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Beyond Counting Votes: The Political Economy of *Bush v. Gore*

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I. INTRODUCTION

[I]f a case on the outcome of a presidential election should reach the Supreme Court, . . . the Court's decision might well turn on the personal preferences of the justices.¹

Journalists covering the 2000 presidential election controversy have had little trouble reconstructing the events of virtually every stage of the post-election process, reporting even privileged conversations among the candidates' lawyers.² Yet one critical stage of the process remains shrouded in mystery: the behind-the-scenes events at the Supreme Court,³ which led to its decision in *Bush v. Gore*.⁴ Investigative reporting has produced only a few suggestive details.⁵ The Court has long insisted that it speaks through its opinions,⁶ and indeed the Court has left the public with only the Justices' statements at oral argument, and the various opinions themselves, from which to identify the considerations that motivated the Justices. Undoubtedly, this will not deter law professors, whose analyses are likely either to construct novel defenses, claiming that

1. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 70 (1993).

2. See, e.g., David Von Drehle, *For Gore, Reasons to Hope Dwindled: Blows Came from Supreme Court, Florida Judge*, WASH. POST, Feb. 1, 2001, at A1.

3. Most accounts of the case simply skip from the oral argument to the time at which the opinions were released. See, e.g., David Von Drehle et al., *Anxious Moments in the Final Stretch: High Court Stepped in and Wrote Stirring Finish*, WASH. POST, Feb. 3, 2001, at A1.

4. 531 U.S. 98 (2000) (per curiam).

5. The reporting that does seem to reveal details of the behind-the-scenes maneuvering at the Court does not make clear whether it is based on reliable anonymous sources or on pure speculation. See, e.g., Linda Greenhouse, *Election Case a Test and a Trauma for Justice*, N.Y. TIMES, Feb. 20, 2001, at A1 (reporting without attribution that the three most conservative Justices signed onto the per curiam opinion "[i]n order to permit the majority to speak with one voice"); Jeffrey Rosen, *In Lieu of Manners*, N.Y. TIMES, Feb. 4, 2001, § 6 (Magazine), at 46 (reporting without attribution that Justice Kennedy authored the unsigned per curiam opinion). In any event, both of these assertions will prove to be plausible inferences from the models we develop *infra* Parts III and IV.

6. The Court has sought to enforce that norm by preventing law clerks from revealing information about its deliberations. See CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES Canon 3(C) ("The relationship between a Justice and law clerk is essentially a confidential one A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties"); *id.* Canon 3(D) ("After the Justice acts, the action and, if there is an opinion, the reasoning underlying the action are matters of public record. Except as authorized, the law clerk should not purport to interpret or try to explain them."). A former law clerk's decision to chronicle his year at the Court produced criticism from other former clerks. See Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 837-38 & n.12 (1999) (reviewing EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998)).

the Justices were acting consistently with constitutional doctrine,⁷ or to attack the decision as unjustified and result-oriented, again on doctrinal grounds.⁸ Law professors, however, do not have a good track record on *Bush v. Gore*. Although we do not have hard numbers, strong anecdotal evidence suggests that law professors generally predicted that the Court would not even take the case.⁹ If law professors cannot predict when the Court will act, one might ask, can we confidently rely on law professors to explain what happened now that the Court has acted?

While we do not have evidence of predictions by judicial politics scholars concerning *Bush v. Gore* itself, the opening quotation reveals that at least two prominent judicial politics scholars anticipated the possibility not only of action in such a case, but also of a result consistent with the Court majority's ideological predilections.¹⁰ For judicial politics scholars, the notion that judges and Justices pursue their policy preferences is nothing new. That the five conservatives would vote for Bush and the four liberals would vote for Gore simply underscores the commonly held belief among political scientists that Supreme Court Justices vote consistently with their attitudes, meaning their ideological views.¹¹ For judicial

7. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 22 CARDOZO L. REV. (forthcoming 2001) (manuscript at 1-63, on file with authors); John Yoo, *Bush v. Gore: In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001) (arguing legitimacy concerns are overblown); Note, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170, 2174 (2001) (opining that the ultimate resolution was sufficiently grounded in existing law to satisfy the rule of law norm); Jason F. Jagemann, *Partisanship, Legitimacy, and the Law: A Response to Seth Steinzor's "J'Accuse,"* VT. BAR J., June 2001, at 51, 51-52; see also sources cited *infra* notes 131-33 (defending the outcome of *Bush v. Gore*, but not the equal protection holding).

8. See, e.g., Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 28 FLA. ST. U. L. REV. (forthcoming 2001) (manuscript at 3-37, on file with authors); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming 2001) (manuscript at 4-31, on file with authors); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18, 18-21; Seth Steinzor, *J'Accuse*, VT. BAR J., June 2001, at 44, 46-47.

9. William Glaberson, *Justices May See Task as Calming the Storm*, N.Y. TIMES, Nov. 25, 2000, at A12 (reporting that law professors were "startled to learn that the Supreme Court had agreed to hear an appeal by Gov. George W. Bush"); Knight Ridder News Service, *High Court Intervention Called Unlikely*, Nov. 23, 2000, 2000 WL 26097633 (quoting various law professors stating the Supreme Court intervention in the controversy was possible but unlikely); William Sherman, *Profs Shocked that Justices Step in Election Mess*, N.Y. DAILY NEWS, Nov. 25, 2000, at 2; see also David G. Savage & Henry Weinstein, *Bush Takes His Case to the U.S. Supreme Court*, L.A. TIMES, Nov. 23, 2000, at A24 ("Most legal experts agreed that there are long odds against Bush's actually winning in the Supreme Court if the vote count does not render the case moot."); Rowan Scarborough, *State's Top Court Seen as Voicing Final Word on Vote*, WASH. TIMES, Nov. 18, 2000, at A1.

10. See *supra* text accompanying note 1; see also *infra* notes 1-155 and accompanying text (discussing the prediction).

11. See *infra* Part III.A.

politics scholars, regardless of their own political affiliation, *Bush v. Gore* must seem the ultimate academic victory. Yet law professors might justly rejoin that even if judicial politics models could predict the outcome, the tools of political science offer little in helping to understand the subtleties and peculiarities of the opinions themselves. If judicial politics models stop at the 5-4 lineup in *Bush v. Gore*, then, at least in thinking about this one case, they offer little beyond what media pundits already provide.¹² The difference between the judicial politics approach, which proceeds through statistical analysis of databases with a large number of observations, and that of traditional legal scholars, who largely engage in close doctrinal analysis, helps explain why one scholar has cited this academic divide as a case of “unfortunate interdisciplinary ignorance.”¹³ Lawyers read but can’t count; political scientists count but don’t read.

In this Article, we show how a third field, social choice, can serve as a link between legal analysis and judicial politics, one that will allow lawyers to contextualize doctrine and political scientists to move beyond counting votes. A product of positive economic theory, social choice is most widely known for revealing the possibility of cyclical preferences when three or more persons are selecting among three or more options, none of which has first-choice majority support.¹⁴ That is but a special case of collective preference aggregation, and social choice properly understood is as much about identifying the conditions under which cycling does not arise as it is about the phenomenon of cycling itself. Although social choice and judicial politics are ordinarily not considered together, the models provided by scholars in each field help to explain an aspect of judicial behavior that is outside the other’s frame of reference. Judicial politics scholarship reveals not only that judges’ preferences matter, but also that Justices behave in a sophisticated manner in pursuing their policy objectives.¹⁵ Social choice has been used to study how the Supreme Court’s various institutional rules serve to overcome difficulties associated with transforming group preferences

12. See Edward Walsh & James V. Grimaldi, *Two Justices Could Hold the Key: O'Connor and Kennedy May Provide Swing Vote in a Divided Court*, WASH. POST, Dec. 11, 2001, at A1 (positing that “Gore’s lawyers faced the heavier burden . . . because the high court’s 5-4 ruling . . . ordering at least a temporary halt to the manual recounting of thousands of votes in Florida suggested that a majority of justices is poised to rule the same way on the merits”).

13. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 309-26 (1997).

14. See *infra* Part IV.A.

15. See *infra* Part III.

into a collective output, thus shaping the development of constitutional doctrine.¹⁶ Our purpose is as much to connect these two fields as to explain how both can complement legal analysis. The establishment of such a connection is timely, because a growing and influential body of judicial politics scholarship has moved beyond mere predictions based on Justices' attitudes, emphasizing instead how judges may deviate from their direct preferences for strategic gain.¹⁷ This literature has moved judicial politics scholars' object of study toward that of law. While the fields are coming together, a gap persists, one that we believe social choice is uniquely suited to bridge.

We illustrate the connection between judicial politics and social choice by applying both disciplines to *Bush v. Gore*. This choice may inspire an immediate objection of selection bias, for it is an extraordinary rather than an ordinary adjudication. Even if we can show that there is something "political" happening in *Bush v. Gore*, the objection goes, that does not mean that political decision making is commonplace. We will not apologize for choosing a case that appears to make our argument stronger rather than weaker. But our analysis is not designed to show that judicial decision making is more often political than legal. To the contrary, our thesis is that the institutional features and norms of the Supreme Court sharply constrain strategic behavior. Judicial preferences regarding how particular cases and issues should be resolved certainly depend, at least in significant part, upon the Justices' attitudes. And yet, some of the most anomalous features of *Bush v. Gore* also reveal that Justices behave in response to doctrinal concerns. The study of a single case, even one as prominent as *Bush v. Gore*, cannot conclusively establish the persuasive force of judicial politics or social choice models. But it can provide strong evidence that these combined theories offer explanations of a number of features of the case about which traditional doctrinal analysis simply has little to offer and that neither approach can fully explain on its own.¹⁸ Of

16. See *infra* Part IV.

17. See *infra* Part III.B.

18. Using *Bush v. Gore* to illustrate the political science models we describe also serves a useful pedagogic purpose. Many law professors will wish to incorporate the decision in their courses, but because it does not seem to establish a landmark precedent, many will conclude that they have little to say other than perhaps an endorsement or rejection of its application of constitutional principles. By showing that *Bush v. Gore* illustrates the value and complementary nature of political science and social choice in enhancing case analysis, we hope to provide law professors an opportunity to assign an interesting case and illuminate the process of constitutional decision making.

course, our approach cannot indicate whether the decision was “right” or “wrong,” an issue on which we take no position.

The Article proceeds as follows. Part II briefly reviews the history of *Bush v. Gore* and breaks down the opinions of the Justices. More significantly, Part II identifies a set of puzzles concerning *Bush v. Gore*. The primary puzzle is why the per curiam opinion resolved the case based upon an equal protection analysis rather than on an alternative ground that many commentators have found more persuasive. Part II introduces a host of other puzzles as well, such as why the per curiam opinion seemed to all but resolve a state law issue despite remanding the case to the Florida Supreme Court for further proceedings. In Part III, we review two sets of judicial politics theories, and we show how the outcome of *Bush v. Gore* reveals the most fundamental insights and weaknesses of each. The two schools of judicial politics that we consider, attitudinalism and new institutionalism, help us understand the breakdown of votes in the case and provide preliminary—if ultimately incomplete—answers to the puzzles set out in Part II.

Part IV considers the implications of social choice for *Bush v. Gore*. We use the theory to suggest three progressive models that explain the underlying dynamics that we believe may have contributed to some of the case’s more peculiar doctrinal features. Assuming that the Justices voted consistently with the predictions of judicial politics, the case threatened to present at least two anomalies: first, a result at odds with majority issue resolutions; and second, a potential judgment impasse. The strategic behavior in *Bush v. Gore*, and in particular the decision by the most conservative Justices to sign the per curiam opinion, may have been an attempt to eliminate these anomalies. We also will demonstrate that the most common type of strategic behavior, in which Justices embracing more extreme views of how a case should be resolved adjust their positions toward that of the median Justice to secure a majority precedent, provides an unsatisfying account of *Bush v. Gore*. In addition, by casting *Bush v. Gore* along a more complex array of issue dimensions, we show that the various coalitions were such that no Justice had an incentive to yield on either of the two theories supporting a judgment for Bush as a means to secure a majority precedent or to affect the case outcome. Paradoxically, the strategic behavior manifested in *Bush v. Gore* proves the exception to the rule that opportunities for such behavior are generally limited indeed.

We certainly do not claim to have any special means of revealing the Justices’ conscious or subconscious motivations. Thankfully, this is not necessary to our analysis. Instead, judicial politics

and social choice theory allow us to infer the conditions that likely gave rise to the dynamics of interactive behavior among the Justices in this one very important case, which effectively decided the outcome of the 2000 presidential election.

II. THE EVENTS, OPINIONS, AND PUZZLES OF *BUSH V. GORE*

The circumstances up to and including *Bush v. Gore* are sufficiently familiar that providing a history might seem unnecessary. We do so in part because future readers will be less intimately familiar with the circumstances that gave rise to this peculiar case. And more significantly, even for those for whom the circumstances are familiar, there is a benefit in presenting a common—if brief—factual foundation for the analysis to follow. We are interested not so much in the political effect of the Court's decision—although that certainly plays a role in our analysis—but in how individual Justices approached and resolved individual issues. To undertake this analysis, some background is necessary. We will limit the description in Parts II.A and II.B, as well as our exploration of the opinions in *Bush v. Gore*, to those features that are directly relevant to the later analysis, and we will highlight the case's most puzzling features in Part II.C.

A. *The Events*

After the polls closed in the quadrennial presidential election on November 7, 2000, it became clear that the electoral vote outcome would turn on Florida, where the initial count indicated that Texas Governor George W. Bush had defeated Vice-President Albert Gore, Jr., by 1784 votes.¹⁹ Under Florida law, the small margin of victory triggered an automatic machine recount,²⁰ producing an even narrower Bush victory.²¹ Gore then requested manual recounts in four counties.²² Florida's Secretary of State, Katherine Harris, ruled that these recounts must be completed within seven days of the election, that is, by November 14, to comply with Florida law.²³ The deadline appeared impossible to meet, and although a lower

19. At the time, Oregon and Wisconsin remained too close to call, but with their combined eighteen electoral votes, it was clear that Florida's twenty-five electoral votes were the key to the election. See *Decision 2000, 4:00AM* (NBC television broadcast, Nov. 8, 2000).

20. See FLA. STAT. ch. 102.141(4) (2000).

21. David E. Rosenbaum, *Bush Holds Slim Lead over Gore as Florida Recounts*, N.Y. TIMES, Nov. 10, 2000, at A24.

22. *Id.*

23. Richard L. Berke, *Republican Rejects Offer that Two Sides Accept a Count by Hand*, N.Y. TIMES, Nov. 16, 2000, at A1.

court eventually found that the Secretary had acted within her discretion,²⁴ the Florida Supreme Court ruled that the Secretary's decision was contrary to Florida law.²⁵ Invoking its equitable powers, that court set a new deadline of November 26, effectively extending the period prior to certification under state law for twelve days while correspondingly reducing the contest period in which the certification could be challenged.²⁶ The United States Supreme Court granted certiorari under the name *Bush v. Palm Beach County Canvassing Board*²⁷ and unanimously vacated and remanded the Florida Supreme Court decision.²⁸

Palm Beach County Canvassing Board was a triumph for those who favor judicial minimalism.²⁹ The Court vacated and remanded the case without issuing any definitive rulings on either federal or state law.³⁰ Nonetheless, the Court introduced, without deciding, several issues that would prove important in *Bush v. Gore*. The Court explained that although it ordinarily

defers to a state court's interpretation of a state statute . . . in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.³¹

This, the Court suggested, might present a potential problem, because the Florida Supreme Court's opinion discussed, and therefore may have relied upon, the Florida Constitution "without regard to the extent to which the Florida Constitution could, consistent with Art. II, Section 1, cl. 2, 'circumscribe [state] legislative power.'"³² Similarly, the Court expressed concern that "Congress might deem [the Florida Supreme Court's ruling] to be a change in

24. David G. Savage & Henry Weinstein, *Decision 2000/America Waits: Case Before Florida Justices May Turn on a Legal Phrase; Law: Palm Beach Uses 'Error in Vote Tabulation' to Justify Its Hand Counts. Secretary of State Says a Manual Recount Is Only Valid When the 'System' is Flawed*, L.A. TIMES, Nov. 19, 2000, at A22.

25. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239-40 (Fla. 2000).

26. The Florida Supreme Court's reliance on the safe harbor date in setting the deadline and providing for a shortened contest period would prove critical later. See *infra* notes 67-71 and accompanying text.

27. 531 U.S. 70 (2000) (per curiam).

28. *Id.* at 78.

29. See Cass R. Sunstein, *The Broad Virtue in a Modest Ruling*, N.Y. TIMES, Dec. 5, 2000, at A29 (embracing the decision as an example of judicial minimalism); see also Cass R. Sunstein, *Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001) (evaluating the minimalism of both election decisions).

30. *Bush*, 531 U.S. at 78.

31. *Id.* at 76.

32. *Id.* at 76 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

the law” that would deprive the state’s voters of their ability “to take advantage of the ‘safe harbor’ ”³³ of 3 U.S.C. § 5.³⁴ The purpose of the remand was thus to allow the Florida Supreme Court to clarify “the extent to which [it] saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2.”³⁵

The immediate issue in *Bush v. Palm Beach County Canvassing Board*, whether the delay in the certification from November 14 until November 26 was permissible, became moot on the latter date because the partial recounts up to that date still provided Bush an edge, however slight.³⁶ The Florida Secretary of State thus certified Bush as the winner of the state’s electoral votes.³⁷ Gore, however, pursued further legal avenues by relying upon Florida’s provisions allowing for election contests.³⁸ Along with affected voters, Gore filed several legal challenges.³⁹ In the case that ultimately would become *Bush v. Gore*, the Leon County Circuit Court denied relief in *Gore v. Harris*,⁴⁰ and Gore appealed to the Florida Supreme Court.⁴¹ That court reversed the circuit court’s decision to deny a

33. *Id.*

34. That section provides as follows:

If any State shall have provided, by laws enacted prior to the date fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (1994). The Court thus explained that the provision “creates a ‘safe harbor’ for a State insofar as congressional consideration of its electoral votes is concerned.” *Bush*, 531 U.S. at 77. “If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors.” *Id.* at 77-78.

35. *Id.* at 78. The Supreme Court based its authority to remand for clarification on *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940), which stated that although “[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions . . . [i]ntelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.”

36. Michael Cooper, *Talk About Fuzzy Math; Numbers Abound in Florida*, N.Y. TIMES, Nov. 28, 2000, at A25.

37. *Statements on the Certification of Florida’s Votes*, N.Y. TIMES, Nov. 27, 2000, at A13 (providing excerpts of statements made by Florida Secretary of State Katherine Harris and Agriculture Commissioner Robert Crawford, who was serving on the Florida Election Canvassing Board for Governor Jeb Bush after Governor Bush recused himself).

38. See FLA. STAT. ch. 102.168 (2000).

39. David Firestone, *Contesting the Vote: Florida Judge Is Asked to Declare Gore the Winner*, N.Y. TIMES, Nov. 28, 2000, at A1.

40. No. 00-2808, 2000 WL 1790621 (Fla. Cir. Ct. Dec. 3, 2000).

41. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

recount for “undervotes,” those votes identified as not having registered a choice for any presidential candidate, and it ordered that such votes be subject to a manual recount.⁴² The Florida Supreme Court decision went further than Gore had requested, ordering that a manual recount proceed in all counties in which such recounts had not yet taken place.⁴³

Shortly after the recount began, however, the United States Supreme Court granted certiorari and issued a stay.⁴⁴ Although publishing an opinion accompanying a stay order is uncommon, Justice Scalia, who concurred in the grant of the stay, explained that its issuance “suggests that a majority of the Court, while not deciding the issues presented, believe that petitioners have a substantial probability of success.”⁴⁵ Oral argument was set for the morning of December 11, 2000, and on the night of December 12, the case was decided, and soon along with it, the 2000 presidential election.⁴⁶

B. The Opinions

Immediately upon its release, the opinions in *Bush v. Gore* generated media confusion.⁴⁷ First, the opinion for the Court was per curiam, leading some to suppose that more than five Justices supported it.⁴⁸ Second, the majority opinion reversed and remanded to the Florida Supreme Court,⁴⁹ making it appear possible that the Supreme Court had left the Florida court with enough wiggle room to proceed with a recount. Quickly enough, however, it became clear that there was little, if any, room to wiggle. Five Justices—Rehnquist, O’Connor, Scalia, Kennedy, and Thomas—supported the per curiam opinion. In addition to joining the per curiam, Chief

42. *Id.* at 1260-62.

43. *Id.* at 1262.

44. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (granting stay and certiorari).

45. *Id.* (Scalia, J., concurring)

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

47. See Mike Allen, *A Long Day of Waiting for Decision, Then Chaos; Candidates, Backers and News Media Scramble for Understanding*, WASH. POST, Dec. 13, 2000, at A30; Howard Kurtz, *Instant Analysis—and Confusion: Sorting Out a Complicated Decision, Live and on Television*, WASH. POST, Dec. 13, 2000, at C1.

48. Nonunanimous per curiam opinions are unusual but not unprecedented. An early example is *United States v. Peters*, 3 U.S. (3 Dall.) 121, 129 (1795), in which the Court adjourned to give the parties a chance to settle, and released the opinion when negotiations faltered.

49. This was consistent with traditional Supreme Court practice in state court cases. See *infra* note 136 and accompanying text. Nonetheless, the existence of a remand left journalists, whether they were familiar with this practice or not, unable to decode the outcome without reading the opinions.

Justice Rehnquist and Justices Scalia and Thomas signed a concurring opinion.⁵⁰ Justice Stevens, joined by Justices Ginsburg and Breyer, filed a dissenting opinion.⁵¹ Souter filed a separate dissent, part of which appeared to support the principal analysis of the per curiam opinion.⁵² Breyer joined Justice Souter's dissent unequivocally.⁵³ Justices Stevens and Ginsburg joined Souter's dissent except with respect to the portion that expressed partial support for the analysis contained in the per curiam opinion.⁵⁴ Finally, Justices Ginsburg and Breyer filed separate dissents, which each of the four dissenting Justices joined at least in part.⁵⁵ The partial disagreement stemmed from an analytical rift over the merit of the equal protection claim, which ultimately separated the dissenters into two groups, Justices Souter and Breyer in one camp (acknowledging at least the possibility of an equal protection violation) and Justices Stevens and Ginsburg in another (rejecting the equal protection challenge along with the remaining claims).

The per curiam opinion held that the Florida Supreme Court's order of a recount of undervotes throughout the state violated the Equal Protection Clause. The Court began its analysis by noting that although the state legislature is empowered to select a slate of electors for the President and Vice-president on its own, without the benefit of a statewide election, once it proceeds by statewide election, it must ensure that the votes cast are equally weighted.⁵⁶ The Court noted that the articulated standard for the statewide manual recount, namely the "intent of the voter," was "unobjectionable as an abstract proposition."⁵⁷ The difficulty, the per curiam writers reasoned, was that the Florida Supreme Court had erred in failing to provide "specific standards to ensure . . . equal application" of the intent-of-the-voter inquiry.⁵⁸ This led to

50. *Bush*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

51. *Id.* at 123 (Stevens, J., dissenting).

52. *Id.* at 129 (Souter, J., dissenting).

53. *Id.*

54. *Id.*

55. *Id.* at 135 (Ginsburg, J., dissenting); *id.* at 144 (Breyer, J., dissenting).

56. *Id.* at 103-05 (majority opinion) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) and *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

57. *Id.* at 105-06.

58. *Id.* at 106. The Court recognized that courts are often in the business of determining individuals' intent. They argued, however, that "the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object." *Id.* In other words, while it may be difficult or impossible to create mechanical rules for evaluating issues like credibility, the Florida Supreme Court presumably could have created objective rules for evaluating paper ballots.

different standards being applied both within and across counties.⁵⁹ The “[s]tate Supreme Court ratified this uneven treatment” by mandating inclusion of recount totals from counties with different standards in the certified total.⁶⁰ Several other inconsistencies in the Florida Supreme Court’s approach exacerbated the perceived unequal treatment: the court’s allowance of a recount of all ballots rather than just undervotes in some counties,⁶¹ the court’s inclusion in the certified vote of partial recounts from one county,⁶² and the court’s failure to specify who would count the ballots.⁶³ In enumer-

59. The Court gave two examples of intra-county inconsistency:

A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. . . . Palm Beach County . . . began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal.

Id. at 106-07. One might question, however, whether this intra-county inconsistency is as relevant as inter-county inconsistency for the purposes of equal protection. As long as the members of the Miami County Canvassing Board all voted on each controversial ballot, and as long as the ultimate rules adopted in Palm Beach were applied to all controversial ballots, all voters within the county were treated equally. Thus, intra-county inconsistency might be relevant only insofar as it exacerbates inconsistency among counties.

60. *Id.*

61. *Id.* “The distinction has real consequences,” the Court argued, explaining that it would result in the hand counting of “overvotes,” i.e., ballots in which more than one candidate was named in those counties. *Id.* at 107. This suggests that the problem is that some overvotes will be counted, while others will not be. The Court’s analysis, however, supports a different point. The opinion states:

[T]he citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent.

Id. at 108. This observation supports the separate claim that there is an inequality between undervoters and overvoters within counties that do not conduct a full manual recount, not that voters in different counties are being treated differently. Indeed, Justice Breyer treats this claim as involving two separate arguments. *See infra* note 65. The problem with this argument is that an undervoter is at least arguably differently situated from an overvoter.

62. *Id.* at 108 (“The Florida Supreme Court’s decision thus gives no assurance that the recounts included in a final certification must be complete.”). The apparent inequality is in some voters having their votes counted while the votes of others are not counted.

63. *Id.* at 109 (“The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots.”). Although this equal protection concern seems to sound particularly like a due process concern, the remainder of the Court’s analysis suggests that unequal counting might have resulted from the absence of adequate procedural safeguards. Perhaps recognizing, however, that its reasoning dovetails with due process concerns, the Court ultimately concludes that “it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.” *Id.* at 110. The Court, however,

ating these various flaws, the per curiam opinion issued a rather strong admonition not to overread the doctrinal implications of the very opinion it was handing down: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."⁶⁴

Justices Souter and Breyer agreed with the analysis thus far, or at least with the proposition that "the absence of a uniform, specific standard to guide the recounts . . . does implicate principles of fundamental fairness."⁶⁵ Justice Breyer did not, however, conclude that this fundamental fairness problem necessarily amounted to a constitutional violation. Thus, he noted: "In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard."⁶⁶ These Justices diverged from the per curiam opinion on the issue of the remedy. The per curiam opinion noted that the "Supreme Court of Florida [had] said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process' "⁶⁷ by taking advantage of the safe harbor of 3 U.S.C. § 5. This statutory safe harbor provision, the majority reasoned, would be triggered only for states selecting their electors conclusively by December 12.⁶⁸ "That date is upon us," the opinion observed, concluding that the appropriate remedy was thus to reverse the decision of the Florida Supreme Court and remand,⁶⁹ while leaving the Florida Supreme Court little further room to act.⁷⁰

does not offer a doctrinal analysis of why these inconsistencies amounted to equal protection and due process violations.

64. *Id.* at 109.

65. *Id.* at 145 (Breyer, J., dissenting). Justice Breyer disagreed with the propositions that "the failure to include overvotes in the manual recounts" and the "fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties" raised constitutional issues. *Id.* at 144.

66. *Id.* at 145 (Breyer, J., dissenting). Justice Souter went further, citing a specific precedent, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *Id.* at 134 (Souter, J., dissenting). In *Logan*, the Court held that a state cannot "terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424. The majority held that complainant's procedural due process rights had been violated while the concurring Justices indicated that equal protection had also been violated. *Id.* Justice Souter cited this case for the proposition that it is possible for a uniform statutory standard to be subject to constitutional limits on its content and effect. *Bush*, 531 U.S. at 134-35 (Souter, J., dissenting).

67. *Id.* at 110 (per curiam) (citing *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000) (alteration in original)).

68. *Id.* There was no controversy that December 12 was in fact the relevant date for the purpose of the safe harbor.

69. *Id.*

70. See William Glaberson, *With Critical Decision Comes Tide of Criticism*, N.Y. TIMES, Dec. 13, 2000, at A24. Some lawyers for Vice-President Gore and others argued that the Supreme

Justices Souter and Breyer disagreed, concluding that there might still be time for the recount to be completed before December 18, when the electors were scheduled to meet, and that it should be the Florida court's decision whether to forgo the safe harbor.⁷¹

Justice Stevens rejected the equal protection analysis altogether. Emphasizing that the Florida Supreme Court's "intent of the voter" standard was "consistent with the practice of the majority of States,"⁷² Justice Stevens argued that even if various counters applied different standards, those "concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."⁷³ The desire to achieve equality cannot be pushed too far, he argued, for otherwise "Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection."⁷⁴ Justice Ginsburg leveled a similar attack: "I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount."⁷⁵ No Justice was willing to go so far as to say that use of different voting methods in different areas would violate equal protection, presumably recognizing that such a holding would have constitutional implications not only for the Florida recount, but also for balloting practices throughout the nation. The per curiam opinion sidestepped this issue by stating, "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."⁷⁶ Justice Souter provided a more direct defense of the majority's approach. He explained that although the Fourteenth Amendment "does not forbid the use of a variety of voting mechanisms within a jurisdiction," the inconsistencies in reading votes

Court left room for the Florida Supreme Court to continue the recounts by holding that the safe harbor date was not as important to the State of Florida as had been indicated earlier. See Von Drehle et al., *supra* note 3.

71. *Bush*, 531 U.S. at 135 (Souter, J., dissenting) ("Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18."); *id.* at 146-47 (Breyer, J., dissenting) ("Whether there is time to conduct a recount prior to December 18 . . . is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide.").

72. *Id.* at 125 n.2 (Stevens, J., dissenting) (citing numerous state statutes).

73. *Id.* at 125.

74. *Id.* (footnote omitted).

75. *Id.* at 143 (Ginsburg, J., dissenting).

76. *Id.* at 109.

produced on the same kind of voting machine were of “a different order of disparity.”⁷⁷

Except for the per curiam opinion, the opinions also addressed the second issue in the case, whether the Florida Supreme Court’s decision constituted a retroactive change in state election law as established by the Florida legislature, thus violating Article II of the United States Constitution, in addition to running afoul of the statutory safe harbor provision. Chief Justice Rehnquist’s concurring opinion acknowledged that “[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.”⁷⁸ He stated, however, that this is because ordinarily “the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law.”⁷⁹ Article II, in contrast, specifically grants to each state’s legislature the power to determine how electors are appointed.⁸⁰ The Chief Justice thus reasoned that “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”⁸¹ The Florida Supreme Court, Chief Justice Rehnquist argued, departed from the legislative scheme in several ways: in according no presumptive validity to the certified candidate, thus divesting certification of significance;⁸² in holding that improperly marked ballots would constitute legal votes;⁸³ and in rejecting the Secretary of State’s interpretations of the election code even though Florida law requires deference to the Secretary’s interpretations.⁸⁴ The Florida Supreme Court’s remedy thus “signifi-

77. *Id.* at 134 (Souter, J., dissenting). Justice Souter explained that there can be “no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights,” implying that use of different voting machines could serve some legitimate state interest, such as the desire to reduce costs. *Id.*

78. *Id.* at 112 (Rehnquist, C.J., concurring).

79. *Id.*

80. *Id.* The relevant provision provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .” U.S. CONST. art. II, § 1, cl. 2.

81. *Id.* at 113 (Rehnquist, C.J., concurring).

82. Chief Justice Rehnquist explained:

Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest . . .

Id. at 118.

83. *Id.* Chief Justice Rehnquist emphasized that Florida voters are instructed to make sure that their ballots have been punched correctly. *Id.* at 119.

84. *Id.* at 118-20. The Chief Justice noted that the Secretary of State’s interpretation was “reasonable.” *Id.* at 119. This is an essential point, because under the concurrence’s analysis, if her interpretation had been unreasonable, it too would have been a change in the law.

cantly departed from the statutory framework in place on November 7.”⁸⁵ For Chief Justice Rehnquist and those who joined his opinion, this provided an independent rationale for holding the Florida Supreme Court decision unconstitutional.⁸⁶

The four dissenters vigorously attacked the theory embraced by the three concurring Justices. Justice Breyer argued that the Florida Supreme Court reasonably interpreted Florida law, rhetorically asking “where is the ‘impermissible’ distortion?”⁸⁷ Similarly, though he did not defend the merits of the Florida Supreme Court’s interpretation of Florida election law, Justice Souter concluded that “the majority view [in the Florida Supreme Court] is in each instance within the bounds of reasonable interpretation.”⁸⁸ His opinion also emphasized that “Article II is unconcerned with mere disagreements about interpretive merits,”⁸⁹ an issue on which Chief Justice Rehnquist did not take a firm position. In her separate dissent, Justice Ginsburg emphasized that the “Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees.”⁹⁰ While recognizing that the Court had in at least three instances rejected state court interpretations of state law,⁹¹ Ginsburg argued that “those cases are embedded in historical contexts hardly comparable to the situation here.”⁹² Article II, moreover, does not mandate greater scrutiny, because the Framers “understood that in a republican government, the judiciary would construe the legislature’s enactments.”⁹³ In his separate dissent, Justice Stevens argued that the Constitution “does not create legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.”⁹⁴

85. *Id.* at 112.

86. *Id.* at 122.

87. *Id.* at 151 (Breyer, J., dissenting).

88. *Id.* at 131 (Souter, J., dissenting). Note that both Justice Breyer and Justice Souter evince an implicit agreement with the concurring Justices with respect to the premise that state construction of state laws is bounded by a reasonableness standard when it implicates a federal issue. *See id.* at 112-16 (Rehnquist, C.J., concurring). Significantly, Justices O’Connor and Kennedy do not indicate whether they share this premise.

89. *Id.* at 132 (Souter, J., dissenting).

90. *Id.* at 136 (Ginsburg, J., dissenting).

91. *Id.* at 139 (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603 (1813)).

92. *Id.* Justice Ginsburg does not indicate whether these “historical contexts” undermine the validity of these cases as precedents, or whether she believes that questioning state interpretation requires a historical context or an importance of type not present in *Bush v. Gore*.

93. *Id.* at 141.

94. *Id.* at 123 (Stevens, J., dissenting).

The concurring and dissenting Justices also discussed, albeit more briefly than the Article II issue, the relevance of § 5 to the ultimate disposition of the case.⁹⁵ Chief Justice Rehnquist argued that the statute “informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme,” because the Florida Supreme Court “acknowledged” that Florida election law “took that statute into account.”⁹⁶ Rehnquist quoted the Court’s unanimous decision in *Bush v. Palm Beach County Canvassing Board*, stating that “‘a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the [Florida] Election Code that Congress might deem to be a change in the law.’”⁹⁷ Although the Chief Justice did not argue that § 5 itself provides a federal law basis for the Court’s overturning an erroneous state court interpretation of state law, all the dissenters other than Justice Ginsburg explicitly explained that § 5 was irrelevant to any claimed constitutional violation in the Florida Supreme Court decision. Justice Stevens argued that the section “did not impose any affirmative duties upon the States that their governmental branches could ‘violate,’”⁹⁸ and Justice Souter concluded that the “§ 5 issue is not serious.”⁹⁹ Justice Breyer noted that the *Palm Beach County Canvassing Board* precedent did not “establish that this Court had the authority to enforce [Article II,] § 1,” and added that “nowhere did we intimate, as the concurrence does here, that a state court decision that threatens the safe harbor provision of § 5 does so in violation of Article II.”¹⁰⁰ The other dissenters did not try to reconcile their views with the earlier case. Rehnquist also did not emphasize that case, presumably because it only hinted at resolution of the federal law issues.

Not surprisingly, perhaps, the media focused on the angry language in the opinions more than on the underlying disputes over constitutional doctrine. In particular, Justice Stevens’s attack upon the per curiam opinion was the most widely quoted portion of the various opinions:¹⁰¹

95. *Id.* at 113 (Rehnquist, C.J., concurring); *id.* at 124 (Stevens, J., dissenting); *id.* at 130 (Souter, J., dissenting); *id.* at 143 (Ginsburg, J., dissenting); *id.* at 153 (Breyer, J., dissenting).

96. *Id.* at 113 (Rehnquist, C.J., concurring).

97. *Id.* (quoting *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000)).

98. *Id.* at 124 (Stevens, J., dissenting).

99. *Id.* at 129 (Souter, J., dissenting).

100. *Id.* at 148 (Breyer, J., dissenting).

101. See, e.g., *A Nation Waits* (ABC television broadcast, Dec. 12, 2000); *Battle for the White House: U.S. Supreme Court Reverses Florida Supreme Court Decision to Proceed with Recounts* (NBC television broadcast, Dec. 12, 2000); *United States Supreme Court Reaches a Decision in the Case of Bush v. Gore* (CBS television broadcast, Dec. 12, 2000); *U.S. Supreme Court Rules 5-1 to End Florida Recount; Decision Gives Bush a Path to the Presidency* (CNN television broadcast,

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.¹⁰²

Taken literally, Justice Stevens's opinion could be construed to suggest no more than that the majority's approach threatened to undermine confidence in the state judiciaries because the majority expressed a "lack of confidence in the impartiality and capacity of the state judges."¹⁰³ Critics, however, read it much more broadly, to suggest that the majority's approach would undermine confidence because the Court's action, taken as a whole, was unprincipled and politically motivated.¹⁰⁴ Justice Breyer similarly, though less forcefully, complained that the "Court was wrong to take this case" and "wrong to grant a stay," and that the "federal legal questions presented, with one exception, are insubstantial."¹⁰⁵ The Justices, it seemed, disagreed not only about how the case should be decided, but also about whether the positions embraced on the other side were respectable as a matter of law.

C. The Puzzles

The puzzles of *Bush v. Gore* stem largely from the majority rationale. How did the argument that there was an equal protection problem with the Florida recount manage to obtain votes of seven Justices? It is beyond our scope to assess whether the majority's equal protection analysis was sound, let alone correct, and we concede that one might well devise a persuasive justification.¹⁰⁶ For our

Dec. 12, 2000); *Court Decision Is Final but Suspect*, SEATTLE POST INTELLIGENCER, Dec. 14, 2000, at A20; Jack W. Germond & Jules Witcover, *Most of High Court Anointed George II*, BALTIMORE SUN, Dec. 14, 2000, at A27.

102. *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

103. *Id.*

104. This is probably a fair reading, given that Justice Stevens cannot mean that whenever the Supreme Court rejects a legal interpretation of a state court as being unreasonable, it is undermining confidence in state judges.

105. *Id.* at 144 (Breyer, J., dissenting).

106. For an argument that the equal protection analysis of *Bush v. Gore* was sound, see Lund, *supra* note 7. Professor Lund makes the strongest defense of which we are aware in defense of the decision's equal protection analysis. While acknowledging that past cases did not squarely control the *Bush v. Gore* decision, Lund points out that the "rationale underlying the vote dilution cases . . . implies that the application of new and discriminatory rules *after* an election has been held should receive an especially skeptical review by the courts because after-the-fact manipulation of voting rules is especially prone to abuse." Lund, *supra* note 7 (manuscript at 31). Ballot box stuffing has long been seen "as a paradigmatic example of an obvious constitu-

purposes it is sufficient to note that the Court plainly did not supply one. The opinion is remarkable in equal protection jurisprudence for the lack of attention given equal protection doctrine and for the superficiality of the bit of doctrine that is discussed. Although the Court alludes to its "one person, one vote" jurisprudence,¹⁰⁷ it offers no analysis of any of the cases developing that rule. Instead, the majority simply states: "The question before us . . . is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."¹⁰⁸ Most notably, the majority did not explain the origin of its "arbitrary and disparate treatment" approach.¹⁰⁹

Commentators have been quick to note the odd connection between this articulated test and the Court's general equal protection jurisprudence.¹¹⁰ As Ronald Dworkin has observed, the Florida Supreme Court recount "puts no class of voters, in advance, at either an advantage or disadvantage."¹¹¹ The conclusion is not universal; Charles Fried has suggested a reconciliation, noting that "disparate treatment may violate the Constitution's guarantee of equal protection even if no identifiable class of persons is the target of the intentional disparity."¹¹² At a minimum, it is puzzling that legal commentators, rather than the per curiam Justices, have had to identify a doctrinal source for the Court's approach. To be sure, the *Bush v. Gore* Court was operating under extreme time pressure. Perhaps if the Court had had more time, it would have articulated a more complete equal protection analysis. Nonetheless, setting aside the equal protection analysis, the aggregate of the Court's opinions do not appear to have suffered any notable lack of polish, a result no doubt attributable to overnights by the Court's law clerks.¹¹³

tional violation," Lund notes, adding that "any distinction between adding *illegal* ballots to the count and *selectively* adding legal ballots in a way that favors one candidate over another would be entirely sophistical." *Id.* (manuscript at 32). Lund also argues against alternative approaches that the Court might have taken in reviewing the case. *Id.* (manuscript at 36-50).

107. *Bush*, 531 U.S. at 105 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

108. *Id.*

109. An online search in the Westlaw Supreme Court cases database confirmed that the phrase "arbitrary and disparate treatment" as a test for a violation of equal protection appears in no other Supreme Court case.

110. See, e.g., David G. Savage & Henry Weinstein, *High Court in Awkward Spot over Equal Protection Ruling*, L.A. TIMES, Dec. 16, 2000, at A1.

111. Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53, 54.

112. Charles Fried, *'A Badly Flawed Election': An Exchange*, N.Y. REV. BOOKS, Feb. 22, 2001, at 8 n.2 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)).

113. See *Greenhouse*, *supra* note 5 ("By the time three New York University Law School professors arrived at the court on Tuesday morning to interview law clerks for teaching positions,

Moreover, the Court's waffling on whether it was resting upon a due process or an equal protection principle adds to the sense that the Court was invoking the Fourteenth Amendment in a very approximate way.

The fact-specific nature of the majority opinion is also puzzling. There are certainly other Supreme Court cases that seem to place a great deal of emphasis on facts rather than law. But the per curiam opinion is notable for its contemporaneous and explicit admonition that its analysis is "limited to the present circumstances."¹¹⁴ While the Court may be right that "the problem of equal protection in election processes generally presents many complexities,"¹¹⁵ the complications of equal protection law have not generally scared the Court away from pronouncing general rules.¹¹⁶ Even if the Justices thought that the analytical difficulties of creating a bright-line rule militated in favor of a balancing test, they could have announced such a test or at least highlighted the factors that appeared relevant to the case at hand. Some minimalist legal scholars favor fact-specific rulings based upon normative uncertainty about appropriate doctrine,¹¹⁷ but minimalist judges probably would have stayed out of the dispute altogether.

Finally, a threshold issue that no opinion addressed also makes the majority opinion puzzling: standing.¹¹⁸ Under third-party

complete exhaustion had set in, and some clerks who had not canceled their long-scheduled appointments slept through them.").

114. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

115. *Id.*

116. David Strauss attributes the equal protection majority's willingness to limit the holding to the facts of the case without offering broader explanation to a desire to correct an incorrect determination by the Florida Supreme Court. Strauss argues:

The Court's attempt to limit its holding, with barely a fig leaf of principle, gives the game away. The majority was not concerned with principle. It smelled a rat in this case. It thought the Florida Supreme Court was up to no good. It could not explain what the Florida Supreme Court was up to in terms that engaged general principles that it was willing to embrace, but it was determined to intervene and stop that court. If the actions of the United States Supreme Court are to be defended, they must be defended in those terms.

David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 751 (2001).

117. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 10 (1999) (noting that "minimalists try to decide cases rather than to set down broad rules").

118. At least, it has puzzled experts on federal jurisdiction. See RICHARD FALLON ET AL., *SPECIAL UPDATE MEMORANDUM, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1 (2001) (noting that "[w]ithout reference to third-party standing doctrine, *Bush v. Gore* . . . upheld the claim of presidential candidate George W. Bush—not himself a Florida voter—that a partial recount of Florida presidential ballots ordered by the Supreme Court lacked adequate standards to vindicate Florida voters' equal protection and due process rights to fair, non-arbitrary counting of their ballots").

standing doctrine, only voters are presumed able to raise a claim that their equal protection rights have been violated.¹¹⁹ Indeed, just weeks before its decision in *Bush v. Gore*, the Supreme Court decided *Sinkfield v. Kelley*, which held that only voters in a gerrymandered district, and not voters in another district necessarily affected by such gerrymandering, have standing to raise equal protection claims.¹²⁰ Even more puzzlingly, the Justices who seem most vigorously to support third-party standing limitations are Justices O'Connor and Kennedy, the only Justices to rely exclusively on a third party to raise a claim upon which their equal protection holding rests. For example, in *Miller v. Albright*, decided only two years earlier, Justices O'Connor and Kennedy stood alone in concluding that a foreign-born illegitimate child of an American citizen was without standing to raise her father's equal protection challenge to a provision of the Immigration and Nationality Act. The Act required her to formalize ties with her father prior to reaching majority as a condition to seeking citizenship, but a similarly situated child of a U.S. citizen mother would face no time limit.¹²¹ While no other Justices joined in their strict reading of third-party standing, their decision to deny standing proved fatal to the woman's ability to be naturalized.¹²² It may be that in *Bush v. Gore*, the Justices did not think of the issue,¹²³ or that the inclusion of voters as intervenors in the lawsuit below,¹²⁴ though not in the application for a stay

119. See generally RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 178-87 (4th ed. 1996) (providing an overview of third-party standing doctrine).

120. The Court found that petitioners had no standing because they had not "personally been denied equal treatment." *Sinkfield*, 531 U.S. 28, 29 (2000) (quoting *United States v. Hays*, 515 U.S. 737, 744-46 (1995)).

121. See *Miller*, 523 U.S. 420, at 445-52 (1998) (O'Connor, J., concurring). The Court recently resolved the merits of the issue left unanswered by *Miller* in *Nguyen v. INS*, 121 S. Ct. 2053 (2001).

122. See *infra* note 321. This was true at the time *Miller* was decided. In *Miller*, Justice O'Connor wrote an opinion concurring in the judgment, which Justice Kennedy joined, in which she strongly suggested that but for a problem of third-party standing, she would have relied upon the equal protection component of the Fifth Amendment Due Process Clause to strike down the provision in the Immigration and Nationality Act imposing different requirements upon United States citizen mothers and fathers whose foreign-born illegitimate children seek to become naturalized. See 523 U.S. at 445-52 (O'Connor, J., concurring). In *Nguyen*, Justice Kennedy wrote for a majority sustaining the very same sex-based classification against a due process challenge. See 121 S. Ct. at 2057-58. By dissenting, Justice O'Connor maintained a consistent position in these two cases, while Justice Kennedy, writing for a majority to sustain the law in *Nguyen*, reversed course.

123. The issue of third-party standing was not briefed by the parties. See Brief of Petitioners, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949); Brief of Respondents, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

124. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000).

that the Supreme Court read as a petition for writ of certiorari,¹²⁵ was sufficient to overcome the third-party standing concern.¹²⁶ At a minimum, however, it is quite odd that the Court in general, and Justices O'Connor and Kennedy in particular, skipped a threshold issue to which they have recently been critically attentive.

Also mysterious is that Chief Justice Rehnquist's concurring opinion did not seem to share the per curiam opinion's defects. The opinion noted precedents in which the Supreme Court rejected state court constructions of state law,¹²⁷ and although the concurring analysis worked from a constitutional provision on which there was relatively little decisional law, it at least provided some doctrinal support for its construction of Article II.¹²⁸ Thus, Judge Fried, a defender of the Court's action, agreed that "the three concurring Justices . . . were on sounder ground than the seven who found an equal protection violation."¹²⁹ Similarly, Judge Robert Bork,¹³⁰ Judge Richard Posner,¹³¹ and Professor Richard Epstein¹³² have defended the decision by focusing on the reasoning of the concurrence.¹³³ It is likely for this reason that general criticism of *Bush v.*

125. *Bush v. Gore*, 531 U.S. 1046 (2000) (granting stay and certiorari).

126. Ordinarily, a party that does not appeal a decision cannot obtain the benefit of a successful appeal, because the failure to appeal a lower court decision results in the entry of the judgment and has res judicata effect. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-402 (1981). *Bush v. Gore* may offer an unusual exception because the deadline on filing a petition for certiorari for the nonappealing parties had not run by the time the Supreme Court issued its ultimate decision. Perhaps the Justices recognized this and felt that waiting for the formality of having the voters file petitions of certiorari would have unnecessarily delayed the decision.

127. *Bush v. Gore*, 531 U.S. 98, 114-15 (2000) (Rehnquist, C.J., concurring).

128. *Id.* at 103-06.

129. Fried, *supra* note 112, at 8.

130. Maureen Dowd, *Black and White*, N.Y. TIMES, Feb. 14, 2001, at A31 ("Robert Bork said that while he thought the majority five-justice opinion in *Bush v. Gore* might be debatable, he deemed the 'concurrent opinion' of three justices . . . to be on 'very solid ground.'").

131. *See* Benjamin Wittes, *Maybe the Court Got It Right: A Judge's Defense of the Florida Election*, WASH. POST, Feb. 21, 2001, at A23 (reporting, on the basis of an advance copy of an article by Posner, that Posner defended the decision on the basis that "[t]he combination of the state supreme court's decision and its later opinion—which ordered an incoherent and standardless hand recount—effectively rewrote the Florida election code"). Judge Posner provides a preliminary analysis of the recount in Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001). In that article, he promises a treatment of the Supreme Court's role in Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, SUP. CT. REV. (forthcoming 2001).

132. *See* Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 619-34 (2001).

133. Professor (and now Bush judicial nominee) Michael W. McConnell similarly has suggested that while Article II might have supported the Supreme Court's holding, the Court acted improperly in halting the recount on the basis of an equal protection problem. *See* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 674-77 (2001).

Gore has focused more heavily on the per curiam opinion's rationale than on those of either the concurrence or the dissents.¹³⁴ Moreover, the portion of the per curiam opinion most criticized, according to an update to the preeminent federal jurisdiction casebook,¹³⁵ was its analysis of why the December 12 deadline required reversal. The authors of the per curiam opinion could respond to this criticism by noting that they remanded the case to the Florida Supreme Court, but this disposition merely reflects the traditional Supreme Court practice of remanding all state court cases for proceedings not inconsistent with the opinion.¹³⁶ Indeed, this tradition emphasizes the puzzle of why the per curiam opinion presumed a particular resolution of the state law issue, rather than, consistent with the purpose of the tradition, allowing the Florida courts to resolve the issue. The concurring opinion's approach avoided this problem altogether. Though that opinion might have been styled a reverse and remand if it had been the majority opinion,¹³⁷ it identified defects that, if

134. Even humorous accounts have focused more on the equal protection analysis. *See, e.g.*, Maureen Dowd, *The Bloom Is off the Robe*, N.Y. TIMES, Dec. 13, 2000, at A35 (offering a fictional dialogue in which Chief Justice Rehnquist states, "Mr. Boies, you fail to grasp the concept of equal protection for the conservative justices who want to retire. I'm 76. Sandy is 70. We started out long ago, working our hearts out for Barry Goldwater, and we're pooped.").

135. FALLON ET AL., *supra* note 118, at 5 ("The most-criticized aspect of the Supreme Court's December 12 ruling was its decision, after having found an equal protection violation, that no recount could proceed.").

136. *See generally* FALLON ET AL., *supra* note 119, at 507-09 (discussing the remand practice of the Supreme Court). It is also worth noting that on December 11, 2000, one day prior to the Supreme Court's issuance of *Bush v. Gore*, the Florida Supreme Court issued an opinion pursuant to the Supreme Court remand in *Bush v. Palm Beach County Canvassing Board*. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000). In that opinion, the Florida Supreme Court, in the context of evaluating the rights of voters within the contest period, asserted that although the Florida statutes set no specific deadline for manual recounts, such recounts must be completed within a reasonable period of time. *Id.* at 1285-86. The court further stated: "In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress." *Id.* at 1286 n.17. This does not necessarily resolve the question whether manual recounts during the protest period must meet the same deadline, especially if the Florida Supreme Court determined that an extension beyond December 12 was necessary to the application of other provisions of the Florida election code as that court construed it, or in the absence of an Article II violation as needed to reconcile the Florida election code with the demands of the state constitution. For an article expressing a contrary view, in treating the Florida Supreme Court's decision in *Palm Beach County Canvassing Board v. Harris* as conclusive on the December 12 deadline for purposes of any further action in *Bush v. Gore*, see Lund, *supra* note 7 (manuscript at 58-61).

137. It is possible, of course, that the concurring Justices would have ignored the tradition of including a remand, or would have included language specifically indicating that there was nothing for the Florida Supreme Court to do on remand. It is worth noting that the concurrence closed by stating "we would reverse," rather than by saying, "we would reverse and remand." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring).

genuine, time could not cure.¹³⁸ It thus needed to make no assumptions about how the Florida courts would resolve state law issues.

The concurring opinion also seems more attractive in the sense that it coheres better with the history of the election controversy. The *Palm Beach County Canvassing Board* opinion alluded to the Article II issue, but not to the equal protection problem,¹³⁹ even though the “intent-of-the-voter” standard was as much an issue in the earlier case as in *Bush v. Gore*. Moreover, the concurring opinion in *Bush v. Gore* corresponded to the mantra of the Bush camp throughout the post-election controversy. While the Gore camp’s cry was “count the votes,”¹⁴⁰ the Bush camp’s was “follow the rules.”¹⁴¹ Both of their messages reflected appeals to common sense, albeit appeals pointing in opposite directions. The equal protection claim suffered a notable lack of rhetorical flourish. Though partisans mentioned the inconsistency with which the ballots were being counted, this point was usually made in conjunction with the argument that ballots ought to be counted according to the procedure allegedly provided by law, a machine count. The per curiam opinion thus rested, in a highly visible case, on a legal argument that did not resonate in the court of public opinion. At a minimum, the per curiam opinion’s reliance on an analytically dubious—and certainly thin—argument cannot be rested upon its public appeal.

Even if the equal protection analysis proved fatally flawed, that alone does not establish that the Court reached the wrong outcome. Moreover, the puzzle extends as much to Justices Souter and Breyer as to Justices O’Connor and Kennedy and the concurring Justices. Indeed, the puzzle may not be one puzzle, but three. Why did Justices O’Connor and Kennedy find the equal protection argument more appealing than that presented in the concurrence? Why did Justices Souter and Breyer go out of their way to indicate agreement with the peculiar portion of the per curiam opinion when

138. In particular, the concurrence’s argument that the Florida Supreme Court was inappropriately removing the presumptive effect of the certification by allowing recounts in the contest phase presumably would have prevented new recounts, regardless of how much time was allowed. See *supra* note 82 and accompanying text.

139. The per curiam opinion did emphasize the ambiguous nature of the state court ruling, but only in terms of how the ruling applied state law, not in terms of the court’s approach to the intent-of-the-voter issue. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam).

140. *Al Gore Defends His Decision to Contest Florida’s Presidential Election* (CNN television broadcast, Nov. 27, 2000).

141. David Espo, Associated Press, Nov. 22, 2000, 2000 WL 29129990 (reporting Bush spokesman James A. Baker III’s comment that the Florida Supreme Court “has changed the rules and has invented a new system for counting the election results”).

they disagreed strongly enough in any event to dissent in a case in which the per curiam authors emphasized the case's lack of precedential value? And perhaps the greatest mystery, why did the concurring Justices not simply concur in the judgment and rest entirely upon their seemingly more appealing independent rationale? The result, after all, would still have been five votes for Bush regardless of whether they concurred in the per curiam opinion. Though psychological speculation can be used to address all of these questions, we hope to show that our combined technique drawn from judicial politics research and social choice theory provides a more useful framework.

III. JUDICIAL POLITICS APPROACHES TO JUDICIAL VOTING

In this part, we show how two schools of political science, both within the general field of inquiry known as judicial politics, help provide insights on *Bush v. Gore*. Both schools, attitudinalism and the new institutionalism, are the heirs of a twentieth-century political science tradition that has sought to study judicial behavior scientifically. Early attempts, such as Jerome Frank's use of psychoanalytic theory,¹⁴² were influential in advancing the cause of legal realism but failed to produce robust models.¹⁴³ Beginning in the middle of the twentieth century, however, political scientists, in particular those who came to be called behavioralists, began to rely heavily on statistics. In 1948, C. Herman Pritchett authored a statistical study on the previous ten years of Supreme Court decisions premised on the theory that judicial decision making was essentially political and thus susceptible to study like other forms of political activity.¹⁴⁴ Political scientists soon began using statistics explicitly to support generalizations about judicial behavior, and two books published in the mid-1960s emphasized that judicial behavior

142. JEROME FRANK, *LAW AND THE MODERN MIND* 13-31 (1930) (arguing that judges may act as "father substitutes" in their exercise of social authority).

143. For a skeptical assessment of the possibility of integrating psychoanalysis and legal theory, see Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 *YALE L.J.* 1053 (1968). For broader assessments of Frank's philosophy, see ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985); and JULIUS PAUL, *THE LEGAL REALISM OF JEROME N. FRANK* (1959).

144. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at 20 (Quadrangle Books 1969) (1948). This was not the first work that could be called behavioralist. See, e.g., Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 *U. ILL. L. REV.* 96 (1922).

was a predictable phenomenon.¹⁴⁵ Glendon Schubert's *The Judicial Mind* articulated a theory emphasizing that Justices' decisions reflect their policy leanings.¹⁴⁶ Walter Murphy, in contrast, argued in *The Elements of Judicial Strategy* that Justices' decisions reflect strategic considerations that take into account the preferences of other actors in the judicial process.¹⁴⁷ These claims are, with much refinement, the central tenets of attitudinalists and new institutionalists, respectively.

A. Attitudinalism

Attitudinalism is perhaps the most straightforward modern application of judicial politics research to Supreme Court decision making. The theory posits that Justices, like political actors, have "attitudes" concerning public policy and that these attitudes determine how they vote in particular cases.¹⁴⁸ For example, a Justice whose attitudes are relatively conservative is likely to vote against expansive interpretations of the Fourth Amendment,¹⁴⁹ at least when that Amendment might be used to inhibit the activities of law enforcement. The opposite could be said about a Justice who is relatively liberal. In short, attitudinalists insist, outcomes in Supreme Court cases depend not so much on the merits of the legal arguments as on how Justices react to the facts of individual cases, and the Justices' attitudes are strong predictors of their reactions.¹⁵⁰

145. For an early assessment of these and related works, see Samuel Krislov, *Theoretical Attempts at Predicting Judicial Behavior*, 79 HARV. L. REV. 1573 (1966).

146. GLENDON SCHUBERT, *THE JUDICIAL MIND* (1965).

147. See WALTER MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* (1964).

148. See SEGAL & SPAETH, *supra* note 1, at 64. Attitudinalists explain that Justices are able to turn their attitudes into votes because they generally "lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction." *Id.* at 69.

149. The Fourth Amendment is just an example, but one that attitudinalists have found easy to study because "the situational context—the facts—in which law enforcement authorities conduct searches and seizures are readily identifiable and limited in number." *Id.* at 216. Analysis reveals, for example, that the Court as a whole has been more likely to uphold searches in places of business than in homes. *Id.* at 216-18. A possible critique of the attitudinalists' focus on the Fourth Amendment is that this Amendment essentially presents a mixed question of law and fact. Attitudinalists, however, have shown that attitudes are predictive in other areas tending to include pure questions of law, such as federalism and taxation. *Id.* at 244. For an excellent empirical analysis of Supreme Court decision making in another fact-specific area, see Tracey George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992), which focuses on death penalty cases.

150. Attitudes, supplemented by other variables such as where a search or seizure took place, can be used to predict individual Justices' votes in Fourth Amendment cases with 75% accuracy. SEGAL & SPAETH, *supra* note 1, at 229. Overall, Justices' attitudes are highly statistically significant, with $p < 0.001$. *Id.* at 229-31.

“Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he [was] extremely liberal.”¹⁵¹

At first blush, *Bush v. Gore* might well appear to be the consummate reflection—perhaps even a vindication—of this theory. This was a decision destined to have an unmistakable effect on public policy because if Bush won, he would almost certainly be elected President, while if Gore won, a continuing recount conceivably could lead to the opposite result.¹⁵² Just as an attitudinalist might suspect, the five most conservative Justices on the Court favored Bush, while the four most liberal dissented, effectively favoring Gore.¹⁵³ An attitudinalist would not insist that any of the Justices were being disingenuous, for psychological motive is irrelevant to the approach. Attitudinalism makes a prediction about how the Justices are likely to vote, and this case provides an additional datum in support of the theory.

The case is not merely just one more data point for a regression, though, because of Jeffrey Segal and Harold Spaeth’s surprising prediction in the seminal work presenting the attitudinal model quoted at the outset of this Article. The quotation is noteworthy in part because, even in the period between the election and the decision in *Bush v. Gore*, the consensus among most academics, at least law professors,¹⁵⁴ was that Supreme Court Justices would try to avoid any involvement in election controversies.¹⁵⁵ While Segal and

151. *Id.* at 65.

152. Although some insisted that Bush and Gore held quite similar policy positions, others argued that in fact their positions were more sharply in contrast than the positions of competing presidential candidates in recent elections. Compare *American Home Truths: Offering an Alternative to Bush ‘n’ Gore*, THE GUARDIAN, July 5, 2000, 2000 WL 23928865 (agreeing with Ralph Nader’s assessment that Bush and Gore were Tweedledum and Tweedledee) with Jonathan Alter, *The Real Stakes in November: The Supreme Court Is Just the Beginning—Why This Seemingly Ho-Hum Race Actually Matters*, NEWSWEEK, July 10, 2000, at 26, 26 (discussing policy differences between Gore and Bush).

153. Classifying Justices as liberal or conservative presents some difficult empirical issues. See, e.g., Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 266-84 (1996) (exploring some problems associated with one popular measure). Nevertheless, the contention that even before *Bush v. Gore*, the five more conservative Justices would be those who voted for Bush is uncontroversial, because of the many important cases producing 5-4 splits along this divide. See, e.g., Stuart Taylor, Jr., *The Supreme Question*, NEWSWEEK, July 10, 2000, at 18, 18-19 (referring to “familiar 5-4 splits between the court’s more liberal and more conservative members”).

154. See sources cited *supra* note 9.

155. Law professors predicting that the Court would not involve itself in the case noted the Court’s reputed aversion to involving itself in political controversies, but the political question doctrine received little attention. This may be because in *Baker v. Carr* the Supreme Court applied the Equal Protection Clause to an election districting controversy, rejecting the suggestion that the controversy was a political question. See 369 U.S. 186, 226 (1962). “It is the relationship

Spaeth did not predict that the Court would in fact involve itself in such a case, they did not seem to think such involvement unlikely, and they further thought that upon accepting such a case, the Justices would not be able to, or would choose not to, place their attitudes aside. Such a view might have seemed to be just another example of the attitudinalists' cynicism about legal process prior to *Bush v. Gore*. Score one for attitudinalism.

The attitudinalist approach of correlating the Justices' votes with their apparent political leanings is subject to several important counterarguments, but it reveals a fundamental truth. Surely it cannot be a coincidence that the nine Justices happened to sort themselves in a way that placed the five generally viewed as conservative on the side of the Republican and the four generally viewed as liberal on the side of the Democrat.¹⁵⁶ This is nothing more than an appeal to common sense, and *Bush v. Gore* does illustrate that the attitudinalists' regressions do not identify a surprising trend in decisions. Rather, they state what we already know. Everyone recognizes that Justices' views matter, and that Justices who are perceived as relatively conservative are more likely to vote in a way that people would generally label conservative than are Justices who are perceived as relatively liberal. This attitudinalist insight is subject to criticism not because it is untrue, but because it is trivial.¹⁵⁷

between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' " *Id.* at 210. Of less fame but greater relevance was *McPherson v. Blacker* in which the Court held that the political question doctrine did not prevent it from reviewing state counting of electoral votes. *See* 146 U.S. 1, 23-24 (1892); *see also* *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 456-59 (1992) (rejecting a challenge under the political question doctrine to the Supreme Court's jurisdiction to decide whether Montana was entitled to an additional member of the House of Representatives).

156. The chance of randomly selecting five Justices of nine and ending up with the five regarded as conservative is 1 in 126.

157. That Supreme Court decisions depend on Justices' ideological predilections might be trivial in part because Supreme Court decisions do not represent a random sample of all disputes. *See, e.g.*, Cross, *supra* note 13, at 289 ("[I]f the attitudinal model were limited to Supreme Court cases lacking a clear resolution under the legal model, the model's significance would seem trivial. In cases that have no answer under the legal model, it is hardly surprising that other factors influence the decision."). As Professor Cross notes, attitudinalists have responded to this critique in part by identifying attitudinal phenomena in lower court decisions. *See, e.g.*, Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals*, in *CONTEMPLATING COURTS* 243 (Lee Epstein ed., 1995). Though the set of all appellate cases is a larger universe, it too is not a random subset, as the vast majority of cases never reach this stage. Thus, one might argue, even if attitudes are important in reported cases, the "legal model" might be successful in explaining settlement decisions in the shadow of the law.

Nonetheless, *Bush v. Gore* presents an unusually clean test of the attitudinal model. The case is unusual (if not unique) in that the consequence of the legal issues for public policy seem diametrically opposed to the consequence of the disposition of the case in terms of the election at issue. The two primary issues in the case, as we have seen, were whether the Florida recount violated the Equal Protection Clause and whether the Florida Supreme Court's interpretation of the state's election law constituted a change in the law, thus violating Article II or undermining the statutory safe harbor provision. In the abstract, the public policy consequences of vigorously applying equal protection guarantees would seem more enticing to the liberal than to the conservative Justices.¹⁵⁸ Similarly, the conservative Justices would seem more likely to defer to the Florida courts' interpretation of their own law, rather than label an interpretation a change in the law.¹⁵⁹ Even if other issues would turn on attitudes in a manner consistent with the Court's decision, these issues seem less salient.¹⁶⁰ Endorsement of Bush's arguments, however, would lead to a result, the election of a Republican president, less attractive to liberals than to conservatives.

The existence of such a conflict might at first seem to make attitudinalism an unfalsifiable theory. If the Justices vote for their presumed preferred candidate, it is because of their attitudes, and

158. The alignment, of course, need not always be 5-4. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), only Chief Justice Rehnquist and Justices Scalia and Thomas dissented from a decision striking down a state constitutional amendment prohibiting legislative, executive, and judicial action protecting homosexuals from discrimination. Moreover, there may be some cases in which the conservatives advocate a more expansive view of equal protection, such as in the affirmative action context. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (presenting the same 5-4 split as in *Bush v. Gore*, with the majority applying strict scrutiny to a racial classification benefiting allegedly disadvantaged business enterprises). This only strengthens the attitudinalist case, indicating that Justices on opposite sides of the spectrum may switch sides in equal protection cases depending on whether the plaintiff is a member of a minority group. It does not, however, necessarily indicate ideological inconsistency.

159. The first Bush lawsuit, *The New York Times* noted, "presents an irony too delicious for many observers of the continuing federalism debate to resist." Linda Greenhouse, *Recount Fight Widens as Court Case Begins: As Bush Camp Looks to Federal Court, Gore Supporters Embrace States' Rights*, N.Y. TIMES, Nov. 13, 2000, at A1.

160. One might argue that conservatives are generally more skeptical of judicial authority and were thus more inclined to see the Florida Supreme Court as illegitimately assuming power belonging to the legislature. A problem with this argument is that the conservative Justices on the Rehnquist Court had not previously in any context questioned state court decisions on state law. Indeed, the conservative Justices have generally argued that state court judges are as competent as federal court judges, even with respect to vindication of federal rights. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 723 (1993) (Scalia, J., concurring in part and dissenting in part) ("It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not).").

if they vote for their presumed preferred legal theory, it is because of their attitudes.¹⁶¹ But the case is unusual in that the importance of any potential precedent from the case in terms of public policy, though not insignificant, seemed likely to be small relative to the public policy effects that would turn on the outcome, in part because the outcome of the case would likely affect the composition of the Court itself.¹⁶² Thus, if attitudinalism is taken to mean that Justices will vote to maximize their net public policy preferences, weighted by the importance of those preferences, *Bush v. Gore* was a chance for the Justices to establish a datum at odds with attitudinalism. Had the lineup of the Justices been completely reversed, that would indicate that the Justices cared about legal considerations more than policy considerations, perhaps encouraging a reconceptualization of attitudinal theory. That is not how the case turned out.

Indeed, *Bush v. Gore* helps undermine a significant critique of attitudinalism.¹⁶³ Just because liberal Justices tend to vote more liberally than conservative Justices does not mean that legal

161. This is reminiscent of one of the major criticisms of the theory. See SEGAL & SPAETH, *supra* note 1, at 361 (acknowledging this to be “[t]he most damning criticism of the attitudinal model in earlier days”). One cannot know whether a particular doctrinal position is “liberal” or “conservative” unless and until liberal or conservative Justices assume that position in a given case. Once Justices viewed as liberal or conservative line up as they do in a new controversy, attitudinal scholars then cast the revealed preferences in ideological terms. As applied here, there is a seeming tension between the ideological direction of doctrine on the one hand and of the outcome on the other. Of course this is also a case in which outcome overwhelms doctrine. But it is only because the jurists revealed that truth with their votes that we can know with certainty that the conservative position subordinated federalism concerns in favor of expanded equal protection principles as needed to generate the case outcome for Bush, and that the liberal position advanced the cause of federalism and subordinated equal protection concerns in an unsuccessful effort to generate a case outcome favoring Gore.

162. See, e.g., Linda Greenhouse, *Justices Ready to Walk a Very Fine Legal Line*, N.Y. TIMES, Nov. 27, 2000, at A13 (“[T]he justices are now in a position to shape the outcome of a presidential election in which not only the court itself but individual justices featured prominently as campaign issues.”).

163. For an example of this critique, see Gerald N. Rosenberg, *The Supreme Court and the Attitudinal Model*, L. & CTS. NEWSL., Spring 1994, at 6 (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993)). Professor Rosenberg argues:

[U]nder the Legal Model Properly Understood, judges apply a set of interpretive canons, a set of principles that guide them in interpreting the Constitution, statutes, precedent, and derive an outcome. They are driven not by outcomes but by interpretive philosophy. And, in accord with the sort of scientific procedure that Segal and Spaeth apply, a group of ‘judges,’ if provided a set of facts and told to employ a given interpretive philosophy, should reach similar outcomes. It follows from the Legal Model Properly Understood, for example, that it matters a great deal who the President nominates to sit on the Court because different interpretive philosophies will produce different outcomes.

Id. at 7.

method is pure subterfuge, critics argue. Rather, it may show only that legal methods are contested and that different Justices embrace different interpretive theories. Some theories tend to produce results that correlate with what many view as conservatism, while other theories produce results that correlate in the opposite direction. Thus, the repeated instance of the same 5-4 splits does not indicate that Justices are engaged in crude public policy calculations. For all we can tell from the pattern of decision making, Justice Scalia may be a leftist who happens to have settled on an interpretive method that, in the world that we live in, appears to generate more conservative than liberal decisions.¹⁶⁴ Thus, the argument concludes, while it may be that Presidents choose Justices based upon anticipated results, this does not mean that Justices choose outcomes on a similar basis.¹⁶⁵ *Bush v. Gore* seems to undermine this argument, given the apparent inconsistency of the Justices' votes with their theoretical—meaning doctrinal—orientation.¹⁶⁶ Simply put, if Justices embrace a doctrinal approach that generally correlates with a particular ideological bent, in a case with sufficiently high stakes that thwart the expectations of that approach, the Justices appear at least temporarily willing and able to set it aside.

Let us now consider three objections to the attitudinal model. The first objection is that *Bush v. Gore* proves that judicial decision making is at least sometimes apolitical, for Justices Ste-

164. Perhaps more plausibly, a Justice's political ideology relative to the rest of the Court may change over time. Consider Justice Frankfurter, who joined the Court as a progressive liberal in an era where liberalism was moving in the direction of increasing judicial intervention into state and federal legislative processes. Without changing his own ideological predilections, he became regarded as a conservative within the Warren Court. Yet at least one proxy for Frankfurter's ideology commonly used by attitudinalists, namely a variable based on statements made about him at the time of his confirmation, still rates him as relatively liberal. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559-61 (1989).

165. On this account, perhaps the most political decision that a judge or Justice makes is the decision when to retire, since this may affect the ideology of the judge's successor. See James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573, 579-93 (1995) (demonstrating that courts of appeals judges are more likely to retire when the President is of the political party of the President who appointed them).

166. Frank Michelman articulates this point well, noting "the apparent difficulty of mapping the judicial votes cast, or the legal issues with respect to which they were cast, onto any cognizable grid of constitutional principles and ideals, or competing sets of them, that independently might explain the Court's division over these issues." Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 680 (2001). Michelman later emphasizes, "after all, it's not particularly to the Court's conservative ideological wing that you would normally look for a somewhat daring doctrinal innovation on behalf of voting rights." *Id.* at 685.

vens and Souter, both appointed by Republican Presidents, sided with Al Gore, the Democratic candidate. Indeed, many political science studies that code Justices for attitudes use the political party of the appointing president as one relevant proxy.¹⁶⁷ This imperfection could mean that attitudes do not always determine decision making. Attitudinalists, however, do not claim that attitudes are perfectly predictive of Supreme Court voting. In many cases, attitudes will prove conflicting, leaving the result indeterminate, and those who embrace even the best social science theories well understand that they cannot explain perfectly all social phenomena. But the attitudinalist who reads *Bush v. Gore* can say with some pride that seven-out-of-nine ain't bad.

More significantly, the attitudinalist would retort that political party is not a perfect proxy for attitudes. This explains why some of the most powerful attitudinal studies advance the model by ignoring party and using decision making in one set of cases as an independent variable to explain decision making in another set.¹⁶⁸ That other studies have found attitudes to be significant despite using an independent variable as crude as political party is a strike for attitudinalism, not against it.¹⁶⁹ Although attitudinalists may not be able to measure attitudes perfectly, their ability to explain much of judicial voting with a relatively weak measure suggests that they would be able to explain even more of it if measurement difficulties could be overcome. *Bush v. Gore* only strengthens the attitudinalist case in this regard, because the two outliers are easily explained as Justices for whom party affiliation has proved to be a poor predictor of attitudes.¹⁷⁰ Thus, even if one proxy for atti-

167. The use of this variable, however, is more common in studies of the courts of appeals than in studies of the Supreme Court. See, e.g., Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO STATE L.J. 1635, 1677-86 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1738 (1997).

168. Segal and Spaeth themselves rely heavily on this approach. See, e.g., SEGAL & SPAETH, *supra* note 1, at 225 (noting that "the use of past voting behavior to predict what occurs subsequently exceeds conventional levels of significance for 18 of the 21 issues into which criminal procedure has been divided").

169. For an overview of studies demonstrating that political party affiliations can be predictive of decision making, see Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220-24 (1999).

170. Conservatives have been disappointed in both Stevens and Souter, concluding that they turned out to be more liberal than expected. See, e.g., Paul A. Gigot, *Supreme Politics: Who'd Replace Justice Stevens?*, WALL ST. J., May 29, 1998, at A14 ("While the justice appointed by President Gerald Ford likes to claim Republican credentials, you can bet he doesn't want to be replaced by another Antonin Scalia, a staunch conservative."); Ramesh Ponnuru, *Empty Souter*, NAT'L REV., Sept. 11, 1995, at 24; see also *A Look at the Court*, ARIZ. REPUB., Dec. 11, 2000, at A6

tudes—political party affiliation—can explain only seven votes, when broadened to include other, superior proxies, attitudinalist theory can explain all nine.

The second objection, to which we have alluded already, is that *Bush v. Gore* was an exceptional case and that attitudinalism's success in explaining Justices' votes cannot be extrapolated to other cases. The easy retort is that this is why attitudinalists advance their case through regressions rather than analysis of individual cases. The purpose of analyzing *Bush v. Gore* cannot be to prove the attitudinalist case, but to show its reflection. That *Bush v. Gore*, an exceptional case, is consistent with a model advanced by scrutiny of largely run-of-the-mill cases,¹⁷¹ assuming any Supreme Court cases can be so called, cannot undermine the theory. Perhaps the high stakes nature of *Bush v. Gore* provides an explanation for Justices' voting their attitudes that cannot be extrapolated to other cases, but at least it in no way falsifies the model. Indeed, it strengthens the model by indicating that one contingency in which one might expect that the theory would break down—high stakes and high media scrutiny—in fact does not undermine its robust claims.

An additional answer, however, is that the importance of *Bush v. Gore* only strengthens the attitudinalist case. If Justices are more likely to vote their attitudes in more important cases than in less important ones, then the data that seem inconsistent with attitudinalism are the less important data. For example, the Supreme Court issues many unanimous opinions. This is not inconsistent with attitudinalism, for it may be that all of the Justices' attitudes about certain issues are the same, but attitudinalism does not have much to say about such cases.¹⁷² Even if these cases were

(noting in anticipation of the Supreme Court's decision that both Stevens and Souter were once considered moderate or conservative but were now considered liberal). A counterargument might be that Stevens and Souter are in fact conservative, but that ideology does not explain judicial voting. In any event, the consensus that Stevens and Souter are, by today's standards, liberal, existed well prior to the decision in *Bush v. Gore*.

171. Some attitudinalist studies focus on relatively important Supreme Court cases. For an analysis of how the importance of a case may be measured and a review of the literature assessing how case importance affects decision making, see Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. POL. SCI. REV. 66 (2000).

172. The problem dates back to early behavioralist work. Pritchett, for example, suggested that nonattitudinal factors such as precedent explained unanimous decisions. See PRITCHETT, *supra* note 144, at 25-31. Attitudinalists have sought to identify why the Supreme Court often decides cases unanimously. See Saul Brenner & Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAVIOR 75, 82-85 (1987); Harold J. Spaeth, *Consensus in the Unanimous Decisions of the U.S. Supreme Court*, 72 JUDICATURE 274, 275-81 (1989); see generally Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 392-94 (1998) (discussing the attitudinalists' approach to the problem of unanimity). Critics, however, have pointed out that the

flatly inconsistent with attitudinalism, the advocate of the theory could still find solace in being able to explain the “important” cases, assuming that the unanimous opinions tend to be the less important ones.¹⁷³ *Bush v. Gore* by itself does not prove that attitudinal explanations will work better in more important cases than in less important ones, but *Bush v. Gore* provides evidence that is as strong as any data point on this issue could be.

The third objection to attitudinalism is simpler and yet more forceful: So what? Even if attitudinalism helps us understand votes on the merits of cases, it explains nothing about the inner dynamics of judicial opinions. Though attitudinalists acknowledge that their approach cannot explain judicial reasoning, they deprecate what they refer to as the “legal model.”¹⁷⁴ This term is intended to convey the notion that law, neutrally applied to a new set of facts, is expected to generate consistent and predictable answers, and that its failure to do so renders law as a discipline analytically suspect. The use of the term “legal model” is thus synonymous with legal formalism, a discredited jurisprudential theory since the legal realism movement. The obverse of legal formalism—what the attitudinalists intend to convey by negative implication—is that the very flexibility of doctrine renders judicial opinions just so many words. It is this disparagement of the law that has made the attitudinal model anathema to lawyers,¹⁷⁵ who generally believe that the ar-

sheer volume of unanimous decisions demonstrates that “[t]he impact of a body of common legal rules on a group of constrained voters can be dramatic.” Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949, 959 (1990); see also Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 777-78 (2000) (“[T]he fact that the Court rules unanimously in nearly 40% of its argued cases suggests either that there is a strong core of agreement among the Justices about the law’s requirements in a significant percentage of cases, or at least that their disagreements are not sharp enough to provoke a dissent.”). Attitudinalists, in any event, can predict that in certain contexts, unanimous opinions are unlikely. See SEGAL & SPAETH, *supra* note 1, at 223-24 (“At the level of the individual justices we could have predicted with considerable confidence that no death penalty case in either direction would ever be decided unanimously because of the behavior of Douglas, Brennan, and Marshall at the liberal extreme, and Rehnquist at the Conservative extreme.”). For new institutionalist approaches to Supreme Court unanimity, see sources cited *infra* at note 206.

173. There are obvious exceptions, including *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). See *infra* notes 247-49 and accompanying text.

174. SEGAL & SPAETH, *supra* note 1, at 62 (referring to the “meaninglessness of the legal model”).

175. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 131 (1996) (suggesting that “it is likely that many [lawyers] would reject out of hand the idea that the justices’ policy preferences are the primary basis for decision”). Lawyers sometimes seem to misunderstand the point. Judge Wald, for example, argues in response to an attitudinal study, “[a]ny assumption, therefore, that judges intentionally act in alignment with the party from which they sprung is extremely problematic. When the judge’s decisions and the

guments in judicial opinions are what is important, if for no other reason than that doctrine is the language through which legal arguments must be presented to those with the power to decide cases. Moreover, for academic lawyers who are not merely, or even primarily, interested in predicting case results from legal doctrine, the label "legal model" is entirely misleading. *Bush v. Gore* may reveal that Justices are occasionally disingenuous in their willingness to bend doctrine to their advantage, but even this conclusion derives from a prior identification of which arguments liberals and conservatives would tend to prefer.

To assess this critique, let us return to the center of the puzzle that animates this essay: Why did Chief Justice Rehnquist and Justices Scalia and Thomas, who reasoned that the Florida Supreme Court's interpretation of the election statutes constituted an impermissible change in Florida law, sign on to the per curiam opinion, which rested upon equal protection? Even if attitudinal theory can provide a persuasive answer, academic lawyers can still protest that predicting the judgment vote only scratches the surface of difficult and salient cases because it ignores the underlying dynamics of argument and the obvious importance of doctrine to the deciding Justices, who otherwise would not have labored over developing acceptable theories consistent with their preferred outcomes. If attitudinal theory cannot provide a plausible answer to this inquiry, then its scope is limited indeed, for that would suggest that attitudinalism can explain only one aspect of voting behavior, why Justices vote for one outcome rather than another.

The attitudinalist could answer by pointing out that a breakdown of individual opinions may seem to make the attitudinalist case even stronger. The three Justices generally considered to be the most conservative found that Bush should win for essentially two independent sets of reasons. Justices O'Connor and Kennedy subscribed only to the equal protection theory, joining only the per curiam opinion and not the Chief Justice's opinion adding the theory that the Florida Supreme Court's decision constituted an illegal change in the law. Moving toward the left of the Court, Justice Souter, probably the most conservative of the Court's four lib-

party's view do coincide, it is far more likely that the same life experiences that channel a judge's choice of political parties also guide her judicial decisionmaking." Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240 (1999). Attitudinalists, however, do not maintain that judges vote along party lines because they are following the commands of the party, only that different judges, perhaps because of differences in "life experiences," have different ideologies, which necessarily shape how they tend to resolve cases before them.

erals,¹⁷⁶ and Justice Breyer agreed with the equal protection theory, disagreeing only with the remedy. Justice Stevens, probably the most liberal Justice,¹⁷⁷ and Justice Ginsburg not only expressed strong dissatisfaction with the Court's ruling, but also rejected any claim of a constitutional violation in the case. In addition, only Justice Stevens's dissent suggested a loss of trust in the judiciary.¹⁷⁸ Thus, Justices whom one would expect would care most about the public policy impact of the election were most emphatic in their views. In this analysis, we can posit that the conservatives signed onto the per curiam opinion because it gave additional support for the outcome.

Although this answer shows that the breakdown of Justices within each group voting for a particular outcome seems to reflect attitudes, this is not a prediction of attitudinal theory. A judge seeking to maximize public policy should be indifferent as to whether the desired public policy result is achieved for one reason or for two. If anything, the conservative Justices should have concurred only in the judgment of reversal, because that would have allowed them to achieve the desired result (Bush's election) without strengthening equal protection law in a way that seems counter to their apparent beliefs. If strong attitudinal preferences cause judges to be emphatic, perhaps that is owing to some expressive function in judging.¹⁷⁹ In other words, emphasis might provide satisfaction that is independent of the result. Conservatives might vote conservatively because they want to be seen as conservative and liked by their fellow conservatives.¹⁸⁰ The more justifications lead-

176. In each of the Supreme Court terms from 1995 through 1998, Justice Souter agreed with Justices Thomas and Scalia, generally considered the most conservative Justices, a higher percentage of the time than any of the other liberals. See *The Supreme Court 1998 Term—The Statistics*, 113 HARV. L. REV. 400, 402 (1999); *The Supreme Court 1997 Term—The Statistics*, 112 HARV. L. REV. 366, 368 (1998); *The Supreme Court 1996 Term—The Statistics*, 111 HARV. L. REV. 431, 432 (1997); *The Supreme Court 1995 Term—The Statistics*, 110 HARV. L. REV. 367, 368 (1996).

177. In the same Supreme Court terms, Justice Stevens agreed with Justices Thomas and Scalia a far lower percentage of the time than any of the other liberals. See sources cited *supra* note 176.

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

179. On expressive theories of law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

180. The desire of people to be well thought of by those who generally agree with them helps explain the phenomenon of "group polarization," in which discussion among a group that disagrees with a separate population tends to move the group further away from that separate population. Cass Sunstein explains that group polarization

ing to the conservative result they offer, the more conservative they might seem. The same analysis could be true in reverse for liberals. If true, this at least would force a significant modification of attitudinal theory, which insists that judges seek to maximize their effect on public policy through their votes cast on case outcomes, not that they use opinions as a vehicle of self-expression.¹⁸¹

There is more that attitudinalism cannot explain. Why did the Supreme Court wait until *Bush v. Gore* to help Bush's cause, rather than resolving the issue in *Bush v. Palm Beach County Canvassing Board*? Why did some Justices in the minority agree with the authors of the per curiam opinion that there was an equal protection violation, while disagreeing on the remedy? Why did Justice Stevens assert that the resolution of the case would undermine faith in the courts, an outcome ironically exacerbated by the statement itself? Why was the majority decision "per curiam," rather than signed by its author, presumably Justice O'Connor or Justice Kennedy? Why did the Chief Justice's concurrence cite cases generally seen as decided by liberal Courts to support its case? Why did any of the Justices choose to write opinions at all?

No model of judicial politics can be expected to offer definitive answers to all these questions, and certainly neither political science nor social choice can resolve the ultimate normative question: Who, if anyone, was right? But it would help political science to develop a complementary theory that provides plausible answers to puzzles about why individual Justices signed onto, ignored, or rejected particular theories, and some explanation of how legal argument and attitudes intersect. At times, even attitudinalists seem to acknowledge that various legal arguments can be assessed in terms of plausibility. For example, Segal and Spaeth state, "If Michael Dukakis filed a suit arguing that he should be declared win-

is based on the commonsense intuition that any individual's position on an issue is partly a function of which arguments presented within the group seem convincing. The choice therefore moves in the direction of the most persuasive position defended by the group, taken as a whole. Because a group whose members are already inclined in a certain direction will have a disproportionate number of arguments going in that same direction, the result of discussion will be to move people further in the direction of their initial inclinations. The key is the existence of a limited argument pool, one that is skewed (speaking purely descriptively) in a particular direction. Hence there will be a shift in the direction of the original tilt.

Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 89-90 (2000).

181. Though there is a small literature on the expressive function of judging, that literature tends to emphasize that judicial decisions will be a reflection of public attitudes, not that judges make decisions as a means of self-expression. See, e.g., Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 374-78 (2000).

ner of the 1988 presidential election, and if the Supreme Court had to decide the case, we would not expect the votes in the case to depend on whom the justices voted for in the election."¹⁸² No Justice, they say, would grant credence to "meritless cases."¹⁸³ Whether a case has merit, however, is often controversial, and Justices often go to considerable lengths to establish that their position has more merit than the opposing one. A more refined theory than attitudinalism is needed to show why they bother.

B. New Institutionalism

Frustration with attitudinalism has led political scientists to embrace a school of thought that adherents have called the "new institutionalism."¹⁸⁴ The approach cabins attitudinalism by postulating that although Justices seek to advance their policy preferences, the institutional contexts in which they operate may affect how they do so. Although the new institutionalism is not easily categorized, it can be divided into two rough camps, which Sue Davis has dubbed "rational-choice institutionalism" and "historical-interpretive institutionalism."¹⁸⁵ The rational choice variant characterizes Justices as strategic actors who contemplate how decisions that they make might affect other decision makers, including other members of the Court as well as members of other political branches. The historical-interpretive approach maintains that particular institutional roles inform the actor's institutional perspective. On this view, Justices act as they do in part because institutions condition their views of how they are supposed to act.

As suggested above, these perspectives may be complements rather than substitutes, and they may each help explain some important features of judicial decision making. Consider, for example, the most basic question about *Bush v. Gore*: Why did Justices write opinions at all? A rational-choice institutionalist might argue that Justices write opinions because they wish to persuade other institu-

182. SEGAL & SPAETH, *supra* note 1, at 70.

183. *Id.*

184. The term originates in James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 741 (1984), which emphasized politics as a vehicle through which "individuals develop themselves, their communities, and the public good." Rogers Smith was the first to import the new institutionalism into judicial politics scholarship. See Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 98-107 (1988).

185. Sue Davis, *The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 135, 137 (Cornell W. Clayton & Howard Gillman eds., 1999).

tional actors that they have disposed of the case properly in an effort to gain their support and so that the other actors do not seek to overturn their decisions.¹⁸⁶ Though such overturning is a smaller danger for constitutional than for statutory decision making,¹⁸⁷ even constitutional decisions can be overruled or overturned by constitutional amendment.¹⁸⁸ And even though remote, there is at least a theoretical possibility that other actors, typically the President, will refuse to abide by the decision and precipitate a constitutional crisis. In *Bush v. Gore*, there might have been a danger that Congress would have ignored the Supreme Court decision when counting electoral votes or that the losing candidate would have refused to concede defeat.¹⁸⁹ Neither of these occurred. And though the possibility to most observers seemed vanishingly small,¹⁹⁰ given the existing practice of justifying decisions in opinions, failure to do so in an epochal case would have appeared sufficiently bizarre that the chances of overruling or of precipitating at least a crisis of confidence would have been higher than usual.

The historical-interpretive institutionalist, meanwhile, would maintain that Justices write opinions because they believe that justifying decisions is part of their job. This is not an inevitable aspect of judging, but a function of historical context.¹⁹¹ Indeed,

186. Sometimes, however, Justices may be able to effect their policy preferences best if Congress does overturn the Court's decision, and therefore they may encourage Congress to do so. See Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 504-21 (1996).

187. For a historical review of congressional reversals of Supreme Court statutory interpretation decisions, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

188. See U.S. CONST. amend. XXVI (overturning *Oregon v. Mitchell*, 400 U.S. 112 (1970)); *id.* amend. XVI (overturning *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *id.* amend. XIV (overturning *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); *id.* amend. XI (overturning *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

189. These theories are not altogether unrelated, as the Constitution assigns to the President of the Senate, who was then Gore, the task of counting the votes. *Id.* amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."). Gore might have argued that the counting of the electoral votes was a political question for Congress in general and the President of the Senate in particular. Gore, of course, did not do so, instead overruling objections from his supporters to the Florida electors. Edward Walsh & Juliet Eilperin, *Gore Presides as Congress Tallies Votes Electing Bush; Black Caucus Members Object as Fla. Numbers Are Accepted*, WASH. POST, Jan. 7, 2001, at A1.

190. Of course, it was not always vanishingly small, and rational choice institutionalists have been able to cast new light on the emergence of judicial review. See Lee Epstein & Jack Knight, *On the Struggle for Judicial Supremacy*, 30 L. & SOC'Y REV. 87, 89-112 (1996).

191. Even appeals court judges decline to write opinions in many cases. For a critique of summary dispositions in the federal appellate courts, see Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995), and see also

Supreme Court Justices make many decisions, such as votes on certiorari, which are generally not explained.¹⁹² For the historical-interpretive institutionalist, opinion writing is not solely a function of a strategic calculation, but also a reflection of institutional norms. Such norms can change. For example, Supreme Court Justices used to issue opinions seriatim, with each Justice explaining his reasoning on the merits.¹⁹³ Today, of course, a Justice who merely signs onto someone else's opinion ordinarily does not explain the reason for doing so, with the presumption being that one signs onto an opinion because one agrees with—or at least is willing to acquiesce in—its reasoning, except to the extent elsewhere indicated. Thus, Chief Justice Rehnquist and Justices Scalia and Thomas do not explain why they signed onto the per curiam opinion, and though their signatures attest to endorsement of the opinion, any pragmatic reason for joining it remains unstated. Though the break from the practice of seriatim opinions was sudden,¹⁹⁴ changes in norms can take place over long periods of time as well. Indeed, one of the mysteries that historical-interpretive institutionalists have sought to resolve is why the frequency of dissent has greatly increased in this century.¹⁹⁵

The new institutionalism would amount to little, if all it could do was to explain such practices as opinion writing, and without consensus about the best explanation at that. The same kinds of reasoning, however, can resolve some of the mysteries that attitudinalism fails to answer. To illustrate, we will start with some of the easier mysteries and work up to the more challenging ones. Consider again the observation that no Supreme Court Justice would have held that Governor Dukakis was the true winner of the 1988 presidential election.¹⁹⁶ The historical-interpretive institutionalist would explain that this is because there are shared legal and cultural understandings about the quality of legal arguments. There are some legal propositions that everyone would label either “acceptable” or “unacceptable,” and given our cultural understand-

Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707 (1956) (criticizing the Supreme Court for resolving cases summarily).

192. *Bush v. Gore* is a rare exception in that Justice Scalia explained at least his own decision to grant a stay. 531 U.S. 1046, 1046-47 (2000) (Scalia, J., concurring) (granting stay and certiorari).

193. E.g., John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 139-43 (1999).

194. *Id.* at 143.

195. See *infra* note 206 and accompanying text.

196. See *supra* text accompanying note 182.

ings of law, no argument for a Dukakis victory could have been offered with a straight face.¹⁹⁷ The rational-choice institutionalist would add that a decision contrary to what everyone viewed as unambiguously persuasive would have negative repercussions for the decision maker, either defiance or at least some reputational loss.

The institutionalist recognition that legal reasoning is a cultural constraint on judges does explain more than why some decision making options seem altogether unavailable, which the attitudinalists already seem to concede. For once we accept that legal culture can brand certain arguments in this manner, we must recognize that legal argument is not just mumbo-jumbo, that even if legal reasoning is culturally determined, there are stronger arguments and weaker ones from the perspective of a particular legal culture. Yet because there is no algorithm with which to measure the quality of arguments,¹⁹⁸ there will be many cases in which everyone recognizes that there are competing "reasonable" arguments to be advanced. Moreover, there will be borderline cases in which some people will believe that there is an unambiguous answer to the legal problem with which all reasonable jurists would agree, while others will maintain that different answers are plausible, or that the result is unambiguous but in the opposite direction.

The new institutionalist recognition of the role of legal argument does not make judicial attitudes irrelevant. Attitudes may help explain both how a jurist is likely to resolve a case in which the jurist recognizes that there is no unambiguous answer and whether or not a case has an unambiguous answer. If the law is genuinely ambiguous on a particular issue, even given whatever commitments a particular judge has made to abstract principles of legal interpretation, then the judge might as well resolve the issue in the way that advances the judge's public policy preferences. Moreover, attitudes are psychological, and even if our understanding of psychology is too shallow to produce robust explanations of

197. The best argument we can come up with for a Dukakis victory is that then-Vice-President Bush, by virtue of his alleged participation in the Iran-Contra scandal, might be found to "have engaged in insurrection or rebellion against the" Constitution, so that he is ineligible to "hold any office, civil or military, under the United States." U.S. CONST. amend. XIV, § 3. This shows that at least a bad argument can be constructed to support even the ridiculous proposition that Dukakis was the victor; we will leave a dissection of the argument to the reader. Thus, the claim that no court would embrace the proposition is true not simply because no argument whatsoever can be constructed. It must be because there are shared understandings about what makes arguments sound.

198. Moreover, in the constitutional context, a variety of different types of arguments can be made, and there is no single principle by which these arguments can be compared. *E.g.*, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-119 (1982).

attitudes, the theory of cognitive dissonance implies that, *ceteris paribus*, judges are generally likely to find arguments that advance their policy preferences more appealing than arguments that do not.¹⁹⁹ Just as any individual is less likely to accept data that represent a vehement affront to his or her most strongly held world views,²⁰⁰ so too is a judge less likely to find persuasive a legal argument that seems to point in the wrong direction.²⁰¹ This may explain the apparent inconsistency between presumed preferences on equal protection and federalism in *Bush v. Gore*. Just as Americans seemed to divide along party lines in their views of the fairness of the Florida recount,²⁰² so too desired outcomes may have colored the Justices' genuine assessments of the merits in the Supreme Court.

This reconceptualization can help provide a theory explaining judicial views in *Bush v. Gore* that is more sophisticated than that offered by attitudinalism. For the five conservative Justices who voted for Bush, both issues in the case presumably seemed susceptible to reasonable disagreement. Though the Justices in the majority implied the basis of their disagreement with dissenters, neither the *per curiam* opinion nor Chief Justice Rehnquist's concurrence ever attacked the dissents directly, perhaps indicating a recognition that their views, though different, were reasonable.²⁰³

199. See Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 556-62 (1990) (exploring how cognitive dissonance theory might affect judicial decisions).

200. For examples and evidence, see LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

201. Psychologists also have termed the tendency of people to reject evidence that undermines their theories as "confirmation bias." See generally Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987) (explaining and analyzing concept of "confirmation bias"). As a legal commentator explains:

[W]hen asked to assess the validity of a hypothesis, subjects systematically search available information for theory-confirming, at the expense of theory-disconfirming, data. They not only evaluate theory-confirming evidence as being more relevant than theory-disconfirming evidence but also have better recall for the former than the latter. Indeed, people have a good deal of difficulty in searching for and recognizing theory-disconfirming information. They accept theory-confirming evidence at face value, whereas they subject theory-disconfirming evidence to critical evaluation. Unsurprisingly, this results in a rather powerful bias toward confirming tentative judgments or beliefs. This enormous quantity of empirical evidence suggests that Title VII's assumption of a blank slate from which employers make decisions is wholly unworkable.

Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1210-11 (1995).

202. See, e.g., Richard Morin & Claudia Deane, *Poll Finds Most Want Recount as Last Word*, WASH. POST, Nov. 14, 2000, at A20.

203. There are certainly many cases in which the same majority has directly confronted arguments offered by the same dissenters. E.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 121 S. Ct. 924, 933-34 n.4 (2001).

One of the dissenters, in contrast, explicitly questioned the integrity of the per curiam approach and outcome, while another stated that “the federal legal questions presented, with one exception, are insubstantial.”²⁰⁴ These Justices thus may well have felt that the issues were at or beyond the unambiguous threshold. Certainly this is not the only case in which a majority or concurring opinion author has declined to reply to his dissenters. And the failure to respond directly to criticism might simply reflect time constraints in drafting. But it is worth at least considering the alternative thesis that the asymmetry reflects a divergence in the confidence interval concerning how the dispositive issues should be resolved. If this were so—implying that the dissenters were more confident in their analyses than were those who authored the per curiam opinion and concurrence—then one might imagine the more strongly held views of four to persuade a more ambivalent majority of five.²⁰⁵ And yet, Court rules afford each Justice a single vote without regard to strength of conviction. And thus, because each Justice receives one vote, regardless of degree of confidence, Bush was able to prevail.

This is, however, just one plausible story, and a further consideration of the role of dissent in new attitudinalist scholarship may provide different ones. New attitudinalists demonstrate that there was once a norm rendering dissents extraordinarily rare, but that this norm changed beginning about 1940.²⁰⁶ Dissents may expose faulty reasoning by a majority, and scholars have shown that

204. *Bush v. Gore*, 531 U.S. 98, 144 (2000) (Breyer, J., dissenting).

205. In addition to the problem discussed in the text, there are two further difficulties with this prediction. First, it has no empirical support. Indeed, even commentators who believe that there is strategic behavior in federal courts acknowledge that there is no evidence for vote swapping across cases. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2331 & n.101 (1999). The new institutionalist explanation is that there is a norm against such behavior that various constraints, such as the constraint that judges explain their decisions in a consistent way, promote. See *id.* at 2334-62. Second, even if some Justices are only weakly confident that their legal determination is correct, that does not mean that they have only a weak preference for that outcome. *Bush v. Gore* may be an illustration of this; even if the Justices ruling for Bush felt that the issues were debatable, that does not mean that they would have been almost as happy with the alternative outcome.

206. For a table demonstrating the dramatic decline in the percentage of unanimous Court opinions, see David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACH 91, 92-94 (Cornell W. Clayton & Howard Gillman eds., 1999). Explorations of the reason for the decline include Lee Epstein & Jeffrey A. Segal, *The Norm of Consensus on the U.S. Supreme Court*, AM. J. POL. SCI. (forthcoming 2001), available at <http://artsci.wustl.edu/~polisci/ep-stein/research/Norm.html>; Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158 (1992); and Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 362 (1988).

dissents circulated among the Justices often result in changes in the majority opinion.²⁰⁷ The puzzle is why dissents today often survive the internal debate, even though they have no immediate or predictable effect on the law, especially in a case like *Bush v. Gore* in which there is little hope for a dissent to be vindicated by a later Court. One commentator has suggested that the practice of dissent is demanded by norms of democratic legitimacy,²⁰⁸ but this normative defense does not provide a positive explanation for the practice. Moreover, the term legitimacy itself is susceptible to competing definitions. Thus, if one instead defines judicial legitimacy as basing decisions upon agreed-upon materials and a common jurisprudential method,²⁰⁹ then the increased frequency of dissents threatens to undermine legitimacy. Moreover, dissents risk undermining the perceived legitimacy of the Court when, as in *Bush v. Gore*, they are dismissive or disrespectful of the majority's views.

One answer is that a circulated dissent will have a chance of influencing the majority only if the threat to publish the dissent is credible. Sometimes, evidence indicates, separate opinions are withdrawn,²¹⁰ but a Justice who often failed to follow through on a

207. Professors Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck offer a detailed empirical model of what they term "the decision to accommodate" a requested change in a draft opinion. See FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 94-124 (2000). Although requests to accommodate often come in the form of memos, they sometimes come through circulation of first drafts of separate opinions. *Id.* at 113-14. Lee Epstein and Jack Knight offer the following explanation:

[O]ur suspicion . . . is that the justices occasionally use these writings as bargaining tools. They demonstrate to the writer that she cannot count on support if she does not adjust her opinion in ways suggested in the dissent or concurrence. By this logic, a writing circulated by the non-opinion writer that is never published or that changes in form when it is published provides some evidence of strategic interaction.

LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 76-77 (1998) (footnote omitted).

208. See Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2246-58 (1996) (arguing that although the rule of law cannot justify the practice of dissent, the practice may be justified through the constitutional commitment to deliberative democracy).

209. Cf. Amartya K. Sen, *Social Choice Theory: A Reexamination*, 45 ECONOMETRICA 53 (1977), reprinted in AMARTYA K. SEN, WELFARE AND MEASUREMENT 158 (1982) (positing that judgment-based decision making is grounded in agreed-upon norms).

210. Anecdotal evidence suggests that Justices will withdraw separate opinions only when the author of the majority opinion accommodates their concerns. Professors Epstein and Knight give an example from memoranda concerning *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). After Justice White wrote an opinion, Justices Brennan, Stevens, and Stewart circulated concurring opinions. Justice Stevens eventually withdrew his separate opinion when Justice White modified his opinion to meet at least Justice Stevens's objections, but Justice Brennan, even though he explicitly indicated in a memorandum that he would withdraw the concurrence if his concerns were satisfied, ended up publishing a revised version as a partial concurrence. See EPSTEIN & KNIGHT, *supra* note 207, at 67-70.

threat to dissent would lose credibility.²¹¹ The dissents of the Justices in the minority in *Bush v. Gore* may represent those Justices' carrying out their credible threats to dissent. The threats, however, may or may not have been explicit. It would be more typical in the Rehnquist Court for votes simply to be taken in conference with little discussion.²¹² Repeated dissents issued over time in the event of disagreement, with more vituperative dissents saved for either more important cases or for cases in which the minority believes that the majority's position is entirely unwarranted, may make explicit threats unnecessary.

This suggests two possible accounts of the dissents in *Bush v. Gore*, each corresponding to a game-theoretic model.²¹³ The first game is analogous to a prisoners' dilemma, in which two prisoners would be best off if neither ratted out the other, but in which it is in each prisoner's interest to rat out the other regardless of what the other prisoner does.²¹⁴ In the judicial context, the disagreeing Justices in each case must choose whether to expose the majority, recognizing that everyone will be best off across a range of cases if no one dissents. Because the game is repeated, payoffs from unlimited iterations are possible such that a cooperative solution might appear dominant.²¹⁵ This might help to explain why the Court was able to maintain a norm of non-defection for so long. In an infinitely repeated prisoners' dilemma, a "tit-for-tat" strategy might emerge in which cooperation by a Justice in one period induces cooperation

211. That dissents may represent carrying out of credible threats may explain the relatively low dissent rate on the courts of appeals. See Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1616 n.72 (2000).

212. See O'Brien, *supra* note 206, at 110 ("In comparison to Burger, Chief Justice Rehnquist discouraged lengthy exchanges at conference . . .").

213. Although new institutionalists do not generally frame their models in this manner, providing a game theoretical cast on these models is useful at least in developing a preliminary explanation for the strategic behavior that new institutionalists observe. For articles articulating explicit game theoretic approaches to judicial decision making, see Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game-Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63 (1994); and Edward P. Schwartz, *Policy, Precedent, and Power: A Positive Theory of Supreme Court Decision-Making*, 8 J.L. ECON. & ORG. 219 (1992).

214. For a more rigorous treatment of the prisoners' dilemma, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 31-35 (1994), and see also MAXWELL L. STEARNS, *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* 540-51, 961-67 (1997).

215. Of course, to the extent that the Justices anticipated an end point, they faced the phenomenon of unraveling, which serves to restore the original prisoners' dilemma payoffs, and thus the norm of mutual defection. See ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 88-89 (1989); see also Reinhard Selten, *The Chain-Store Paradox*, 9 THEORY & DECISION 127 (1978) (providing an early illustration of the problem). But see David M. Kreps et al., *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 J. ECON. THEORY 245, 245-47 (1982) (explaining why cooperation may occur even in finite-period prisoners' dilemmas).

by another Justice in the next.²¹⁶ But this norm is not inevitable,²¹⁷ particularly in an ideologically divided Court in which some Justices are consistently likely to be in the minority. Because there will be few opportunities for the Justices typically in the majority to pay back the Justices typically in the minority by not dissenting in cases in which the alignments are reversed, cooperation may break down. For example, Justice Breyer's opinion, which methodically dissects the majority's analysis, may reflect that he had little reason not to identify areas of disagreement. Even if his dissent marginally undermines the Court's legitimacy, Justice Breyer may benefit from it if he believes that it demonstrates his own integrity or consistency or simply the rightness of his own analysis.

The second game, focusing on the possibility of a threat in an individual case, is "chicken," referring to the dangerous real-life game in which two teenagers speed cars toward a cliff, each hoping that the other applies the brakes first.²¹⁸ This can take place at the level of the individual case. Justice Stevens may have hoped that one Justice would have been so concerned about the effect of an angry dissent in such a controversial case on either the reputation of the individual Justice or on the Court as a whole that the Justice would have switched votes. So viewed, a potential divergence exists between the incentives to affect—or at least try to affect—the behavior of other Justices, and the incentives to preserve the appearance of decorum on the Court. The problem with challenging an opponent to a game of chicken, of course, is that both sides may go off the cliff, and this might be what occurred in *Bush v. Gore*. The Court, of course, will survive the crash,²¹⁹ and Justice Stevens may

216. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 20-37 (1984) (reporting that the simple tit-for-tat strategy defeated other strategies in a round robin competition among algorithms).

217. Even if tit-for-tat defeats other strategies in a tournament structure, that does not mean that it will defeat other strategies in equilibrium. Indeed, it can be deductively proved that once any strategy becomes sufficiently dominant, there will be another strategy that can defeat it. See, e.g., Jonathan Bendor & Piotr Swistak, *The Evolutionary Stability of Cooperation*, 91 AM. POL. SCI. REV. 290, 295 (1997). Moreover, more complex game theory models show that institutional context can affect the equilibrium that results, with relatively small defections potentially unraveling a previously stable equilibrium. See Kenneth G. Binmore & Larry Samuelson, *Evolutionary Stability in Repeated Games Played by Finite Automata*, 57 J. ECON. THEORY 278, 288-98 (1992).

218. See BAIRD ET AL., *supra* note 214, at 44.

219. See Jess Bravin, *Election 2000: High Court's Deep Divisions Have Almost Always Healed—So Far*, WALL ST. J., Dec. 14, 2000, at A19. Indeed, the Court not only will survive the crash, but the Court's political capital might remain largely unaffected by the ultimate decision. Liberals tend to favor a more activist Court and conservatives tend to favor a minimalist, non-activist court. Cf. *The Nearest Run Thing*, NAT'L REV., Dec. 31, 2000, at 13, 13 (responding to

have believed that the small chance of persuading a Justice in the majority to switch sides was worth the cost.

New institutionalism cannot tell us which of these competing explanations for Justice Stevens' actions is more persuasive. There may be elements of truth in both, and on another level, both may abstract from the complex reality of the case. Nonetheless, new institutionalism at least provides a basis for furnishing an explanation of a phenomenon—a dissenting jurist calling into question the integrity of the opposing Justices—that traditional legal and attitudinal approaches cannot.²²⁰ The new institutionalist literature thus transcends attitudinalism's insistence on the irrelevance of legal argument and confirms lawyers' instinctive sense that Justices use majority opinions and dissents to argue over legal issues. This acknowledgment of doctrine's relevance is critical, because doctrine is the vehicle through which courts affect the conduct of the state, the shape of institutions, and the nature of countless interactions regulated by law. Lawyers advising their clients, including the government, about how to shape their conduct to avoid litigation and adverse judicial decisions do not simply read cases for their facts and outcome votes. Now that new institutionalism has helped us understand how the Justices have acted *given* their voting coalitions, we can mine it for an understanding of how the voting coalitions in *Bush v. Gore* formed.

To start, new institutionalism can provide a theory explaining why Justices Souter and Breyer agreed with the *per curiam*'s analysis of the equal protection issue. It could be, of course, that Souter and Breyer genuinely agreed that the different manual recount standards in different counties posed an equal protection

Justice Stevens's statement that the " 'nation's confidence in the judge as an impartial guardian' " of the law was undermined by stating that "[a]fter decades of capricious and arbitrary decisions, we can only hope so"). If this conservative decision is regarded as activist, that is unlikely to cause liberals to reject the Court's institutional power to be activist in the future. Failing victories in the political process, liberals well appreciate that the Court remains a helpful last bastion. And conservatives, while generally preferring the Court to remain out of the political process, certainly will overcome whatever reticence they have to benefit from a victory that itself will solidify the Court's own conservative base through subsequent judicial appointments. So viewed, *Bush v. Gore* is reminiscent of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a case that appeared unlikely to have provoked a constitutional crisis given that the two Republican-controlled political branches had no incentive to upset the Court's ultimate ruling, denying a Federalist judicial appointment even while staking out the power of judicial review.

220. Legal theorists also would have trouble understanding such an attack. Ronald Dworkin's account of legal interpretation, for example, explains that "when judges disagree, at least in detail, about the best interpretation of the community's political order . . . each judge still confirms and reinforces the principled character of our association." RONALD DWORKIN, *LAW'S EMPIRE* 264 (1986). Direct attacks on another Justice's integrity would seem to defeat the purpose of dissent on his account.

problem. This is a simple attitudinal explanation, except that it seems odd that they would find an equal protection problem when the ordinarily more liberal Justice Stevens did not. Another possibility is that Justices Souter and Breyer were attempting to lure some of the Justices who ended up in the majority, particularly Justices O'Connor and Kennedy, to their side. Such attempts at maneuvering are familiar stories of the new institutionalist literature. New institutionalist scholars, supplementing data with anecdotes, have unearthed memoranda indicating that Justices at least sometimes are willing to vote in ways inconsistent with their first-choice policy preferences, or ideal points, in an attempt to forge successful majority coalitions.²²¹ Indeed, it is central to the new institutionalist rejection of attitudinalism that Justices' professed policy preferences will deviate from their actual policy preferences because of strategic attempts to ensure that the case holding is as close as practically possible to their ideal point.²²²

While we cannot yet explore conference memoranda to ascertain whether this is what happened in *Bush v. Gore*, and while these memoranda may prove inconclusive even once available, there are clues indicating that this is a plausible account of *Bush v. Gore*. Interestingly, newspaper reporters covering the oral argument²²³ in *Bush v. Gore* sensed that Justices Souter and Breyer were attempting to find some common ground with the conservatives on the Court.²²⁴ Although Justices O'Connor and Kennedy did not defini-

221. Lee Epstein and Jack Knight are particularly successful in uncovering examples of such maneuvering. See, e.g., EPSTEIN & KNIGHT, *supra* note 207, at 92 (arguing that Chief Justice Burger took a position "at odds with his sincere preference" because he "thought that he could attract sufficient support for the establishment of a good faith exception [to the exclusionary rule] only by taking the eradication of the rule off the table").

222. Keith Whittington explains:

[T]he attitudinal model posits that a judge will vote so that the case outcome is as close to her preferred position as possible Rational choice scholars, by contrast, assume that the constraints faced by justices are more severe and also that some of those constraints are mutable. Notably, the choices of relevant actors may be interdependent. As a result, in order to achieve their desired outcome, it may not be enough for judges to act sincerely. They may need to act strategically, in the sense of understanding and anticipating the likely responses of others to the judge's own actions. Judicial decisions may not simply reflect judicial attitudes, but may also reflect the larger strategic environment.

Keith E. Whittington, *Once More unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 611-12 (2000) (review essay).

223. The official transcript does not identify the questioners by name. See Official Transcript, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) 2000 WL 1804429. For a transcript including identification of Justices, as transcribed by a private media organization, see *George W. Bush v. Al Gore*, L.A. TIMES, Dec. 12, 2000, at S1.

224. William Glaberson, *Contesting the Vote: The Legal Battle; Justices Trying to Find Middle Ground, Legal Experts Say*, N.Y. TIMES, Dec. 12, 2000, at A1.

tively express their positions, both Justices indicated general skepticism about the Florida Supreme Court's decision to allow recounting of ballots.²²⁵ Moreover, both indicated some openness to the equal protection claim,²²⁶ and both expressed some skepticism about the Article II claim.²²⁷ Eventually, of course, the attempt failed,

225. A *New York Times* editorial summarized, "The comments of the two potential swing justices on the election case—Anthony M. Kennedy and Sandra Day O'Connor—suggested they were inordinately troubled by the Florida Supreme Court order to hand-count disputed ballots." *Nine Votes for History*, N.Y. TIMES, Dec. 12, 2000, at A32. A news article in the same paper, however, quoted prominent law professors as concluding that these Justices appeared undecided. Glaberson, *supra* note 224 ("[S]ome experts said . . . two of the justices who had agreed with Justice Scalia on Saturday, Sandra Day O'Connor and Anthony M. Kennedy, appeared undecided about certain issues."). Our assessment is that both statements are correct. While O'Connor and Kennedy both suggested that they were disturbed by the Florida Supreme Court's action, they used the oral argument as an opportunity to consider the strengths and weaknesses of different arguments, apparently showing preference for the equal protection claim.

226. Justice Kennedy asked Gore's lawyer, David Boies, about whether there must be a uniform standard in counting ballots and Boies replied, "I think there is a uniform standard The standard is whether or not the intent of the voter is reflected by the ballot." *George W. Bush v. Al Gore*, *supra* note 223. To that Justice Kennedy answered:

That's very general. It runs throughout the law. Even a dog knows the difference in being stumbled over and being kicked. We know it. Now, in this case, what we're concerned with is an intent that focuses on this little piece of paper called a ballot. And you would say that from the standpoint of the equal protection clause, each—could each county give their own interpretation to what intent means, so long as they are in good faith and with some reasonable basis finding intent?

Id. Without allowing Boies to respond in a full sentence, Justice Kennedy added, "But here you have something objective. You're not just reading a person's mind. You're looking at a piece of paper This is susceptible of a uniform standard. And yet you say it can vary from table to table within the same county." *Id.*

Justice O'Connor was less active in this line of questioning, but she did ask Boies, "Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?" *Id.* O'Connor indicated some discomfort with Bush's equal protection argument but seemed to be seeking a satisfactory answer. O'Connor asked Theodore B. Olson, Bush's attorney, "Well, there are different ballots from county to county too, Mr. Olson, and that's part of the argument that I don't understand. There are machines; there's the optical scanning. And then there are a whole variety of ballots; there's the butterfly ballot that we've heard about and other kinds of postcard ballots. How can you have one standard when there are so many varieties of ballots?" *Id.* When Olson responded that "the standard should be that similarly situated voters and similarly situated ballots ought to be evaluated by comparable standards, O'Connor replied, "Then you'd have to have several standards, county by county, would it be?" *Id.* After Olson agreed, O'Connor asked no further questions on this issue.

227. Justice Kennedy asked the first question, requesting that Olson tell him the basis of the Court's jurisdiction. After Olson cited Article II, Kennedy responded, "[T]o say that the Legislature of the state is unmoored from its own Constitution and it can't use its courts and it can't use its executive agency—even you, your side, concedes it can use a state agent—seems to me a holding which has grave implications for our republican theory of government." *Id.* Justice O'Connor soon followed up by stating, "I have the same problem Justice Kennedy does, apparently, which is, I would have thought you could say that Article II certainly creates a presumption that the scheme the Legislature has set out will be followed, even by judicial review, in election matters." *Id.*

with the Justices disagreeing about whether the Florida courts should be allowed to resolve the deadline issue, or whether the Florida courts' professed desire to take advantage of the statutory safe harbor demanded a resolution that would allow the Florida Supreme Court no room to maneuver.²²⁸ Nonetheless, this initial dialogue might have had an effect on the final opinions.

New institutionalists have not systematically studied oral arguments, perhaps because their Socratic form makes it difficult to code whether a Justice is embracing a particular position or merely probing the weaknesses of the alternative. Many lawyers have lamented that it is often difficult to predict how a judge will vote on a case from questions in oral argument.²²⁹ Nonetheless, just as new institutionalists identify attempts at coalition formation in and after conference, so too might oral argument serve as a preliminary opportunity for signaling, negotiating, revealing focal points,²³⁰ and for forming ultimate coalitions. Oral argument is, after all, typically the Justices' first opportunity to discuss the merits of cases together, and commentators have noted that oral argument in the Supreme Court often seems to be among the Justices more so

To the extent that these Justices expressed concern that the Florida Supreme Court might have created a new law, they focused more on 3 U.S.C. § 5 than on Article II. Justice Kennedy pressed Gore's attorney Boies on whether § 5 required a determination of whether a law was "new" or "old," but he did not state a belief that Article II demanded that the Supreme Court make the same distinction. Justice O'Connor later characterized the position that a legislature must "give special deference to the legislature's choices insofar as a presidential election is concerned," as a "tenable view anyway, and especially in light also of the concerns about Section 5." *Id.*

228. See *supra* notes 67–71 and accompanying text.

229. As one commentator noted, "The Justices are notoriously hard to read. What seems to be a Justice's obvious inclinations at oral argument can be quite deceptive when the opinions are released and votes made known." Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 208 (1997).

230. Focal points may be particularly important in cases in which the outcome is more important to some Justices than the reasoning, and when there will be little time for negotiation. If a Justice is intent on garnering a majority for an outcome, then that Justice will want to consider which of various arguments for achieving that result are particularly salient, rather than focus in conference on an issue that seems tangential to other Justices. Selection of different possible arguments for resolving a case may thus be what Thomas C. Schelling has referred to as a "tacit coordination" game. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54 (1979). Schelling explains:

When a man loses his wife in a department store without any prior understanding on where to meet if they get separated, the chances are good that they will find each other. It is likely that each will think of some obvious place to meet, so obvious that each will be sure that the other is sure that it is "obvious" to both of them.

Id. Similarly, two Justices eager to coordinate their arguments for a particular resolution will seek out the "obvious" argument for that resolution, and oral argument may help solidify one argument relative to others without explicit negotiation.

than between the bench and counsel.²³¹ New institutionalism thus suggests that Justices may use questions and comments in oral argument as a subtle way of staking out positions and forming alliances more so than to seek guidance from counsel as to how to resolve the case.²³²

Though other limited opportunities for bargaining may exist later in the opinion-writing process, there are reasons Justices may prefer to provide preliminary signals about future bargaining at oral argument. First, post-argument opportunities to negotiate may prove scarce,²³³ especially given the lack of discussion in conference in the Rehnquist Court.²³⁴ Second, Justices attempting to persuade colleagues seen as “swing voters” will want to make a concession to those Justices before the Justices on the other side of the Court are able to make their own concessions to push the judgment and holding in the opposite direction. Third, because oral argument is public—though not usually published²³⁵—adoption of positions at oral argument may be seen as potential bonds to facilitate bargaining.²³⁶

231. See Michael C. Dorf, *The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 40 (1998) (noting that Justices often “ask questions of counsel that sometimes seem aimed more at their colleagues”); *id.* at 40 n.193 (citing oral arguments “in which the attorney appears to be cast in the role of ventriloquist’s dummy”).

232. A similar dynamic may occur in quite different settings. See Kimberly A. Moore & Maxwell R. Stearns, *The Law and Economics of Survivor* (Feb. 2001) (unpublished manuscript, on file with authors) (demonstrating similar behavior among participants forming alliances on the television show *Survivor*).

233. Professors Maltzman, Spriggs, and Wahlbeck explain:

Once justices react to a draft and make known their views regarding its content, an author will consider whether he or she already has a majority opinion coalition prior to deciding how to respond to a justice who seeks further changes in the majority opinion. Opinion authors who have already secured a winning coalition have little incentive to make additional changes to the opinion.

MALTZMAN ET AL., *supra* note 207, at 105 (citation omitted); see also *id.* at 136-37 (noting that “[w]orkload pressures are likely to be exacerbated at the end of a term” and that “end-of-term pressures may compel justices to join an opinion, rather than hold out for subsequent drafts”). Even with ample *time* to negotiate after oral argument in many cases, the existence of a norm discouraging explicit tradeoffs among issues in a case, see *supra* note 206, may lead Justices to negotiate through informal signaling, which may be more difficult on paper than in person.

234. See *supra* note 212 and accompanying text.

235. See *supra* note 223 (noting that official oral argument transcripts do not identify the questioner).

236. This may help explain why the Supreme Court allowed an audiocast of the oral arguments in the two election cases immediately after the argument. The concession was remarkable given the Supreme Court’s past refusal to budge on the issue. Cf. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the House of Rep. Comm. on Appropriations*, 104th Cong. 31 (1996) (quoting Justice Souter as announcing that “the day you see a camera coming into our courtroom it is going to roll over my dead body”). Radio may be less intrusive than television, though the difference in presentation is slight, particularly given the technology that television stations employed to animate the audiocasts. See Peter Marks, *Contesting the Vote: The Media; Without Pictures, TV*

In private negotiations, in contrast, Justices may be able to withdraw concessions initially made with little effect on public reputation, a strategic bargaining problem that may undermine preliminary agreements.²³⁷

All of these may have been factors in *Bush v. Gore*. The Justices' desire to decide *Bush v. Gore* quickly may have increased the need to "negotiate" during oral argument. The negotiation, of course, ultimately broke down, apparently over the issue of whether December 12 was a deadline to which the Supreme Court was required to adhere for purposes of any remedial action on remand. But once Justices Souter and Breyer expressed approval for the equal protection argument, they may have determined that they could not back down from it, or at least could not ridicule the position. It is thus not surprising that Justices Souter and Breyer indicated sympathy with that aspect of the per curiam opinion. It might, after all, undermine their credibility in such an important case to label such an issue "insubstantial" after having appeared to embrace that position just one day before. Justices Stevens and Ginsburg, in contrast, had no such need to hedge. At the same time, it is not surprising that Justice Breyer hedged by not explicitly concluding that the per curiam opinion's resolution of the equal protection issue was sound.²³⁸

If this argument explains the votes of Justices Souter and Breyer, it provides an equally good account of the votes of Justices O'Connor and Kennedy. By indicating at oral argument, and perhaps at conference, that they too were sympathetic to the equal protection claim,²³⁹ they might have seemed overtly strategic had they

Networks Were Scrambling, N.Y. TIMES, Dec. 2, 2000, at A9 (noting that the networks were able to demonstrate graphically who was asking and answering particular questions). Undoubtedly, the importance of the case partially explains the Court's decision, though it might seem that in an important case, the Justices would be even more hesitant about television technology. A complementary explanation is that some Justices eager to reach an accommodation thought that a public oral argument, allowing Justices to commit implicitly to certain positions, would help.

237. This distinction between signaling to bond at oral argument without necessarily doing so in private conferences is parallel to that of combining votes with published opinions by jurists and simple voting without offering published justification by legislators. The former operates as a bond that imposes constraints on doctrinal maneuverability. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1276-81 (1994) (positing that published opinions inhibit judicial logrolling while voting without published explanations promotes legislative logrolling); see also *supra* note 205 (noting the absence of logrolling by judges). The latter facilitates logrolling by allowing legislators to shift from previously assumed positions on public policy. See generally DENNIS C. MUELLER, PUBLIC CHOICE II 82-86 (1989) (discussing legislative logrolling).

238. See *supra* note 66 and accompanying text.

239. See *supra* note 226 and accompanying text.

mysteriously abandoned the argument in the opinion they wrote or joined, particularly if they had then joined an opinion relying on an argument about which they had signaled skepticism.²⁴⁰ Similarly, this provides a possible explanation of why Justices O'Connor and Kennedy did not find standing to be a threshold problem.²⁴¹ Of course, Justices O'Connor and Kennedy might well have not noticed the standing issue and might have found the equal protection argument substantively more appealing than the Article II argument.²⁴² This leaves unanswered, however, the question of why O'Connor and Kennedy did not explicitly disagree with the concurrence's Article II analysis. Though a failure to address an issue made irrelevant by resolution of another issue is not unusual,²⁴³ one possibility is that expressing explicit disagreement in the opinion would have made the per curiam designation more difficult, given the designation's implicit suggestion that all joining members authored—and thus accepted—its content. Justices O'Connor and Kennedy might well have preferred a "per curiam" designation both to increase the appearance of broader support for the outcome on the closely divided Court and to deflect any criticism to a larger base of Justices.²⁴⁴

A desire to accommodate this diffusion of responsibility provides a partial explanation of the ultimate mystery, why the Chief

240. See *supra* note 227 and accompanying text.

241. See *supra* notes 118–26 and accompanying text.

242. Justices O'Connor and Kennedy may have worried that signing onto the Article II argument might seem inconsistent with their federalism jurisprudence. Though the more conservative Justices faced the same problem, for the conservative Justices to endorse an equal protection argument would seem equally inconsistent. Justices O'Connor and Kennedy, however, had sometimes not agreed with the conservatives on equal protection issues. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (agreeing with majority that male-only admissions policy at state military institute violated the Equal Protection Clause).

243. It might, however, be more common practice at least to indicate that the resolution of one issue makes it unnecessary to address the other, especially when other Justices explicitly treat the issue. For example, in a case decided shortly after *Bush v. Gore*, *Seling v. Young*, 121 S. Ct. 727 (2001), Justice O'Connor explicitly indicated that its holding gave it "no occasion to consider" a further question, *id.* at 736, which Justice Scalia nonetheless chose to address in a concurrence, *id.* at 737 (Scalia, J., concurring).

244. Of course, it was readily apparent that the per curiam opinion was the only opinion to which Justices O'Connor and Kennedy had affixed their names. Nonetheless, the media also recognized that five Justices had signed onto that opinion, so any attack on its reasoning presumably would be levied against all five per curiam Justices. See Charles Lane, *Decision Sharpens the Justices' Divisions*, WASH. POST, Dec. 13, 2000, at A1 (concluding "by process of elimination . . . that O'Connor and Kennedy had provided the fourth and fifth votes to decide the case for Bush," but not indicating a belief that these Justices were likely more sympathetic to the equal protection claim than were the concurring Justices). Justices O'Connor and Kennedy might have been particularly concerned about diffusing responsibility if they believed that critics would find the equal protection argument less defensible than the Article II argument.

Justice and Justices Scalia and Thomas signed onto the per curiam opinion. In this case, there appears to be a fairly clear departure from the ideal point of the three Justices holding the most consistent conservative views in the case. New institutionalists have developed models predicting to whom the Chief Justice will assign the task of drafting the opinion when the Chief Justice is in the majority and therefore entitled, by a longstanding Supreme Court practice, to choose the opinion author. The theory predicts that in 5-4 cases, because the Chief Justice can afford to lose no Justices if he is to maintain his preferred judgment, he is most likely to assign opinions to the marginal Justice, whose views are closest to those of the minority coalition.²⁴⁵ Thus, it appears plausible to infer that Chief Justice Rehnquist assigned the opinion to O'Connor or Kennedy to secure their continued support.²⁴⁶ And along with Justices Scalia and Thomas, he may have remained part of the majority coalition, despite analytical reservations, because failing to do so would have risked antagonizing the marginal Justices and encouraging them to defect.

This story leans heavily on explanations that combine elements of psychology with elements of rational choice. The picture that emerges is of strategic jurists seeking to optimize the Court's output based upon anticipated reactions to their own conduct. The concurring Justices joined the per curiam to avoid a form of retaliation in which Justices O'Connor and Kennedy would concur in the judgment on separate or narrower grounds, thus highlighting the fractured composition of the judgment majority. Justices O'Connor and Kennedy declined to criticize the concurring Justices with whom they disagree to avoid signaling that the presidential contest turned on their minority doctrinal predilections. Justices Souter

245. MALTZMAN ET AL., *supra* note 207, at 49-50. A countervailing factor is that the Chief Justice is more likely to assign an opinion to someone ideologically aligned with him in more important cases, as measured by the proxy of the number of amicus briefs filed. *Id.* at 50-51. The authors do not indicate how these effects interact, and whether the Chief Justice is still more likely to assign a 5-4 case to the median Justice than to an ideologically allied Justice in an important case.

246. It is impossible to tell from the opinion itself, at least barring linguistic analysis, whether O'Connor or Kennedy was the author. Indeed, it is conceivable that one of the other members of the majority wrote the opinion. For example, the Chief Justice himself might have written the opinion, confident in his ability to keep O'Connor and Kennedy on his side. On this story, the opinion eventually was split into two when O'Connor and Kennedy indicated that they did not want explicitly to endorse or dissent from the Article II analysis; the splitting necessitated the opinion being labeled a per curiam so that Rehnquist would not have been the principal author of two different opinions. Though this is a plausible story in the abstract, Jeffrey Rosen has attributed the opinion to Justice Kennedy, presumably on the basis of anonymous sources. *See Rosen, supra* note 5, at 51.

and Breyer expressed continued support for the equal protection analysis, even though the remaining Justices who nominally embrace it had all but prevented correction of the problem through a remand, having signaled support for the claim at oral argument. We do not doubt that some significant truth lies beneath each of these explanations. But we also remain unpersuaded that they provide a complete account of even the most significant dynamics that gave rise to this peculiar and important case.

Nonetheless, the simplest alternative explanation, in some ways the obverse of this strategic portrait, is not persuasive either. This explanation emphasizes the Court as a collegial institution, one in which Justices at least try to show a united front, particularly in controversial cases. This conception may explain *Bush v. Palm Beach County Canvassing Board* satisfactorily,²⁴⁷ as another example along the lines of *Brown v. Board of Education*,²⁴⁸ in which the Court's members strenuously sought to avoid any signs of defection as they ventured into an area previously thought by many to be off limits.²⁴⁹ It is harder to understand from the analysis thus far, however, why, once the 5-4 split became a *fait accompli*, those Justices in the judgment majority remained sufficiently concerned with the appearance of a united front that they incurred major doctrinal sacrifices to maintain it. It is especially perplexing since the concurring Justices willingly exposed the absence of a true agreement with the remaining per curiam authors by producing an opinion resting almost entirely on separate grounds. And it strains credulity to suppose that Justices Souter and Breyer continued to embrace the equal protection argument to bolster the appearance of a united front, when they could have done so by signing a still-narrower partial concurrence rather than an opinion labeled as a dissent, with no change in the outcome of the case. In sum, we have little doubt that the Justices pursued behavior that can properly be viewed as strategic in *Bush v. Gore*, but we are less persuaded that the judicial politics account for that behavior completes the story.

247. The media certainly interpreted the decision in this way. See, e.g., Frank J. Murray, *Florida Court Rejects Gore 'Contest'; U.S. Supreme Court Voids Hand Count*, WASH. TIMES, Dec. 5, 2000, at A1 ("To achieve the 9-0 vote that many analysts called crucial to acceptance in such an inflamed political climate, the high court's seven-page opinion said the state court 'relied in part' on the Florida Constitution to counter dictates of the U.S. Constitution.").

248. 347 U.S. 483 (1954).

249. For a discussion of how Chief Justice Warren was able to achieve unanimity in *Brown*, see S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 690 (1971). The Justices also demonstrated the strength of their unanimity in *Cooper v. Aaron*, 358 U.S. 1, 4 (1958), by separately listing all nine Justices as joint authors of the opinion.

IV. SOCIAL CHOICE ANALYSIS OF *BUSH V. GORE*

We now shift to a social choice framework. Social choice informs the institutional constraints on strategic behavior that confront deciding Justices. This approach, we believe, will better explain the incentives for, and the nature of, the bargaining arrangements that affected the judgment and doctrine of *Bush v. Gore*. Social choice proves valuable in this setting because it provides the basis upon which to build models that explain the persistence of institutional rules that have the benign effect of limiting cycling and the corollary result of shaping and limiting opportunities for strategic behavior. In Part IV.A, we introduce the framework of social choice as it relates to the *Bush v. Gore* decision.²⁵⁰ Part IV.B then introduces the most elementary social choice model, involving a unidimensional issue spectrum, primarily as a point of departure, to show that the unarticulated assumptions of attitudinalism represent a special case of collective preference aggregation.²⁵¹ This special case proves robust in predicting the Justices' votes on the disposition of *Bush v. Gore*, but less so in assessing either the nuances of law or details of the voting alliances in the case. This Part further reveals the conditions under which opportunities for gains from trade arise between and among Justices in a given case.

In Part IV.C, we relax the assumptions from the unidimensional model to develop a more nuanced account of *Bush v. Gore*. This more complex model provides a means with which to identify multiple dimensions that lurk beneath the surface of both the attitudinal model and the unidimensional social choice model. It also provides a means of framing some of the limits on strategic behavior that lie at the base of the new institutional analysis. This model helps reveal the anomaly that while a majority supported a judgment for Bush, absent some strategic interaction among members of that majority, the winning coalition risked disclosing separate majorities on issues that the Court as a whole agreed were logically controlling in the case in a manner consistent with a ruling for Gore. Such anomalies can arise only when the Court possesses overlapping majorities, such that the outcome vote and separate majority resolutions of identified dispositive issues point in opposite directions. This analysis reveals the possibility that the Supreme

250. This part builds upon the model developed in MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 97-156 (2000).

251. Professors Segal and Spaeth do discuss briefly social choice to point out the "meaninglessness of the legal model," but do not systematically explore the implications of dimensionality for their own model. See SEGAL & SPAETH, *supra* note 1, at 62-64.

Court was so closely divided that, just as the choice between a popular vote count and the Electoral College controlled the outcome of the presidential election, so too the choice between two hypothetical Supreme Court decision-making rules, one focused on the outcome vote and the other focused on majority issue resolutions, would have determined whether the Court ruled for Bush or for Gore. In short, the case could have produced yet another venue for Bush to chant "follow the rules," and for Gore to retort "just keep counting." By signing onto the *per curiam* opinion, the concurring Justices formally eliminated the anomaly and signaled that the equal protection analysis was not only a Condorcet winner, but indeed a first-choice majority winner. The social choice analysis thus helps to build upon the judicial politics accounts to construct a more robust story as to why the Justices went "beyond counting votes," instead forging a seemingly disingenuous equal protection alliance, given that Bush would have won regardless of whether the concurring Justices had simply struck out on their own.

In Part IV.D, we describe yet another lurking anomaly that might have affected the nature of the ultimately controlling coalition in favor of Bush. Based upon reasonable assumptions, we demonstrate that a preliminary round of voting—for example at conference—might well have revealed the absence of a majority in support of a single judgment or a single mandate under a nominal remand judgment. If the concurring Justices had declined to join Justices O'Connor and Kennedy, who might have given the remand content, then effectively no disposition—a remand in name only, a true remand, or an affirmance—would have commanded five votes: Rehnquist, Scalia and Thomas would have supported what in effect would have amounted to a straight reversal;²⁵² O'Connor, Kennedy, Souter, and Breyer would have favored a remand, though possibly with disagreement as to the breadth of the Florida Supreme Court's mandate; and Stevens and Ginsburg would have favored affirmance. Had this occurred, yet another manifestation of bargaining might have taken place with implications for the final outcome. The primary difficulty in such a situation is not confusion—although especially in a case of this magnitude that is certainly a problem in its own right—but more importantly the incentives the situation provides for strategic behavior. If clarity is desired, concessions

252. We say "in effect" because the concurring opinion, despite its conclusion that "we would remand," might, if it had garnered five votes, have been a remand in name only, leaving nothing for the Florida Supreme Court to do. See *supra* text accompanying note 138; *infra* notes 339-40 and accompanying text.

must be made, and the result for some Justices is necessarily to produce an outcome that is other than their first-choice disposition. Assuming O'Connor and Kennedy could have found common ground for instructing the Florida Supreme Court on remand with Souter and Breyer, Stevens and Ginsburg would have had little to lose and much to gain by signing onto that judgment. The possibility of such a coalition, we will show, helps to explain why the O'Connor-Kennedy and Rehnquist-Scalia-Thomas camps might have compromised in forging a common basis for a limited mandate on remand.

A. *The Problem of Social Choice*

Social choice grows out of the seemingly simple insight that under specified conditions one of the primary attributes of individual rationality—the assumption of transitive preference orderings—cannot be assumed for groups of three or more persons. If three persons are selecting among three options—A, B, and C—and none of those options has first-choice majority support, it is possible for the group as a whole, unlike a rational individual, to have intransitive preferences. To illustrate, imagine that three persons are selecting among the listed options and that P_1 prefers ABC, P_2 prefers BCA, and P_3 prefers CAB.²⁵³ Under these conditions, there is no first-choice majority candidate. If we assume that the decision makers vote solely based upon the merits of presented alternatives when confronted with binary comparisons,²⁵⁴ we will discover that while P_1 and P_3 prefer A to B, and P_1 and P_2 prefer B to C, the group as a whole does not therefore prefer A to C. Instead, P_2 and P_3 prefer C to A. This hypothetical illustrates that under specified conditions groups of three or more persons with transitive individual preferences can cycle by unlimited majority rule over binary comparisons.

For historical reasons, this phenomenon of collective intransitivity is known as the Condorcet Paradox. The Marquis de Condorcet not only provided an early account of the paradox,²⁵⁵ but also

253. This notation is a shorthand, indicating that P_1 prefers A to B to C, P_2 prefers B to C to A, and P_3 prefers C to A to B.

254. In the language of social choice, we are assuming compliance with the condition of independence of irrelevant alternatives. See STEARNS, *supra* note 250, at 88-92 (defining and explaining independence criterion).

255. For informative discussions of Condorcet and his writings on the paradox, see Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445 (1992); H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231 (1988), and see also Stearns, *supra* note 237, at 1221-25 (collecting authorities).

provided a partial solution to the problem of collective preference aggregation that underscores the limited conditions under which it can arise.²⁵⁶ To illustrate, assume that the preferences of P_3 are CBA, rather than CAB. With this set of preferences, there is no cycle. Instead, making the same assumption about principled decision making, P_1 and P_2 prefer B to C, and P_2 and P_3 prefer B to A. Regardless of whether the group as a whole prefers C to A (which it does with P_1 and P_3 controlling), option B is a dominant second choice. This option B is referred to as the Condorcet winner, which simply means that option, in the absence of a first-choice majority candidate, defeats all others in direct binary comparisons.²⁵⁷

For purposes of analyzing the Supreme Court's decision in *Bush v. Gore*, we can begin with the second of these two very elementary paradigms in which a Condorcet winner exists. In doing so, we do not intend to suggest that when a Condorcet winning option is present, all institutions employ rules that discover it. Nor do we intend to suggest that when problems of collective intransitivity arise, the group cannot find some means of generating a seemingly rational outcome. In fact, mechanisms for avoiding this anomaly abound. Institutions can develop any number of mechanisms that facilitate choice by allowing members to put weights upon, rather than merely rank ordinally, their preferences. Such strategies include pricing mechanisms to reveal preferences in private markets; strategic voting, meaning casting ballots based upon non-merit criteria to avoid—or derail—decision paths that might lead to a least-desired outcome; and vote trading, a kind of barter system that achieves an imperfect commodification of preferences that is routinely employed in legislatures.²⁵⁸ Alternatively, the group can designate another person or institution to choose the outcome on their behalf, as courts of law do in establishing default rules that will control in the absence of a specific agreement.²⁵⁹ Or the group can seek to become a single unit, as is the case with a firm, in which one person, focusing upon an agreed-upon objective like profit, has achieved the necessary institutional stature with which to make decisions on behalf of the group as a whole. Or the group can, through political processes, designate a leader, who can act on be-

256. See STEARNS, *supra* note 250, at 44-45.

257. See *id.* at 47 (defining Condorcet criterion).

258. See, e.g., MUELLER, *supra* note 237, at 82-83; Hovenkamp, *supra* note 172, at 962-63 (discussing logrolling).

259. See generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 613-25 (1998) (providing and critiquing the traditional economic account of the role of default rules).

half of constituents using the coercive power of the state. Or the group can precommit to proscribe certain outcomes, effectively limiting the choice set of some members. This is not intended to exhaust the possibilities, and those familiar with Arrow's Theorem will recognize this presentation as the shadow of what the theorem proves: any effort to solve the problem of collective intransitivity will necessarily sacrifice some aspect of collective decision making that appears defensible on normative grounds.²⁶⁰

For our immediate purposes, it is not necessary to consider the intricacies of the theorem except to state formally what we have already suggested. Different institutions respond differently to the problems they confront as a consequence of the difficulties associated with collective preference aggregation. Thus, while legislatures routinely countenance—indeed encourage—practices that thwart decisions based solely upon principled assessments of presented alternatives, appellate courts have developed a set of practices or norms that facilitate a pattern of bonding commitments that, while not preventing all manner of strategic interactions, nevertheless raise the cost of strategic behavior to individual members relative to other institutional settings. While we have already discussed oral argument as a venue for bonding, students of law and judicial politics are well aware that the publicity attendant oral argument is short-lived. But published opinions live on in infamy. The custom of publishing a set of justifications to accompany a judgment vote, whether with the controlling majority, in concurrence, or in dissent, not only serves to express views concerning the argu-

260. Arrow's Theorem, which is best understood as a generalization of the Condorcet paradox, proves the inability of a collective decision-making body to ensure collectively rational—or transitive—outcomes, while simultaneously satisfying four conditions that Arrow thought essential to fair collective decision making: (1) *range*: the collective decision-making rule must select its outcome consistently with the members' selection from all conceivable rank orderings over three available alternatives; (2) *independence of irrelevant alternatives*: in choosing between paired alternatives, participants must select solely based upon the merits of the options presented and without considering how they might rank options yet to be introduced; (3) *unanimity* (or the *Pareto* criterion): if a move from the status quo to an alternative state will improve the plight of one participant without harming others, the institution must make the move; (4) *nondictatorship*: the group cannot systematically select the preferences of one member against the contrary preferences of the group as a whole. See STEARNS, *supra* note 250, at 49. The theorem was initially presented in KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951), and revised to correct a mathematical error in the original proof in KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Arrow was awarded the Nobel Prize in Economics for this proof in 1972. For an accessible summary of Arrow's proof, see MUELLER, *supra* note 237, at 384-99. The presentation of the theorem's criteria in this note are taken from the simplified proof, set out in William Vickrey, *Utility, Strategy, and Social Decisional Rules*, 74 Q.J. ECON. 507, 507-35 (1960).

ments raised or upon which the other Justices rest their contrary positions, but also and more importantly, it raises the cost to the Justices of departing from their expressed beliefs in future periods. That is not to suggest that opinions present intractable limits on future conduct; certainly they do not.²⁶¹ But the need to justify departures with an audience of jurists whose job it is to identify your inconsistencies, a media who will sell more copy the more outrageous their depictions of Court output, and an academy of scholars who secure tenure off your mistakes, undoubtedly raises the cost relative to other institutional contexts that lack this important institutional norm. This brief introduction to social choice provides an apt starting point for translating what we already know about *Bush v. Gore* into social choice terms.

B. The Unidimensional Model

The preferences that give rise to a Condorcet winner—ABC, BCA, CBA²⁶²—reflect a group whose members agree upon the relevant issue spectrum, and whose views of the underlying issue can be cast along that spectrum. In short, a single option, B, dominates because it represents a median along a single normative issue dimension.²⁶³ A dominant normative issue dimension is certainly common enough. Different people add different amounts of salt to their pasta. Those with high blood pressure might prefer none to a little to a lot; those with low blood pressure might prefer the opposite. Persons of moderate taste most likely will prefer a middle amount and then rank either none or a lot as their second choice. While one always can construct a story, it seems odd to imagine a person who most prefers a lot of salt to none to a middle amount, or none to a lot to a middle amount. While such people might exist, as a general matter we can safely assume that most persons whose first choice is an extreme position will hold a more conventional set of preferences over the remaining alternatives. If three people holding different first choices and conventional preferences over the re-

261. Occasionally, a Supreme Court Justice will explicitly admit to an inconsistency. See, e.g., Linda Greenhouse, *A Change of Mind and a Deft Mea Culpa*, N.Y. TIMES, Mar. 30, 2000, at A22 (noting Justice Souter's admission, in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316 (2000), that he had changed his mind on a particular issue).

262. The discussion in the text would be unaffected by reversing the second and third ordinal rankings of the person who ranks B first, thus producing collective rankings of ABC, BAC, CBA. Under either set of preferences, B emerges as the Condorcet winner.

263. Indeed, the term "median" means the midunit on a single dimensional scale, in which the normative criterion for evaluation is strictly the number of entries on either side without regard to their relative weight.

maining alternatives were required to instruct a chef as to how to prepare a group meal (and assuming no need to defer to the person with high blood pressure for health reasons), they would likely come to a resolution in favor of the median position favoring a little salt.

The attitudinal model rests upon the very assumption needed to generate a unidimensional model of group decision making. While attitudinalists do not claim that their regressions account for the votes of every Justice in each case, as a general matter they assume that Supreme Court cases can be cast along a single dimensional issue spectrum that reflects a conventional liberal-to-conservative political ideology.²⁶⁴ That is, after all, what attitudinalists, as opposed to say the Pointer Sisters, mean by *Attitude*. In a world with two options, Bush, a conservative, or Gore, a liberal, attitudinalists assume that the conservatives would choose Bush and the liberals would choose Gore. Attitudinalist scholars, of course, are substantially more sophisticated than that. They well recognize that someone might be conservative for one type of issue and liberal for another.²⁶⁵ They also understand that even if one codes attitudes based upon voting patterns over a large set of substantive doctrinal areas, those patterns will provide an imperfect set of proxies for predicting votes in a case that tests views in an entirely new area.²⁶⁶ But the attitudinal model presumes that however many discrete views the Justices have respecting the resolution of a case, those views can generally be cast along a single liberal-to-conservative issue spectrum. And based upon the number of Justices that favor a liberal or conservative outcome in any given case, they can reliably predict the most often binary outcome choice.

Just as the general case in our salt hypothetical likely captures the vast majority of real-world preference orderings, the attitudinal assumption is borne out in a very high proportion of Supreme Court cases. What attitudinalist scholars are unable to account for in their model, however, are those cases in which the preferences of the Justices do not lie along a single normative issue dimension and in which there are no stable endpoints against

264. SEGAL & SPAETH, *supra* note 1, at 68 (providing a figure of "attitudinal space" consisting of a one-dimensional axis, with different Justices and case scenarios situated at different points).

265. Justice Marshall, among all Justices on the Warren Court was found to be the most liberal in federal taxation cases, but the twelfth most liberal (out of seventeen Justices) in what attitudinalists classify as economic activity cases. Justice Douglas, in contrast, was the most liberal in economic activity cases and sixteenth in tax cases. *Id.* at 246-47.

266. *Id.* at 252-54.

which to identify a dominant median, or Condorcet-winning, position.²⁶⁷ Before considering the implications of such a set of preferences for *Bush v. Gore*, we will now formalize the opinion within a single dimensional issue spectrum. We will show how this model identifies the constraints on strategic behavior that Justices face in a unidimensional case, but then reveal the caricature-like quality of the picture of *Bush v. Gore* that emerges. In Table 1, we fit *Bush v. Gore* onto the model.

Table 1. A Unidimensional Social Choice Model of *Bush v. Gore*

(A) Rehnquist, Scalia, Thomas (concurring)	(B) O'Connor, Kennedy (per curiam)	(C) Souter, Breyer (dissenting)	(D) Stevens, Ginsburg (dissenting)
Florida Supreme Court decision violates Article II and equal protection	Florida Supreme Court decision violates equal protection only; Florida Supreme Court's expressed desire to receive benefit of safe harbor prevents timely remand for corrective remedy satisfying equal protection	Florida Supreme Court decision violates equal protection only; safe harbor provision is not mandatory, thus permitting timely remand for corrective remedy satisfying equal protection	Florida Supreme Court decision does not violate Article II or equal protection
Broad mandate to correct state judicial intervention in elections		←————→	Narrow mandate to correct state judicial intervention in elections

The single dimension along which we can cast the various opinions, or opinion groupings, involves the permissible extent of Supreme Court intervention into state court decisions that affect the selection of electors for presidential and vice-presidential candidates. Along this normative issue spectrum, it is fairly easy to cast each opinion from those that would allow the broadest set of grounds for Supreme Court intervention to those that would allow the narrowest. Social choice analysis reveals that when the positions of the Justices fall along a naturally ordered spectrum, the narrowest grounds rule ensures that the median position will ex-

267. To be fair, attitudinalists claim no more than the power to predict case outcomes, and even in cases that result in the phenomenon of multidimensionality and asymmetry, described *infra* Part IV.C, attitudinalists can generally predict the judgment. The point in the text is simply that the attitudinal model provides no basis for considering the relationships between and among doctrinal camps in such cases.

press the Court's holding.²⁶⁸ The narrowest grounds doctrine states, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."²⁶⁹ When the Court strikes down a law on constitutional grounds, the rule seeks the opinion consistent with the outcome that would strike down the fewest laws. Conversely, when the Court sustains a law against a constitutional challenge, the narrowest grounds opinion is that opinion consistent with the outcome that would sustain the fewest laws.

Although the opinion consistent with the outcome that resolves the case on the narrowest grounds states the holding under the *Marks* doctrine, for now we are not interested in finding the controlling opinion. Instead, we are interested in plotting all opinions along a single normative issue dimension, including those that are too narrow to afford relief, and that therefore become dissents. After placing the various opinions along the spectrum, we will consider the implications of the narrowest grounds rule for any incentives to engage in strategic behavior. Because *Bush v. Gore* overruled a state court decision, the broadest opinion is that which would strike down the most state rulings, while the narrowest is the opposite. While the Court produced a majority opinion in the form of a per curiam, for expositional purposes, it is helpful to treat the case as if the per curiam opinion represents the views of Justices Kennedy and O'Connor only, in which case lower courts construing the case would have been required to apply the narrowest grounds rule. Otherwise, the fact that the per curiam opinion received majority support belies the need for such analysis.

The broadest position is expressed in Chief Justice Rehnquist's concurring opinion. Rehnquist would have allowed Supreme Court reversal of a state supreme court opinion that interferes with a state election of a slate of presidential and vice-presidential electors when the decision either represents so marked a departure from the acceptable norms of statutory interpretation as to constitute a change in the state-legislated election rules in place prior to the election, in violation of Article II, or when the decision results in inconsistent treatment of voters in recount proce-

268. See Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 329-39 (2000) (providing social choice analysis of narrowest grounds rule); see also STEARNS, *supra* note 250, at 124-39 (same).

269. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted).

dures, in violation of the Equal Protection Clause. The next broadest position was expressed in the per curiam opinion, which, by subtracting those in concurrence, we can deduce represents the views of Justices O'Connor and Kennedy. Although these Justices did not explicitly disagree with the concurring opinion's analysis, we will assume that Justice O'Connor and Kennedy disagreed with the Chief Justice on the Article II issue. In this somewhat narrower analysis, a state supreme court's arguably dubious interpretation of state election law is insufficient to trigger a violation of the Article II grant to state legislatures to create rules governing such elections, but inconsistent treatment of state voters in manual recount procedures constitutes an equal protection violation, albeit one for which considerations of timing prevent a true remand to produce a corrective remedy on the case facts. Slightly narrower still, Justices Souter and Breyer agreed that the state ruling violates equal protection, but disagreed that timing considerations prevented a remand. Instead, the Florida Supreme Court could itself determine whether under state law the binding deadline is December 12, the date *Bush v. Gore* was issued, or December 18, the date the electors were scheduled to meet. And finally, Justices Stevens and Ginsburg embraced the narrowest position, finding no constitutional violation and voting to affirm the Florida Supreme Court. Table 1 uses a double vertical line to separate those whose views were consistent with the case judgment from those whose views are too narrow to afford relief, and thus who ended up in dissent.

The simple unidimensional model requires that the positions of the Justices fit along a single normative issue spectrum, and Table 1 shows that at a surface level, the various opinions appear susceptible to such an interpretation. In this analysis, it is easy to locate as the Condorcet winner the views embraced by Justices Kennedy and O'Connor. And in fact, their views, as expressed in the per curiam opinion, were ultimately controlling. Notice that *Bush v. Gore* can be cast along a single issue dimension even though it involves more than a single substantive legal issue. As Table 1 reveals, it is possible to devise a normative issue spectrum at a meta-level that subsumes both the Article II and equal protection issues in the case. While we are able to cast the various positions along a single issue dimension, we do not maintain that this is the best means of understanding the positions taken by the various Justices. As we will show below, by relaxing the assumptions needed to generate this simple model, we can develop a more nuanced account of *Bush v. Gore*. But if we accept the premises articulated above, then we can readily see why the minority views held by Justices Ken-

nedy and O'Connor were dominant. If we label the views of the concurring Justices "A," the views of O'Connor and Kennedy "B," and the views of those in partial or complete dissent "C," then it is easy to formalize the social choice analysis. The single dimensional issue spectrum implies that the conservative members would rank their preferences ABC and that the liberal members would rank their preferences CBA. The second- and third-choice ordinal rankings of Justices Kennedy and O'Connor are irrelevant. Whether their rankings are BAC or BCA, B emerges as the Condorcet winner.

This presentation of *Bush v. Gore* is premised upon the very assumptions that underlie the attitudinal account. It is for that reason that attitudinal theory suggests rather limited opportunities for strategic interactive behavior on the Court.²⁷⁰ In this model, for example, the O'Connor and Kennedy position is necessarily bounded. It is bounded on the political right (the left of Table 1) by the broad assertion of authority to overturn state supreme court decisions that affect manual recounts arguably in violation of preexisting state election law for the selection of presidential and vice-presidential electors. And it is bounded on the political left (the right of Table 1) by the narrow assertions of authority embraced by those who would find a constitutional violation but then allow a remand to effectuate a remedial order preceding the resumed recount, which could result in victory for Gore. If we assume that Justices O'Connor and Kennedy were committed to a result that would ensure a Bush victory, but did not want to suggest the broad power of the Supreme Court to second-guess state court decisions construing state law, then their space along this issue spectrum was necessarily constrained. And it is quite possible that the constraint itself required them to walk a sufficiently fine line that the opinion that they ultimately produced seemed analytically hollow to many Court observers.²⁷¹ The unidimensional model thus can help explain the narrow, fact-specific nature of the per curiam opinion.

For the multidimensional analysis to follow, it will be helpful to consider the nature of, and limits on, strategic interactions that can arise in a unidimensional setting. The social choice model demonstrates that when the opinions can be cast along a unidimen-

270. Attitudinalists acknowledge but discount the possibility that Justices may act strategically in taking into account Congress's potential interaction. See, e.g., SEGAL & SPAETH, *supra* note 1, at 239 ("Although anecdotes can be told of occasional justices who switched votes in response to political pressure from Congress and elsewhere . . . no systematic evidence of Congressional influence on the justices' decisions exists.").

271. See *supra* Part II.B.

sional issue spectrum, the narrowest grounds rule substantially limits opportunities for strategic bargaining. If the opinions are truly aligned along such a spectrum, within any single case there appears to be little or nothing that Justices who would embrace a broader or narrower view than that of the median jurist can do to force the median jurist to move in their direction.²⁷² Along the single normative issue dimension that characterizes such cases, the question arises what the conditions are that would produce opportunities for gains from trade, thus encouraging a move away from the ideal point of the median jurist. If the only concern that a median jurist had were to express the holding of the Court, then the narrowest grounds rule would eliminate virtually any opportunity for gains from trade in a single case. Unless the Justices taking a more extreme position consistent with the expressed views of the median Justice are willing to jump over to the dissenting position, or unless the dissenters are willing to jump over and embrace the views of the broader concurrence in the judgment, then those embracing these more extreme positions can do little or nothing to undermine the power of the median Justice to express the holding of the Court. And if the broader concurring or narrower dissenting Justices are willing to jump over the median to embrace each other's views, then we must reject the characterization of the case as truly resting upon a single normative issue dimension.²⁷³

This analysis, however, does not capture the whole story. We assumed that the median Justice was motivated only by a desire to state the holding. The median Justice is also strongly motivated to establish a precedent.²⁷⁴ And to do that, she needs not only to stand in the median position, but also to command the support of a major-

272. We assume that Justices do not logroll across cases. See *supra* note 237. While new institutionalists have identified observed manifestations of strategic behavior, to our knowledge, they have only observed such behavior along a single normative issue dimension within a given case. There is no case of which we are aware in which a verifiable instance of trading across cases has been demonstrated. For general discussions of strategic interactions among Justices, which we conclude to be consistent with this analysis, see EPSTEIN & KNIGHT, *supra* note 207; MALTZMAN ET AL., *supra* note 207.

273. This is ultimately a matter of definition; a single normative issue dimension *assumes* that those taking an extreme view will rank the positions closer to them over those that lie farther away. For a general discussion of dimensionality, see STEARNS, *supra* note 250, at 71-77.

274. Applying *Marks v. United States*, 430 U.S. 188 (1977), lower courts will treat the narrowest grounds decision as binding, but the Supreme Court need not attach the same stare decisis value to a non-majority opinion as it would a majority decision. See, e.g., *Nichols v. United States*, 511 U.S. 738, 746 (1994) (stating that the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision").

ity.²⁷⁵ A median Justice who does not initially command a majority, or who does not anticipate commanding a majority based upon an opinion that rests on her ideal point, has two complementary methods of trying to secure majority support. First, she can try to write a sufficiently convincing opinion that she will persuade the requisite number of colleagues to join to create a majority. Second, if that alone proves inadequate to garner majority support, she can move toward one of the wings of the Court in an effort to secure whatever additional support is needed. Of course those who embrace a more extreme set of views, either in concurrence or in dissent, have an incentive to try to encourage the median Justice to move in their direction, for example by moving themselves part of the way toward the position of the median Justice.

The Justices' incentives to achieve a majority might not be absolute. It is possible to imagine Justices preferring to defer final resolution of an important question of constitutional law in the hope that future appointments will change the Court's composition in a manner that bodes well for an even more favorable future ruling than one that rests somewhere between the ideal point of the median Justice and their ideal point. It would be unusual, however, for Justices on both extremes of the Court to be mutually optimistic about the future.²⁷⁶ Ordinarily, at least one set of Justices will see the median Justice's resolution of the issue as a favorable move from the status quo. If both wings of the Court agree that they would prefer to resolve the case without *stare decisis* value, it is likely because the Justices on the side toward which the proffered opinion moves existing doctrine feel constrained by their prior opinions. Such constraint, however, is unlikely in a case that truly reflects a unidimensional issue continuum and is more likely to exist when the group that appears to represent a median position actually has expanded the underlying dimensionality of the case in some fundamental and seemingly problematic way. Setting aside this possibility, most often we can safely assume that Justices on one of the wings of the Court will generally prefer to create a precedent that moves doctrine in their preferred direction. They will thus

275. In a case that lies along a single normative issue dimension, no majority can form that does not include the median Justice.

276. Mutual optimism, of course, is not an unknown phenomenon, and civil procedure commentators have identified it as a prime reason that many cases do not settle. *See, e.g.,* Lisa Bornstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2225-26 (1993); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993).

attempt to form a coalition with the median Justice. Because the median Justice also will have an incentive to attain five votes, the Justices on an extreme may seek a compromise in which the median Justice moves a bit toward their position.²⁷⁷

These insights drawn from the unidimensional social choice model largely complement the empirical observations and models developed in the new institutionalist literature. The new institutionalists have strengthened the attitudinal account by demonstrating that while Justices who are motivated by policy considerations tend to vote on the outcome consistently with their ideological predilections, they also are willing and able to anticipate and respond to the behavior of their colleagues to affect the substantive development of doctrine as it emerges in the cases that they are deciding.²⁷⁸ While judicial politics scholars embracing the rational choice approach have documented cases in which Justices have engaged in mutual accommodations, resulting in moves from ideal points to forge majorities capable of generating a precedent, their observations have been partially limited by the absence of a model that explains how the underlying dimensionality of the case affects the nature and limits of such strategic interactions. In our view, the social choice model developed here enriches the new institutionalist account by revealing not only the opportunity for gains from trade that are empirically observed, but also the limits on such opportunities. In addition, as we will demonstrate in the next part, neither the attitudinalists nor the new institutionalists have explored systematically the implications of relaxing the assumption of a unidimensional issue spectrum in any given case.

The prior discussion has assumed that all gains from trade arise within a single case. Although rational choice institutionalists have identified moves along a given issue dimension within a single case, to our knowledge, no one has uncovered a verifiable instance of logrolling across cases. The historical-interpretivist institutionalists might attribute this to a strong norm barring such behavior. But as yet, these scholars have not developed a model that can be used to explain why this behavior has proved dominant in appellate

277. Some unidimensional cases in which no coalition is formed may be explainable as reflecting the bilateral monopoly problem. See generally Michael Abramowicz, *Market-Based Administrative Enforcement*, 15 YALE J. ON REG. 197, 247 n.149 (1998) (providing an overview of the problem). That is, because both the median Justice and the Justices on an extreme will benefit from a majority coalition, they may bargain over just where they should meet. Sometimes, such bargaining may result in a failure to agree, especially if institutional norms make Justices hesitant to bargain explicitly.

278. See, e.g., EPSTEIN & KNIGHT, *supra* note 207, at 79-88.

courts, when it has not proved dominant in other institutional contexts, including, most notably, legislatures.²⁷⁹ Again, the social choice model developed here complements this judicial politics account. The very incentive to produce opinions that are sufficiently persuasive to encourage other Justices to join in an effort to secure majority support results in a kind of bond that, although not preventing future departures from expressed views, certainly raises the cost relative to that in other institutional contexts in which individuals need not provide a written justification for their decisions for or against collective output. The institutional custom of published opinions imposes a significant constraint on judicial logrolling across cases, especially in the Supreme Court.

If we are correct in positing that most, if not all, strategic accommodation between the Justices arises within individual cases, then we must consider the role *stare decisis* nonetheless plays in encouraging strategic voting behavior. Because the Supreme Court grants greater *stare decisis* weight to majority opinions than to fractured panel opinions, Justices may be willing to make modest moves from their ideal positions to secure a necessary majority. For example, the median Justice may decide that achieving a stable precedent is more important than having the holding represent his or her preferred position. And since those in concurrence or dissent have power over whether the ultimate position taken by the median jurist will simply state the holding, or also carry precedential force, the median Justice operates as a monopsonist with the power to sell to either of two sets of buyers, one to the right and one to the left. This element of competition slightly favoring the median jurist might limit extreme moves in favor of the other side, but it also does present potential for gains from trade. This theoretical observation appears consistent with some of the most recent literature surveying changes from originally circulated drafts to final decisions in response to suggestions of those needed to forge successful majorities.²⁸⁰

What we can label a "unidimensional *stare decisis* game" involves not only gains from trade between the median Justice and those to one side, but also the efforts of those on either side to prevent gains from trade from being realized in the opposite direction and thus at their expense. To illustrate, consider a case with a 4-1-4

279. For an analysis of this question, see Stearns, *supra* note 237, at 1257-87 (comparing the Supreme Court and Congress using Arrow's Theorem criteria).

280. See MALTZMAN ET AL., *supra* note 207, at 94-124.

split.²⁸¹ As we have already seen, the median Justice has the potential to move in either direction along the issue spectrum, trading off the Justice's view of which of the competing approaches is more satisfying based upon the willingness of the other camps to move toward the Justice's own ideal point. At the same time, the Justices in either camp might preemptively express a willingness to moderate their views in an effort to prevent the median Justice from moving in the other direction. From the perspective of the side making such a move, it is likely preferable to secure a precedent that is watered down relative to their ideal point but that moves doctrine in their preferred direction than to risk having a precedent that takes an even more extreme view from that of the median Justice, moving doctrine in the opposite direction.

While the unidimensional social choice analysis provides a model for framing the observations of judicial politics scholars concerning strategic bargaining, the fact remains that the Court sometimes fails to produce a majority. And many, probably most, fractured panel cases appear to reside along a single issue dimension. This includes, for example, *Memoirs v. Massachusetts*,²⁸² the very decision that Justice Powell was assessing in *Marks v. United States* when he articulated the most well-known statement of the narrowest grounds rule.²⁸³ Such cases reveal that Justices either sometimes fail to behave strategically when a suitable opportunity appears to have presented itself or that their efforts at strategic bargaining sometimes fail. While the theory of efficient markets eschews systematic failures to realize potential gains from trade,²⁸⁴ one of the insights developed in the new institutionalist literature focuses on the very few opportunities available between an assigned opinion author and those with whom he or she can form a majority to reach a middle ground.²⁸⁵ Certainly other factors might also pre-

281. The 4-1-4 split is chosen simply for expositional purposes. The same analysis applies for any set of three camps in which two of the three camps possess the necessary votes to form a majority.

282. 383 U.S. 413 (1966).

283. For a breakdown of the various *Memoirs* opinions along a single dimension based upon Justice Powell's analysis in *Marks*, see STEARNS, *supra* note 250, at 124-29.

284. The theory has been analyzed particularly in financial market settings. See, e.g., Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 413-16 (1970); Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575, 1582-86 (1991). Even the weak form of the Efficient Capital Markets Hypothesis suggests that individuals are not systematically failing to take advantage of gains from trade. Cf. Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546, 559-63 (1994) (discussing different variants of the hypothesis).

285. See *supra* note 233.

vent mutual gains from trade, including stubbornness, hedging against the possibility of benign personnel changes on the Court (for example following a presidential election), and of course the constraints that prior published opinions pose. We do not claim to have exhausted all of the dynamics that underlie potential strategic interactions among Supreme Court Justices. For our present purposes, however, it is not necessary to provide a complete account. As the next part shows, we believe *Bush v. Gore* is not best characterized by a unidimensional issue spectrum, and as a result, any negotiations that occurred, for example between the Justices in concurrence and the remaining Justices in the per curiam coalition, were not the product of a desire to secure a precedent on the per curiam opinion's equal protection analysis. *Bush v. Gore* cannot easily be understood as a case driven by concerns for stare decisis because it seems highly improbable that those in concurrence who blinked first cared much (or even a little) for the substantive precedent that the per curiam opinion produced. Moreover, it is difficult to imagine why the concurring Justices willingly compromised their positions, giving the holding of the case greater stare decisis weight, only then to proceed to insist upon including a fact-specific disclaimer that effectively announces no meaningful stare decisis impact.²⁸⁶

In short, the unidimensional model cannot provide a complete account of the strategic interactions that likely characterized *Bush v. Gore*. While it might appear that we are back to where we started, namely that the *Bush v. Gore* per curiam resulted from a conservative majority seeking to present a united front, the unidimensional analysis has significantly furthered our understanding of the opportunities for, and limitations on, strategic interactions among the Supreme Court Justices. In addition, and perhaps more importantly, by making explicit the conditions that are assumed, but not expressly articulated, in the attitudinal account, and by showing them to be a special case of collective preferences, we can now consider the implications of relaxing those assumptions upon any strategic interactions that might have taken place. We are thus now ready to consider the implications of assessing multiple issue dimensions on the dynamics of interactive bargaining in *Bush v. Gore*.

286. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) (noting that the analysis was "limited to the present circumstances").

C. The Multidimensional Model

To develop the multidimensional model, we must revisit the problem of social choice with which Condorcet was initially concerned. Recall that with collective preferences ABC, BCA, CAB, majority resolutions of each binary comparison produce the result A preferred to B preferred to C preferred to A. This is the Condorcet paradox. Unlike the preferences that give rise to a Condorcet winner—ABC, BCA, CBA—the former preferences produce no dominant outcome because the preferences of one of the members defy the assumption of a single dimensional issue spectrum.²⁸⁷ By ranking his preferences CAB, the third member has implicitly rejected the apparent issue spectrum—A to B to C—in favor of another in which the extreme positions—end points A and C—are preferable to the apparent middle position along the spectrum, B. It is this combination of issue spectrums that creates the possibility of a collective intransitivity.

There is nothing inherently illogical about holding preferences that defy a seemingly obvious, or conventional, spectrum, at least in certain circumstances. Recall that it seemed difficult to imagine a person who prefers a lot of salt to none to a middle amount, or a person who prefers none to a lot to a middle amount. Instead, most persons who prefer an extreme position will then prefer an intermediate amount to the opposite extreme amount. Such preferences, of course, mirror the unidimensional issue spectrum used to depict *Bush v. Gore* in Table 1. While this pattern is likely the most common, there are also conditions under which preferences will not fit this pattern. For example, imagine that three persons are selecting among three weight loss plans: (A) vegetarianism, which for simplicity we assume to consist of all vegetables; (B) a mixed diet, which includes both vegetables and meat in moderation; and (C) the Atkins Diet, which for simplicity we assume to consist only of meat. By recognizing that dietary preferences based upon these considerations can be cast along two dimensions, it becomes possible to construct a set of preferences among three persons that would result in cycling by unlimited majority rule. This could occur, for example, if the group were required to select a single diet for all to follow.

287. To be precise, one can characterize cyclical preferences in either of two ways, namely three sets of unipeaked preferences that lie along more than a single issue dimension, or three sets of preferences one of which has more than a single peak, along a single issue dimension. In fact, this proves to be two ways of expressing the very same intuition. See STEARNS, *supra* note 250, at 75.

Assume that P_1 believes—rightly or wrongly—that although extreme diets might be most effective, he strongly dislikes the idea of a meat-only diet and would thus prefer a mixed diet to a meat-only diet even at the expense of optimal weight loss. If so, his ordinal rankings are ABC. Assume that P_2 enjoys all kinds of food, but that if forced to forego meat or carbohydrates, she would prefer to forego the latter. Her preferences are BCA. And finally, assume that P_3 is persuaded that the extreme diets are most likely to be effective and that while he has a preference for a meat-only diet over a no-meat diet, he is sufficiently concerned about weight loss that if the Atkins Diet is unavailable, he would choose vegetarianism. His preferences are CAB.²⁸⁸ The options that give rise to these cycling preferences are presented in Table 2.

Table 2. Diet Selection Options in Two Dimensions with Potential Cycling Preferences

	Preference for meat diet over no-meat diet	Preference for no-meat diet over meat diet
Believes extreme diets are more effective	(C) Atkins Diet	(A) Vegetarian Diet
Does not believe extreme diets are more effective	(B) Mixed Diet	

Under these stated assumptions, the preferences of the group as a whole, if required to select a single diet plan by unlimited majority rule, would cycle. While we can articulate the options as resting along a seemingly logical single dimensional issue spectrum—all vegetables, mixed diet, all meat—with P_1 holding extreme preferences as his first two ordinal rankings, a more meaningful account recognizes that the three prospective dieters are confronting a choice set that lies across not one dimension, but two. In each case, the three would-be dieters are weighing the competing concerns about weight loss against their culinary preferences. It is this combination of group preferences over more than a single issue dimension that has the potential to produce a collective intransitivity.

This is most easily demonstrated by imagining three people who were not concerned about dieting to lose weight and who were

288. This is not the only set of preferences that result in an intransitivity. For the six possible ordinal rankings over ABC (ABC, ACB, BAC, BCA, CAB, CBA), two sets of combinations (ABC, BCA, CAB and ACB, CBA, BAC) result in a collective intransitivity.

responsible for developing a menu in which the options were (A) all vegetables, (B) a mixed platter; and (C) all meat. If P_1 had a strong preference for meat, P_2 had a preference for the mixed platter, and P_3 had a strong preference for vegetables, then it is difficult to imagine their seizing on other than option B as the dominant, Condorcet-winning, choice. Each member embracing an extreme view would prefer second that option that provides a platter that caters to some, but not all, of his or her culinary preferences to one that caters to none. As a result, we can credibly posit that with but one issue dimension, culinary preference, the resulting ordinal rankings would be P_1 : ABC; P_2 : B[AC,CA]; and P_3 : CBA, where the bracketed entries are in the alternative. In the first hypothetical, it was only because we assumed that P_3 had a peculiar conception about what constituted an effective diet and that he was willing to subordinate culinary concerns to engage in what he viewed as the most effective diets for his first two choices that we were able to create a set of preferences that generated a cycle.

Thus far we have established that the introduction of a second issue dimension is a necessary condition for generating cyclical preferences. We have not demonstrated that it is sufficient. In fact, it is not. The introduction of a second issue dimension has the potential to produce a cycle, but it is possible to have a Condorcet winner across two dimensions. To illustrate, assume that three persons are again selecting a menu. Assume that P_1 ranks the vegetarian menu, option A, first, due to his moral beliefs. Assume that P_2 ranks the mixed platter, B, first, because she is not on any special diet and prefers variety in her meals. Finally, assume that P_3 ranks the all-meat menu, C, first, because he is on the Atkins Diet. In this case, there are again two normative dimensions affecting the group's choice. While one person has selected his first choice based solely upon moral considerations, another has selected it based solely on concerns for weight loss. The third person rejects either of these two independent normative bases for selecting a lopsided menu. Even though the menu selection is based upon considerations that lie along two issue dimensions rather than one, under reasonable assumptions we can nonetheless identify a Condorcet winner. Because P_1 is a vegetarian, he will rank second a mixed menu, which provides some food that he can eat consistently with his diet. And conversely P_3 will also rank the mixed diet second for the same reason. The second- and third-choice ordinal rankings for the person not on either special diet are irrelevant because regardless of what those preferences are, the resulting preferences—ABC,

B[AC,CA], CBA—produce option B as the Condorcet winner. Table 3 presents the resulting preferences across two dimensions.

**Table 3. Menu Selection in Two Dimensions
with Potential Condorcet-Winning Option**

	On Atkins Diet	Not on Atkins Diet
Vegetarian		(A) All vegetable
Not vegetarian	(C) All meat	(B) Mixed platter

Before applying these insights to *Bush v. Gore*, it is important to note that there are Supreme Court cases that fit each of the paradigms represented in Tables 1 through 3.²⁸⁹ We have already seen that it is possible, based upon clearly defined, but potentially refutable, assumptions,²⁹⁰ to fit *Bush v. Gore* itself onto a unidimensional issue spectrum, represented in Table 1. And recall that in announcing the narrowest grounds rule, Justice Powell cast the opinions in *Memoirs v. Massachusetts* along a single dimensional issue spectrum. The various opinions in *Regents of the University of California v. Bakke*²⁹¹ can be well-characterized as fitting an intermediate category, one with two normative issue dimensions but yielding a Condorcet-winning opinion.²⁹²

In *Bakke*, a twice-rejected applicant to the University of California at Davis Medical School sued, claiming that the medical school's quota-based affirmative action program violated his equal protection rights.²⁹³ The case produced several opinions, of which three are most relevant for our immediate purposes. Writing in partial concurrence and partial dissent, Justice Brennan would have sustained the quota-based affirmative action program under intermediate scrutiny, on the ground that remedying the present effects of past discrimination was an important governmental interest that the program substantially furthered.²⁹⁴ Writing in partial dissent

289. For an article that places several Supreme Court plurality opinions into these three categories, see Maxwell L. Stearns, *Should Justices Ever Switch Votes: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87 (1999), and see also STEARNS, *supra* note 250, at 97-156 (presenting social choice model of individual case decision making).

290. For a discussion of the implications of relaxing the assumptions needed to place the various *Bush v. Gore* opinions along a single normative issue dimension, see *infra* notes 305-06 and accompanying text.

291. 438 U.S. 265 (1978).

292. The discussion of *Bakke* that follows, including Table 4, is adapted from STEARNS, *supra* note 250, at 130-33.

293. *Bakke*, 438 U.S. at 275-77.

294. *Id.* at 345, 361-62 (Brennan, J., concurring in part and dissenting in part).

and partial concurrence, Justice Stevens would have prohibited any use of race in state institutions of higher learning on the ground that the practice violated Title VI of the Civil Rights Act of 1964.²⁹⁵

In an opinion, the relevant parts of which no one else joined, Justice Powell distilled the case into two issues: (1) whether the medical school can use race at all in admissions; and (2) if so, whether it used race in a permissible manner.²⁹⁶ Justice Powell agreed with Justice Brennan that the use of race was permissible, but he disagreed with the test to evaluate its proper use and on what constituted an acceptable rationale under the chosen test.²⁹⁷ Justice Powell determined that the medical school was not competent to make the requisite factual findings regarding the present effects of past discrimination or to effectuate a remedy for any resulting violations that it identified.²⁹⁸ But he further concluded that the school could use race to further its compelling interest in diversity in an academic setting.²⁹⁹ While Justice Powell insisted upon strict scrutiny, Justice Brennan would have upheld the so-called benign use of race by applying intermediate scrutiny in cases involving sex-based classifications.³⁰⁰ On the second issue, Justice Powell, again alone on this point, determined that while the quota-based system violated equal protection, the medical school could use race in the manner that Harvard University uses race, as one factor among many in the context of an integrated admissions program.³⁰¹ Table 4 depicts the preferences in *Bakke*.

Table 4. *Regents of the University of California v. Bakke* with Multidimensional and Symmetrical Preferences

	State may consider race	State may not consider race
State properly considered race	(A) Brennan (plus three others)	
State did not properly consider race	(B) Powell	(C) Stevens (plus three others)

The effect of Justice Powell's ruling was to strike down the U.C. Davis affirmative action program but to leave in place the possibility of a future program that would satisfy equal protection.

295. *Id.* at 412 (Stevens, J., concurring in part and dissenting in part).

296. *Id.* at 281-82, 287-88, 305-06 (Powell, J., announcing the judgment of the Court).

297. *Id.* at 307-10.

298. *Id.* at 309.

299. *Id.* at 311-12.

300. *Id.* at 361-62 (Brennan, J., concurring in part and dissenting in part).

301. *Id.* at 316-23 (Powell, J., announcing the judgment of the Court).

Given this result, even though the case lies across two dimensions, it is easy to explain why the Powell opinion emerged as the Condorcet winner. In Table 4, we assume that if Justice Stevens had reached the equal protection issue, he would have determined that Davis's use of race violated equal protection, even if there had been no federal statute prohibiting the use of race.³⁰² If we were to make the contrary assumption, we would construct a cycle even though there is no indication of unstable collective preferences in the actual opinions. Based upon this assumption, it is intuitive that Justice Brennan would rank second the views of Justice Powell, which provide some possibility of future race-based affirmative action, to those of Justice Stevens, which would allow none. And it is equally intuitive that Justice Stevens would rank second the view of Justice Powell, which at least restricts the scope of state-based affirmative action programs, to the expansive view of Justice Brennan. Regardless of Justice Powell's second and third ordinal rankings, his opinion, B, represents the Condorcet winner. Before moving on to *Bush v. Gore*, it is important to note one feature of the *Bakke* decision. Based upon our stated assumptions, Justices Brennan and Stevens agreed upon how to define the relevant issues in the case, but they resolved those issues in opposite fashion. Their opposite resolutions of those issues produced opposite judgments. In contrast, Justice Powell resolved one issue in favor of the Brennan and Stevens camps along with one part of the two-part holding. Under these conditions, it is easy to understand why Justice Powell was allowed to issue the judgment for the Court even though no one agreed with the relevant portions of his opinion that distinguished the Harvard and Davis affirmative action programs and that determined that while Davis could not use race to remedy the present effects of past discrimination, it could use race to further its compelling interest in diversity in an academic setting. In order for the Brennan or Stevens camps to rank the other's opinion ahead of that of Justice Powell, they would have had to prefer opposite resolutions of both underlying issues, leading to an opposite judgment, over a favorable resolution of one of the two issues, leading to a partially favorable holding.³⁰³ In short, *Bakke*, at least under our stated assumptions,

302. In other words, we assume that Justice Stevens would have reached the same judgment based upon either of the two proffered theories of the case.

303. Though this seems analytically possible—perhaps Brennan was determined to avoid the Powell distinction because that distinction might lead to more litigation than an absolute position—it seems unlikely in this particular case. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 332 (1978) (Brennan, J., concurring in part and dissenting in part).

reveals the characteristic feature of symmetry, meaning that opposite resolutions of identified dispositive issues lead to opposite judgments. In a multidimensional case with symmetrical features, that opinion affording each of the others a partial victory necessarily emerges as the Condorcet winner.

We have now shown that fractured Supreme Court cases that can be cast along either a single issue dimension or along two dimensions with symmetrical preferences can generate a Condorcet winner. We are now ready to explore the most intriguing category of fractured Supreme Court decisions, that in which there is more than a single issue dimension but in which there is no Condorcet winner. To do so, we return to *Bush v. Gore*. Imagine that the Justices are divided on the resolutions of two discrete sets of issues: first, whether the Florida Supreme Court decision represents a retroactive change in state election law in violation of Article II; and second, whether the Florida Supreme Court decision, by allowing differential standards in manual vote counts, violates equal protection.

**Table 5. *Bush v. Gore* in Two Dimensions
with Asymmetrical Preferences**

	Florida Supreme Court ruling should be reversed on the basis of equal protection	Florida Supreme Court ruling should not be reversed on the basis of equal protection
Florida Supreme Court ruling should be reversed on the basis of Article II		(A) Rehnquist, Scalia, Thomas
Florida Supreme Court ruling should not be reversed on the basis of Article II	(C) O'Connor, Kennedy	(B) Souter, Breyer, Stevens, Ginsburg

Table 5 operates from several assumptions, each of which we will carefully articulate and explain. The first assumption derives from a simple premise that each of the Justices will insist upon an internally consistent opinion. This simply means that if a Justice believes that conditions X and Y must be met to affirm, she will reverse if neither X nor Y is met, or if only X or only Y is met. Unless this assumption of internal consistency is met, then it is impossible to comprehend why the Justices produced or signed onto opinions identifying or rejecting each of these possible constitutional grounds for their judgment votes. In this case, we assume that all nine Justices agreed that to reverse the judgment of the Florida

Supreme Court, that court's ruling must be found to have violated either Article II, equal protection, or both. Because these two grounds are disjunctive, reversal can occur even if a majority is split on which of the two grounds is met, provided that all members in the majority agree that at least one of the two grounds is met. To affirm, conversely, a Justice must find that neither ground is met.

The second and third assumptions reflect inferences about the views of the Justices who in fact signed the per curiam opinion. The second assumption applies only to the members of the A camp: Rehnquist, Scalia, and Thomas. We assume that the concurring Justices signed onto the per curiam resolution despite disagreeing with it on the merits. We make this assumption for two reasons. First, beyond an opening sentence stating agreement with the per curiam's equal protection rationale, nothing in their separate opinion suggests an equal protection basis for reversing the judgment of the Florida Supreme Court.³⁰⁴ And second, as we have noted above,³⁰⁵ with the notable exception of affirmative action, in which the conservatives embrace a more expansive view of equal protection than the liberals, the equal protection analysis appears to be in tension with the general jurisprudence of these three conservative jurists, and that includes the issue of voting rights. Thus, while they joined the per curiam, to highlight the anomaly surrounding that important feature of the opinion, we present the Justices in the A camp as if they had not yet decided to do so, and as if they are considering resting solely upon the ground represented in their presumed ideal point, namely an Article II violation resulting from a retroactive change in the Florida election law established by the state legislature.

The third assumption is largely the converse of the second. We assume that the B group, Justices O'Connor and Kennedy, who alone remain in the per curiam camp after we remove the concurring Justices, preferred to reverse only on equal protection grounds.

304. We will, of course, concede that, setting aside the opening sentence of the concurring opinion, the absence of evidence of agreement is not evidence of absence of agreement. But when we add to such an absence of evidence of direct support for the central rationale of the per curiam opinion the per curiam's limiting language suggesting that the holding applies only to the case facts, and the generally restrictive views on equal protection among the concurring Justices—setting aside affirmative action, but certainly including voting rights—we think it fair to infer the strong possibility that the concurring Justices joined the per curiam's equal protection analysis based upon strategic concerns. That said, we also concede that this supposition is ultimately a premise upon which our analysis rests, rather than a proposition that is proved by our analysis itself.

305. See *supra* note 158 and accompanying text.

This assumption is easy to defend given that it is entirely consistent with the opinion that they ultimately joined, and given that nothing in the per curiam opinion expresses agreement with the views held by the concurring Justices on the Article II issue. We recognize that Justices O'Connor and Kennedy may not necessarily have disagreed with the conservative Justices' Article II analysis;³⁰⁶ perhaps they simply preferred that the opinion rest on one ground rather than on two.³⁰⁷ Whether they preferred not to rest in part on the Article II argument because they disagreed with it or because they found it extraneous is not relevant to the analysis that follows.

The fourth assumption involves the two groups of dissenting Justices, Justices Souter and Breyer (who found an equal protection problem but who would have remanded to cure it) and Justices Stevens and Ginsburg (who found no violation of equal protection or Article II). Strictly for expositional purposes, we will assume that the four dissenting Justices found no constitutional violation to support a reversal. We make this assumption, which is fully consistent with the opinions written and joined by Justices Stevens and Ginsburg, because it enables us to simplify the presentation of the anomaly that the multidimensional and asymmetrical model of *Bush v. Gore* presents by grouping all four dissenting Justices together in one box. This is obviously not the position that Justices Souter and Breyer took (which we indicate by placing their names in italics), but relaxing the assumption does not change the analysis. Given our other assumptions, seven of nine Justices believed that there was no equal protection problem, so that even if Souter and Breyer believed that there was an equal protection violation,

306. We will later reconsider the possibility that Justices O'Connor and Kennedy were sympathetic to at least part of the Article II analysis. See *infra* note 351 and accompanying text.

307. Linda Greenhouse notes that for "Justice O'Connor, the broadly worded Rehnquist opinion may have violated her rule that the court should decide cases on the most narrow ground possible. The holding of the per curiam was as narrow as possible, 'limited to the present circumstances,' it said." Greenhouse, *supra* note 5. While Greenhouse might be correct that this was Justice O'Connor's reasoning, it is important to set out two clarifications. First, the claim seems to confuse the proposition that a case should be resolved on the narrowest grounds with the proposition that a case holding should be limited to present circumstances. Though Justice O'Connor's opinions may be more fact sensitive than those of some Justices, she does not always refrain from announcing a holding unambiguously applicable in other cases. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) ("[W]e hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment."). Second, there is an important distinction between resolving a unidimensional case on the narrowest possible ground and resolving a multidimensional case on only one ground rather than two. Even if Justice O'Connor prefers not to consider issues that need not be addressed given her resolution of other issues, that does not explain why she would prefer the equal protection analysis over the Article II analysis.

their votes would not make a difference, with five of nine Justices still believing there to be no such violation.

These assumptions allow us to identify the central anomaly of *Bush v. Gore*, which we contend may have caused the concurring Justices to embrace a position with which they disagreed on the merits. As the discussion of *Bakke* reveals, adding a second issue dimension in a case does not itself prevent a Condorcet-winning opinion from emerging. But comparing Tables 4 and 5 reveals a critical difference between the relationships between and among the opinions in *Bakke* on the one hand, and in *Bush v. Gore* on the other. Table 4 shows that in a case such as *Bakke*, characterized by the two features of multidimensionality and symmetry—meaning that opposite issue resolutions of identified dispositive issues produce opposite judgments—the opinion that affords each of the other two principal opinions a partial victory with respect to the resolution of one issue will emerge as a dominant second choice. Thus, when these two characteristic features are present, unlimited binary comparisons by majority rule over the packaged resolutions of identified dispositive issues coupled with a judgment does not yield a collective intransitivity.

Now let us compare *Bush v. Gore*. Table 5 reveals unique characteristics that belie a claim of symmetry. As a result, this case generates a possible set of cyclical preferences by unlimited majority rule over the packaged resolutions of dispositive issues coupled with a judgment that each box represents. The anomaly arises because the identified dispositive issues are disjunctive. Following the internal consistency assumption, a Justice can vote to overrule the Florida Supreme Court if he or she finds that the ruling violates *either* Article II *or* equal protection. But a Justice can vote to affirm the Florida Supreme Court ruling only if he or she finds a violation of *neither* Article II *nor* equal protection. The anomaly arises because the two opposite sets of resolutions of identified dispositive issues—the lower court ruling violates Article II but not equal protection *or* the lower court ruling violates equal protection but not Article II—both lead to the same judgment, namely to reverse. In contrast, from the perspective of either camp A or C, a favorable resolution of one of the two identified dispositive issues—finding no Article II violation (favoring the O'Connor camp) and no violation of equal protection camp (favoring the Rehnquist camp)—produces the opposite judgment, namely to affirm.

In a case of lesser magnitude, we might well imagine the Justices possessing rank orderings over the remaining alternatives that would generate either of the following intransitive preference

orderings: ABC, BCA, CAB or CBA, BAC, ACB. The unique characteristic of these preference orderings is that in each case, one of the camps favoring reversal ranks second the opinion closer on the rationale but opposite on the judgment and third the opinion that is farther on the rationale while reaching the same judgment. The other camp does just the opposite. There is no reason to assume, a priori, that a Justice should necessarily care more about achieving a common resolution on an important doctrine, even if doing so yields an opposite judgment, or more about achieving the same judgment, even if doing so requires sacrificing her preferred resolution on both identified dispositive issues. And that is precisely our point. Under these fairly unusual conditions, there simply is no available decision-making rule—like the *Marks* rule in a unidimensional context³⁰⁸—with which to identify a dominant second choice, or Condorcet winner. And that is because given this set of preference configurations, it is possible to devise ordinal rankings for which no Condorcet winner is available. Instead, the Court employs its outcome voting rule, which allows the majority vote on the judgment to control, even if the result is to produce a judgment in tension with majority resolutions of identified dispositive issues.³⁰⁹

While this set of conditions is unusual, it is not unique. Scholars have surveyed such cases and proposed a variety of solutions to avoid the perceived problem of a judgment that is at odds with the majority resolutions of each issue logically necessary to produce it.³¹⁰ Others have defended the outcome voting rule against these proposals, claiming that the alternative approach elevates issues over outcomes,³¹¹ or that a regime that rested primarily on

308. The same analysis that applies in a unidimensional case applies in a multidimensional symmetrical preference case. See STEARNS, *supra* note 250, at 75-77.

309. For an analysis of the relationship between outcome voting and the narrowest grounds rule, see *id.* at 99-156, which presents the rules as complementary, with outcome voting ensuring an outcome in all but three-judgment cases, and the narrowest grounds rule ensuring in a fractured panel case that if an opinion consistent with the outcome represents a Condorcet winner, it will express the Court's holding.

310. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 56-59 (1993) (proposing that the Supreme Court elect issue or outcome voting in each case by majority rule); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1079 (1996) (offering a "stopping rule" in response to challenges that their proposed issue voting rule would be indeterminate); David G. Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 770-72 (1992) (proposing that the Supreme Court should switch to issue voting).

311. See John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 VAND. L. REV. 997, 1021-25 (1996) (arguing against issue voting proposals on grounds that they would increase the problem of doctrinal indeterminacy and undermine the integrity of rule of law); John M. Rogers, "I Vote This Way Because I'm Wrong:" The

issue voting would generate a kind of strategic behavior among the Justices in identifying what the dispositive issues are.³¹² While it is beyond the scope of this Article to review, let alone resolve, these debates, we contend that *Bush v. Gore* does provide an important datum in support of the outcome voting rule. Specifically, it reveals one important constraining effect such a rule places on judicial behavior by encouraging not only principled—meaning non-strategic—articulation of issues,³¹³ but also principled resolution of issues.

To demonstrate, we begin with an observation from the unidimensional model. Recall that in a potentially fractured panel decision resting along a single normative issue dimension,³¹⁴ the additional value of attaching *stare decisis* to an opinion that represents even a partial move from the status quo toward the ideal point of those embracing more extreme views creates an opportunity for gains from trade with the median Justice. If the median Justice is willing to move slightly off his or her ideal point, and if one of the camps embracing a more extreme view is willing to move toward the median position, then the two groups can improve their overall position by securing a majority precedent. For the median Justice, this elevates the status of the opinion that he or she would otherwise issue from one that merely states the holding to one that does so with *stare decisis* effect. For those who form a majority coalition with the median Justice, this secures a precedent that, although not moving doctrine to their ideal point, at least moves it in a favorable direction.

One might well imagine that the introduction of a second dimension, and a combination of preferences that results in a voting anomaly characterized by asymmetry, would also provide an oppor-

Supreme Court Justice as Epimenides, 79 KY. L.J. 439, 459-74 (1991) (criticizing vote switch by Justice White in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), inter alia on the ground that doing so elevates issue resolutions over outcome resolutions).

312. See Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1062-65 (1996) (arguing against issue voting proposals based upon insights drawn from social choice and demonstrating that outcome voting promotes principled identification of issues); see also STEARNS, *supra* note 250, at 99-124 (comparing issue and outcome voting regimes).

313. See STEARNS, *supra* note 250, at 122-24 (explaining how outcome, as opposed to issue, voting promotes principled issue identification).

314. The same analysis that applies along a single dimension also applies in a multidimensional case with symmetrical preferences. Gains from trade arise because either camp that is not a Condorcet winner can gain by enhancing the *stare decisis* value of the Condorcet winning opinion and by encouraging a move in their direction on the point of disagreement with the author of that opinion.

tunity for gains from trade. To evaluate this seemingly plausible supposition, it is important to consider, from the perspective of each camp in Table 5, whether a move to the position of the other camps in exchange for producing a majority precedent places them in a more favorable position. Because this stylized depiction of *Bush v. Gore* represents a paradigm, our observations about the limits on strategic behavior that such a case presents can be fully generalized to cases characterized by multidimensionality and asymmetry. After revealing the limits on strategic behavior, we can identify the narrow set of conditions under which such a gain from trade is plausible and show why those conditions appear not to have been met in *Bush v. Gore*.

Table 5 reveals that the Justices in camp A—Rehnquist, Scalia, and Thomas—confront three possible choices. First, they can issue an opinion concurring in the judgment that rests solely on Article II grounds. Assuming that the other two camps—B and C—do not reach a compromise producing a majority opinion for the opposite result,³¹⁵ this strategy would likely produce a fractured panel decision in which two separate camps provide opposite rationales in support of a judgment to reverse. Second, the Justices in camp A can concede on the point of disagreement with the dissenting Justices in camp B—Souter, Breyer, Stevens, and Ginsburg—thus elevating the dissenting opinion to majority status. For two reasons, we would suggest that in most but not all cases of this type, such an exchange is implausible. First, from the perspective of the Justices in camp A, it would change the disposition from a desired reversal to an affirmance. Second, it would provide a single rationale consistent with the judgment to reverse, and thus a precedent opposite their preferred resolution of the Article II issue. Third, the Justices in camp A can concede their point of disagreement on the equal protection issue with the members of camp C. While it appears that this is exactly how camp A proceeded, we contend that Chief Justice Rehnquist and Justices Scalia and Thomas did not do so to secure gains from trade of the sort discussed above. Such an exchange appears implausible, at least if motivated by the willingness to trade off a decision on their ideal point to secure a desired majority precedent. Without engaging in this strategy, the members of camp A would ensure the same judgment, namely a reversal. In addition, by engaging in this strategy, the members of camp A would secure a

315. We will defend this assumption below. See *infra* text preceding note 316 (explaining why the same analysis that applies to the Scalia camp also applies to the Breyer camp).

majority disposition, and thus a precedent, on a point of law with which they appeared to disagree.

The same analysis that reveals the disincentive for camp A members to move off their ideal point also explains the disincentive for camp C members to move off their ideal point. Conceding a point of disagreement with the dissenters—camp B—will produce a disfavored judgment based upon a rationale with which they disagree. Conceding a point of disagreement with those in camp A will not change the outcome, but doing so will generate a precedent on a point of law with which they disagree. And finally, the dissenters, camp B, have no incentive to move off the ideal point and to embrace the positions of either camp A or camp C. This follows from the disjunctive relationship between the issues. By staying put, they reveal that a majority disagrees with the resolution of each identified dispositive issue necessary to secure the opposite result. By moving to one of the other camps, the members of camp B not only would still face the outcome opposite that which they prefer but also would provide a majority rationale, and thus a holding consistent with that outcome given precedential weight, on a rationale that they expressly reject. Even if the Justices in camp B cared more about the outcome than about the doctrine, they could not trade with Justices in one of the other camps who care more about doctrine than outcome, because of the first assumption above. Individual Justices could not announce an outcome for *Gore* based upon the resolution of issues in a manner that favors Bush.

To summarize, unlike in the unidimensional case,³¹⁶ the Justices confronted with multidimensional and asymmetrical preferences have no incentives to move from their ideal points in an effort to secure gains from trade. Because this holds true for the Justices in all three camps, no camp has an incentive, as they do in the unidimensional case, to try to reach an accommodation to avert a successful strategic accommodation in the opposite direction between the remaining two camps. As stated above, while we have presented this in the context of discussing *Bush v. Gore*, the point is fully generalizable to this category of cases. The point, of course, is not generalizable to every conceivable rule for resolving multidimensional, asymmetrical preferences. If the Supreme Court operated under a regime that rendered the logical progression of majority resolutions of dispositive issues—as opposed to the majority out-

316. This analysis applies as well to a multidimensional case with symmetrical preferences. See *supra* note 314.

come vote—controlling, then there would have been an incentive to switch votes. Setting aside the problem that this alternative regime might affect the framing of issues, and assuming that the Justices would still have voted consistently with the presentation of Table 4, then this alternative regime would have produced a Gore victory. As a result, if the Rehnquist camp cared more about the outcome of the case than about the resolution of the equal protection issue, this hypothetical voting regime would have given it an incentive to sign onto the per curiam opinion. In contrast, the outcome voting rule serves to discourage such strategic behavior. As a result, we must now look for some other explanation of the Rehnquist camp's decision to join the equal protection analysis.

We have now provided a basic explanation for why, under the Court's actual voting protocols, this category of case eschews gains from trade. And yet, there are three known cases in which one group of Justices confronted with this type of voting anomaly acquiesced in what would have become the dissent's contrary resolution of one identified dispositive issue, with the effect of elevating what would have been a dissent to majority status.³¹⁷ In each of those cases producing an acknowledged "vote switch," the Justices conceded their preferred resolution of an issue arising at one level to secure a majority precedent on an issue arising at another.³¹⁸ In contrast, in those cases in which the identified dispositive issues arise at the same level—whether procedural or substantive—the Justices have not engaged in a vote switch.³¹⁹ In such cases, Jus-

317. For an analysis of these cases, and an explanation of why the title case did not present such a "vote switch" even though it involved a combination of a threshold and substantive issue, and thus was conducive to a vote switch, see Stearns, *supra* note 289.

318. Thus, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 56-57 (1989), Justice White switched votes, conceding to a contrary majority that determined that Congress intended to abrogate state sovereign immunity, to reach the Eleventh Amendment question whether Congress has the constitutional power to do so. In *Arizona v. Fulminante*, 499 U.S. 279, 313-14 (1991), Justice Kennedy conceded to a contrary majority that determined that a confession was coerced, to reach the constitutional question whether harmless error applies to the admission of a coerced confession. And in *United States v. Vuitch*, 402 U.S. 62 (1971), Justices Harlan and Blackmun conceded to a contrary majority that determined that the Supreme Court had jurisdiction in appeals from a conviction for abortion under a statute that applied only in the District of Columbia, to reach the constitutional question whether the statute in question was unconstitutionally vague. *Id.* at 93 (opinion of Harlan, J.); *id.* at 97-98 (opinion of Blackmun, J.). For a more detailed discussion of these cases, see STEARNS, *supra* note 250, at 129-41.

319. Thus, in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), neither of two camps achieving the same judgment, but opposite resolutions of the two disjunctive issues needed to reach that judgment, conceded to a contrary majority on either of two dispositive issues needed to find a violation of the Dormant Commerce Clause. And in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), neither of two opposing camps achieving the same judgment, but opposite resolutions of the two disjunctive issues needed to

tices have no incentive to switch positions on an issue not of central concern as a means of reaching and resolving a substantive legal issue to produce a desired precedent. The vote switch cases reveal that when a preliminary or gateway issue prevents a Justice from reaching the merits of a logically subsequent substantive issue, if the affected Justice is more concerned about how the second issue is resolved than how the gateway issue is resolved, he might be willing to concede as needed to the contrary majority resolution on the gateway issue to produce a desired precedent on the substantive issue.³²⁰ But when the issues in the case arise at the same level—gateway or procedural—then it appears likely that there really is a fundamental disagreement as to how the case issues should be characterized and resolved.³²¹

This analysis only reinforces the conclusion that the desire to gain advantage on one aspect of a case, such as resolution of an issue or the outcome, cannot explain any vote switching in *Bush v.*

reach that judgment, conceded to a contrary majority on either of two dispositive issues needed to uphold a statute granting the citizens of the District of Columbia citizenship status for purposes of federal diversity jurisdiction. For a more detailed discussion of these cases, see STEARNS, *supra* note 250, at 142-46.

320. This was the central thesis of Stearns, *supra* note 289, at 146-56.

321. In Stearns, *supra* note 289, one of us posits that that this explains all of the voting anomaly cases under review except for the title case, *Miller v. Albright*, 523 U.S. 420 (1998). In that case, Justices O'Connor and Kennedy alone embraced the view that Lorelyn Penero Miller was unable to raise her father's equal protection challenge to a provision of the Immigration and Nationality Act under which a foreign-born illegitimate child of a U.S. citizen father had to formalize his or her relationship with the father prior to reaching majority as a precondition to obtaining citizenship, while a foreign-born illegitimate child of a U.S. citizen mother could secure citizenship at any time without the need to formalize his or her relationship in advance with the mother. *Miller*, 523 U.S. at 445-52 (O'Connor, J., concurring). The author offers three reasons that Justices O'Connor and Kennedy might have declined to concede this gateway issue to allow their views on the underlying equal protection claim to control. First, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Supreme Court, in an opinion by Chief Justice Rehnquist declined to give stare decisis effect to the structurally identical case of *Union Gas*, see *supra* note 318, in part as a result of Justice White's vote switch. Justices O'Connor and Kennedy might therefore have taken this as a collective condemnation of the practice. Second, an independent analysis of the standing jurisprudence of Justices O'Connor and Kennedy reveals a strong separation-of-powers underpinning, which might have produced an independent rationale for their outcome judgment to decline Miller citizenship. And finally, Justices O'Connor and Kennedy might have declined to switch votes due to a peculiarity of the *Miller* opinion, namely that the contrary majority resolution on standing was spread over four separate opinions, rather than contained in one as was the case in each instance of a vote switch. The question addressed, as well as the theory advanced, in the text is the flipside of that presented in the analysis of *Miller*. The article on *Miller* considered why a vote switch did not occur even though the necessary conditions—namely two identified dispositive issues arising at different levels in the case—appeared conducive to a vote switch. Here, in contrast, we explain why there was a vote switch even though the necessary conditions appear to have been absent, given that the underlying issues arose at the same level in the case.

Gore.³²² In *Bush v. Gore*, the disagreements between the positions embraced by camps A and C arise at the same level; both involve substantive constitutional challenges—one based upon Article II, the other based upon equal protection—to the Florida Supreme Court ruling. The case therefore did not produce conditions that facilitate an incentive to acquiesce in the resolution of one issue to secure a majority precedent on the other. This is borne out by the explicit disclaimer in the per curiam opinion itself.³²³ If the concurring Justices were motivated to ensure a majority precedent on the equal protection basis for striking down the Florida Supreme Court ruling, it seems most unlikely that they would have done so by including language that effectively limits the precedential force of that issue to the case facts.³²⁴ In addition, the majority resolution of

322. We certainly agree that Justices sometimes vote to reinforce institutional concerns that are not directly related to the case merits. In some cases, Justices might simply conclude that a majority-backed precedent is preferred to a fractured panel decision producing the same judgment in which they stick to their ideal point. We have argued that this arises most typically in cases with a single dimension or cases with two dimensions and symmetrical preferences. In addition, even when the Court has a majority to support its judgment disposition, in certain high profile or doctrinally significant cases, the participating Justices experience significant internal pressure to achieve unanimity. Characteristic cases include *Brown v. Board of Education*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); and *United States v. Nixon*, 418 U.S. 683 (1974). This might also explain *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). For an article that explores these institutional pressures and norms, see Caminker, *supra* note 205. And as we have noted, *see supra* note 318, in the three vote switch cases, one more Justice conceded to a contrary majority their preferred resolution on a gateway issue. While *Bush v. Gore* has features that resemble each of these case categories, it nonetheless remains critically distinct. First, when there is pressure to establish a precedent or to achieve unanimity, such pressure generally results from the need to provide a clear resolution to a contested or salient point of law. But it is difficult to maintain that *Bush v. Gore* generated doctrinal clarity on the per curiam's underlying equal protection issue. If it had, there would have been little need for a case-specific disclaimer. In addition, *Bush v. Gore* has a critical feature that distinguishes it from each of the three vote switch cases. In each of those cases, the conceding Justice or Justices acquiesced in a contrary majority's resolution of a gateway issue to elevate what would have been a dissenting opinion to majority status. In *Bush v. Gore*, in contrast, even if the concurring Justices adhered to what we maintain was their likely ideal point—finding a violation of Article II, but not of equal protection—the judgment would have remained the same. For these reasons, we argue that the concurring Justices likely possessed a distinct motivation from that in other case contexts where the resulting behavior can fairly be characterized as strategic. These concurring Justices likely voted as they did to preserve the appearance of the institutional integrity of the Supreme Court by producing a single majority-backed rationale for this vitally important case judgment, even though the judgment was unaffected by their decision to join the per curiam's equal protection analysis and even though that decision was not intended to strengthen the clarity of any proposition of law.

323. *See supra* note 286 and accompanying text.

324. Indeed, Linda Greenhouse suggests that the language might have been the result of a negotiation between the two conservative factions. *See Greenhouse, supra* note 5 ("In language that was perhaps the result of negotiations between the majority's two factions, the opinion contained an unusual declaration that the principle it established was in effect a ticket for this train only.").

the case on equal protection grounds did not affect the precedential status (or lack thereof) of the Court's Article II analysis. Regardless of whether the Justices switched on the equal protection issue, the case would produce no holding with respect to Article II. Nor can one tell a story in which any of the other Justices might switch because of a deeper concern for one issue than another.

We are left then with a puzzle. Why did the Rehnquist camp—camp A—sign onto the per curiam opinion, apparently conceding their preferred resolution of the equal protection issue, when the relationships between and among the various camps is not such as to promote any kind of ordinary strategic gain from trade? Our answer rests in part on an observation that might appear stunningly obvious. This was, to be sure, no ordinary case. Rather, it was one in which the importance of the outcome vote eclipsed that of any doctrine that the case might produce. This was, of course, well known to anyone following the case. Moreover, the case involved an election in which every stage of decision making was resolved by historically thin—and contested—margins. This was true of the nationwide popular vote, the Florida popular vote, the immediately preceding decision of the Florida Supreme Court (4 to 3 for Gore), and apparently it was also going to be equally close in the opposite direction in the Supreme Court (5 to 4 for Bush). This is all troubling enough, especially when the vote margins likely fell within the range of counting error.³²⁵ And while it is certainly possible that with different election rules, the candidates' strategies would have changed this result,³²⁶ at least the popular press tended to claim that but for the rather odd Electoral College system, which most regard as an historical relic, Gore would have won based upon the popular vote.³²⁷ Still, elections, like games, have rules, and

325. Cf., e.g., William R. Brody, *The Truth About Recounts*, WASH. POST, Nov. 22, 2000, at A27 (arguing that the conclusion of any recount would be within the margin of error).

326. Cf. George F. Will, *'Had 'Em All the Way!'*, NEWSWEEK, Nov. 27, 2000, at 92, 92 (analogizing claims that Gore won the election to a claim that the Mets won Game 5 of the World Series because they were on base more often).

327. See, e.g., National Archives and Records Administration, 2000 Presidential Election: Popular Vote Totals, at <http://www.nara.gov/fedreg/elctcoll/2000popres.html> (last visited July 17, 2001) (indicating a popular vote differential of 540,520 votes); see also John Duchneskio & Stephen Seplow, *Gore's Vote Lead Totals 540,435*, PHIL. INQ., Dec. 15, 2000, at A27 (noting inconsistencies in reporting of the popular vote differential). Indeed, a media postmortem suggests that "despite the griping about the Supreme Court's intervention, Bush would have won Florida's electoral votes under most realistic scenarios." *Another Postmortem on Florida's Debacle*, NEWS TRIB., July 17, 2001, at B6. The author adds: "Nevertheless, his margin of victory was smaller than the margin of error, given the problems that permeated Florida's amazingly slipshod voting system." *Id.* For one of *The New York Times* articles that grew out of this postmor-

however close the popular vote, both sides understood that the election came down to the Electoral College. And the Electoral College came down to the historically close margin in Florida. And in Florida, the margin was so close, and the result subject to claimed voting irregularities, that it gave rise to several legal contests, two of which made it to the Supreme Court. As was the case in the Florida Supreme Court, which favored Gore, the United States Supreme Court was destined to come down to a split victory, favoring Bush.

It is one thing to decide a landmark case involving a presidential election by a razor thin margin. But it is another to do so based upon a set of rationales that simple counting could disclose not to support the judgment.³²⁸ We do not imagine that the peculiar voting anomaly in *Bush v. Gore* would have been the stuff of headlines, but we do think that in a case of this magnitude, the Justices had a strong incentive to at least appear to stand behind a united front on a single common rationale. This concern was especially acute in a case in which the Court's legitimacy had been called into question simply for having entered the fray.³²⁹ The Rehnquist camp might have reasoned that however slight the impact, presenting a majority rationale would at least remove one quiver from the bow of those calling the *Bush v. Gore* Court's legitimacy into question. Those in the Rehnquist camp might well have believed that while such a maneuver undermined to some extent the strength of their own reasoning, that was a small price to pay for trying to enhance

tem, see David Barstow and Don Van Natta, Jr., *Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1.

328. Indeed, a critique of *Bush v. Gore* that circulated widely on the Internet shortly after the decision made such a claim in spite of the apparent strategic vote by the members of the Rehnquist camp, albeit based upon a false premise. It emphasized, for example, that "[s]ix of the justices (two-thirds majority) believed the hand-counts were legal and should be done," and that "[t]he five conservative justices clearly held (and all nine justices agreed) 'that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.'" Mark H. Levine, *The Supreme Court Explained* (Dec. 14, 2000) (unpublished manuscript, on file with authors). This argument is not persuasive because four of the six Justices referred to maintained that the Florida Supreme Court's approach to the recount violated equal protection. But absent the apparent vote switch by the Rehnquist camp, a complaint that six Justices rejected the proposition that there was an equal protection problem demanding reversal and that six Justices rejected the proposition that the Florida Supreme Court had effected an unconstitutional change in Florida election law would have been both easy to understand and powerful. Whether or not the Justices consciously recognized the potential existence of an issue voting anomaly, they presumably would have intuitively understood the likelihood of criticism of a disposition that lacks majority support for either of the two logically plausible, and agreed upon, rationales supporting a reversal. And thus the anomaly helps us understand the reason that the five signatories were concerned with presenting a united front.

329. Some of this criticism was from within the Court itself. See *Bush v. Gore*, 531 U.S. 98, 144 (2000) (Breyer, J., dissenting) ("The Court was wrong to take this case.").

the prestige associated with an imprimatur by the nation's highest court for the person who, as a result of its decision, would be elected the President of the United States. In this unique case, it therefore seems probable that the Justices reached an accommodation *in spite of*, rather than *because of*, the presence of preferences that possessed the characteristic features of multidimensionality and asymmetry.

Not only does the social choice analysis thus help to explain the unique nature of the strategic accommodation by Rehnquist, Scalia, and Thomas, but it also helps to explain the limited scope of the per curiam opinion that they joined. Just as it is plausible to intuit why the Rehnquist camp joined the O'Connor camp, it is equally plausible to imagine why the O'Connor camp might also have agreed to include language limiting the equal protection analysis to the case facts, assuming that the O'Connor camp did not prefer to include a fact-specific disclaimer.³³⁰ In addition, O'Connor might well have agreed—whether or not explicitly—not to openly criticize the concurring opinion's resolution of the Article II issue. One question about the concurrence, however, still remains. Once the Rehnquist camp signed onto the per curiam opinion, why did these Justices not simply abandon the Article II analysis, which was no longer necessary to the desired case disposition? After all, the attitudinalist analysis suggests that the conservatives' resolution of the Article II issue, as distinguished from the outcome generated by the judgment, was contrary to the conservatives' federalism preferences, even if not as contrary to their preferences as the resolution of the equal protection claim.³³¹ The likely explanation is that members of the Rehnquist camp felt that the Article II argument for reversing the Florida Supreme Court was more persuasive than the equal protection argument. Their concurring opinion thus managed both to eliminate the formal anomaly discussed above and to signal to legal scholars and historians that there was a sound basis (or at least a more sound basis than that presented in the per curiam opinion) for reversal. Had the conservatives simply ignored the Article II issue, the Article II defense of the outcome might have been lost in the debate.

Though we do not stake a position on whether the Rehnquist camp's decision to sign onto the per curiam opinion was justifiable despite the conservative Justices' likely disagreement with it, it is

330. See *supra* note 324 (suggesting the possibility of such an agreement).

331. See *supra* Part III.A.

worth emphasizing that as strategic behavior goes, the Rehnquist camp's decision was fairly benign. As the social choice model underscores, the case would have been resolved for Bush even if the Rehnquist camp had only concurred in the judgment. In addition, the decision produced a relatively low risk of entrenching a precedent with which they disagreed, given their emphasis on the unique facts of the case. The motive, moreover, was to ensure the appearance of the continued legitimacy of the Court. There are counterarguments, of course. There is a straightforward appeal to judicial candor,³³² and perhaps the conservatives should have been willing to bear the criticism that no rationale supporting Bush garnered a majority, as appears to have been the case. In any event, this analysis of *Bush v. Gore* reveals how rare and constrained such opportunities for strategic behavior really are. The Court's voting rules do not eliminate strategic behavior altogether, even in the multidimensional/asymmetrical case. But our ability to classify strategic behavior in such cases as reflecting two relatively unusual situations—associated with the multiple levels problem discussed above and associated with the desire to show a unified rationale in *Bush v. Gore* itself—shows that the exception proves the rule.

D. *The Three-Judgment Anomaly*

The multidimensional/asymmetrical model has greatly enhanced our understanding of *Bush v. Gore*. First, it explained why the Rehnquist camp joined the per curiam opinion. Second, it explained some of that opinion's most peculiar features. And yet, while the model has brought us most of the way home, we contend that it still fails to provide a complete account. One important question remains: Why did the per curiam authors undermine the purpose of remanding this state court case by presumptively resolving a critical underlying state law issue? To answer this question, we must now introduce a third social choice model, one that relies as well upon several insights drawn from the earlier judicial politics analyses in Part III.

It is easy to come up with arguments against including any remand language at all, despite the Court's traditional practice of

332. See, e.g., Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 723-41 (1979) (arguing for judicial candor); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-50 (1987) (same). But see Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1395-1417 (1995) (arguing that judicial candor is not always appropriate).

remanding state court cases.³³³ First, the remand risked confusion at a time when there was a strong need to bring a clear and final resolution to a drawn-out election battle.³³⁴ Since Chief Justice Rehnquist's concurring opinion, which Justices Scalia and Thomas joined, made plain that they perceived no basis for the Florida Supreme Court to continue a recount, joining an opinion that left open the possibility of room to maneuver threatened to weaken the otherwise clear signal in the concurrence favoring Bush. Second, the concurring Justices' conclusion that they "would reverse,"³³⁵ without mention of remand, may have been a signal that they would have been willing to sign onto an opinion ignoring the traditional practice. Third, Justice O'Connor had signaled frustration with the results of the remand in *Bush v. Palm Beach County Canvassing Board* at oral argument in *Bush v. Gore*.³³⁶ It seems unlikely that she presumed that a true remand in *Bush v. Gore* would produce a more satisfying result than it had in the earlier unanimous Supreme Court case. If ever there was a case for ignoring the Court's traditional practice, *Bush v. Gore* was it, and the Justices might have justified such an approach by pointing to the occasional straight reversal of a state court opinion.³³⁷

Presumably, these arguments were insufficient to induce such a dramatic break with tradition. Nonetheless, it is puzzling that the per curiam opinion adhered to the letter of the practice, while flouting its spirit by effectively deciding the question of Florida law at issue, whether the safe harbor deadline was to be met at all costs. The answer stems from the recognition that if we include

333. See *supra* note 136 and accompanying text.

334. Justices O'Connor and Kennedy might have even cited the famous statement, in an opinion jointly authored by them and Justice Souter, that "[l]iberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion).

335. See *supra* note 137.

336. See *George W. Bush v. Al Gore*, *supra* note 223. Justice O'Connor said:

I did not find, really, a response by the Florida Supreme Court to this court's remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes in deadlines were just fine, and they'd go ahead and adhere to them. And I found that troublesome.

Id.

337. The most recent case failing to include a remand in a case on review from a state court was *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which the Court simply used the word "reversed" in rejecting the analysis of, by coincidence, a Florida court. There is nothing in that case, however, to indicate that this choice of disposition was anything but an accident, and indeed the Florida court interpreted the Supreme Court's action as implicitly containing a remand. See *Palmore v. Sidoti*, 472 So. 2d 843, 843 (Fla. Dist. Ct. App. 1985). Nonetheless, cases like this might have furnished an argument that the Court occasionally directly reversed state court opinions and that *Bush v. Gore* was a particularly appropriate case in which to do so given the need for a clear resolution.

the concurring Justices in the group that would prefer *not* to give the Florida Supreme Court any room to maneuver on remand, then including the remand without resolving the issue of state law threatened to produce a judgment impasse, in which no outcome resolution of the case garnered five votes. On this assumption, three Justices preferred an opinion amounting to a straight reversal leaving the Florida Supreme Court no room to maneuver (Rehnquist, Scalia, and Thomas); four Justices preferred a remand, although not necessarily subject to the same mandate (O'Connor and Kennedy in the conservative remand camp and Souter and Breyer in the liberal remand camp); and two Justices preferred to affirm (Stevens and Ginsburg). Assuming this to be an accurate lineup of first-order preferences on the judgment, no judgment would have possessed the requisite majority support.

This initial hypothesized lineup does appear somewhat uncertain. At a minimum, Justice Breyer might not have joined in the per curiam remand given that his separate dissenting opinion did not find a clear violation of equal protection or due process. Just as it would have strengthened the concurring Justices' signal to rule for a simple reversal, so too would it have strengthened Justice Breyer's signal had he joined with Justices Stevens and Ginsburg in favor of a simple affirmance and rejected all constitutional claims. And had Justice Breyer done so, perhaps Justice Souter would have followed suit. Even if Souter and Breyer had joined Stevens and Ginsburg, however, there still could have been a judgment impasse, as there would have been only four votes for affirmance. For the analysis to follow, it is helpful to grade the various opinions along a single dimensional issue spectrum, based upon the effective breadth of the judgment, rather than upon the rationale. We do so in Table 6 below.

Table 6. The *Bush v. Gore* Three-Judgment Anomaly

(A) Rehnquist, Scalia, Thomas	(B) O'Connor, Kennedy	(C) Souter, Breyer	(D) Stevens, Ginsburg
Reverse	Remand		Affirm

This judgment anomaly, of course, would not have been apparent from the dispositions recommended in the opinions if the concurring Justices' statement that they "would reverse" was just a shorthand way of saying that they "would reverse and remand" in accordance with the typical practice. The conceptual problem, however, is precisely the same as in a pure three-judgment anomaly case. Because there would not have been a majority of votes for any

one opinion, the Florida Supreme Court would not have been given guidance by a U.S. Supreme Court majority on whether there was anything left for it to do. The respectful Supreme Court practice of issuing a surface remand even when an opinion amounts to a straight reversal, thus allowing the state courts technically to get the last word,³³⁸ does not eliminate the real problem of what the state courts should do when it is apparent that one opinion leaves the lower court no room to maneuver, one opinion leaves the court some room to maneuver, and one opinion tells the court that it need not maneuver at all for it has already avoided federal law problems.

Technically, the anomaly might properly be labeled a "mandate anomaly," rather than a "judgment anomaly." In some cases, this might make a difference, because the narrowest grounds rule plainly would apply when the only ambiguity is as to a case's mandate. But, in contrast with the hypothetical unidimensional model,³³⁹ there would be no narrowest grounds opinion in *Bush v. Gore* if the Rehnquist camp preferred to resolve the case on Article II grounds only. A reverse and remand on equal protection grounds would not technically be any narrower than a reverse and remand on Article II grounds, even though a reverse and remand on equal protection grounds *would* be narrower than a reverse and remand on both equal protection and Article II grounds. Instead, the choice of mandate would turn on the legal theory justifying the reverse and remand. And as we have previously demonstrated, when the rationales rest along two separate dimensions, the narrowest grounds analysis cannot be assumed to apply.

The social choice analysis of *Bush v. Gore* presented here thus provides an important theoretical refinement over previous analyses of three-judgment anomalies. The analysis reveals that a potential three-judgment case that is nominally avoided by the Supreme Court's practice of issuing a remand upon the review of a state court decision might then manifest itself as a multidimensional/asymmetrical case in which the Court is split over two, rather than three, judgments.³⁴⁰ This demonstrates that a rule im-

338. That is all the Florida Supreme Court eventually did with its remand, as several Justices used the opportunity to reflect back on the case. *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000). The court itself straightforwardly interpreted the Supreme Court's opinion as having "mandated that any manual recount be concluded by December 12, 2000." *Id.* at 526. The Florida court also declined to address the issue of what a proper "specific, uniform" standard would be, noting that such a decision was best left to the legislature. *Id.*

339. *See supra* Part IV.B.

340. Only one of the cases in which scholars have identified a three-judgment anomaly is a review of a state supreme court decision, and in that case, the anomaly existed because Justice

posing an arbitrary limit on the choice set of Justices with respect to the judgment disposition cannot avoid an underlying intransitivity with respect to their collective preferences on the mandate to the relevant state court. In any event, for consistency and ease of exposition, we employ the convention, in Table 6 and in the discussion to follow, of characterizing the resulting difficulty as a “judgment anomaly” in which the Rehnquist position is identified as “Reverse.”³⁴¹

As in Table 5, we have made certain assumptions in setting out the voting camps in Table 6. First, we plot the preferences based upon our intuitions about the prenegotiation positions of the various camps. Thus, we assume that those Justices in concurrence did not initially want to issue a remand judgment and instead preferred to send a clear signal of reversal. This assumption is easy to defend because it is entirely consistent with the separate concurring opinion that Chief Justice Rehnquist wrote and that Justices Scalia and Thomas joined. It is also more consistent than is the remand given the signal that Justice Scalia sent in his opinion accompanying the stay.³⁴² Second, because the per curiam opinion itself appears to have left very little room for the Florida Supreme Court to maneuver, we assume for now that Justices O'Connor and Kennedy favored the disposition that the Court eventually reached. The remand box is split, with Justices O'Connor and Kennedy to the left (closer to those in concurrence who favor a simple reversal) and Justices Souter and Breyer to the right (closer to Stevens and Ginsburg who favor a simple affirmance). Third, we assume that Justices Souter and Breyer initially preferred an affirmance given that their separate opinions find no clear constitutional violation. And finally, consistent with their opinion and reasoning, we assume that Justices Stevens and Ginsburg preferred to affirm without remand. Thus, the only group whose resolution deviates clearly from their ideal point in this stylized presentation is that of the conservative Justices. Our immediate task, then, is to bolster our earlier explanation of why these Justices signed onto an opinion allowing

Stevens would have preferred to dismiss the writ of certiorari. *See infra* note 343 (listing the identified cases, including *Connecticut v. Johnson*, 460 U.S. 73 (1983), which was on certiorari from the Connecticut Supreme Court).

341. *But see infra* note 345 (offering a further comparison of the situation in *Bush v. Gore* and in a case presenting a pure three-judgment anomaly).

342. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring) (granting stay and certiorari) (“It suffices to say that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that the petitioner has a substantial probability of success.”).

the Florida Supreme Court some room to maneuver and to clarify why Justices O'Connor and Kennedy followed the tradition of remanding in only a formal sense.

A quick glance at Table 6 confirms the possibility that unless one or more camps departed from their ideal points, the case could have ended in a judgment impasse. If we assume that camps B and C, totaling four Justices, favored some form of remand, then the Court as a whole risked failing to produce a majority judgment disposition unless one of the more extreme camps, A or D, moved to the center. In fact, in every known case in which the Supreme Court was confronted with a true judgment anomaly, one or more members from a more extreme camp acquiesced in favor of a remand to avoid this potential impasse.³⁴³ There is literally no exception of which we are aware in which the Court issued a decision split on the judgment, thus generating an impasse on the mandate to the court below. It is possible to argue that should this ever occur, then the logic that underlies the narrowest grounds rule itself might be loosened, through an assumption that the remand opinion, although not a first-choice majority candidate and although possibly, but not necessarily, a narrowest grounds opinion,³⁴⁴ was the dominant second choice. However sound this might be as a theoretical matter, it was obviously critical to the Court as a whole, or at least to those who favored some form of reversal, that *Bush v. Gore*

343. See *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998) (Stevens, J., concurring) (casting vote to remand rather than to affirm to produce majority judgment); *Connecticut v. Johnson*, 460 U.S. 73, 89-90 (1983) (Stevens, J., concurring) (casting vote to affirm, rather than to dismiss certiorari, to produce majority judgment); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 423 (1954) (plurality opinion) (breaking deadlock by voting to remand, rather than to reverse, consistent with concurring opinion); *Klapprott v. United States*, 335 U.S. 601, 618 (1949) (Rutledge, J., concurring) (breaking deadlock by voting to remand, rather than to reverse, consistent with plurality opinion); *Von Moltke v. Gillies*, 332 U.S. 708, 726-27 (1948) (plurality opinion) (observing that two concurring Justices have agreed to break deadlock by voting with plurality to remand, rather than voting to reverse); *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring) (switching vote to remand to allow disposition and observing that a "[s]talemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other"); see also STEARNS, *supra* note 250, at 153 (collecting cases).

344. The logic behind applying the narrowest grounds rule is both stronger and weaker than it would be in the typical three-judgment anomaly case. On one hand, the logic is stronger, because *Bush v. Gore* represents a mandate, rather than a judgment, anomaly, and thus *Marks v. United States*, 430 U.S. 188 (1977), dictates adherence to the narrowest grounds rule, assuming it is possible to apply that rule. See *supra* notes 339-40 and accompanying text. On the other hand, the logic is weaker, because many judgment anomaly cases rest along a single normative issue dimension, and thus will present an identifiable narrowest grounds opinion. When, in contrast, the majority favoring a remand rests upon two noncomplementary rationales, as in the multidimensional asymmetrical case that we posit characterizes *Bush v. Gore*, there may simply be no narrowest grounds opinion.

not be the test case on identifying a dominant judgment when confronted with judgment ambiguity.

Let us begin the analysis with a minor puzzle. Even at the issuance of the order to stay, Justice Scalia sent a clear signal that a majority thought that Bush had a strong probability of success.³⁴⁵ Why would he have published such an unusual statement in such a high profile case? One possibility is to raise the costs to the median Justices—O'Connor and Kennedy—of defecting by publicizing that the stay had the support of five Justices. A result in favor of Gore would have resulted from at least one of those five going to the other side. So viewed, this published statement might have signaled to Justices O'Connor and Kennedy that the media would readily detect who among those granting the stay defected in the event that the Court's issuance of the stay backfired. Another explanation is that, anticipating the very brief window of opportunity for negotiations from oral argument to the issuance of the final opinion, Scalia was sending a signal of solidarity to his more moderate colleagues, more so than a signal as to the probable outcome to the media. Scalia might have been signaling to the marginal Justices in support of the stay that he would do what it took to secure a majority in favor of his preferred result, *even if* that required some accommodation.

The moderate liberals in *Bush v. Gore*, Souter and Breyer, certainly understood that they were not going to form a coalition with Rehnquist, Scalia, and Thomas, who stood on the opposite side of the Court, and that their only opportunity to affirm was to sway the moderates. But they also understood that the Court practices favored those who initially were part of the majority coalition once a draft opinion was circulated.³⁴⁶ The liberal wing could also predict that Rehnquist, if he behaved rationally, or even if he merely behaved typically when confronted with a closely divided Court in a high profile case, would likely assign the majority opinion to O'Connor or Kennedy to secure their continued commitment.³⁴⁷ The result was to raise significantly the stakes at oral argument, which we have shown may have become their only real opportunity to signal an alliance between the moderate conservatives and the moderate liberals.³⁴⁸ Such an alliance could produce a remand that criti-

345. See *supra* note 342 and accompanying text.

346. See *supra* note 233.

347. See *supra* note 245 and accompanying text.

348. See *supra* notes 229-32232 (noting the limited opportunities for bargaining after assignment of the opinion, particularly in a case with a time deadline like *Bush v. Gore*).

cized the Florida Supreme Court while appealing to the concerns that Justice O'Connor might find attractive in favor of respecting state court determinations on state law.

The question is why the moderate alliance did not prevail. While the oral argument signaled a common basis for agreement between the conservative moderates, O'Connor and Kennedy, and the liberal moderates, Souter and Breyer, at the opinion stage it quickly must have become apparent that the differences outweighed the similarities. Souter and Breyer preferred a remand based upon a finding that the Florida Supreme Court ruling had violated equal protection in failing to establish consistent manual recount instructions. But if this was the constitutional problem, then it was one that could easily have been fixed.³⁴⁹ The differences between the approach of O'Connor and Kennedy versus that of Souter and Breyer might seem minor at first glance. Although the per curiam opinion presumed that the Florida Supreme Court would stick by its earlier statement that Florida law sought to take advantage of the safe harbor, the opinion nowhere stated that the Florida Supreme Court could not refute this logic on remand. Instead of criticizing the per curiam opinion for making an assumption about Florida law, Justices Souter and Breyer might well have emphasized that the Florida Supreme Court could conclude that Florida law actually did *not* insist on taking advantage of the safe harbor.

The significance of the distinction between the two positions becomes clear once we recall that the per curiam opinion did not explicitly disagree with the concurring opinion's Article II analysis. If the Florida Supreme Court actually issued an order remedying the seemingly inconsistent recount standards, then this presumably would have represented a change in existing state-legislated election law. Justices O'Connor and Kennedy might have been willing to find such a clear shift by the Florida Supreme Court to violate Article II even if they were unwilling to find that the Florida Supreme Court's interpretations leading up to *Bush v. Gore* constituted a change in the law. Unlike an equal protection violation, an Article II violation could not be cured with clearer standards. Pursuing the nominal remand thus likely would have produced at most a Pyrrhic victory for the Gore camp. The nominal remand ended the game one move shy of checkmate because to fix the equal protection

349. Indeed, after *Bush v. Gore* was decided, Gore's lawyers recognized that it would be straightforward to come up with an unambiguous recount standard. See Von Drehle et al., *supra* note 3.

problem, the Florida Supreme Court would have had to declare a new legal standard that arguably would then have contravened the express delegation in Article II to the state legislature.

Thus, by making a presumption about state law in the per curiam opinion,³⁵⁰ Justices O'Connor and Kennedy might well have signaled how they would resolve the case using an alternative—and fatal—rationale if the case bounced up to the Court again. In doing so, they afforded Gore an opportunity for a graceful exit while making the Supreme Court decision the penultimate instead of the final step in identifying the Florida winner.³⁵¹ This analysis explains why the nominal remand was appealing to Justices O'Connor and Kennedy, who presumably preferred a Bush victory. It also explains why Justices Souter and Breyer, who presumably preferred a Gore victory, decided to criticize the per curiam's approach with respect to the safe harbor instead of pointing out that there was only a small difference between their opinion and the per curiam's and that the per curiam opinion did not foreclose the possibility that Gore could seek to have the Florida Supreme Court declare that in fact Florida law did not insist on meeting the safe harbor deadline.

The conservatives—Rehnquist, Scalia, and Thomas—certainly had no incentive to join a result that would generate a remand with room for maneuverability. At a minimum, such a result suggested the possibility of a new manual recount, and thus a potential victory for Gore. But if a remand coalition consisting of O'Connor, Kennedy, Souter, and Breyer did form, then Justices Stevens and Ginsburg would have had every possible incentive to acquiesce in that position. By insisting instead upon an affirmance, they would have risked an impasse in the judgment. But by joining in a remand judgment that actually facilitated a corrective order in the Florida Supreme Court, the liberal camp could express their skepticism regarding the equal protection analysis while still producing a result that could lead to a Gore victory. Moreover, in doing so, they would afford Gore the prestige associated with a majority mandate on a single rationale and judgment.

From the perspective of the conservative coalition—Rehnquist, Scalia, and Thomas—the possibility that the liberal Justices might convince O'Connor and Kennedy not to conclude that

350. And recall that this presumption was consistent with, although not necessarily controlled by, the Florida Supreme Court's decision upon remand in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273 (Fla. 2000).

351. In his inaugural address, President Bush commended Gore for a contest "conducted with spirit, and ended with grace." *'Bound Ideals That Move Us,'* WASH. POST, Jan. 21, 2001, at A23.

the December 12 deadline was binding as a means of avoiding a judgment impasse was likely a result to be avoided at all costs. And the cost was not terribly high. Justices O'Connor and Kennedy had included the traditional remand, but they had not gone so far—yet—as to provide that remand meaningful content. If the conservatives could strike preemptively by swallowing their pride on the equal protection argument, and joining an opinion that nominally remanded, while preventing a negotiation that conceivably could result in providing content to that remand, then they would avert a possible renewal of the recount and a possible victory for Gore. In sum, the conservatives may have acted strategically to avert a strategic play from the other side of the Court, recognizing that the judgment anomaly required the impasse to be resolved on one side or the other. And since a remand, if given content, was tantamount to a Gore victory, the safe course was a preemptive strike, joining the remand but keeping it empty.

This analysis furnishes a complementary explanation to that of the multidimensional model in understanding why the conservative Justices joined the per curiam opinion. Similar analysis, however, also could produce a slightly different plausible story that makes the three-judgment anomaly even more important. Assume that Rehnquist was insistent on a resolution tantamount to a straight reversal and the moderate coalition initially was cohesive, with Justices O'Connor and Kennedy favoring a full remand to the Florida Supreme Court. In this case, the existence of the judgment anomaly would have meant that both the conservative and the liberal Justices needed to do something to ensure a majority judgment. Presumably, as we have noted, Justices Stevens and Ginsburg would have joined an opinion providing a full remand to eliminate the judgment anomaly, and ordinarily opinion authors will not further deviate from their ideal points once they have secured majority support. But Justices O'Connor and Kennedy might have resisted this because of the signal that a 6-3 decision for Gore—even in the form of a remand—might send, recognizing that the conservative Justices were unwilling to join to achieve a unanimous opinion. In essence, the feared signal from such a voting alignment might have become an additional concern, just as the stare decisis weight of a case can become an additional concern in cases fitting the unidimensional model. Thus, Justices O'Connor and Kennedy might have moved away from their ideal points ever so slightly in an effort instead to form a coalition with the conservative Justices. Of course, the opinions cannot tell us whether this story is correct or whether Justices O'Connor and Kennedy pre-

ferred the nominal, and hollow, remand approach initially. Our purpose, however, has not been to provide final answers but to reveal possibilities that ordinary legal analysis would miss.

V. CONCLUSION

It is commonplace in academia to become hegemonic in the pursuit of the ideal theory. Theory is difficult to master, and having made the investment, scholars become jealous of those who claim that alternative methodologies are more fruitful or robust. While this is understandable, it is also unfortunate. Models are never "right" or "wrong"; instead they are more or less explanatory. And even this characterization fails to capture an important point. Theories that grow out of different disciplines often employ tools designed to explain phenomena that the other disciplines either are not studying or are ill-equipped to explain. It is therefore critical to distinguish a critique of a theory with a critique of the theory's object of inquiry. Political scientists reject the "legal model" as fundamentally indeterminate. Of course there is no such thing as a legal model, and attitudinalists are entirely correct that doctrine, as such, does not allow lawyers to predict as well as they can, using databases with a large number of observations which code votes according to the Justices' attitudinal predilections, how the Supreme Court will decide any given case. Judicial politics scholars who approach the Court from a rational choice perspective have amply demonstrated, however, the limitations of the attitudinal assumption of pure ideological, nonstrategic voting. New institutionalists have developed more subtle models that reveal the limited opportunities that confront Justices in anticipating or responding to the behavior of their colleagues in an effort to move doctrine toward their ideal points. None of these theories is correct or incorrect; instead, they deploy different tools aimed at answering different questions.

Of course, traditional doctrinal approaches to law, which have long since supplanted legal realism with a more contextual understanding that implicitly incorporates attitudinal concerns, provide a means that theory cannot of formulating arguments to those who are empowered to resolve real cases. While the methodologies of political science and law remain distinct, their subjects of inquiry have moved closer than ever before. Our own view is that social choice provides a critical bridge between the data-driven approaches of judicial politics and the more nuanced, but less robust, approach of law. We have proceeded inductively, using a particular, but important, datum, namely *Bush v. Gore*, to make our case, and

we have then reasoned deductively in assessing that datum using models with general applicability in identified categories of Supreme Court decisions. Certainly political scientists can challenge this method of proceeding on the ground that one datum does not a theory make. But our point is not to prove the superiority of any single theory or approach. It is instead to demonstrate that by asking different questions, and by developing different tools specifically intended to answer them, these approaches can be combined to provide a richer and more robust understanding of cases and judicial behavior. We hope that our case study of *Bush v. Gore* encourages our readers to consider employing this interdisciplinary technique in their own work.