra* note 17, at 108–09 (mistakenly stating that Gore had only five days from election night to ask for manual recounts).

277 For support, see Kramer, *supra* note 40, at 112; Rosenfeld, *supra* note 2, at 123. *But see* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 105; Lund, *Unbearable Rightness*, *supra* note 12, at 1230–35; McConnell, *supra* note 17, at 108–09.

278 *See* FLA. STAT. § 102.168(3)(c).

ject[ed]." This, too, was a complex issue.[279] For now, the point is that Gore's argument was plausible on one plain meaning view of statutory text, for "rejection of legal votes" does not require a showing of administrative illegality or abuse of discretion (the Bush position), but plausibly includes any county decision not to recount votes legally cast. Whether or not this was the best reading of Florida law (and unlike the protest phase, where I argue in my book that the Florida court got it right, here I'm not so sure), it certainly was an act of statutory interpretation, not a usurpation of state legislative power through judicial lawmaking.[280]

279 *See* GREENE, *supra* note 15, at 59–68.

280 For support, see Dworkin, *Reply to Charles Fried*, *supra* note 159, at 107; Kramer, *supra* note 40, at 133; Rosenfeld, *supra* note 2, at 123; Tribe, *supra* note 171, at 116–18. *But see* POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 119; Lund, *Unbearable Rightness*, *supra* note 12, at 1235–42; McConnell, *supra* note 17, at 110–13.

APPENDIX B. THE SAFE HARBOR ARGUMENT[281]

Bush v. Gore turned in part on the relevance of the safe harbor provision of federal law[282] and on the December 12 deadline for that safe harbor.[283] The safe harbor provision is conditional. It doesn't require a state to complete a judicial contest before December 12. Rather, it offers the incentive of a safe harbor, a protection from further challenge over electoral slates, if that deadline is met. States can choose whether or not to meet the deadline. The question was whether Florida had expressed such a desire. If it had, then the election had to end, for it was already 10:00 p.m. on December 12 when the U.S. Supreme Court ruled. Any further hand counting would take the state past December 12 and would eliminate the safe harbor option. If, however, the state had not expressed a desire to choose the safe harbor option, then the case could be sent back to the Florida Supreme Court to give that court a crack at implementing a clearer, uniform, constitutional counting system. Such counting could continue until at least December 18, the date for electors to cast their

281 For the original version of the following, see GREENE, *supra* note 15, at 120–25. For the best discussions of the safe harbor issue, see Ackerman, *supra* note 17, at 195–96; Balkin, *supra* note 10, at 1423, 1429–31; Berkowitz & Wittes, *supra* note 12, at 459–63; McConnell, *supra* note 17, at 118–19; Rosenfeld, *supra* note 2, at 130–33; Sunstein, *supra* note 6, at 90–91. For other discussions, see GILLMAN, *supra* note 12, at 159–60, 187–88; POSNER, BREAKING THE DEADLOCK, *supra* note 12, at 125–26, 132, 151; RASKIN, *supra* note 1, at 19–20; TOOBIN, *supra* note 12, at 266; Chemerinsky, *supra* note 174, at 96–98; Dworkin, *Badly Flawed*, *supra* note 159, at 92–93; Dworkin, *Early Responses*, *supra* note 159, at 67; Elhauge, *supra* note 18, at 25; Fried, *supra* note 166, at 16; Fried, *Response to Ronald Dworkin*, *supra* note 194, at 102–03; Issacharoff, *supra* note 179, at 64–65 n.34; Klarman, *supra* note 12, at 1732–33; Kramer, *supra* note 40, at 142, 149; Lund, *Unbearable Rightness*, *supra* note 12, at 1220, 1275; Posner, *supra* note 179, at 192; Posner, *Florida 2000*, *supra* note 12, at 42, 48; Radin, *supra* note 8, at 116; Rubenfeld, *supra* note 17, at 22–26; Scheppele, *supra* note 236, at 1427; Strauss, *supra* note 17, at 185, 188–89; Tribe, *supra* note 9, at 264; Tribe, *supra* note 171, at 110, 136; Mark Tushnet, *The Conservatism in* Bush v. Gore, *in* THE QUESTION OF LEGITIMACY, *supra* note 7, at 163, 165.

282 *See* 3 U.S.C. § 5 (2000).

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days prior to the time fixed for the meeting of the electors, such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution . . . .

Id.

283 *See id.* § 7 (establishing a date for the electoral college to meet; in 2000, the date was December 18).

votes for President across the nation, and perhaps until early January, when Congress was to meet to count those votes.

The majority opinion held that Florida had opted for the protection of the safe harbor. The Court wrote:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5 [the safe harbor provision]. __ So.2d at __(slip op. at 27); see also *Palm Beach Canvassing Bd. v. Harris*, 2000 WL 1725434, *13 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.[284]

Thus, the Supreme Court of the United States ended the presidential election. George W. Bush had won Florida, 2,912,790 to 2,912,253, and had won the presidency. But did the counting have to stop on December 12? The Court did not exercise its own judgment in holding that December 12 was the last day for counting votes. Rather, the Court deferred to what the state supreme court had said. If the U.S. Supreme Court correctly construed the opinion of the Florida Supreme Court, then its conclusion that the counting must end immediately was sound. The state supreme court has the power to interpret Florida law as opting for the protection of the safe harbor, and it is the responsibility of the U.S. Supreme Court to defer to the state's wishes regarding the safe harbor. But if the U.S. Supreme Court misunderstood the Florida Supreme Court's opinion, then it ended the counting too soon. What exactly did the Florida Supreme Court say on the issue of the safe harbor?

According to the U.S. Supreme Court, as quoted above, "[t]he Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5 [the safe harbor provision]."[285] Unfortunately, this statement is incorrect. The Florida Supreme Court opinion referred to is the revised opinion from the protest-stage case, which the state high court issued in response to the U.S. Supreme Court's request for clarification. The U.S. Supreme Court was con-

284 Bush v. Gore, 531 U.S. 98, 110 (2000).

285 *Id.*

cerned about whether the state court had taken the safe harbor provision into account when it issued its protest-stage ruling. In response, the Florida Supreme Court said that manual recounts must be included in vote tallies, before a winner is certified, unless this would jeopardize either the losing candidate's opportunity to contest the election or the state's ability to take advantage of the safe harbor date of December 12.[286] The Florida Supreme Court did not claim to be interpreting statutes passed by the state legislature. There is nothing in Florida law that refers to a desire to take advantage of the safe harbor date or not to do so.[287] Florida law is silent on the subject. The Florida Supreme Court's clarification is best understood as a response to the U.S. Supreme Court's concern that the state court had not itself adequately thought about the safe harbor date when extending the deadline for manual recounts at the protest stage. To the extent that the U.S. high court ordered the counting stopped on December 12 because it thought that's what Florida statutes require, that conclusion was wrong. Moreover, had the Florida legislature addressed the issue as a general policy matter, it might well have chosen to ensure that all ballots are accurately counted, rather than adhere to a nonmandatory federal timetable.

There is more to be said, though, regarding whether Florida had in fact opted for the protection of the safe harbor, thus making December 12 the appropriate date for the election to end. The U.S. Supreme Court—perhaps because of the speed with which the Justices wrote the opinions—simply goofed in stating that the Florida Supreme Court had said anything about what the Florida legislature intended regarding the safe harbor. As mentioned, Florida statutes are silent on the subject. But the Florida Supreme Court, in its revised protest-stage opinion, had lots to say about the safe harbor, including some important statements that the U.S. Supreme Court overlooked.

In addition to the state high court's concern that Florida voters "participat[e] fully in the federal electoral process, as provided in 3 U.S.C. § 5" (which the court said twice), consider these two footnotes from the state court's opinion:

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286 Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1289 (Fla. 2000).

287 Chief Justice Rehnquist thought otherwise, writing: "Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5." Bush v. Gore, 531 U.S. at 121 (Rehnquist, C.J., concurring). Rehnquist cited no legislative history to support this claim, and the state law to which he referred, FLA. STAT. § 102.168(8) (2000), makes no reference to the safe harbor provision of federal law.

> What is a reasonable time required for completion [of a manual recount at the protest stage] will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. §5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.
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> . . . .
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> . . . [I]t is necessary to read all provisions of the elections code in pari materia. In this case, that comprehensive reading required that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.[288]

Taking all these statements together, it is reasonable to suggest that the Florida Supreme Court thought all manual recounts must end no later than December 12. One might respond, though, that these statements were made in the context of setting time limits for manual recounts during an election protest, when county canvassing boards are still counting ballots. The statements were not made in the context of an election contest, when the losing candidate challenges the winner's certification. Perhaps the state court, in a contest case, would not view December 12 as the drop-dead date for counting ballots.

There is some evidence, though, that the state court viewed December 12 as the end of all counting, protest or contest. Consider these two footnotes from its opinion upholding Gore's contest challenge, issued Friday, December 8:

> The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law.
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> . . . .
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> We are mindful of the fact that due to time constraints, the count of the undervotes places demands on the public servants throughout the State to work over this weekend. However, we are confident that with the cooperation of the officials in all the coun-

288 *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1286 n.17, 1290 n.22.

> ties, the [count of the] remaining undervotes in these counties can be accomplished within the required time frame.[289]

The implication of these statements, especially when combined with the ones quoted above from the protest-stage revised opinion, is that the Florida Supreme Court thought all manual recounts—whether protest or contest—must be completed no later than December 12.

Does this mean that the U.S. Supreme Court was correct in deeming Florida to have opted for the protection of the safe harbor? Not necessarily. It depends on what the Florida Supreme Court meant by its various references, explicit and implicit, to December 12. The state high court could not have meant to refer to state statutes, because, as mentioned, Florida statutes say nothing about opting in or out of the safe harbor protection. That leaves only two explanations. One is that the state court was choosing for Florida, saying what it believed the Florida legislature would say were it faced with the question (in the abstract, not limited to this election) whether to allow manual recounts past the safe harbor date. The other explanation is that the state court understood the safe harbor provision as mandatory rather than conditional, and thus that the state lacked the authority to count votes past December 12. This understanding would have been beyond the power of the Florida Supreme Court. For although state courts are supreme in interpreting state law, they must yield on interpretations of federal law. A state court understanding that the safe harbor provision is absolute rather than conditional would be a misreading of federal law and could be set aside by a federal court in an appropriate case.

This lack of clarity about the Florida Supreme Court's views on the safe harbor provision should have resulted in a remand to that court for clarification.[290] That's what the U.S. Supreme Court did in

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289 Gore v. Harris, 772 So. 2d 1243, 1261 n.21, 1262 n.22 (Fla.), *rev'd on other grounds sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

290 Nelson Lund correctly points out that the Court "remanded for further proceedings not inconsistent with this opinion," Bush v. Gore, 531 U.S. at 111, and thus that, technically speaking, the Florida high court could have taken a second look at the safe harbor issue—and the possibility of a recount under constitutional substandards—on remand. *See* Lund, *Unbearable Rightness*, *supra* note 12, at 1276–78. (Jack Balkin is wrong to say that the Court had "nothing left . . . to do but to dismiss" the case. *See* Balkin, *supra* note 10, at 1412.) This would have been easier, though, had the Supreme Court said something like "we don't really know what Florida wants regarding the safe harbor, and thus we remand for the state high court to figure it out." Instead, the Supreme Court said:

> Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its order-

the first, protest-stage case, and it's what it should have done (with even greater justification) in the second, contest-stage case. Granted, such a remand, and further proceedings in the state court, would have taken even more precious time. But, if upon reflection (and after briefing) the state court had realized and clearly stated that it understood the safe harbor to be an option, not a requirement, and if it had focused on whether a contest should be allowed to continue past the safe harbor date, it might well have determined that the Florida legislature would opt for votes to be counted.[291]

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ing of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

Bush v. Gore, 531 U.S. at 111.

291 Had the Florida high court, on remand, decided that the Florida legislature would opt for recounting ballots over the security of the safe harbor provision, and if it had specified objective criteria for recounting ballots, then it would have been appropriate for the Supreme Court to extend the federal statutory date, *see* 3 U.S.C. § 7 (2000), for the Electoral College to meet past December 18 to make up for the vote counting days lost because the Court had stayed such recounting on Saturday, December 9. *See* Bush v. Gore, 531 U.S. 1046 (2000) (granting certiorari and stay).