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JUSTICE GINSBURG'S DISSENT IN *BUSH V. GORE*

HUGH BAXTER*

Abstract: In this essay, I examine Justice Ginsburg's dissenting opinion in *Bush v. Gore*, the decision that ended the 2000 controversy over the winner of the presidency. I look critically at Justice Ginsburg's invocation of federalism-based deference to the Florida courts' interpretations of state election law in the recount controversy. I consider also Justice Ginsburg's criticisms of the Court's remedial decision to stop the recounts. Finally, I take up the much-debated question of how to understand Justice Ginsburg's final two words: "I dissent," rather than "I respectfully dissent." My conclusion is that the omission of "respectfully" is pointed, but not for the simple reasons usually given. More significant, I think, is her decision not to point to possible future positive consequences of a decision from which she dissents—a strategy she often has followed in other cases, even ones in which her disagreement with the Court is deep.

When the editors of this *Review* asked me, along with other former clerks to Justice Ginsburg, to write an essay on some aspect of Justice Ginsburg's jurisprudence, I chose to focus on a single case: *Bush v. Gore*. I justified this narrow focus by recalling the Court's caution that the precedential force of that case might not extend beyond the case's "present circumstances."¹ If that is so, I thought, then consideration of *Bush v. Gore* is in fact consideration of an entire and complete body of law.

I pick up the story of *Bush v. Gore* with Bush's second and final trip to the United States Supreme Court.² Bush presented three claims. First, he argued, the Florida Supreme Court's recount decisions violated Article II, section 1, clause 2 of the United States Constitution.³ That clause provides

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

2. The opinion for the previous trip, under the title *Bush v. Palm Beach County Canvassing Bd.*, appears at 531 U.S. 70 (2000).

3. Petition for Writ of Certiorari at *9, *Bush v. Palm Beach County Canvassing Bd.*,

that “[e]ach State shall appoint [presidential electors], in such Manner as the Legislature thereof may direct.”⁴ According to Bush, the Florida Court’s decisions violated this clause by departing from the statutory scheme in place at the time of the election.

Second, Bush argued that the Florida Court had erred in mandating a recount that could not be completed by December 12.⁵ This date was significant, according to Bush, because it was designated by 3 U.S.C. § 5 as the last day for submitting a slate of electors that would be conclusively binding.⁶ The Florida Court’s ruling would take the state outside this “safe harbor” provision, Bush contended, because it had departed from the statutory scheme in place on election day. In this latter respect, Bush’s second claim sounded the same theme as the first: the Florida Court had rewritten the Florida Election Code, not permissibly interpreted it.

Third, Bush maintained, the recount procedures were “selective and capricious,” violating both equal protection and due process guarantees.⁷ The inclusion of this claim was perhaps surprising: the Court had refused to hear it the first time the case had come before the Court.⁸

And yet this third claim was the basis upon which the Court granted Bush relief—and victory in the presidential race. In a *per curiam* opinion joined by the five members of the Court generally deemed most conservative—Chief Justice Rehnquist, and Justices O’Connor, Scalia, Kennedy, and Thomas—the Court found three defects in the Florida

531 U.S. 40 (2001) (No. 00-836), 2001 WL 34117432.

4. U.S. CONST. art. II, § 1, cl. 2.

5. See Petition for Writ of Certiorari, *supra* note 3, at *9.

6. That section reads as follows:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days 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 (2006).

7. Petition for Writ of Certiorari, *supra* note 3, at *9.

8. Compare *id.* at *1 (setting out three questions for review, the third of which is the equal protection/due process claim mentioned in text), with *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004, 1004 (2000) (granting certiorari).

Court's recount decisions, each violative of equal protection.⁹ Correcting these defects would be impossible by the "safe harbor" date of December 12—the date on which the Court issued its opinion. And so, the Court concluded, the recounts must cease. Justices Souter and Breyer, while agreeing that the recount procedures as they stood were inconsistent with equal protection, would have remanded to the Florida Court for it to decide how much weight the "safe harbor" date should receive. They noted that this question was one of state rather than federal law. Accordingly, they presented their views in dissents from the Court's judgment.

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote separately to say that he also would have found for Bush on his first claim: the contention that the Florida Court's recount decisions had "impermissibly distorted" the relevant provisions of the Florida Election Code "beyond what a fair reading required, in violation of Article II."¹⁰

The four dissenters were the Justices usually deemed most liberal: Justices Stevens, Souter, Ginsburg, and Breyer. Each dissenter wrote an opinion. Justice Ginsburg first focused her attack on the separate concurrence, then turned to the *per curiam*'s equal protection ruling and remedial decision.

In rejecting the concurrence's approach, Justice Ginsburg reminded the three Justices of a principle ordinarily agreed upon: the principle of deference to state courts' interpretation of state law. She noted that this principle applies even when, as in the *habeas corpus* context, the existence of a federal right depends upon a court's answer to a question of state law.¹¹ The *per curiam* offers up only three examples, Justice Ginsburg observed, of cases in which the Court has "rejected outright an interpretation of state law by a state high court," and each was "embedded in historical contexts hardly comparable to the situation here."¹² The first was decided in 1813, "amidst vociferous States' rights attacks on the Marshall Court."¹³ The other two, Justice Ginsburg noted, were part and

9. The three alleged problems are accurately stated in Justice Breyer's dissenting opinion: "[F]irst, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts." *Bush v. Gore*, 531 U.S. 98, 145 (2000) (Breyer, J., dissenting). "Overvote" refers to ballots for which the machine registered more than one choice for President; "undervote" refers to ballots for the machine registered no such choice.

10. *Id.* at 115 (Rehnquist, C.J., concurring).

11. *Id.* at 136-37 (Ginsburg, J., dissenting).

12. *See id.* at 139-40.

13. *Id.* at 140.

parcel of “Southern resistance to the civil rights movement.”¹⁴ In each, Justice Ginsburg suggested, the state court had distorted pre-existing state law to justify denying a federally secured right.¹⁵ But in the present case, by contrast, the Florida Court’s interpretation of state election law was designed to *protect* exercise of a federal right: it aims at “counting every legal vote.”¹⁶ Accordingly, Justice Ginsburg concluded, that court “surely should not be bracketed with state high courts of the Jim Crow South.”¹⁷

As Justice Ginsburg likely would admit, these arguments against the Rehnquist concurrence only go so far. The concurrence distinguished the selection of presidential electors from other contexts, and did so for reasons rooted in constitutional text. The Chief Justice contended that the Federal Constitution secures a right to vote in presidential elections only if a state’s legislature has chosen popular election as the method of elector selection, and even then, only upon the terms mandated by the state legislature. And thus, while the Court’s review of state court interpretation must be “deferential,” the Chief Justice acknowledged, it must at the same time be “independent,” examining whether the state court has remained faithful to the legislatively mandated scheme.¹⁸ In this unusual context, in which the Constitution “confers a power on a particular branch of a State’s government,” the balance of power between state legislature and state court takes on federal constitutional significance.¹⁹ That, at any rate, is the concurrence’s contention.

Thus, while Justice Ginsburg’s theme of deference is important, the argument against the concurrence must acknowledge and address the Article II context. And Justice Ginsburg does, though, by denying that context’s special significance. In the Chief Justice’s “independent” reading of Florida election law, Justice Ginsburg argues, the concurrence “reach[es] out” “to disrupt a State’s republican regime.”²⁰ In so doing, Justice Ginsburg maintains, the concurrence “contradicts the basic principle that a State may organize itself as it sees fit.”²¹ According to Justice Ginsburg, “Article II does not call for the scrutiny” that the concurring Justices would apply to the Florida court’s opinion.²²

14. *Id.*

15. *See Bush*, 531 U.S. at 139-40.

16. *Id.* at 141.

17. *Id.*

18. *Id.* at 114 (Rehnquist, C.J., concurring).

19. *Id.* at 112-13.

20. *Id.* at 141 (Ginsburg, J., dissenting).

21. *Bush v. Gore*, 531 U.S. 98, 141 (2000) (Ginsburg, J., dissenting).

22. *Id.* at 142. Justice Ginsburg’s opinion actually reads: “Article II does not call for the scrutiny undertaken by this Court.” *Id.* This wording suggests that perhaps the Rehnquist

I find myself not entirely persuaded by this argument that Article II has no effect on the basic principle of deference to state court interpretation of state law. However, Justice Ginsburg hints at further support for her conclusion when she tweaks the Chief Justice for his “solicitude for the Florida Legislature . . . at the expense of the more fundamental solicitude we owe to the legislature’s sovereign.”²³ Here, it seems, Justice Ginsburg is suggesting that Bush and the Chief Justice erred in reading Article II to require a special method of statutory interpretation. Toward this end, Justice Ginsburg quotes the relevant clause of Article II, supplying her own emphasis to diminish the concurrence’s focus on the legislature: “‘Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct,’ the electors for President and Vice-President.”²⁴

On this reading, the important point is that it is the *state* that does the appointing; the fact that it is for the legislature to direct this appointment simply reflects the ordinary fact that states express law in the first instance through their legislatures. But legislative expressions of law must be interpreted, the argument would go, and that task is for the courts. So understood, I think Justice Ginsburg is implying there is nothing special about the Article II context that requires less than ordinarily deferential review of a state court’s statutory interpretation.

The concurrence offers no response to this argument. But an apparently plausible counter is suggested by Michael McConnell. According to McConnell, Article II’s reference to “the Legislature” is not simply shorthand for “the State.” Instead, McConnell contends, “Article II . . . places authority to set electoral rules in the institution least able to manipulate the rules to favor a particular candidate.”²⁵ And thus, while “Justice Ginsburg is correct that, in ordinary cases, federal courts must defer to state courts with regard to interpretations of state law[,]”²⁶ the “wisdom” of Article II is to alert us to the danger of partisan “interpretations” of pre-existing statutory law—judicial “interpretations” that would change the law to pursue partisan objectives.²⁷

opinion originally was an opinion for the Court, demoted to a concurrence when Justices O’Connor and Kennedy decided instead to rely upon the equal protection rationale. This possibility, however, would mean that Justice Ginsburg, in the extraordinary haste with which the opinions were issued, failed to correct the reference to “the Court.” I remain uncertain why Justice Ginsburg refers to “the Court” and Article II rather than to the concurrence’s reading of Article II.

23. *Id.* at 142.

24. *Id.*

25. Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 663 (2001).

26. *Id.*

27. See Richard A. Epstein, “*In such Manner as the Legislature Thereof May Direct*”:

One might object that McConnell's counter would permit post-election tinkering with the electoral scheme, so long as it was done by legislatures, not courts or the state executive. That objection seems unanswered by Article II's text. The only safeguard against a legislature's post-election alteration of the elector selection scheme would seem to be both statutory and political—the possibility that Congress could deem the state's choice of electors outside the “safe harbor” of 3 U.S.C. § 5.²⁸ But perhaps the drafters of Article II were in fact unconcerned with legislative manipulation: they gave legislatures apparently plenary power to “direct the Manner of” electors' appointment,²⁹ and that would seem to include the power to change the scheme post-election. And so it might be, then, that Article II requires reviewing courts to police closely post-election judicial interpretations, ensuring that legislative handiwork is not undone.

I'm skeptical, in other words, that we can so easily dismiss the concurrence's theory of special scrutiny in this Article II context. But still, the Chief Justice concedes that review of the Florida Supreme Court's recount decisions must be “deferential,” if “independent.” Perhaps what our Article II clause calls for is something less than the near-total deference given ordinary state-court interpretations, but significant deference nonetheless.

Justice Ginsburg's opinion suggests this intermediate point of view. She reads the Chief Justice's concurrence as “maintain[ing] that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging.”³⁰ Justice Souter implies a similar standard: the question, he suggests, is whether the Florida

The Outcome in Bush v. Gore Defended, 68 U. CHI. L. REV. 613, 620 (2001) (“[T]he strong federal interest in the selection of the President of the United States makes it appropriate for federal courts to see that all state actors stay within the original constitutional scheme.”).

28. See 3 U.S.C. § 5 (2006). That would be because the laws determining the choice of electors would not be “laws enacted prior to the day fixed for the appointment of the electors . . .” *Id.*

29. The Supreme Court raised, but did not answer, the question whether the legislature's power is constrained by state constitutions. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (remanding for clarification “as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2”). By the time the case came back, this time under the heading *Bush v. Gore*, the question seems to have largely disappeared. *But see Bush v. Gore*, 531 U.S. 98, 148 (2000) (Breyer, J., dissenting) (“[N]either the text of Article II itself nor the only case the concurrence cites that interprets Article II, leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.” (citation omitted)). Clearly, the Fourteenth Amendment of the Federal Constitution, for example, would bar a racially discriminatory selection scheme.

30. *Bush*, 531 U.S. at 135-36 (Ginsburg, J., dissenting).

court's decision was "so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question."³¹ And Justice Breyer's dissent expresses the same idea: the question, he says, is whether the state court's interpretation is "so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature."³² All these formulations could be read to concede that *some* review, rather than total deference, is appropriate in the context of Article II, section 1, clause 2.

The question then becomes whether the Florida Supreme Court's recount decisions passed under this standard. In the division of labor that the *Bush v. Gore* dissenters adopted, the task of defending the Florida Court's performance under this lenient standard fell largely to Justice Souter and Justice Breyer. Neither commits himself to the correctness of the Florida court's opinion—nor need he—but each argues, against the concurrence, that the Florida court's interpretation was not "so 'unreasonable as to [be] a constitutionally 'impermissible distort[ion] of Florida law.'"³³ Details of these arguments are beyond the scope of this short paper; their merits have been amply and ably debated elsewhere.³⁴

The remainder of Justice Ginsburg's dissent concerns the propriety of the Court's decision to "remedy" the recounts' equal-protection defects by stopping the recounts altogether—rather than remanding for the Florida court to decide what to do in the first instance. This aspect of the Court's opinion has been almost universally criticized. The Court's reasoning was that the Florida court had attributed to its state's legislature the objective of meeting the December 12 "safe harbor" deadline, and the Supreme Court's opinion was released on the evening of December 12. And so, maintained the Court, the Florida legislative scheme would not permit renewing the recount.

31. *Id.* at 131 (Souter, J., dissenting).

32. *Id.* at 152 (Breyer, J., dissenting).

33. *Id.* at 151 (alterations in original). For Justice Breyer's reading of Florida election law, see *id.* at 149-52 (Breyer, J. dissenting); for Justice Souter's, see *id.* at 130-33 (Souter, J., dissenting).

34. For a defense of the Florida court, see, for example, Jed Rubenfeld, *Not as Bad as Plessy. Worse, in BUSH V. GORE: THE QUESTION OF LEGITIMACY* 20, 29-33 (2002); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1417-20 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 *U. CHI. L. REV.* 737, 751-55 (2001). For criticism, see, for example, RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 117-28 (2001); Epstein, *supra* note 27, at 619-34; McConnell, *supra* note 25, at 664-72.

In reaching this position, the Court went so far as to imply—misleadingly—that the “safe harbor” preference was a requirement clearly fixed in Florida statutory law.³⁵ Nowhere does that preference appear in statutory text. It is true that the Florida court twice mentioned the significance of the “safe harbor” for the Florida legislature. But the court did not attribute overriding significance to the “safe harbor” deadline, nor did it weigh the importance of the “safe harbor” preference against conflicting statutory policies—such as counting all “legal votes.”³⁶

Justice Ginsburg notes three other dates after December 12 that the Florida court might have chosen for a recount deadline: the date the electors meet (December 18), the date on which Congress must inquire of a state that has not submitted its choice of electors (December 27), and the date on which Congress ultimately would decide the matter (January 6).³⁷ As Justice Stevens observes: “in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines.”³⁸

35. See *Bush v. Gore*, 531 U.S. 98, 111 (2000).

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. §5, Justice Breyer’s proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an ‘appropriate’ order authorized by Fla. Stat. Ann. §102.168(8) (Supp. 2001).

Id.

36. See, e.g., Balkin, *supra* note 34, at 1421.

Ensuring that Florida’s vote is “conclusive” is surely a valid purpose, but it is not the only purpose behind the election code. Given changed circumstances, one has to decide which purpose is more important—meeting the safe harbor deadline or counting every legal vote and attempting to discern which candidate actually received the most votes. Choosing between valid but competing purposes is a fairly standard job of courts in interpreting statutes. The text of the Florida Election Code does not decide this question, and Rehnquist [one should add also the Court in its *per curiam* opinion] simply disagreed about which was more important. But that disagreement does not by itself constitute a violation of Article II, Section 1.

Id. at 1423.

37. *Bush*, 531 U.S. at 143–44 (Ginsburg, J., dissenting). As Justice Ginsburg notes, 3 U.S.C. § 15 contains “detailed provisions for determining, on ‘the sixth day of January,’ the validity of electoral votes.” *Id.* at 144.

38. *Id.* at 127 (Stevens, J., dissenting).

Scholars have debated whether the Hawaii situation should count as relevant precedent: Congress was well aware that the decision about Hawaii's electoral votes would not change the outcome of the election, and losing candidate Richard Nixon conceded those votes to his opponent. This choice was at least in tension with federal law.³⁹ But the December 18 date, in particular, seems a clear possibility.

Further, as Justice Breyer explains in more detail, the Electoral Count Act of 1887 contains not just the "safe harbor" provision of 3 U.S.C. § 5, but a host of other provisions—provisions that make up a "detailed, comprehensive scheme for counting electoral votes."⁴⁰ And this scheme, Justice Breyer argues, commits the resolution of conflicts in some part to state courts,⁴¹ and in large part to Congress.⁴² As Justice Breyer explains, the Electoral Count Act—enacted after the disputed election of 1876, the resolution of which involved Supreme Court Justice Bradley in an unfortunate way⁴³—is designed to leave no place for the federal courts. "However awkward or difficult it may be for Congress to resolve difficult electoral disputes," Justice Breyer writes, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about."⁴⁴

It is widely, though not universally, agreed that the Court's equal protection theory did not legally support the Court's decision, on its own, to terminate the recounts. The Florida court should have been given the opportunity to decide for itself whether the "safe harbor" benefits outweighed the importance of counting more accurately the "legal votes." If the recounts were procedurally defective, and if December 12 was not a drop-dead deadline, then it was for the Florida court to decide whether to continue the recounts with constitutionally improved and adequate procedures.

The concurrence's Article II theory, by contrast, would—if correct—support the decision to terminate the recounts. This is so, at least, if the concurrence was correct in rejecting, as an unreasonable interpretation of the statutory term "legal vote," ballots that had been marked in violation of the instructions (principally, the instruction to detach all corners of the famous "chad"). If ballots with hanging chads were not "legal votes," the argument goes, then the Florida court had no business ordering a manual

39. See McConnell, *supra* note 25, at 676 n.93.

40. *Bush*, 531 U.S. at 155 (Breyer, J., dissenting).

41. See *id.* at 153 (quoting 3 U.S.C. § 5 (2005)).

42. See *id.* at 153-55 (detailing the Electoral Count Act's provisions and its history).

43. See *id.* at 156-57.

44. *Id.* at 155.

recount to count them.⁴⁵ For that reason, defenders of the Supreme Court's decision in *Bush v. Gore* have—to the extent that they offer a legal rather than a purely pragmatic defense of the Court's decision—preferred the concurrence's Article II strategy over the *per curiam*'s equal protection approach.⁴⁶

The Article II argument, we have seen, is essentially the contention that the Florida court departed from a proper judicial role. The full but unexpressed form of this contention is that that court, whose justices all were Democrats, abandoned law for politics in seeking the election of a fellow Democrat. Justice Ginsburg is correct that none of her colleagues formally “doubted the good faith and diligence with which Florida . . . courts of law have performed their duties.”⁴⁷ But even the *per curiam* opinion, with its decision not to entrust the Florida court with the option to perform a constitutionally adequate recount, could be read to rest upon distrust of the Florida justices' good faith. In any event, the Court's decision on remedy makes little sense as a matter of law.⁴⁸

For her part, Justice Ginsburg refrains from casting aspersions upon her colleagues' motivations—and so, it should be said also, do they refrain from casting aspersions upon her and the other dissenters' motivations. The “temperature” of Justice Ginsburg's dissent is decidedly warmer than most of her other dissents, but cooler than intemperance.⁴⁹ I find it interesting

45. This argument depends also upon the circumstance that no one alleged that the machines had failed to read ballots marked in accordance with the instructions.

46. See, e.g., POSNER, *supra* note 34, at 151-53; Epstein, *supra* note 27, at 619-34; McConnell, *supra* note 25, at 661-64, 671.

47. *Bush*, 531 U.S. at 144 (Ginsburg, J., dissenting).

48. The other interpretation, of course, is pragmatic: the Court wanted (wisely, say some supporters of the Court's action) to spare the country the uncertainty and “constitutional chaos” of a continued recount—with the overwhelming likelihood that, at the end of the turbulence, Bush would emerge the winner even without Supreme Court assistance. See, e.g., POSNER, *supra* note 34, at 133-34, 147-49.

49. Of the four dissenting opinions, Justice Stevens's is probably the most pointed. He describes first what he takes to be Bush's motivation: “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. Otherwise, their position is wholly without merit.” *Bush*, 531 U.S. at 128 (Stevens, J., dissenting). Justice Stevens continues:

The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges through out the land. . . . 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.

that Justice Ginsburg refrained from comment upon the Court's apparent limitation of *Bush v. Gore's* precedential force: "[o]ur consideration," the Court wrote, "is limited to the present circumstances," whereupon the Court proceeded to describe the facts of the case.⁵⁰ But then neither did she note optimistically, as sometimes she does in dissent, that the Court's otherwise regrettable decision might have some positive consequences.⁵¹ The possibility she might have mentioned was that the Court's newfound solicitude for equal protection constraints on state election procedures could be interpreted to produce more liberal-friendly results in the future—such as the equalization of voting equipment, both with respect to its error rate and with respect to equality of access among different (and politically

Id. at 128-29. Notice that Justice Stevens implies that the true "winner of this year's Presidential election" is not necessarily George W. Bush, even though it was clear at the time that the Court's decision had handed Bush the presidency: the true winner, Justice Stevens says, "may never [be] know[n] with complete certainty." *Id.* at 128.

50. *Id.* at 109 (per curiam).

51. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 934-35 (1995) (Ginsburg, J., dissenting). Justice Ginsburg noted the points of agreement between her and the Court:

First, we agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together.

Id. (citations omitted). Justice Ginsburg's strategy here was to limit what she saw as the damage of the Court's opinion. She followed a similar approach in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting) (requiring strict scrutiny of federal affirmative action programs). She wrote in her dissent: "I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court." *Id.* at 271. She then put as positive a spin as possible upon the Court's opinion—positive, that is, in the sense of suggesting agreement with her own pro-affirmative action perspective. *Id.*

I learned as a law clerk to Justice Ginsburg, first at the D.C. Circuit and then at the Supreme Court, that this approach was more productive—though less satisfying—than the impulse to respond to the Court's majority with a verbal two-by-four.

and racially identifiable) neighborhoods. Litigation toward this end has developed since *Bush v. Gore*, and it remains uncertain whether the Supreme Court will acknowledge the reform potential of that case.⁵²

That brings me to the much debated last two words of Justice Ginsburg's dissent: the words, set out in a separate sentence and paragraph, "I dissent." Each of the other three dissents inserts the word "respectfully" between "I" and "dissent." Controversy has arisen about just how pointed Justice Ginsburg's omission of the word "respectfully" should be taken to be. At first it was reported, incorrectly, that Justice Ginsburg otherwise invariably inserts the word "respectfully." At the other end of the spectrum on this matter, (then) New York Times Supreme Court reporter Linda Greenhouse wrote that the omission of "respectfully" was a "choice . . . that she frequently made for economy of style rather than to convey a particular level of anger."⁵³

In my estimation, while Greenhouse's estimation is closer, neither of these characterizations quite captures the likely meaning of Justice Ginsburg's choice. Greenhouse is right that Justice Ginsburg not infrequently employs the words "I dissent" in succession. My LEXIS® search for the words "I dissent" in Justice Ginsburg's dissents produced twenty-three hits. Her usual format is to place these words either in the same sentence with an explanation or (with other words in the same sentence) immediately adjacent to an explanation. In this context, the words have a softer impact than they do in Justice Ginsburg's *Bush v. Gore* dissent, where they appear in their own sentence and even in their own paragraph.⁵⁴ Only on one other occasion, my review suggests, has Justice Ginsburg used the words "I dissent" as a full and independent sentence,⁵⁵ and the temperature of her opinion in that case does not seem to be especially high. Her *Bush v. Gore* opinion, however, is unique in using the words "I dissent" as an independent and full paragraph. Further underscoring the significance of Justice Ginsburg's choice is the fact that

52. Election-law expert Richard Hasen's view is negative. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007). But see Adam Liptak, *Bush v. Gore Set to Outlast Its Beneficiary*, N.Y. TIMES, Dec. 23, 2008, at A1.

53. Linda Greenhouse, *Bush v. Gore: A Special Report.; Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

54. The impact is variable, however, depending upon how pointedly she formulates the reasons for her disagreement. For a comparatively sharp formulation, see *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 234 (2002) (Ginsburg, J., dissenting). "Because in my view Congress cannot plausibly be said to have 'carefully crafted' such confusion, *ante*, at 221, I dissent." *Id.*

55. See *Carter v. United States*, 530 U.S. 255, 289 (2000) (Ginsburg, J., dissenting).

the other three dissenting opinions all employ the word “respectfully”—though Justice Stevens, at least, seems to me less respectful in the body of his opinion.

How significant, then, is Justice Ginsburg’s decision to use “I dissent” as a separate sentence and paragraph? Perhaps not terribly significant. She did not make that choice in her dissents in *Gonzales v. Carhart*⁵⁶ and *Ledbetter v. Goodyear Tire & Rubber Co.*⁵⁷—even though in each case she took the unusual step of reading her dissent from the bench,⁵⁸ and even though her dissent at least in *Carhart* is more pointed than her offering in *Bush v. Gore*.

But perhaps one bit of evidence worth considering is this: Linda Greenhouse reported that Justice Ginsburg and Justice Scalia had their customary New Year’s Eve dinner just nineteen days after *Bush v. Gore*.⁵⁹ Of course that doesn’t mean that Justice Ginsburg wasn’t angry with the Court, and with Justice Scalia, for the outcome of *Bush v. Gore*. But it does indicate the perspective that Justice Ginsburg takes upon professional disappointments, even ones as bitter as *Bush v. Gore* must have been for her.

56. 127 S. Ct. 1610, 1640-53 (2007) (Ginsburg, J., dissenting). Her concluding sentence in that opinion is: “[f]or the reasons stated, I dissent from the Court’s disposition and would affirm the judgments before us for review.” *Id.* at 1653. She completes the opening to her opinion with: “I dissent from the Court’s disposition.” *Id.* at 1641.

57. 127 S. Ct. 2162, 2188 (2007) (Ginsburg, J., dissenting). Her concluding sentence: “For the reasons stated, I would hold that Ledbetter’s claim is not time barred and would reverse the Eleventh Circuit’s judgment.” *Id.* at 2188.

58. Likely she would have read her *Bush v. Gore* dissent from the bench as well, had the opinion not been issued in the middle of the night rather than in open court.

59. See Greenhouse, *supra* note 53, at A1.

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