The Liberal Legacy of *Bush v. Gore*

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INTRODUCTION

Few cases in the Supreme Court's 200-plus year history have more deeply tested its institutional legitimacy than *Bush v. Gore*.[1] In that historic decision, the Supreme Court intervened in the most closely contested presidential election of all time—a virtual dead heat—and essentially called the election by blocking a recount of votes in Florida. As a result, victory went to George W. Bush, who had lost the popular vote but, by virtue of his exceedingly narrow and hotly disputed victory before recount in Florida, had managed to eke out an Electoral College majority.

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Volumes have been written about the *Bush v. Gore* decision—most, although not all, of it critical of the Court's intervention. The criticism was not limited to the pages of law reviews but extended to the popular press, and, no doubt, to water cooler conversations across the country. Few cases in the Court's history have likely raised more substantial questions about the line between law and politics in the Court's decisionmaking.

In this Article, I move beyond the debate about *Bush v. Gore* itself and look instead at its aftermath. My claim is that since the decision, the Court has apparently been on a campaign to rehabilitate itself—to repair its image as an institution guided by law and constitutional principle rather than partisan politics. One sign of this campaign is that the Justices have been increasingly willing to cross traditional voting lines in cases that capture the public's attention. Moreover, it appears that, at least in the most controversial cases, conservatives (those held responsible for the result in *Bush v. Gore*) have more often sided with liberal Justices to reach liberal results than vice versa. In addition, at least some post-*Bush v. Gore* decisions seem to reflect a renewed emphasis on the rule of law—namely, on that which distinguishes the realm of law from the realm of politics. If so, that development could not be more timely, because some of the most important constitutional issues for the foreseeable future are likely to involve claims of unchecked presidential power in the "war on terror." In this respect, at least, *Bush v. Gore* may have had a silver lining.

More broadly, the Court's own reaction to *Bush v. Gore* demonstrates the checking power of popular perceptions of the Court's legitimacy. Because the Court's power depends almost entirely on its public legitimacy, decisions that call that legitimacy into question may inevitably trigger a correction. Some have suggested that the Burger and Rehnquist Courts were a corrective to the perceived excesses of the Warren Court. This Article suggests that the last years

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

of the Rehnquist Court saw a self-correction in the other direction. Whether the correction will continue with the Roberts Court remains to be seen, but the apparent reaction of a fundamentally conservative Court to criticism of *Bush v. Gore* suggests that "We the People" may have something to say about it.

I will first show in Part I that the Supreme Court's decision in *Bush v. Gore* raised serious questions about the Court's legitimacy. Reaction in the mainstream press and the academy was overwhelmingly negative, and polls showed that large percentages of the populace felt that the Justices' votes were influenced by their partisan political preferences. Such a reaction constitutes a major threat to the institutional standing, and ultimately to the power, of the Court. Part II demonstrates that, in the decision's wake, at least some of the conservative Justices may have taken this criticism to heart. Qualitative and quantitative analyses show that the Rehnquist Court was more likely to reach liberal results in the four years after *Bush v. Gore* than in the corresponding period preceding the decision. Part III suggests that the criticism of *Bush v. Gore* may also have sparked renewed emphasis on the rule of law, because it is precisely the rule of law, and the Court's role in maintaining it, that legitimates the Court's authority in our democracy. The Article concludes with an argument that such judicial reaction to popular perceptions of the Court's legitimacy is appropriate and necessary. Perceptions about whether the Court is acting "like a Court" play an important checking function on the Court's power to "say what the law is."

I. *BUSH V. GORE*—THE INITIAL REACTION

The contentiousness of the 2000 post-election battle between George W. Bush and Al Gore meant that *any* Supreme Court intervention would likely be controversial, no matter how it resolved the matter. With the fate of the presidency at stake, every move by every actor in the wake of the election seemed tainted by partisan politics. One expects partisanship from the candidates, their legal teams, and their political parties. But the Supreme Court's legitimacy rests largely on its perceived nonpartisanship; the Court, like constitutional law, is supposed to be above everyday politics, guided by deeper principles than mere political advantage. Thus, any involvement by the Court risked tainting the institution with the brush of partisanship.

The way the Court reached its decision only made matters worse. The vote was, for all intents and purposes, along party lines. The five Justices who likely would have voted for Bush—Rehnquist, O'Connor, Kennedy, Scalia, and Thomas—formed a majority in favor of blocking the recount.[2] The four Justices who likely would have voted for Gore—Stevens, Souter, Breyer, and Ginsburg—were in dissent.[3] The Justices' reasoning further reinforced the sense that, in this

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2. *See id.* at 100 (per curiam); *id.* at 111 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

3. *See id.* at 123–58 (Stevens, Souter, Breyer, & Ginsburg, JJ., dissenting). Justices Souter and Breyer agreed that the way Florida was proceeding with the recount violated the Equal Protection

case, the result drove the reasoning and not vice versa. In voting along partisan lines, all of the Justices acted against type and employed reasoning contrary to their own stated judicial philosophies and constitutional commitments. The conservative Justices in the majority—who generally criticize judicial activism, prize state autonomy, and take a dim view of new constitutional rights—aggressively intervened not once but twice in a state electoral process and ultimately found that Florida's plan to conduct a manual recount had violated a novel one-time-only equal protection right,[4] despite the fact that manual recounts had occurred repeatedly in the past without any suggestion that they violated equal protection. In reaching this decision, moreover, the majority announced that it would not be bound in future cases by any principles announced therein,[5] thus overtly discarding one of the principal constraints on judicial decisionmaking—the obligation to follow one's own precedents in future cases. At the same time, the dissenting Justices—who tend to favor individual rights over states' rights—criticized the majority for judicial activism, for interfering with state autonomy, and ultimately for undermining confidence in the judge as "an impartial guardian of the rule of law."[6]

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That so many Justices were willing to act so deeply against type, and that each ended up supporting the result that they would have preferred as a political matter, prompted many to question the legitimacy of the institution. Reaction was swift and remarkably negative. Given that the nation was almost evenly divided on the outcome of the election, one might suppose that reaction to the Court's decision would be similarly divided—with the half of the nation that supported Bush praising the decision as a brilliant and necessary intervention, and the half that supported Gore condemning it as a partisan power grab by the Republican Justices. Yet the reaction was in fact overwhelmingly critical of the Court.[7]

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A review of unsigned editorials and op-eds published in the country's top twenty newspapers by circulation in the week following the decision, for example, finds eighteen unsigned editorials critical of the decision and only six praising it.[8] Signed op-eds in the same newspapers were also overwhelmingly

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Clause but dissented from the majority's decision to halt the recount altogether. *See id.* at 144–46 (Breyer, J., joined by Souter, J., dissenting). They would have remanded to Florida for a recount under uniform standards. *Id.* at 146. Thus, on the decisive issue of whether the recount should go forward or not, the vote was 5-4.

4. *See id.* at 103 (per curiam) (holding that the "standardless" manual recount violates the Equal Protection Clause).

5. *See id.* at 109.

6. *See id.* at 129 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting) (criticizing the majority for undermining "the Nation's confidence in the judge as an impartial guardian of the rule of law"); *id.* at 141 (Ginsburg, J., joined by Stevens, J., and joined in part by Souter & Breyer, JJ., dissenting) (criticizing the majority for intruding on a state's prerogative to "organize itself as it sees fit"); *id.* at 158 (Breyer, J., joined in part by Stevens, Ginsburg, & Souter, JJ., dissenting) (criticizing the majority for a lack of "self-restraint").

7. *See infra* Addenda A, B, & C (illustrating the critical reaction in newspapers and academia).

8. *See infra* Addendum A.

Fn9 critical, with twenty-six critical op-eds and only eight defending the decision.[9]

Law review commentary, a rough guide for the academy's assessment of the decision, was also predominantly critical. Of seventy-eight articles that have discussed *Bush v. Gore* between 2001 and 2004, thirty-five criticized the Fn10 decision, and only eleven defended it.[10] Some 625 professors signed a letter shortly after the decision expressing their dismay at the Court's failure to abide Fn11 by the rule of law.[11]

Public polls also reflected serious questions about the Court's legitimacy among a large segment of the population. Polls taken around the time of the decision found between 37% and 65% of respondents thought that the Justices' Fn12 personal politics influenced their decision.[12] One poll reported that 46% of respondents said that the decision made them more likely to suspect that Fn13 Supreme Court Justices have a partisan bias.[13] Another found that 53% of respondents felt the Court's decision to stop the recount was based mostly on Fn14 politics.[14] In short, *Bush v. Gore* led the press, the academy, and the public to question the Court's legitimacy as an institution guided by principle rather than politics.

II. THE AFTERMATH—THE LIBERAL LEGACY OF A CONSERVATIVE DECISION

Whether or not one agrees with the substance of the criticism of the Court outlined above—and I presume that at least the five Justices in the *Bush v. Gore* majority did not agree with it—the mere existence of the criticism is a serious problem for an institution whose authority depends largely on perceptions of its legitimacy. As an unelected body in a democratic polity, without the means to enforce its own judgments, the judiciary more than any other branch of government must rely on the authority of legitimacy. And its legitimacy, in turn, rests on the perception that it is not simply a political institution, but that it is guided by constitutional principle and law that rises above—and constrains—everyday partisan political decisionmaking. The Court is at its most vulnerable where it is seen as deciding cases without a basis in constitutional principle because then

9. *See infra* Addendum B.

10. See *infra* Addendum C.

11. *See* Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 188 n.62 (reproducing letter).

12. *See, e.g.*, CBS News Poll (Dec. 17, 2000), http://www.cbsnews.com/stories/2000/12/17/opinion/main257905.shtml (finding that 37% of voters thought the decision was based more on partisan politics than on objective interpretation of the law); CNN/Gallup/USA Today Poll (Dec. 15–17, 2000), http://archives.cnn.com/2000/ALLPOLITICS/stories/12/18/cnn.poll/ (finding that 50% of voters thought the decision influenced by political views); Harris Poll (Dec. 14–21, 2000), http://www.pollingreport.com/wh2post.htm (finding that 41% of voters believed the decision mainly reflected Justices' political views); Princeton Survey Research Associates Poll (Dec. 14–15, 2000), http://www.pollingreport.com/wh2post.htm (finding that 65% of voters thought partisanship or politics played a major role or some role in Court's decision).

13. Princeton Survey Research Associates Poll, *supra* note 12.

14. NBC News/Wall Street Journal Poll (Dec. 10, 2000), http://www.pollingreport.com/wh2post.htm.

there appears to be little to differentiate it from the political branches. And if the Court cannot be distinguished from the political branches, it loses its authority to decide; if decisions are politically driven, why shouldn't they be decided in a democracy by officials accountable to the people through elections?

Accordingly, the Court's most precious commodity is its own legitimacy. *Bush v. Gore* called that legitimacy deeply into question. The Court's record since then suggests that the Justices may realize this and, consciously or subconsciously, have sought to rehabilitate the Court's image by reducing partisan division, correcting to some extent the Court's considerably conservative tilt, and emphasizing the importance of a rule of law that is distinct from and rises above politics. The desire to reduce perceptions of partisanship would not necessarily favor liberal or conservative results. Such perceptions could be offset as much by liberals supporting conservative results as vice versa. In fact, however, liberals more frequently seem to have been the beneficiaries of the reaction. Since *Bush v. Gore*, the Court's rulings in prominent cases have been markedly less "partisan," and conservative Justices have sided with their more liberal counterparts to reach liberal results more often than have liberal Justices sided with conservatives to support a conservative result.[15]

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The four decisions from the 2003 Term that prompted this Symposium—*Blakely v. Washington*,[16] *Crawford v. Washington*,[17] *Rasul v. Bush*,[18] and *Hamdi v. Rumsfeld*[19]—fit this pattern. In all four cases, conservative Justices joined with their more liberal colleagues to rule against the Bush Administration and in favor of criminals or alleged terrorists. In *Crawford*, Justices Scalia, Kennedy, and Thomas joined forces with Justices Stevens, Souter, Breyer, and Ginsburg to affirm the right of criminal defendants under the Sixth Amendment's Confrontation Clause to confront the evidence used against them by barring introduction of taped statements where the defendant had no opportunity to cross-examine the witness.[20] In *Blakely*, Justices Scalia and Thomas joined Justices Stevens, Souter, and Ginsburg to form a majority, while Justice Breyer sided with Chief

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15. For purposes of this Article, I break down the Rehnquist Court by describing Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas as "conservative" and Justices Stevens, Souter, Ginsburg, and Breyer as "liberal." These terms are obviously crude and ignore important differences between the Justices. They are also relative. None of the "liberal" Justices is as liberal as, say, Justices Warren, Brennan, or Thurgood Marshall. And on the "conservative" side, Justices Scalia and Thomas are much more radical conservatives than Justices Kennedy and O'Connor, and Chief Justice Rehnquist was generally closer to Justices Scalia and Thomas than to Justices Kennedy and O'Connor. Nonetheless, for purposes of assessing broad trends in reaction to *Bush v. Gore*, I have characterized the majority in that case as conservative and the dissent as liberal.

16. 542 U.S. 296 (2004).

17. 541 U.S. 36 (2004).

18. 542 U.S. 466 (2004).

19. 542 U.S. 507 (2004).

20. *See Crawford*, 541 U.S. at 68–69 (holding that a defendant must be afforded the opportunity to cross-examine testimonial statements under the Sixth Amendment). *But see id.* at 69–76 (Rehnquist, C.J., joined by O'Connor, J., concurring in the judgment) (concurring in the holding but dissenting sharply from the majority's reasoning).

Justice Rehnquist and Justices O'Connor and Kennedy in dissent.[21] The majority held that Washington's sentencing guidelines scheme violated the defendant's Sixth Amendment right to a jury trial by permitting his sentence to be increased over the statutory maximum on the basis of facts not found by the jury or admitted by the defendant.[22]

Neither *Crawford* nor *Blakely* came as a complete surprise and, as one contributor to this Symposium shows, were arguably forecast by prior decisions in the area.[23] But although these decisions may be explained as extensions of pre-*Bush v. Gore* cases, that claim cannot be made with respect to the enemy combatant decisions. In *Rasul v. Bush*, Justices Kennedy and O'Connor joined their more liberal colleagues to hold that foreign nationals detained at Guantanamo Bay, Cuba, as "enemy combatants" had a right to seek habeas corpus relief challenging the legality of their detention.[24] And in *Hamdi v. Rumsfeld*, eight members of the Court rejected the President's claim that he could detain a U.S. citizen as an "enemy combatant" without any hearing whatsoever.[25] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, reasoned that due process demanded that such a detainee be afforded notice of the charges and a "meaningful opportunity" to rebut them before a neutral decisionmaker.[26] Justices Souter and Ginsburg concurred in that result, although they would have gone further, holding that the Non-Detention Act barred Hamdi's detention.[27] Justices Scalia and Stevens dissented, maintaining that under the Constitution, the government has only two options when confronted with a citizen that it alleges is fighting for the enemy in a military conflict—to try him in the criminal justice system for treason or to ask Congress to suspend the writ of habeas corpus.[28] Only Justice Thomas adopted the government's argument that it could hold Hamdi indefinitely without a hearing.[29]

The decisions that sparked this Symposium are noteworthy from four vantage points. First, the Rehnquist Court was not known for being sympathetic to

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21. *See Blakely*, 542 U.S. at 297 (majority opinion by Scalia, J., joined by Stevens, Souter, Thomas, & Ginsburg, JJ.); *id.* at 314 (O'Connor, J., joined by Breyer, J., and joined in part by Rehnquist, C.J., and Kennedy, J., dissenting); *id.* at 326 (Kennedy, J., joined by Breyer, J., dissenting); *id.* at 328 (Breyer J., joined by O'Connor, J., dissenting).

22. *Id.* at 313–14 (majority opinion).

23. *See* Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L.J. 1537, 1551–54 (2006).

24. *See* Rasul v. Bush, 542 U.S. 466, 485 (2004) (Stevens, J., joined by O'Connor, Souter, Ginsburg, & Breyer, JJ.) (holding that federal courts may determine whether foreign nationals may be indefinitely detained); *id.* at 485 (Kennedy, J., concurring in the judgment).

25. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality) (O'Connor, J., joined by Rehnquist, C.J., Kennedy & Breyer, JJ.).

26. *Id.*

27. *See id.* at 541 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that, absent the government raising further claims, the Non-Detention Act requires Hamdi's release).

28. *See id.* at 554 (Scalia, J., joined by Stevens, J., dissenting) (asserting that the President's claim of military necessity does not permit detention without charge).

29. *See id.* at 579 (Thomas, J., dissenting) (arguing that indefinite detention "falls squarely" within the Executive Branch's war powers).

criminal defendants—much less suspected terrorists—yet in all of these cases it ruled in favor of alleged criminals and terrorists. Second, the Supreme Court has historically been extremely deferential to executive claims of national security in times of crisis, yet in the enemy combatant cases the Court resoundingly rejected President Bush's arguments for deference. Third, none of the decisions was decided by the traditional conservative-liberal divide.

The most important point, however, is that while these cases may seem aberrational—indeed, that perception is what prompted this Symposium—they are not. Since *Bush v. Gore*, many of the Court's most prominent and contentious cases have been decided by a majority comprised largely of liberal Justices, with one or more conservatives signing on to make up the majority. It is as if, having consolidated their power by ensuring that President Bush won the 2000 election, the conservative Justices felt more free, or, as I will argue, more *obliged*, to side with liberal Justices. The trend is particularly evident in prominent cases, suggesting that the Justices may, again perhaps subconsciously, recognize that the cases the public notices have the most impact on perceptions of the Court and therefore on its legitimacy.

As illustrated below, over the course of the four Supreme Court Terms that followed *Bush v. Gore*, the Court dealt substantial setbacks to a host of popular conservative causes, as conservative Justices joined the liberal dissenters in *Bush v. Gore* to reach liberal outcomes. The Court upheld affirmative action in
Fn30 university admissions,[30] declared unconstitutional a statute criminalizing homo-
Fn32 sexual sodomy,[31] reined in the "federalism" revolution,[32] frustrated the property
Fn33 rights movement,[33] expanded criminal defendants' rights and civil rights vic-
Fn34 tims' remedies,[34] and upheld a campaign finance law opposed by many conserva-
Fn35 tives.[35] The Court's record is not, of course, one-sided. During the same period,
Fn36 it also relaxed restrictions on government aid to religious schools,[36] rejected challenges to "three-strikes" statutes imposing life imprisonment for relatively
Fn37 minor repeat offenses,[37] and upheld mandatory detention of foreign nationals in

30. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

31. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

32. *See* Tennessee v. Lane, 541 U.S. 509 (2004) (allowing the states to be sued when fundamental access to the courts is prevented); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (allowing Congress to abrogate state sovereign immunity with the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2000))).

33. *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005) (affirming the use of eminent domain for economic development); Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (holding the collection of interest on lawyers' trust accounts to fund free legal services is not a taking).

34. *See* Smith v. City of Jackson, 544 U.S. 228 (2005) (holding that age discrimination suits can proceed on a showing of disparate impact); Crawford v. Washington, 541 U.S. 466 (2004) (holding that the Confrontation Clause guarantees to criminal defendants the right to cross-examine all testimonial evidence).

35. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

36. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

37. *See* Ewing v. California, 538 U.S. 11 (2003).

deportation proceedings for a prior criminal conviction.[38] On the whole, though, the post-*Bush v. Gore* Court's record is remarkably liberal for a conservative Court.[39]

Each of the four Terms after *Bush v. Gore* provided significant examples of this "liberalizing" trend. In the 2001 Term, the Court declared the death penalty for the mentally retarded unconstitutional, with Justices Kennedy and O'Connor joining the liberal Justices,[40] and invalidated death sentences imposed on the basis of facts not found by a jury, with Justices Scalia, Thomas, and Kennedy joining their more liberal brethren.[41] Justice O'Connor sided with the liberals to extend the right to lawyers for the poor to cases in which only a suspended sentence is imposed.[42] By a 7-2 margin, over the dissents of Chief Justice Rehnquist and Justice Scalia, the Court held invalid the Child Pornography Prevention Act, which made it a crime to create, disseminate, or possess "virtual" child pornography constructed from computer images rather than actual children.[43] The Court also dealt a setback to a favorite conservative cause—the use of the takings clause to restrict government regulation of private property. In *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justices O'Connor and Kennedy joined the liberal Justices to rule that even an extended moratorium on development of private property did not constitute a "taking" requiring just compensation.[44]

In the 2002 Term, only five of fourteen 5-4 decisions that Term were decided by the conservative bloc that decided *Bush v. Gore*.[45] In its final week, the Court upheld affirmative action in university admissions, with Justice O'Connor

38. *See* Demore v. Kim, 538 U.S. 510 (2003).

39. At the time of this writing, there were only four completed Supreme Court Terms since *Bush v. Gore* was decided. Moreover, with the appointments of Chief Justice Roberts and Justice Alito, the Rehnquist Court is no longer. I have accordingly compared the four Terms after *Bush v. Gore* to the four Terms that preceded it. Because *Bush v. Gore* itself was handed down in the middle of the 1999 Term, I have not included that Term in the analysis. Many of the cases decided that Term were argued and effectively decided before the decision in *Bush v. Gore* was issued, while others were argued and decided in the immediate aftermath of the decision. In addition, as the opinions in *Bush v. Gore* itself attest, passions ran high at the Court that Term. Given that fact, and the difficulty of dividing up the Term, I restricted my analysis to the four complete Terms before and after the 1999 Term.

40. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

41. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002).

42. *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002).

43. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

44. 535 U.S. 302, 336–37 (2002) (declining to adopt a per se rule that the moratoria constitute takings).

45. *The Supreme Court, 2002 Term—The Statistics*, 117 HARV. L. REV. 480, 485 (2003). Justices Scalia and Thomas were the most frequent dissenters in nonunanimous cases, perhaps reflecting their judgment that the Court was veering too far to the left. *See id.* at 480 (showing that Justice Scalia dissented ten times, and Justice Thomas dissented thirteen times). In prior Terms, Justice Stevens had generally been the most frequent dissenter. *See, e.g.*, *The Supreme Court, 2001 Term—The Statistics*, 116 HARV. L. REV. 453, 435 (2002) (showing that Justice Stevens dissented fourteen times, followed by Justice Scalia with ten dissents). One should not make too much of these particular statistics, as they may be outliers. In the 2004 Term, for example, Justice Stevens was back on top, dissenting thirteen times, while Justice Scalia dissented only seven times. *The Supreme Court, 2004 Term—The Statistics*,

joining the liberal Justices,[46] and struck down a Texas statute that criminalized gay sodomy.[47] In the Texas sodomy case, the majority, consisting of Justice Kennedy and the liberal Justices, concluded that the statute violated the due process rights of consenting adults to engage in private sexual conduct,[48] while Justice O'Connor concurred, reasoning that the prohibition of homosexual but not heterosexual sodomy denied equal protection.[49] The same Term, the Court dramatically departed from what had been a solid record of conservative bloc voting on the question of state immunity from suits for damages under the Eleventh Amendment.[50] In *Nevada Department of Human Resources v. Hibbs*, the Court ruled that states could be sued for damages for violating the Family Medical Leave Act.[51] Chief Justice Rehnquist wrote the opinion, on behalf of himself, the liberal Justices, and Justice O'Connor.

In addition to these "blockbuster" cases, the Court in the 2002 Term also upheld a Washington program for funding indigent legal services by garnering interest on lawyers' trust accounts, dealing another blow to the conservative property-rights movement.[52] Justice O'Connor joined the liberals to make up the majority, holding that the program did not constitute an impermissible taking of a client's private property. And in *Wiggins v. Smith*, the Court found ineffective assistance of counsel in a criminal case for only the second time

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119 HARV. L. REV. 415, 420 (2005). But as discussed *infra*, the 2004 Term was at least as liberal in its results as the 2002 Term, if not more so.

46. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding The University of Michigan Law School's affirmative action admissions policy). Although the Court struck down Michigan's undergraduate admissions affirmative action policy as too rigid in this same Term, *see* Gratz v. Bollinger, 539 U.S. 244 (2003), it made clear in *Grutter* that as long as race was considered as a plus factor in an individualized review of applications, as opposed to a formulaic or mechanical consideration of race, affirmative action could continue in university admissions. *Grutter*, 539 U.S. at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment . . . . Unlike the program at issue in *Gratz*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity."); *see also Gratz*, 539 U.S. at 244.

47. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

48. *See id.*

49. *See id.* at 579 (O'Connor, J., concurring).

50. The Court had previously held that states could not be sued for damages for violating a host of federal statutes, including the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and even federal patent and copyright laws. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that states may not be sued for damages for violating Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that states may not be sued in state courts for violating Fair Labor Standards Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that states may not be sued for damages for violating trademark law); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (holding that states may not be sued for damages for infringing patents); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that states may not be sued for damages for violating laws enacted under Congress's Commerce Clause power).

51. *See* 538 U.S. 721, 726–34 (2003) (holding that the statute was a proper exercise of Congress's authority to enforce equal protection under the Fourteenth Amendment).

52. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003).

since it announced a right to effective assistance of counsel in 1984.[53] In *Wiggins*, which overturned a death sentence, only Justices Scalia and Thomas dissented.

The conservative majority carried the day in other cases, including two decisions rejecting Eighth Amendment challenges to California's "three-strikes" law[54] and a case upholding mandatory detention of foreign nationals placed in deportation proceedings on the basis of prior criminal convictions.[55] But these were exceptions to the rule, at least in those cases that drew national attention. Much more often than not, in such cases the Court departed from the conservative-liberal divide of *Bush v. Gore*.

The 2003 Term, the immediate catalyst for this Symposium, continued this trend, so much so that the *New York Times*'s Supreme Court reporter Linda Greenhouse captioned it "The Year Rehnquist May Have Lost his Court."[56] In addition to the decisions discussed above in *Blakely*, *Crawford*, *Hamdi*, and *Rasul*, the Court's liberals were in the majority on several other prominent cases. Justice O'Connor joined the liberals to uphold in large measure the McCain-Feingold campaign finance law,[57] and she also provided the decisive votes in two cases further curtailing the federalism revolution. The first, *Tennessee v. Lane*, held that under the Americans with Disabilities Act,[58] states could be sued in cases implicating the "fundamental right of access to the courts."[59] The second, *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, upheld the EPA's authority to impose stricter air quality conditions on a mine than state regulators had imposed,[60] over a spirited dissent resting on federalism grounds.[61] In another prominent and potentially partisan case, Justice Kennedy joined the liberals to forestall a conservative effort to jettison all constitutional limits on partisan gerrymanders.[62]

Justices Kennedy and Thomas joined Justices Souter, Ginsburg, and Stevens

53. *See* 539 U.S. 510, 538 (2003).

54. *See* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding a sentence imposed under a three-strikes law as "not [an] unreasonable application of clearly established law" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.)); Ewing v. California, 538 U.S. 11, 30–31 (2003) (finding that a sentence imposed under a three-strikes law did not violate the defendant's Eighth Amendment protection).

55. *See* Demore v. Kim, 538 U.S. 510, 531 (2003) (holding that an alien convicted of burglary and petty theft may be mandatorily "detained for the brief period necessary for [his] removal proceedings").

56. Linda Greenhouse, *The Year Rehnquist May Have Lost his Court*, N.Y. TIMES, July 5, 2004, at A1.

57. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 245 (2003) (affirming the validity of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.)).

58. 42 U.S.C. §§ 12101–12213 (2000).

59. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

60. *See* 540 U.S. 461, 469 (2004).

61. *See id.* at 502–03 (Kennedy, J., dissenting).

62. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004).

to rule that the Child Online Protection Act of 1998,[63] which sought to limit children's access to internet pornography, was unconstitutional unless the government could show that voluntary use of filters was an inadequate alternative means of protecting children.[64] In another closely watched case, the Court effectively ruled that the Free Exercise Clause did not require vouchers for religious schools, with only Justices Scalia and Thomas dissenting.[65] Conservatives had long argued that state funding of secular education without also funding religious education constituted discrimination against religion, but the Court rejected that contention.[66] And in *Sosa v. Alvarez-Machain*,[67] Justices O'Connor and Kennedy joined the liberals to reject a conservative attack on the Alien Tort Statute,[68] which permits foreign nationals to sue for damages in federal courts for violations of international human rights.[69] Although the Court read the Alien Tort Statute narrowly, it rejected the Bush Administration's position that it provided no cause of action whatsoever absent further legislation by Congress.[70]

The Court's conservative majority held together in other cases, but these cases paled in significance compared to those in which the Court reached liberal outcomes. Thus, the conservative majority ruled on technical jurisdictional grounds that Jose Padilla, a U.S. citizen arrested at O'Hare Airport and held in military custody as an enemy combatant, had to re-file his petition for habeas corpus because his lawyers had filed it in the wrong court.[71] But five of the Justices indicated that, had the petition been properly filed, they would have ruled in Padilla's favor on the merits.[72] The traditional conservative majority also ruled that the Court's prior decision invalidating death sentences based on facts not tried to a jury was not retroactive,[73] and that citizens could be required to identify themselves to police officers on the street without probable cause.[74] However, these cases simply cannot compete for doctrinal significance or public prominence with the more liberal-leaning results of the 2003 Term.

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63. 47 U.S.C. § 231 (2000).
64. *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 659–61, 673 (2004).
65. *See* Locke v. Davey, 540 U.S. 712, 715 (2004).
66. *See id.* at 725.
67. 542 U.S. 692 (2004).
68. 28 U.S.C. § 1350 (2000).
69. *See Sosa*, 542 U.S. 692.
70. *See id.* at 714.
71. *See* Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).
72. For four Justices in dissent, Justice Stevens stated that "I believe that the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits—and the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, adopted on September 18, 2001, does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States." *Padilla*, 542 U.S. at 464 n.8 (Stevens, J., dissenting). And Justice Scalia, who joined the majority in *Padilla* on jurisdictional grounds, made clear in his opinion in *Hamdi* that in his view, the government has no authority to hold U.S. citizens without a criminal trial unless it gets Congress to suspend the writ of habeas corpus. Hamdi v. Rumsfeld, 542 U.S. 507, 573–74 (2004) (Scalia, J., dissenting).
73. *See* Schriro v. Summerlin, 542 U.S. 348, 358 (2004).
74. *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 188–89 (2004).

Of twenty-two cases decided by a 5-4 vote in the Court's 2004 Term, the five-member conservative bloc voted together only four times.[75] Once again, conservative Justices joined liberal majorities in many of the Court's most prominent cases. In perhaps the most controversial decision of the Term, the Court rebuffed another conservative property rights argument, upholding broad use of eminent domain, as Justice Kennedy joined the liberal Justices to make a 5-4 majority.[76] In another case, Justices Scalia and Thomas joined Justices Ginsburg, Souter, and Stevens to declare unconstitutional the federal sentencing guidelines.[77] In a decision rejecting a narrow construction of the reach of Congress's Commerce Clause power, Justices Scalia and Kennedy joined the liberals to uphold federal legislation banning private use of marijuana.[78] Justice Kennedy joined his more liberal counterparts to hold unconstitutional the application of the death penalty to juveniles who committed their crimes before turning eighteen.[79] And for only the third time ever, the Court found another instance of ineffective assistance of counsel in a criminal case, as Justice O'Connor sided with the liberal Justices.[80]

In a handful of cases involving constitutional and statutory discrimination claims, the Court adopted pro-civil-rights rulings, as conservatives again split to give the liberal Justices the majority. Justice O'Connor joined with the liberal Justices to hold that Title IX,[81] which prohibits sex discrimination in schools, provides a cause of action for retaliation.[82] The Court ruled that a California prison scheme that segregated prisoners by race, ostensibly for security purposes, was constitutionally suspect,[83] that the Americans with Disabilities Act applies in some circumstances to foreign cruise ships,[84] and that age discrimina-

75. *See* Linda Greenhouse, *Court's Term a Turn Back to the Center*, N.Y. TIMES, July 4, 2005, at A1. Four of these cases were 5-3 votes in which Chief Justice Rehnquist did not participate for health reasons. *Id.*

76. *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005). Some might argue that this outcome was a conservative result, in that it allowed the state to take a poor woman's property and transfer it to a developer. But that would mistake the facts for the broader legal implications at stake. The case was part of a concerted conservative campaign to resist societal regulation of private property and was brought by the Institute for Justice, a conservative public interest legal organization. Moreover, to characterize it as conservative would require an explanation for why four liberal Justices voted for the result and four conservative Justices voted against it.

77. *See* United States v. Booker, 543 U.S. 220, 242 (2005).

78. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2201 (2005). Like *Kelo*, one might see the result as conservative if one focused on the specific factual setting—application of a federal antidrug law to users of marijuana for medicinal purposes. But the broader doctrinal significance of the case concerned Congress's power under the Commerce Clause, a "states' rights" issue on which the conservatives had made significant inroads in prior years. That is why Justices O'Connor (joined by Chief Justice Rehnquist) and Thomas dissented, maintaining that Congress had no power to reach the conduct in question.

79. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005).

80. *See* Rompilla v. Beard, 125 S. Ct. 2456, 2463 (2005).

81. 20 U.S.C. § 1681 (2000).

82. *See* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1502 (2005).

83. *See* Johnson v. California, 543 U.S. 499, 509 (2005).

84. *See* Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2715 (2005).

Fn85 tion suits can proceed on a showing of disparate impact.[85] And the Court reversed a murder conviction on grounds of racial discrimination in selection of
Fn86 the jury.[86]

The Supreme Court prior to *Bush v. Gore* looks like a different court altogether. In the years preceding *Bush v. Gore*, the Rehnquist Court had begun to assert itself aggressively in a number of areas. Most significantly, it had generated a states' rights revolution of sorts, reining in Congress's Commerce Clause power, reading the Tenth and Eleventh Amendments expansively to protect state prerogatives, and sharply restricting Congress's authority under the Fourteenth Amendment to enact anti-discrimination legislation, in all but one
Fn87 case by 5-4 votes pitting the conservative bloc against the liberal bloc.[87] Before *Bush v. Gore*, the Court had also invalidated race-conscious redistricting designed to maximize minority voting power, even comparing such efforts to
Fn89 apartheid[88]—often by the same 5-4 vote.[89] In 1997, the conservative majority eased restrictions on government aid to religious schools, overturning a 1985
Fn90 holding barring such aid,[90] and in 2000 the same majority, this time joined by
Fn91 Justice Breyer, upheld a federal program of aid to religious schools.[91] Prior to *Bush v. Gore*, the Court narrowly construed limits on police power in the criminal context, upholding the power of police to use pretextual traffic stops to

85. *See* Smith v. City of Jackson, 125 S. Ct. 1536, 1540 (2005).

86. *See* Miller-El v. Dretke, 125 S. Ct. 2317, 2322, 2339–40 (2005).

87. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (striking down the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that states cannot be sued for damages for violating the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2000)); Alden v. Maine, 527 U.S. 706, 712 (1999) (finding that states cannot be sued in state courts for violating the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (1994)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (finding that states cannot be sued for damages for violating trademark law); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (finding that states cannot be sued for damages for infringing patents); Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating the Brady Handgun Violence Prevention Act (Brady bill), Pub. L. No. 103-159, tit. I, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 and 42 U.S.C.), requirement that local law enforcement officials assist in background checks of gun purchasers); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding with a 6-3 vote that Congress lacks the power under the Fourteenth Amendment to require states to accommodate religious beliefs); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that states cannot be sued for damages for violating laws enacted under Congress's Commerce Clause power); United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating, for the first time in decades, a statute as reaching beyond the Commerce Clause).

88. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) (comparing racial reapportionment to "political apartheid").

89. *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000) (holding that the Justice Department can deny preclearance of redistricting plans only where there is evidence of backsliding in minority voting power); Abrams v. Johnson, 521 U.S. 74, 78–79 (1997) (upholding a redistricting scheme in Georgia against a challenge that it diluted minority voting); Shaw v. Hunt, 517 U.S. 899, 901–02 (1996) (invalidating a race-conscious redistricting scheme in North Carolina); Miller v. Johnson, 515 U.S. 900, 927–28 (1995) (invalidating a race-conscious redistricting scheme in Georgia).

90. *See* Agostini v. Felton, 521 U.S. 203, 208–09 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)).

91. *See* Mitchell v. Helms, 530 U.S. 793, 801 (2000) (6-3 decision).

search for drugs,[92] to stop persons who flee even where there is no other individualized reason to suspect them of criminal activity,[93] to search without probable cause guests who are in a private home for business purposes,[94] and to search the personal belongings of innocent passengers in cars so long as there is probable cause to search the car as a whole.[95] All but the first of these cases was decided by the same conservative-liberal divide, with Justice Breyer twice joining the conservatives. Indeed, in the Term immediately preceding *Bush v. Gore*, the four liberal Justices managed to find themselves in a 5-4 majority in only a single case.[96]

This is not to suggest that the Court reached exclusively conservative results in the years before *Bush v. Gore*. For example, in the four Terms preceding the 2000 election, the Court struck down a federal statute that sought to overrule *Miranda v. Arizona*[97] and a Chicago antigang loitering ordinance;[98] rejected a rule requiring civil rights plaintiffs to plead their complaints with greater specificity than other litigants;[99] invalidated a federal forfeiture law as unconstitutional;[100] reaffirmed the validity of state limits on electoral campaign contributions;[101] held unconstitutional a scheme for student-directed school prayer at Texas high school football games;[102] and struck down limits on sexually explicit programming on cable television[103] and the Internet.[104] But five of these eight decisions were decided by margins greater than 5-4, suggesting that they were less close calls to begin with.

This qualitative review of the Rehnquist Court's jurisprudence before and after *Bush v. Gore* is necessarily selective. I have strived to report fairly on the Court's most prominent cases involving issues that typically trigger conservative-liberal divisions, but selecting these cases necessarily involves a certain exercise of judgment. I have focused on the Court's closely divided cases because cases decided by lopsided majorities are likely be less controversial, and therefore less likely to be affected by the concerns of perceived partisanship and legitimacy. I have also focused on the Court's prominent cases because it is there that the Justices are most likely to sense that the public is watching. The brief

92. *See* Whren v. United States, 517 U.S. 806, 818–19 (1996) (unanimous decision).
93. *See* Illinois v. Wardlow, 528 U.S. 119, 125–26 (2000) (5-4 decision).
94. *See* Minnesota v. Carter, 525 U.S. 83, 91 (1998) (6-3 decision).
95. *See* Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (6-3 decision).
96. *See* Linda Greenhouse, *The Nation: Split Decisions; The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, § 4, at 1. The case was *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated an anti-abortion law that failed to recognize an exception to preserve the health of the mother. In that case, Justice O'Connor joined the liberals to give them a majority.
97. *See* Dickerson v. United States, 530 U.S. 428, 431–32 (2000) (7-2 decision).
98. *See* City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (6-3 decision).
99. *See* Crawford-El v. Britton, 523 U.S. 574, 594–95 (1998) (5-4 decision).
100. *See* United States v. Bajakajian, 524 U.S. 321, 324 (1998) (5-4 decision).
101. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381–82 (2000) (6-3 decision).
102. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (6-3 decision).
103. *See* United States v. Playboy Entm't Group, 529 U.S. 803, 826–67 (2000) (5-4 decision).
104. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997) (7-2 decision).

summary recounted above suggests that when one focuses on the prominent, closely decided cases that typically trigger conservative-liberal splits, the Rehnquist Court was substantially less predictably conservative after *Bush v. Gore* than before, as conservative Justices showed more of an inclination to side with their liberal colleagues on the bench.

A statistical comparison of the four Terms after *Bush v. Gore* to the four Terms that preceded it supports the qualitative account, providing solid empirical evidence that partisan lines softened and that conservatives more often joined with liberals to form majorities in closely fought cases. Like the qualitative account, my statistical analysis also sought to examine the Court's prominent and closely divided cases. To avoid my own bias, I used as a proxy for "prominent" those cases involving individual rights or federalism discussed by Linda Greenhouse in her annual *New York Times* articles reviewing the most
Fn105 important cases of the Supreme Court's Term.[105] Greenhouse's articles appear shortly after each Term ends and provide an overview of the Court's Term, briefly describing the voting alignments and holdings in the Court's more notable decisions. As a proxy for "closely divided," I focused on the 5-4
Fn106 decisions among the prominent cases.[106] In the four years before *Bush v. Gore*, the traditional 5-4 split, with the five conservative Justices in the majority,
Fn107 occurred sixteen times in "prominent" cases.[107] In the four years after *Bush v.*
Fn108 *Gore*, that configuration occurred twelve times,[108] for a decrease of 25%. The

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105. *See* Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1; Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 2, 2002, at A1; Greenhouse, *supra* note 75, at A1; Linda Greenhouse, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. TIMES, July 2, 2001, at A12; Linda Greenhouse, *Supreme Court Weaves Legal Principles from a Tangle of Litigation*, N.Y. TIMES, June 30, 1998, at A20; Greenhouse, *supra* note 96; Linda Greenhouse, *The Nation: Supreme Court; The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, § 4, at 1; Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1; Greenhouse, *supra* note 56.

106. Due to partial concurrences, outcomes are not always clear-cut 5-4 decisions; votes can be counted in different ways. I relied on the *Harvard Law Review*'s yearly statistical reviews of the previous Term, which track true 5-4's—that is, where four Justices voted to decide a case in a manner different than that of the majority. *See, e.g.*, *The Supreme Court, 1996 Term—The Statistics*, 111 HARV. L. REV. 431, 434 n.i (1997). I then cross-referenced the 5-4 cases listed in the Harvard Statistics that consist of the traditional conservative or liberal majority with the individual rights and federalism cases appearing in Ms. Greenhouse's year-end articles to compile a list of "important" 5-4 cases from each Term that were decided along traditional lines.

107. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); United States v. Morrison, 529 U.S. 598 (2000); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000); Illinois v. Wardlow, 528 U.S. 119 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Jones v. United States, 527 U.S. 373 (1999); Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Printz v. United States, 521 U.S. 898 (1997); Kansas v. Hendricks, 521 U.S. 346 (1997); Agostini v. Felton, 521 U.S. 203 (1997); O'Dell v. Netherland, 521 U.S. 151 (1997); Abrams v. Johnson, 521 U.S. 74 (1997).

108. *See* United States v. Patane, 542 U.S. 630 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004); Schriro v. Summerlin, 542 U.S. 348 (2004); Hiibel v. Sixth Judicial Dist., 542 U.S. 177 (2004); Vieth v.

traditional liberal 5-4 split (the liberals joined by either Justice O'Connor or Justice Kennedy) occurred only five times in "prominent" cases in the four years before *Bush v. Gore*,[109] but fourteen times in the four years afterward,[110] nearly a three-fold increase.

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Consistent with my theory that this trend would be most evident in the cases most closely watched, the liberalizing trend is somewhat less evident, although still present, when one considers all 5-4 splits, not just those involving individual rights or federalism and sufficiently notable to make Linda Greenhouse's year-end overview. There have been seventy-two 5-4 splits in the four Terms since *Bush v. Gore*, as compared with sixty-seven such splits in the four Terms before *Bush v. Gore*. In 5-4 cases, the conservative majority has voted together less often in the wake of *Bush v. Gore* (38.9% after vs. 47.8% before), while the liberal majority has voted together slightly more often (27.8% after vs. 20.9% before). The fact that these shifts are less pronounced than in the prominent cases is consistent with my hypothesis that the Justices would put a premium on countering the perception of partisanship in the cases that receive the most attention.[111]

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There has also been an increase in "unusual" 5-4 splits since *Bush v. Gore* in prominent cases, using "unusual" to denote splits that fall into neither the traditional liberal nor the traditional conservative groupings, and prominent to mean cases involving individual rights and federalism identified in Ms. Greenhouse's year-end review. In the four Terms before *Bush v. Gore*, there were

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Jubelirer, 541 U.S. 267 (2004); Demore v. Kim, 538 U.S. 510 (2003); Georgia v. Ashcroft, 539 U.S. 461 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); Republican Party of Minn. v. White, 536 U.S. 765 (2002); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); McKune v. Lile, 536 U.S. 24 (2002).

109. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Crawford-El v. Britton, 523 U.S. 574 (1998); Lindh v. Murphy, 521 U.S. 320 (1997).

110. *See* McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005); Kelo v. City of New London, 125 S. Ct. 2655 (2005); Rompilla v. Beard, 125 S. Ct. 2456 (2005); Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169 (2005); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); Roper v. Simmons, 543 U.S. 551 (2005); Missouri v. Seibert, 542 U.S. 600 (2004); Tennessee v. Lane, 5414 U.S. 509 (2004); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004); McConnell v. FEC, 540 U.S. 93 (2003); Stogner v. California, 539 U.S. 607 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Rush Prudential HMO v. Moran, 536 U.S. 355 (2002); Alabama v. Shelton, 535 U.S. 654 (2002).

111. There were eighteen 5-4 votes in the 1996 Term, fifteen in 1997, sixteen in the 1998 Term, and eighteen in the 1999 Term. *See The Supreme Court, 1996 Term—The Statistics*, *supra* note 106, at 434; *The Supreme Court, 1997 Term—The Statistics*, 112 HARV. L. REV. 366, 371 (1998); *The Supreme Court, 1998 Term—The Statistics*, 113 HARV. L. REV. 400, 405 (1999); *The Supreme Court, 1999 Term—The Statistics*, 114 HARV. L. REV. 390, 395 (2000). The traditional conservative majority accounted for thirty-two of the sixty-seven 5-4 cases, and the traditional liberal majority accounted for fourteen. *See id*. Following the Term of *Bush v. Gore*, there were twenty-one 5-4 votes in October Term 2001, fourteen in 2002, nineteen in 2003, and eighteen in 2004. *See The Supreme Court, 2001 Term—The Statistics*, *supra* note 45, at 458; *The Supreme Court, 2002 Term—The Statistics*, *supra* note 45, at 485; *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 503 (2004); *The Supreme Court, 2004 Term—The Statistics*, *supra* note 45, at 424. During these four Terms, the traditional conservative majority accounted for twenty-eight of seventy-two 5-4 cases, and the traditional liberal majority accounted for twenty.

Fn113 seven such unusual splits;[112] in the four years afterward, there were eleven,[113] an increase of over 56%.

Finally, there is evidence that Justice O'Connor in particular and, to a lesser extent, Justice Kennedy were more likely to join liberal majorities in prominent contested cases since *Bush v. Gore*. If one considers only those cases in which the four more liberal Justices vote together and are joined in a 5-4 or 6-3 majority by Justice O'Connor, Justice Kennedy, or both, one finds that Justice O'Connor sided with the liberals almost twice as often in the four years after *Bush v. Gore* as before. She voted with the liberal bloc eight times in the four years before *Bush v. Gore* and fifteen times in the four years after *Bush v.* Fn114 *Gore*.[114] Over the same period, Justice Kennedy sided with the liberal bloc slightly more often post-*Bush v. Gore*, doing so seven times prior to the decision Fn115 and nine times afterward.[115]

One should not make too much of this data. The Court decides only a relatively small number of sharply divisive and prominent cases each Term, so the annual sample size is small. Furthermore, because there have been only four Terms since *Bush v. Gore*, the overall numbers available to work with are not as large as a statistician might like. At the same time, the admittedly primitive quantitative analysis reinforces the qualitative account. It seems fair to say that

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112. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Playboy Entm't Group, 529 U.S. 803 (2000); United States v. Bajakajian, 524 U.S. 321 (1998); Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997); Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997).

113. *See* Van Orden v. Perry, 125 S. Ct. 2854 (2005); Granholm v. Heald, 125 S. Ct. 1885 (2005); United States v. Booker, 543 U.S. 220 (2005) (consisting of two "unusual" 5-4 majorities, each delivering the opinion of the Court in part); Ashcroft v. ACLU, 542 U.S. 656 (2004); Blakely v. Washington, 542 U.S. 296 (2004); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Virginia v. Black, 538 U.S. 343 (2003); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002); Harris v. United States, 536 U.S. 545 (2002); US Airways v. Barnett, 535 U.S. 391 (2002); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

114. *Compare* Stenberg v. Carhart, 530 U.S. 914 (2000), Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000), Williams v. Taylor, 529 U.S. 362 (2000), Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999), City of Chicago v. Morales, 527 U.S. 41 (1999), Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), Lindh v. Murphy, 521 U.S. 320 (1997), *and* M.L.B. v. S.L.J., 519 U.S. 102 (1996), *with* McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005), Rompilla v. Beard, 125 S. Ct. 2456 (2005), Miller-El v. Dretke, 125 S. Ct. 2317 (2005), Rasul v. Bush, 542 U.S. 466 (2004), Tennard v. Dretke, 542 U.S. 274 (2004), Tennessee v. Lane, 541 U.S. 509 (2004), Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004), McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), Stogner v. California, 539 U.S. 607 (2003), Lawrence v. Texas, 539 U.S. 558 (2003), Grutter v. Bollinger, 539 U.S. 306 (2003), Rush Prudential HMO v. Moran, 536 U.S. 355 (2002), Atkins v. Virginia, 536 U.S. 304 (2002), Alabama v. Shelton, 535 U.S. 654 (2002), *and* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

115. *Compare Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, *Williams*, 529 U.S. 362, *Olmstead*, 527 U.S. 581, *City of Chicago*, 527 U.S. 41, Bragdon v. Abbott, 524 U.S. 624 (1998), Crawford-El v. Britton, 523 U.S. 574 (1998), *and M.L.B.*, 519 U.S. 102, *with* Kelo v. City of New London, 125 S. Ct. 2655 (2005), *Miller-El*, 125 S. Ct. 2317, Roper v. Simmons, 543 U.S. 551 (2005), Missouri v. Seibert, 542 U.S. 600 (2004), *Rasul*, 542 U.S. 466, *Tennard*, 542 U.S. 274, *Lawrence*, 539 U.S. 558, *Atkins*, 536 U.S. 304, *and EEOC*, 534 U.S. 279.

the Rehnquist Court shifted to the left after *Bush v. Gore*, at least in its most prominent and controversial cases—namely, those involving federalism and individual rights—toward less predictably partisan divisions and more liberal results. In my view, the most likely explanation for this development is not that the conservative Justices suddenly had a change in their underlying political beliefs, but that their sensitivity to restoring the legitimacy of the institution led them to be more open to forming alliances across traditional battle lines.

III. THE AFTERMATH: RESTORING THE RULE OF LAW

If the Court were concerned about the tarnishing of its image in the aftermath of *Bush v. Gore*, one might also expect to see a renewed emphasis on what differentiates law from politics. The cases from the 2003 Term that inspired this Symposium fit this pattern, too. Each in its own way stresses the values of the rule of law and, in particular, the importance of legal constraints on official discretion and fair procedures for assessing the propriety of deprivations of liberty. If increased concern for the rule of law is an outcome of *Bush v. Gore*, it could not have come at a more propitious time, as the threat of terrorism in the wake of the attacks of September 11, 2001, has led the Executive Branch to launch an aggressive assault on those very values. Perhaps the Court's single most important post-*Bush v. Gore* decision, *Hamdi v. Rumsfeld*, directly rebuffs the assault on the rule of law, proclaiming in the now famous words of Justice O'Connor that "a state of war is not a blank check for the President . . . ."[116] Fn116

The results in the enemy combatant cases strongly reaffirm rule of law values in a context in which the Supreme Court has historically allowed deference to the political branches to trump virtually all legal considerations. In World War I, Congress authorized and the Executive undertook a nationwide campaign of prosecuting and incarcerating critics of the war, and the Court affirmed every conviction that reached it.[117] Fn117 In World War II, the Court infamously deferred to the Executive on the asserted (but entirely unproven) necessity of detaining 120,000 persons of Japanese ancestry on the suspicion that some among them might be spies or saboteurs.[118] Fn118 In the Cold War, the Court did nothing to check the abuses of McCarthyism until three years after the Senate had censured Senator McCarthy and the movement was on the wane.[119] Fn119 While the Court

116. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

117. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 629 (1919) (upholding the conviction of defendants who distributed circulars in support of the Russian Revolution); Debs v. United States, 249 U.S. 211, 216 (1919) (upholding the conviction of a defendant who made public speech in support of socialism); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (upholding the conviction of defendants who published newspaper articles critical of the war effort); Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding the conviction of defendants who circulated anti-war leaflets to drafted and enlisted individuals).

118. *See* Korematsu v. United States, 323 U.S. 214, 219 (1944).

119. *See, e.g.*, MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 215, 236 (1977); ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 213 (1999).

eventually—after the immediate crises passed—adopted doctrines that make a direct repetition of these abuses substantially less likely today,[120] its performance in the midst of each crisis was lamentable and hardly inspired faith in the rule of law.

The 2004 enemy combatant decisions, by contrast, strongly rejected claims that the Court must defer to the Executive in the midst of the crisis.[121] The administration argued that the courts had no jurisdiction, and therefore literally no role to play, with respect to the detention of hundreds of foreign nationals at Guantanamo Bay, Cuba.[122] It went so far as to maintain that any legislative or judicial limitation on the President's power to detain enemy combatants would be an unconstitutional infringement of the Article II Commander-in-Chief authority.[123] The administration initially took virtually the same position with regard to citizens held as "enemy combatants" in the United States, but after the Court of Appeals for the Fourth Circuit rejected that "sweeping proposition" in *Hamdi v. Rumsfeld,*[124] the government fell back to a position that admitted that the courts had jurisdiction over habeas petitions filed by United States citizens held in the United States.[125] Nevertheless, the government asserted that the courts' role was limited to making sure the Executive Branch had said the right words in an affidavit classifying the detainee as an enemy combatant.[126] On its view, the courts could not look behind the affidavit, could not assess the truth of the facts asserted therein, and were obligated to accept generic unidentified hearsay assertions as sufficient to justify the detentions.

The Supreme Court rejected both positions. In *Rasul v. Bush*, the Court held that federal courts do in fact have jurisdiction to entertain challenges to the detention of foreign nationals at Guatanamo Bay.[127] Guantanamo Bay would not be, as the Administration had hoped, a lawless zone where the government could hold human beings indefinitely without process, without any accounting as to why the detainees were there, and without any legal limits. The rule of law would apply, enforceable in federal courts. The Court did not directly resolve the merits of what rights the detainees had or whether those rights had been violated, as those matters had not been decided below, but it did state that if proven true, the detainees' allegations unquestionably stated a claim for relief.[128] And it reversed the decisions of the lower courts, which had thrown out the challenges at the jurisdictional threshold, largely on the reasoning that

120. *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2573–75 (2003).

121. *See Hamdi*, 542 U.S. at 507; Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

122. *See* Brief for Respondents at 13–15, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

123. *Id.* at 42, 44.

124. 296 F.3d 283 (4th Cir. 2002).

125. *See, e.g.*, *Rasul*, 542 U.S. at 480.

126. *See, e.g.*, Brief for Respondents at 25–27, *Hamdi*, 542 U.S. 507 (No. 03-6696).

127. *See Rasul*, 542 U.S. at 480.

128. *See id.* at 484 & n.15.

Fn129 foreign nationals outside the border have no constitutional rights.[129]

In *Hamdi*, the Court even more dramatically affirmed the importance of the rule of law. Here the Court reached the merits, and although it upheld the Executive's authority to detain as an enemy combatant a U.S. citizen captured fighting for the Taliban on a battlefield in Afghanistan, it rejected, by a vote of 8-1, the Administration's position that the courts' role was limited to rubber-stamping a hearsay declaration asserting that the detainee was in fact aligned
Fn130 with enemy forces.[130] Instead, the Court insisted that the fundamental requisites of due process applied, namely notice of the charges and a meaningful opportu-
Fn131 nity to present a defense before a neutral decisionmaker.[131] As noted above, Justice O'Connor, writing for the plurality, strongly affirmed the continuing relevance of the limits of constitutional law on the President, even when he was acting as Commander-in-Chief pursuant to a congressional authorization to use military force, and even where the capture had taken place on a foreign
Fn132 battlefield.[132]

Other Justices also strongly affirmed the importance of legal limits. Justice Souter explained that, given the hydraulics of national security, trust in the Executive is particularly ill-placed on questions of liberty and security:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security
> Fn133 legitimately raises.[133]

And Justice Stevens, dissenting in *Padilla*, insisted that the rule of law was even more important to a democratic state than the right to vote itself: "Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of
Fn134 law."[134]

The *Blakely* and *Crawford* decisions also sounded important rule of law

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129. *See id.* at 484; *cf.* Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (holding that habeas relief may not be made available to aliens when basic constitutional rights are not); Rasul v. Bush, 215 F. Supp. 2d 55, 70–71 (D.D.C. 2002) (same).

130. *See Hamdi*, 542 U.S. at 533–35, 537. Only Justice Thomas adopted the Executive's position that the courts' role was limited to rubber-stamping a declaration filed by the government. *See id.* at 579, 581–86 (Thomas, J., dissenting).

131. *Id.* at 509, 533 (majority opinion).

132. *See id.* at 518, 536.

133. *Id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

134. Rumsfeld v. Padilla, 52 U.S. 426, 465 (2004) (Stevens, J., dissenting). As noted above, the majority declined to reach the merits in Padilla's case, concluding that Padilla's lawyers had filed their

themes, but with a different twist. Where the enemy combatant cases stressed the importance of judicially enforceable legal limits on Executive power, even in wartime, in *Blakely* and *Crawford* the Court emphasized the need for legal limits on the power of *judges* in particular. Both cases are ultimately about the role of juries in checking the power of judges. The infirmity in the sentencing guidelines invalidated in *Blakely* was precisely that they gave judges too much discretion; the Court's solution was to read the Sixth Amendment's jury trial provision to require that a jury try any contested facts used to increase a sentence beyond the prescribed statutory maximum set out by the legislature.[135] As the Court explained, the jury trial right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[136]

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Similarly, in *Crawford* the Court insisted that its view of the Confrontation Clause was important precisely to restrict judicial discretion and to elevate law over discretionary judgment. For the Court, Justice Scalia wrote:

> We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.[137]

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It is particularly interesting, in light of the criticisms of *Bush v. Gore*, that in both *Blakely* and *Crawford* the Court emphasized the need for legal constraints on *judicial* decision making.

In short, in each of these decisions the Court crossed traditional conservative-liberal lines, reached the more liberal result, and expressly affirmed the value of the rule of law in doing so. And as I suggest above, these cases are not aberrations, but part of a larger trend evident in the Rehnquist Court after *Bush v. Gore*—toward rehabilitating the Court's legitimacy as the institution that "say[s] what the law is."[138]

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If this assessment is correct, then *Bush v. Gore* may have a silver lining. Although the Court intervened in a contentious political dispute to cement the victory of a President who lost the popular election but would have won an

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habeas petition in the wrong court because when they filed it in New York, he had already been transferred to a naval brig in South Carolina. *See id.* at 432, 447.

135. *See* Blakely v. Washington, 542 U.S. 296, 301, 304–06.

136. *Id.* at 305–06.

137. Crawford v. Washington, 541 U.S. 36, 67–68 (2004) (citations omitted).

138. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting that it is "emphatically the province and duty of the judicial department" to interpret rules of law).

election among the sitting Justices, the very controversy the Court stirred by taking such action seems to have prompted its conservative members, those who would be held "responsible" for *Bush v. Gore*, to be more open to crossing traditional lines to support more liberal results. As such, it may have triggered an increased emphasis on the "rule of law" as a way of restoring the perception that the Court is guided by law, not partisan politics, in its constitutional decisionmaking. And with the Executive Branch asserting unchecked power and relying increasingly on secrecy in the "war on terror," a heightened sensitivity to the rule of law has never been more important. It is noteworthy that despite the widespread public criticism of the Administration's assertion of unchecked authority over U.S. citizen "enemy combatants," only the Court was willing to stand up to the President.

IV. CONCLUSION

One of the things that made *Bush v. Gore* such a difficult case was the evident fact that among the issues at stake was the future composition of the Supreme Court itself. Whoever won the 2000 election might well have determined which of the Justices would be casting majority votes and shaping the law for the rest of their careers and which ones would be relegated to dissent. The conservative majority voted as a bloc, as they had consistently done in the period preceding the decision, and prevailed. Ironically, though, the Rehnquist Court seems to have moved to the left after *Bush v. Gore*, as conservative Justices showed more inclination to side with their liberal counterparts in support of liberal outcomes. And in at least some of their most prominent decisions, the Rehnquist Court displayed a particular sensitivity to the rule of law. These reactions may well reflect efforts—possibly conscious, but more likely subconscious—to rehabilitate the Court's image with the public, to dispel the charge that it is just another political, partisan institution, and to restore the legitimacy it enjoys as a body ruled by law rather than everyday politics.

It is far too soon to conclude, however, that Bush won the battle but lost the war with respect to conservative hegemony on the Supreme Court and *Bush v. Gore*. For one thing, while the data discussed above do suggest that the Rehnquist Court reacted to the criticism directed at its intervention, the Rehnquist Court is no more. Because George Bush was in office on September 11, 2001, in part thanks to *Bush v. Gore*, he gained a huge boost in popular support attributable to the rally-around-the-leader effect of such an attack. President Bush's approval ratings shortly after the attacks stood at 90 percent, the highest ever recorded for a President.[139] That boost in turn may well have contributed to President Bush's victory over Sen. John Kerry in 2004, which has now paid off in the opportunity to appoint two Justices to the Supreme Court.

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139. *See A Nation Challenged*, N.Y. TIMES, Sept. 24, 2001, at B6 (reporting on a Gallup Poll, conducted on Sept. 21–22, 2001, *available at* http://www.usatoday.com/news/polls/tables/live/2003-11-17-bush-poll.htm).

So what should we make of *Bush v. Gore* now that the Rehnquist Court is history? What will its impact be on the Roberts Court? Will Chief Justice Roberts and Justice Alito feel as obliged to side with their liberal colleagues as with their conservative ones, especially given their appointment by a President who has declared Justices Scalia and Thomas as his ideal Justices? Predicting the direction of the Supreme Court is always a hazardous game. But it is worth noting that, as Justice Robert Jackson has written, "the Court influences appointees more consistently than appointees influence the Court."[140] Chief Justice Roberts and Justice Alito, while less likely to feel "responsible" for *Bush v. Gore*, are nonetheless well aware of the criticism it brought on the Court for its apparent partisanship. They, too, as new Justices, have an interest in the long-term legitimacy of the Court as an institution and therefore in the public perception of its workings. Thus, even though they were not personally involved in the decision, they too may feel a subconscious pull to dispel the appearance of partisan division.

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More broadly, the phenomenon identified in this paper suggests that public opinion can play a substantial checking function with respect to judicial decision-making. This checking function in turn plays an important role in constraining the Court and therefore in maintaining its legitimacy. The Court decides, the public reacts, and the Court then responds accordingly. In some historic instances, the reaction and response have been focused on specific doctrines, as illustrated by the Court's repudiation of *Lochner v. New York*[141] in the wake of widespread criticism, the election of Franklin Delano Roosevelt, the Depression and the New Deal, and President Roosevelt's threat of a court-packing plan. Justice Scalia has argued that judicial response to popular pressure regarding particular doctrines undermines the Court's legitimacy, because the Court is supposed to be above the political fray and to act as a check on majoritarian will.[142] But in the case of *Bush v. Gore*, the reaction and response were focused not on any specific substantive doctrinal developments, but rather on the role of the Court itself in a democratic polity. The criticisms of *Bush v. Gore* were not that the Court got the equal protection doctrine wrong, although it almost certainly did, but that it acted very much like a political institution, not a court of law. Instead of staying above the fray and being guided by long-term legal principle, it was right there in the muck, driven, by all appearances, by partisan self-interest. Here the criticism is directed not at outcome but at rule.

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Institutional meta-criticism of this type—that the Court is not acting like a court should—is of a very different order than criticism of specific substantive doctrines, and responding to it is likely to reinforce rather than undermine the

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140. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS vii (Octagon Books 1979) (1941).

141. 198 U.S. 45 (1905).

142. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) (arguing that the Court undercuts its own legitimacy by responding to public pressure in ruling on abortion issues).

Court's overall legitimacy. Admittedly, it is not always easy to tell the difference. Substantive commitments on particular issues often drive institutional critiques, as illustrated by the use of the term "judicial activism" by all sides to label decisions of whose substantive bottom lines they disapprove. But in the case of *Bush v. Gore,* the focal point of the criticism was precisely the Court's institutional role. In the context of *Bush v. Gore*, the debate was not about the right doctrinal result, but about the proper role of courts in a democratic society. On that meta-subject, the Court must, and properly does, take public opinion into account. In the end, it is public opinion about whether the Court is playing its proper role that determines the Court's legitimacy, and gives it the authority to resolve contested constitutional disputes. Because *Bush v. Gore* called that authority into question, the decision has had a liberal legacy that few would have ever predicted.

ADDENDUM A – A Survey of Unsigned Editorials in the Top 20 Newspapers by Circulation in the Week Following *Bush v. Gore*

Editorials (unsigned)	Positive	Neutral	Critical
7 to 2, WALL. ST. J., Dec. 13, 2000, at A26 (marking the decision as requiring Gore's concession).		X	
A Damaged Court, STAR-LEDGER (Newark), Dec. 14, 2000, at 38 (criticizing the opinion as "dubious" and an abandonment of adherence to states' rights).			X
A President-Elect, WASH. POST, Dec. 14, 2000, at A34 ("We think the Supreme Court should have left to Florida the question . . . of correcting the very real flaws . . . in the voting system [and] thereby have shown more deference to the legitimate impulse to count as accurately as possible, while lessening their own political jeopardy").			X
A Promise to Keep, STAR-LEDGER (Newark), Dec. 15, 2000, at 34 (arguing that discontent with the election should be directed at the Court, not at Bush).		X	
A Victory for Equal Protection, CHI. TRIB., Dec. 13, 2000, at 22N ("Tuesday night's decision suggests that, while they will be criticized for their ruling, the U.S. Supreme Court justices simply wouldn't tolerate a violation of the notion of equal protection . . . .").	X		
An End, at Last?, DETROIT NEWS, Dec. 13, 2000, at 16A (labeling the decision "a murky mix of the theoretical and practical").		X	
Ballot Lock Box, BOSTON GLOBE, Dec. 16, 2000, at A18 (criticizing the decision as inconsistent with democracy and noting that "the biggest loser in *Bush v. Gore* was neither candidate, but the nation's confidence in the impartiality of judges").			X
Beyond the Election; Supreme Court Fault Lines, N.Y. TIMES, Dec. 14, 2000, at A38 ("[R]ather than ennobling the law and the Constitution, and sagaciously bringing the election to a resolution built on the ballot, the justices eroded public confidence in the court itself.").			X
Beyond the Election; Mr. Gore's Farewell, Mr. Bush's Task, N.Y. TIMES, Dec. 14, 2000, at A38 (insisting that Bush will have to rectify the failure of the Court to legitimize his presidency).			X

Editorials (unsigned)	Positive	Neutral	Critical
Bush v. Gore, WASH. POST, Dec. 12, 2000, at A46 (remarking, in advance of the decision and with regard to the oral arguments only, that "the court's hearing . . . didn't strike us as a partisan squabble").		X	
Can Supreme Court Lead Nation Out of This Mess?, S.F. CHRON., Dec. 12, 2000, at A28 (warning, in advance of the decision, that "any 5-to-4 ruling will be fair game for charges of partisanship").			X
Candidates' New Mantra: Unite a 'House Divided', S.F. CHRON., Dec. 14, 2000, at A34 (criticizing the decision as leaving "a bad odor in the nation's air" and being "tortured . . . border[ing] on addlepated").			X
Catch-22 Ruling Brings Election Near Messy End, USA TODAY, Dec. 13, 2000, at 16A ("If the U.S. Supreme Court sought to bring the presidential election to a dignified and convincing ending in its ruling Tuesday night, it failed utterly. Its splintered decision injured its own credibility, that of the courts generally and of the presidential election process.").			X
Count Some of the Votes, WALL ST. J., Dec. 12, 2000, at A26 (cataloguing, in advance of the decision and with regard to the oral arguments only, the weaknesses in the Gore arguments presented to the Court).	X		
Court's Tangled Ruling Produces Clear-Cut Results, ATLANTA J. & CONST., Dec. 13, 2000, at 22A ("[T]his is perhaps the least acceptable outcome the court could have produced, because its decision was based not on the issue of justice, or on the U.S. Constitution, or even on Florida law, but on the basis of the calendar.").			X
Don't Blame the Supreme Court, CHI. TRIB., Dec. 15, 2000, at 28N (arguing that the Supreme Court did what was necessary to preserve basic rules of fairness.).	X		

Editorials (unsigned)	Positive	Neutral	Critical
Equal Protection: Supreme Court Rules Recounts Must Have Standards, HOUSTON CHRON., Dec. 13, 2000, at A42 (labeling the decision as lacking both clarity and finality and stating that it "raised suspicions that [the Court's] members are political creatures who are willing to influence and define the nation's political process.").		X	
Healing Can Begin in Wake of Court Ruling, ATLANTA J. & CONST., Dec. 13, 2000, at 22A (expressing extreme pleasure that the Supreme Court "recognized the illegitimacy of the recounting carnival in Florida.").	X		
High Court Overrules Voters, DAILY NEWS (N.Y.), Dec. 13, 2000, at 38 (criticizing the Supreme Court for substituting its judgment for the will of the voters and giving the White House to the wrong man).			X
High Court's Integrity at Risk, DAILY NEWS (N.Y.), Dec. 12, 2000, at 50 (warning that the Supreme Court must be exceedingly careful not to give any appearance of picking a winner by replacing the will of the people with its own judgment.).			X
Image of Justices as Partisans Is Overdone, USA TODAY, Dec. 12, 2000, at 16A (determining that the justices refrained from marching "straight down the expected ideological path" and thereby lent some much needed credibility to the electoral process).		X	
In Court: Equal Protection Could Muddle Elections Nationwide, HOUSTON CHRON., Dec. 17, 2000, at 2 (predicting that the Court's decision applying equal protection to individual voters will spawn litigation of election disputes nationwide with uncertain results and effects that drag out past the time the winner is to take office).		X	
Low Moment for High Court, DAILY NEWS (N.Y.), Dec. 14, 2000, at 16 (criticizing the Court's decision as an unwise political decision that must nonetheless be accepted and supported).			X
Now's the Time to Become United: Let the Governing Begin, ARIZ. REPUBLIC (Phoenix), Dec. 14, 2000, at 10B (urging unity after the "somewhat unsettling conclusion" of the election).		X	

Editorials (unsigned)	Positive	Neutral	Critical
Power Not Authority, STAR-LEDGER (Newark), Dec. 14, 2000, at 39 (calling the result "a terrible venture away from the territory of democracy").			X
Presidential Saga Winds Down; Time to Heal Nation's Election Wounds, ARIZ. REPUBLIC (Phoenix), Dec. 13, 2000, at 8B (terming the Supreme Court's decision a "principled result").	X		
'Supreme' Court?, DENVER POST, Dec. 13, 2000, at B10 (arguing that the Supreme Court's "fractured per curiam decision will exacerbate, rather than ease, our national division").			X
Supreme Irony, WALL ST. J., Dec. 14, 2000, at A26 (calling the Court's decision Rehnquist's "finest hour" after Gore's inappropriate refusal to concede forced the Court to decide the case and noting the irony that Gore was "finally defeated by the very legal process he sought to exploit.").	X		
The Ballot Reform Imperative, N.Y. TIMES, Dec. 17, 2000, § 4, at 16 (calling the Court's decision the "shameful post-mortem of the messy 2000 presidential contest.").			X
The Brilliant Boies Blunders, S.F. CHRON., Dec. 18, 2000, at A22 (attributing the outcome, in part, to Vice President Gore's attorney David Boies' failure to offer the Court a defined uniform standard).		X	
The Court Rules for Mr. Bush, N.Y. TIMES, Dec. 13, 2000, at A34 (charging Americans to respect the authority of the ruling and the legitimacy of the new presidency whether or not they agree with the ruling to bar a recount in Florida, which "comes at considerable cost to the public trust and the tradition of fair elections.").			X
The Court's Gift to Dubya, STAR-LEDGER (Newark), Dec. 14, 2000, at 39 (referring to the Court's "conservative cadre" as "the real engine that crushed Al Gore").			X
The End of the Struggle, L.A. TIMES, Dec. 13, 2000, at B8 (predicting that the "bitter set of decisions this case has generated will taint this [C]ourt with disquieting questions about its distance from the partisan fray.").		X	

Editorials (unsigned)	Positive	Neutral	Critical
The Nation's Next Task, STAR-LEDGER (Newark), Dec. 13, 2000, at 24 (indicating that the Court's decision made a Gore victory impossible).		X	
The Ultimate Split Decision, S.F. CHRON., Dec. 13, 2000, at A22 (calling the Supreme Court a Bush "trump card" falling cleanly on ideological lines, and noting the unsettling impression that "politics prevailed.").			X
Winner, Loser - Co-Conciliators, PLAIN DEALER (Cleveland), Dec. 14, 2000, at 14B (stating that the fact that "the victory involved the fractious participation of the highest courts is regrettable," but emphasizing the importance of accepting the final outcome and moving on as a nation).		X	
Total: 38	6 positive	12 neutral	18 critical

ADDENDUM B – A Survey of Signed Op-Eds in the Top 20 Newspapers by Circulation in the Week Following *Bush v. Gore*

Op-Editorials	Positive	Neutral	Critical
Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1 (suggesting that the *Bush v. Gore* decision was inconsistent with logic, history, tradition, precedent, and the purposes behind the Equal Protection Clause).			X
Jack M. Balkin, *Supreme Court Compromises Its Legitimacy*, BOSTON GLOBE, Dec. 12, 2000, at A23 (indicating that an attempt to resolve a constitutional crisis will destroy public faith in the Court's impartiality).			X*
Margaret A. Burnham, *A Cynical Supreme Court*, BOSTON GLOBE, Dec. 14, 2000, at A23 (discussing how *Bush v. Gore* created a new equal protection theory that the Court used to obscure the election's inequalities and eviscerate black voters' rights)			X
Dennis Byrne, *Public Behind Bush as President*, CHI. TRIB., Dec. 18, 2000, at 13N (suggesting that the decision supported states' rights by reinforcing states' abilities to set election rules and that the Court only stopped the recount because its selectivity violated the Constitution).	X		
George Cantor, *Democrats End Up Putting Liberalism on Trial*, DETROIT NEWS, Dec 16, 2000, at 8C (describing how the Court justifiably stopped the recount, which would have only included selected counties without any standard definition of a legal vote).	X		
Erwin Chemerinsky, *Court Responds to Values Rather than Partisanship*, L.A. TIMES, Dec. 15, 2000, at B9 (arguing that the Court's decision should not be criticized because it was political, but rather because it failed to adequately address the legal issues).			X

Op-Editorials	Positive	Neutral	Critical
Lloyd N. Cutler, *How Not to Repeat Florida*, WASH. POST, Dec. 18, 2000, at A27 (suggesting that the Court should not have decided a national political contest with a single judicial vote).			X
E. J. Dionne Jr., *So Much for States' Rights*, WASH. POST, Dec. 14, 2000, at A35 (stating that the most troublesome aspect of the opinion was the intrusion into a state election process by champions of states' rights).			X
Michael C. Dorf, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11 (criticizing the Court for basing its opinion on the Fourteenth Amendment when it had deemed the Fourteenth Amendment issue not worthy of review two weeks earlier).			X
John Farmer, *Gore Exit Steals Show*, STAR-LEDGER (Newark), Dec. 15, 2000, at 35 (citing the lack of time as one of the reasons the majority used to bar the recount).		X	
Thomas L. Friedman, *Medal of Honor*, N.Y. TIMES, Dec. 15, 2000, at A39 (indicating that the majority was more concerned with meaningless deadlines than the sanctity of votes in forming its opinion).			X
Paul A. Gigot, *Liberals Discover the Tyranny of the Courts*, WALL ST. J., Dec. 15, 2000, at A16 (describing the opinion as "sav[ing] the country another month of fighting before reaching the same result").	X		
Ellen Goodman, *Very Human Beings Under Those Robes*, BOSTON GLOBE, Dec. 14, 2000, at A23 (indicating that the Justices' opinions were dictated by their politics).			X
Lani Guinier, *A New Voting Rights Movement*, N.Y. TIMES, Dec. 18, 2000, at A27 (stating that the Court's decision allowed the interests of the Florida legislature to trump the rights of voters).			X

Op-Editorials	Positive	Neutral	Critical
Jim Hoagland, *Dynasty at Work*, WASH. POST, Dec. 14, 2000, at A35 (calling the opinion "a shameful substitute for the clear, compelling argument to the nation they had obliged themselves to give").			X
Dennis J. Hutchinson, *Law and Politics in the U.S. Supreme Court*, CHI. TRIB., Dec. 17, 2000, at 21C (arguing that the decision was neither a "self-inflicted wound" nor a triumph of law over politics).		X	
Neal Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35 (calling the opinion "lawless and unprecedented").			X
Michael Kelly, *Democracy Rescued*, WASH. POST, Dec. 14, 2000, at A35 (stating that the Court was divided because of disagreement about the remedy, not the presence of constitutional problems with the recount).	X		
Michael Kinsley, *Unequal Protection*, WASH. POST, Dec. 15, 2000, at A41 (arguing that the Court created a "newly discovered constitutional right" of voters to have an equal chance of having their ballot counted correctly).			X
Douglas W. Kmiec, *The Court's Decision Is Law, Not Politics*, L.A. TIMES, Dec. 14, 2000, at B11 (describing the opinion has "soundly reasoned" and having a "measured tone").	X		
Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing, contrary to popular wisdom, that the Rehnquist court is activist and arrogant).			X
Charles Krauthammer, *Defenders of the Law*, WASH. POST, Dec. 14, 2000, at A41 (supporting the reasoning in *Bush v. Gore* on the grounds that a liberal activist Florida Supreme Court's ruling was arbitrary and unconstitutional).	X		

Op-Editorials	Positive	Neutral	Critical
Anthony Lewis, *Abroad at Home; A Failure of Reason*, N.Y. TIMES, Dec. 16, 2000, at A19 (arguing that the curse of *Bush v. Gore* is its failure to use legal reasoning to reach the outcome).			X
Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 13, 2000, at A26 (noting the description of a "sharply split" court misrepresents the Court's decision because Breyer and Souter indicated a manual recount would be unconstitutional, but ultimately declaring the decision was unwise for the nation).			X
Paul Mulshine, *Gore is Dick Without the Tricks*, STAR-LEDGER (Newark), Dec. 12, 2000, at 31 (pointing out that the decision was split along party lines).		X	
David Nyhan, *Gore's Best Moment Comes Too Late*, BOSTON GLOBE, Dec. 15, 2000, at A27 (calling the decision "a 5-4 heist that went against the wishes of 50 million voters").			X
Charles J. Ogletree Jr., *The Court's Tarnished Reputation*, BOSTON GLOBE, Dec. 17, 2000, at C7 (arguing that the biggest loser in *Bush v. Gore* is the Supreme Court's reputation).			X
Clarence Page, *Turning 'Equal Protection' Upside Down*, CHI. TRIB., Dec. 17, 2000, at 21C (noting that the Justices "sound[ed] less judicial than political, and the Supreme Court's mighty reputation is cheapened for years to come").			X
O. Ricardo Pimentel, *Irreparable Harm Is Right, Without Full Vote Count*, ARIZ. REPUBLIC (Phoenix), Dec. 12, 2000, at 7B (criticizing the opinion's logic as "purely another case of [a] desired outcome in search of a way to get there").			X

Op-Editorials	Positive	Neutral	Critical
William Raspberry, . . . *Or Supremely Biased?*, WASH. POST, Dec. 15, 2000, at A41 (complaining that "the U.S. Supreme Court majority . . . seems to [have] traversed at least half the distance between philosophy and partisanship").			X
Robert Robb, *Supremes' Election Song Went Flat*, ARIZ. REPUBLIC (Phoenix), Dec. 15, 2000, at 9B (critiquing the Court's action as "an improper judicial intervention in a quintessentially political question" that should have been decided by Congress).			X
A.M. Rosenthal, *Dissent That Stains the Dissenters*, DAILY NEWS (N.Y.), Dec. 15, 2000, at 81 (criticizing the dissent as a "sweeping, overblown denunciation of the court's majority decision" that "seemed intended to shake public confidence not only in that opinion . . . but in the judicial system itself").		X	
Steven R. Rothman, *Nation Can Reunite Under Centrist Banner*, STAR-LEDGER (Newark), Dec. 15, 2000, at 34 (noting that the decision eliminated any appropriate options for Gore to continue his challenge).		X	
William Safire, *The Coming Together*, N.Y. TIMES, Dec. 14, 2000, at A39 (commending the Court for ending the drawn-out dispute quickly and thus avoiding the outcome that "many now-reasonable opponents would have become implacable enemies, and the electorate would have been not just evenly divided but angrily polarized").	X		
Stephanie Salter, *Court's Politics: Not a Shock*, S.F. CHRON., Dec. 17, 2000, at A31 (noting that the Court has never been truly "immune to deep ideological divisions and . . . nonobjective partisan politics").			X

Op-Editorials	Positive	Neutral	Critical
Debra J. Saunders, *Court of Law vs. Court of Public Opinion*, S.F. CHRON., Dec. 13, 2000, at A23 (arguing that the Court successfully managed to reverse "the Florida Supreme Court's activist ruling . . . without appearing overly activist itself").	X		
Corky Siemaszko, *Winners and Losers*, DAILY NEWS (N.Y.), Dec. 14, 2000, at 22 ("Led by conservative Justices William Rehnquist and Antonin Scalia, the court tarnished its reputation by wading into the election battle and revealed itself to be as divided as the rest of the country.").			X
Cynthia Tucker, *Voting Rights Not a Done Deal*, S.F. CHRON., Dec. 16, 2000, at A30 ("The five conservatives turned their own traditional deference to states' rights on its head and used civil rights law to disenfranchise voters.").			X
Don Wycliff, *Will We Be Able to Repair the Damage?*, CHI. TRIB., Dec. 14, 2000, at 29N (expressing concern "that the Supreme Court itself, the one institution Americans have traditionally looked to as above the crass political fray, has now been sucked into the whirlpool").			X
*Written prior to ruling in case, but critical of predicted 5-4 outcome			
Total: 39	8 positive	5 neutral	26 critical

Addendum C – Law Review Commentary on the Decision in *Bush v. Gore*

Article	Positive	Neutral	Critical
Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (arguing that *Bush v. Gore* was troubling judicial review used to secure control of the executive branch for conservatives).			X
Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173 (2001) (using *Bush v. Gore* to analyze the role of legal academia as either "interested participants" or "disinterested analysts").		X	
Steven K. Balman, Bush v. Gore—*A Response to Dean Belsky*, 37 TULSA L. REV. 777 (2002) (reviewing Belsky's critique of *Bush v. Gore* and approving of his substantive exploration of the issues underlying the case in lieu of a focus on shrill political criticism).		X	
Martin H. Belsky, Bush v. Gore—*A Critique of Critiques*, 37 TULSA L. REV. 45 (2001) (analyzing the factual and legal implications of *Bush v. Gore* and concluding that the case blurred the line between partisanship and the rule of law).			X
Steve Bickerstaff, *Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 LOY. U. CHI. L.J. 149 (2002) (arguing that the Court was able to decide the case without establishing a precedent involving states' rights).		X	
Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 467 (2001) (concluding that *Bush v. Gore* was "justified under the existing circumstances").		X	

Article	Positive	Neutral	Critical
Stephen G. Bragaw & Barbara A. Perry, *The 'Brooding Omnipresence' in* Bush v. Gore*: Anthony Kennedy, the Equality Principle, and Judicial Supremacy*, 13 STAN. L. & POL'Y REV. 19 (2002) (noting the irony of *Bush v. Gore* where the most outspoken activists of states' rights and judicial restraint arguably decided against those principles).	X		
Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325 (2001) (examining *Bush v. Gore* in the context of the Equal Protection Clause and noting that the Court was troubled with local variations in standards, which is exactly what federalism is supposed to produce).			X
Marshall Camp, Note, Bush v. Gore*: Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409 (2002) (noting that *Bush v. Gore* represents a fundamental development in equal protection law).		X	
Paul F. Campos, *The Search for Incontrovertible Visual Evidence*, 72 U. COLO. L. REV. 1039 (2001) (noting that those upset with *Bush v. Gore* as unprincipled were generally happy about judicial intervention by the Florida Supreme Court).			X
Martin D. Carcieri, Bush v. Gore *and Equal Protection*, 53 S.C. L. REV. 63 (2001) (examining the equal protection precedent for *Bush v. Gore*).		X	
Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of* Bush v. Gore *as a Chapter in the History of Ideas about Law*, 70 U. CHI. L. REV. 55 (2003) (attempting to apply the equal protection holding of *Bush v. Gore*).			X
Erwin Chemerinsky, *How Should We Think About* Bush v. Gore*?*, 34 LOY. U. CHI. L.J. 1 (2002) (distinguishing the helpful from the not helpful ways of looking at *Bush v. Gore*).			X

Article	Positive	Neutral	Critical
Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1094 (2001) (arguing that the Justices in the majority abandoned the principles of judicial restraint, states' rights, and restrictive justiciability).			X
Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335 (2001) (concluding that judicial intervention in *Bush v. Gore* was improper because it created a popular perception of partisanship that could diminish confidence in the Court).			X
Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279 (2001) (book review) (arguing that *Bush v. Gore* was not a significant constitutional adjudication because the justifications that the Court offered for its decision were unconvincing and flawed).			X
Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001) (arguing that the best constraint on judicial activism is the political process; if this fails, the legal academy must hold judges accountable).			X
Allison H. Eid, *A Spotlight on Structure*, 72 U. COLO. L. REV. 911 (2001) (noting that *Bush v. Gore* highlights the importance of legal structure and the Court's role in that structure).		X	
Jonathan L. Entin, *Equal Protection, the Conscientious Judge, and the 2000 Presidential Election*, 61 MD. L. REV. 576 (2002) (arguing that although there is a reasonable argument for the decision in *Bush v. Gore*, reasonable people could also disagree with every aspect of the result).		X	

Article	Positive	Neutral	Critical
Richard A. Epstein, *'In such Manner as the Legislature Thereof May Direct': The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001) (defending the Court's decision in *Bush v. Gore* not on equal protection grounds but on the grounds that the Florida Supreme Court violated the U.S. Constitution Article II, Section 1, Clause 2).	X		
Ward Farnsworth, *'To Do a Great Right, Do a Little Wrong': A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001) (arguing that although some cases should be decided based on extralegal justifications, *Bush v. Gore* was not one of those cases).			X
Joel Edan Friedlander, *The Rule of Law at Century's End*, 5 TEX. REV. L. & POL'Y 317 (2001) (defending *Bush v. Gore* as consistent with the Equal Protection Clause and conservative jurisprudence).	X		
Peter Gabel, *What it Really Means to Say 'Law Is Politics': Political History and Legal Argument in* Bush v. Gore, 67 BROOK. L. REV. 1141 (2002) (arguing that the recent triumph of political conservatism shaped Gore's legal strategy and ultimately undermined his case).			X
Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975 (2001) (arguing that the *Bush v. Gore* decision was a misuse of unelected judicial power because the election should have been decided by the legislative branch).			X
Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407 (2001) (criticizing the Court's failure to recognize the value of normative reasoning in *Bush v. Gore* as a voting rights case).			X

Article	Positive	Neutral	Critical
Steven G. Gey, *The Odd Consequences of Taking* Bush v. Gore *Seriously*, 29 FLA. ST. U. L. REV. 1005 (2001) (examining the consequences of applying the holding in *Bush v. Gore* to future cases).		X	
Howard Gillman, *Judicial Independence Through the Lens of* Bush v. Gore*: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249 (2003) (arguing that the *Bush v. Gore* decision was deeply flawed and that political pressures and considerations played a significant role in the outcome of the decision).			X
Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2d 365 (2001) (examining the arguments of critics and supporters of *Bush v. Gore* and suggesting that the Court thwarted the democratic process through its decision).			X
Richard L. Hasen, *A 'Tincture of Justice': Judge Posner's Failed Rehabilitation of* Bush v. Gore, 80 TEX. L. REV. 137 (2001) (book review) (arguing that Posner's defense of *Bush v. Gore* blurs the line between law and politics and fails to adequately support his argument that the decision was defensible as a pragmatic approach to avoid a constitutional and political crisis).			X
Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001) (analyzing the potential impact, costs, and benefits of the *Bush v. Gore* decision on voting procedures and mechanisms).		X	
Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185 (2002) (discussing *Bush v. Gore* as an example of the importance of allowing a time lapse between an event and judicial consideration of that event to develop clear jurisprudence).		X	

Article	Positive	Neutral	Critical
Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606 (2002) (arguing that the Justices should have taken more measures to avoid the appearance of bias).			X
Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001) (analyzing the decision's effect on the political question doctrine and concluding that the Court should have exercised more restraint).			X
Robert M. Jarvis, Bush v. Gore*: Implications for Future Federal Court Practice*, 76 FLA. BAR J. 36 (2002) (concluding that the decision will "lead to a reexamination of the proper role of the federal courts").		X	
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 (2001) (arguing that both cases "re-enlist[] equal protection in the service of less, rather than greater, equality and democracy").			X
Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in* Bush v. Gore, 64 OHIO ST. L.J. 265 (2003) (arguing that "the Court saw itself as free to determine the meaning of Florida law for itself").			X
Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587 (2001) (discussing Peter Shane's *Disappearing Democracy* and concluding that *Bush v. Gore* eliminated due process).			X
Evan Tsen Lee, *The Politics of* Bush v. Gore, 3 J. APP. PRAC. & PROCESS 461 (2001) (criticizing the written opinion, but concluding that the Justices' activism may have been a justifiable response to a perceived extreme threat to the nation).			X

Article	Positive	Neutral	Critical
Nick Levin, Case Note, *The Kabuki Mask of* Bush v. Gore, 111 YALE L.J. 223 (2001) (suggesting that the Court's expressed concern with equal protection may have been a "mask" covering not political concerns, but rather the Court's underlying suspicion of the counting procedures chosen in Broward County).		X	
Joseph W. Little, *Election Disputes and the Constitutional Right to Vote*, 13 U. FLA. J. L. & PUB. POL'Y 37 (2001) (proposing a process whereby the results of the first vote count, even if slightly flawed, determine the results of the election).		X	
Nelson Lund, *'Equal Protection, My Ass!'?* Bush v. Gore *and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT. 543 (2002) (critiquing as "indefensible" Laurence Tribe's article in the *Harvard Law Review*).		X	
Nelson Lund, *Carnival of Mirrors: Laurence Tribe's 'Unbearable Wrongness'*, 19 CONST. COMMENT. 609 (2002) (responding to Laurence Tribe's response to the author's critique).	X		
Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002) (defending the decision as "straightforward and legally correct").	X		
William P. Marshall, *The Supreme Court,* Bush v. Gore*, and Rough Justice*, 29 FLA. ST. U.L. REV. 787 (2001) (arguing that the decision lacks doctrinal foundation).			X
Michael W. McConnell, *Two-and-a-half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657 (2001) (pointing out that Gore would have lost the election even if the Court had allowed counting to continue, but warning that the decision "cast long shadows both on the Court and on the Bush presidency").		X	

Article	Positive	Neutral	Critical
Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001) (posing the question of whether the Court should act as a regent to save the country in times of national peril; concluding, perhaps facetiously, that the answer is "not obvious").			X
Jon L. Mills, *Florida on Trial: Federalism in the 2000 Presidential Election*, 13 STAN. L. & POL'Y REV. 83 (2002) (expressing hope that the election contest will ultimately lead to technological and legal improvements).		X	
Gerald P. Moran, Bush v. Gore*: A Renaissance of Legal Realism*, 2 FLA. COASTAL L.J. 347 (2001) (disagreeing with the opinion but not viewing it as partisan).		X	
Michael Louis Newman, Bush v. Gore*: What Happened, and What Does the Supreme Court's New Equal Protection Standard Mean for State Election Officials?*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 153 (2002) (arguing that although the Court made it clear that it does not approve of varying standards for counting votes, it did not solve the problem of varying standards).		X	
Helen Norton, *What* Bush v. Gore *Means for Elections in the 21st Century*, 2 WYO. L. REV. 419 (2002) (arguing that the opinion creates new litigation opportunities for addressing flaws in voting practices).	X		
Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469 (2001) (arguing that the majority's "limited vision of democracy inadequately protects the political rights of racial minorities").			X
W. Glen Pierson, *The Role of Federalism in the Disputed Selection of Presidential Electors: 1916 & 2000*, 22 QUINNIPIAC L. REV. 283 (2003) (concluding that federalism was used in the opinion "to achieve practical, political ends and to solve real problems arising under the American Constitutional system").		X	

Article	Positive	Neutral	Critical
Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001) (suggesting that a "cultural conservativism" towards democracy underlies the opinion, rather than "narrow partisan politics").			X
Richard H. Pildes, *Judging 'New Law' in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001) (arguing that constitutional law is the "major source for some degree of the nationalization that one might expect for determining the ground rules of national democratic processes").		X	
Richard A. Posner, *Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001) (calling the result "rough justice" but not deciding whether it represented "legal justice").		X	
H. Jefferson Powell, *Overcoming Democracy: Richard Posner and* Bush v. Gore, 17 J. L. & Pol. 333 (2001) (discussing Judge Posner's assessment of the decision).		X	
George L. Priest, *Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953 (2001) (indicating that the "the principal criticism [of the Court] is that it has not, to date, fully explained all that it was taking into account in its decisions").			X
Barry Richard, *In Defense of Two Supreme Courts*, 13 U. FLA. J. L. & PUB. POL'Y 1 (2001) (arguing that the Court played its role in the election process as dictated by the Constitution).	X		
Glory Ross, Comment, *Constitutional Law: Protecting Equal Protection:* Bush v. Gore, 531 U.S. 98 (2000), 13 U. FLA. J. L. & PUB. POL'Y 173 (2001) (calling *Bush v. Gore* "the most significant voting rights case in recent history").		X	

Article	Positive	Neutral	Critical
Ronald D. Rotunda, *Yet Another Article on* Bush v. Gore, 64 OHIO ST. L.J. 283 (2003) (arguing that seven of the Justices in Bush v. Gore concluded that the Florida State Supreme Court acted unconstitutionally and rejecting the additional justifications given by three Justices).	X		
Edmund S. Sauer, Note, *"Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of* Bush v. Gore *on Election Administration*, 19 J.L. & POL. 299 (2003) (arguing that *Bush v. Gore* could be used to support other equal protection claims against local government voting practices).		X	
Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89 (2002) (analyzing the concurrence as congruent with "the Rehnquist Court's assault on certain aspects of the post New Deal constitutional order").		X	
Roy A. Schotland, *In* Bush v. Gore*: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211 (2002) (submitting that the Court should have decided the case on due process grounds based on issues with the "intent of the voter" standard and potential abuse by the canvassing boards).		X	
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 (2001) (arguing that the Court disregarded the democratic nature of the Constitution and the nation's political history in declaring that a state has the authority to disenfranchise its voters).			X

Article	Positive	Neutral	Critical
David A. Strauss, *What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001) (charging that a majority of the Court approached the case having already decided the outcome and searched for some justification to prevent the perceived greater evil of the Florida Supreme Court acting improperly to influence the election).			X
Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001) (characterizing the opinion as subminimalist and legally weak, particularly with respect to remedy, producing "order without law").			X
Susan L. Swatski, Case Note, 12 SETON HALL CONST. L.J. 789 (2002) (explaining that the Court did not err in deciding a political issue, but "guided the election's resolution by implementing the Constitution").	X		
Laurence H. Tribe, Erog v. Hsub *and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001) (arguing that the Court acted inconsistently with its constitutional duties by interfering with the political process regardless of the grounds it used for its opinion).			X
Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENT. 571 (2002) (responding to Lund's unquestioning support of the Court's decision, emphasizing the Court's flawed use of equal protection analysis, and refining his political question argument).			X
Laurence H. Tribe, *Lost at the Equal Protection Carnival: Nelson Lund's Carnival of Mirrors*, 19 CONST. COMMENT. 619 (2002) (responding to criticisms of his previous article that the Supreme Court decision did foreclose the Florida court from ordering a recount and that Tribe invented a political process doctrine to refute the Supreme Court opinion).			X

Article	Positive	Neutral	Critical
Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History,* 90 GEO. L.J. 113 (2001) (arguing that *Bush v. Gore* signaled the resurrection of critical legal studies arguments and that some legal elites would like to renormalize the decision to ensure that law remains separate from politics).		X	
Mark Tushnet, *The History and Future of* Bush v. Gore, 13 U. FLA. J. L. & PUB. POL'Y 23 (2001) (analyzing *Bush v. Gore* in the context of the historical development of the right to vote and attempting to identify how the Florida provisions violated the U.S. Constitution).		X	
Jonathan K. Van Patten, *Making Sense of* Bush v. Gore, 47 S.D. L. REV. 32 (2002) (arguing that the real culprit of public mistrust of the decision was actually the Florida Supreme Court and that it is only through understanding the legal framework of the case as it moved through the court system that one can understand the Supreme Court decision).			X
Norman Vieira, *The Florida Election Cases: A Commentary on* Bush v. Gore, 11 TEMP. POL. & CIV. RTS. L. REV. 385 (2002) (analyzing three issues addressed by the majority—the order to stay the mandate of the Florida court, the ruling on equal protection and due process grounds, and the remedy devised by the majority—and offering an alternative equal protection argument upon which the majority could have based its decision).		X	
Laurens Walker, *The Stay Seen Around the World: The Order that Stopped the Vote Recounting in* Bush v. Gore, 18 J. L. & POL. 823 (2002) (arguing that the grant of the stay of the Florida recount was correct according to the law).	X		

Article	Positive	Neutral	Critical
L. Kinvin Wroth, Bush v. Gore*: An Exchange: Election 2000 The Disease and the Cure*, 27 VER. B. J. & L. DIG. 53 (2001) (noting that the existing legal framework designed to deal with contested presidential elections was overwhelmed by the political process and misunderstood or ignored by key players, and urging Congress to make the necessary repairs to that framework to prevent recurrence of these problems in future elections).		X	
Jeffrey L. Yates & Andrew B. Whitford, Bush v. Gore*'s Legacy*: *The Presidency and the Supreme Court After* Bush v. Gore*: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101 (2002) (arguing that, in the long term, the decision will not negatively impact the Court's credibility and authority).		X	
John Yoo, Bush v. Gore*: In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001) (indicating that the Court's narrow decision in *Bush v. Gore* was not hypocritical or lawless, but rather restored stability to the political system and was consistent with the institutional role of the Court).	X		
Total Articles: 78	11 Positive	32 Neutral	35 Critical