Judicial Independence Through the Lens of *Bush v. Gore*: Four Lessons from Political Science

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This article explores lessons about judicial independence that might be culled from the 2000 election litigation. It treats judicial independence as related to the more general practice of providing decision-making insulation to certain policy-making institutions and discusses a variety of political motivations and consequences that might be associated with such a practice. Four points are emphasized and illustrated with reference to the litigation leading to the Bush v. Gore *decision. First, the decision to grant independence to a policy-making institution often has as much to do with insulating preferred political agendas from electoral pressure as with ensuring impartial decision-making. Second, independent courts are often supported by other power-holders because they can act as a forum within which contentious political questions may be channeled. Third, even nominally independent decision-makers must assess their political context before choosing politically risky courses of action. Finally, there is no necessary relationship between the degree of a judge's decision-making autonomy and the likelihood that she or he will engage in good-faith interpretations of the law.*

INTRODUCTION

The experiences with the 2000 election litigation, particularly the United States Supreme Court's decision in *Bush v. Gore*,[1] illustrate aspects of judicial independence that may be overlooked if too much focus is placed on linking the concept to the simple virtue of pressure-free, good-faith judging. This article explores the advantages of discussing judicial independence as if it was a subset of the more general practice of insulating policy-making institutions—like central banks or regulatory commissions—from conventional political pressures or mechanisms of political accountability.[2] Unfettered, neutral, professional decision-making may be one outcome that is desired whenever such independence is considered. However, these are not the only relevant political considerations or the only likely political consequences.

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

[2] For similar analyses of judicial politics and a review of the political science literature on the creation of politically insulated policy-making institutions, see Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 102–05 (2000); Edward L. Rubin, *Independence as a Governance Mechanism*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 56, 69–77 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter JUDICIAL INDEPENDENCE].

This article adopts a "regime politics" or "dominant coalition" view of institutional independence. This approach examines institutional structures, including the organization of judicial power, in terms of the political advantages for power-holders who are interested in promoting substantive political agendas.[3] This angle of analysis is not necessarily more accurate than one that emphasizes the relationship between judicial independence and values, such as the rule of law or impartiality. Nonetheless, an exclusive focus on these familiar tropes limits our field of vision. When too much focus is placed on judicial independence and the rule of law, it might mistakenly appear as if high courts are designed to be politically neutral. It is easy to forget that there is actually more room (by design) for ideological decision-making in the United States Supreme Court than there may be for policy-making institutions such as central banks, whose missions are narrower or more well defined.[4]

Bush v. Gore is a useful starting point for thinking about judicial independence in terms of regime politics rather than the neutral application of law. Few scholars have been willing to defend the decision as an exemplar of impartial decision-making or as a stoic defense of the rule of law in the face of enormous political pressure, although some do make this argument.[5] It is already common to treat the case as an example of the sort of political agendas that might be pursued from within an institution that enjoys insulation from conventional mechanisms of political accountability.[6] Perhaps even those with a different view might find value in some of this article's more general points about judicial independence.

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[3] For additional examples of studies that place judicial politics in a larger political context, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Howard Gillman, *How Political Parties Can Use Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

[4] For a canonical treatment of the United States Supreme Court as an ideological policy-making institution, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

[5] *See, e.g.*, Ronald D. Rotunda, *Yet Another Article on* Bush v. Gore, 64 OHIO ST. L.J. 283 (2003)

[6] Commentators disagree about what political agenda was being pursued. Some share Judge Richard Posner's belief that the decision was a salutary effort to forestall a potential constitutional crisis. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 3 (2001). Others believe that the conservative majority let partisan preferences trump their normal views of the law. *See* HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 185–89 (2001). Still, there is a widespread consensus of opinion that some sort of political analysis is useful in understanding the Court's conduct during the 2000 election dispute.

As this article will discuss, the analysis of *Bush v. Gore* reveals four major lessons about judicial independence and the Supreme Court that are sometimes overlooked in conventional discussions.

I. LESSON ONE: THE DECISION TO GRANT INDEPENDENCE TO A POLICY-MAKING INSTITUTION HAS AS MUCH TO DO WITH INSULATING PREFERRED POLITICAL AGENDAS FROM ELECTORAL PRESSURE AS WITH ENSURING IMPARTIALITY

It is a basic assumption of political science that the United States Supreme Court is designed to be a national policy-making institution, not a forum for the routine and neutral resolution of everyday disputes.[7] Conventional ideological and political considerations dominate staffing decisions.[8] Justices may not always act in a way that is preferred by the appointing president, but political explanations usually exist for these relatively rare circumstances,[9] and they do not undermine the basic point. As Terri Peretti stated, ideological voting by justices "is not merely the arbitrary expression of a justice's idiosyncratic views [but] [r]ather . . . is the expression and vindication of those political views deliberately 'planted' on the Court" by policy-conscious presidents and senators.[10]

Because dominant coalitions are largely successful at planting trustworthy agents on the Supreme Court, the justices almost never engage in policy-making that challenges those power-holders who are in a position to assault their nominal independence. It is extremely rare, although not unheard of, for the Court to void an act of a current or "live" national majority.[11] It is more common for the

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[7] *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 71–73 (1999) [hereinafter PERETTI, IN DEFENSE]. More recently, Peretti insists that if analysts persist in linking judicial independence to political neutrality, we all should be "dubious about the existence of judicial independence." Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE, *supra* note 2, at 103.

[8] For a discussion of the modern process, see DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 12–19 (1999).

[9] Consider several political explanations for why justices do not always decide cases in a way that reflects the preferences of appointing presidents. One explanation is that the appointment may have been driven by non-ideological political considerations, such as geographical balance (more important in the nineteenth century than the twentieth) or other aspects of coalition politics. A second is that the President may face a Senate that does not share the President's ideology and insists on a compromise candidate. Yet a third is that unanticipated issues may arise after an appointment that expose viewpoint differences between presidents and their appointees.

[10] PERETTI, IN DEFENSE, *supra* note 7, at 133.

[11] *See* Dahl, *supra* note 3 (providing a classical political science study of this issue); *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L.

justices to go after national legislation passed by a previous governing coalition or to impose a national policy consensus on local or regional "outliers."[12] In other words, judicial independence, defined as decision-making autonomy,[13] is largely a function of political alignment with potential adversaries rather than the maintenance of political neutrality.

However, inter-institutional alignment is not always perfect. During periods of prolonged inter-party competition, different political coalitions may control the White House and Congress, or the House and the Senate, and the justices may split among competing camps that reflect these broader, sustained divisions in the political system. A working majority on the Supreme Court may find itself in and out of sync with all or part of the federal government, especially if a wing of one of the parties has made efforts to entrench a politically tenuous agenda within the judiciary.[14] This condition does not necessarily put the Court's work at risk in the short term because it is likely that the Court's effective majority may be able to count on political allies who are in a position to veto any serious threats. However, under these circumstances, the Court's policy-making agenda can be placed at risk over the long term, especially if (a) that agenda is supported by only a narrow majority; (b) justices in that majority may be close to retirement (or worse); and (c) a chance exists that political opponents may take control of the presidency and the Senate and thus be in a position to use the appointment process to change the course of the Court's decision-making.

This is precisely the political context within which the 2000 election litigation evolved. While the justices were not aligned into opposing camps in all cases, a tenuous conservative majority emerged on several important constitutional issues, especially when Justice Sandra Day O'Connor found herself in agreement with Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas. Given the age and health of some of the justices, it seemed likely that the 2000 election would determine whether their decision-making agenda would be fortified (if Republicans controlled the next appointments) or

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REV. 1, 7–18 (1996). For a similar analysis of the Marshall Court's decision-making, see Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 259–62 (1998).

[12] The Rehnquist Court's federalism decisions might be the best example of "cleaning up" legislation that was passed by earlier governing coalitions. The point about imposing a national consensus on local or regional outliers has been famously developed by Michael J. Klarman. *See* Klarman, *supra* note 11, at 7–18; *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502–09 (1997). For a similar account of the Warren Court, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 485–87 (2000).

[13] For a defense of defining judicial independence as autonomy, see Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares? in* JUDICIAL INDEPENDENCE, *supra* note 2, at 135–38.

[14] For an analysis of how economic nationalists in the post-Civil War Republican Party pursued this agenda in the late nineteenth century, see Gillman, *supra* note 3.

possibly rolled back (if Democrats were in control). In the wake of the election, it was known that the incoming Senate would be evenly divided between Republicans and Democrats, and this meant that the outcome of the presidential election would determine which party controlled both the White House and the Senate and, thus, the appointment of Supreme Court justices.[15]

Thinking about judicial independence simply in terms of neutral, rule-of-law values, it may be a mystery why a narrow majority of Supreme Court justices took the remarkable step of involving themselves in the 2000 election controversy. It is possible to construct a story about how the justices were merely seeking to ensure that all those involved played by the rules. However, if it is accepted that the justices have personal and institutional interests in the configuration of power in the rest of the federal government, then the involvement of the *Bush v. Gore* majority can be seen as an effort to create a more favorable political climate for its (emergent but still vulnerable) constitutional agenda—that is, a political climate that would be less likely to trigger a negative response to conservative decisions and more likely to result in the appointment of justices who would maintain or solidify this agenda.

On this view, the Court's involvement in the 2000 election was not extraordinary simply because it revealed a rare instance of political bias. Political bias (or, more generously, political perspective) is revealed routinely in the ideological patterns of the justices' decision-making.[16] Rather, the Court's involvement was extraordinary because it demonstrated the Court's fortuitous ability to shape which candidates and parties would control the White House and the Senate, and thus make it less likely that political opponents would be able to interfere with its policy-making. Stated another way, this case is extraordinary because the policy alignment between the Court and the political system, which normally is established by the legislative and executive branches, was established by the Court.

II. LESSON TWO: INDEPENDENT COURTS ARE OFTEN SUPPORTED BY OTHER POWER-HOLDERS BECAUSE THEY CAN ACT AS A FORUM WITHIN WHICH CONTENTIOUS POLITICAL QUESTIONS MAY BE CHANNELED

The desire of power-holders to insulate preferred political agendas is not the only reason that they may have an interest in establishing or deferring to the

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[15] This was before it was imagined that Republican Senator Jim Jeffords would bolt from the party and hand over control of the Senate to the Democrats.

[16] I have argued elsewhere, though, that what was different about the political dynamics of the Court's involvement was its overt partisanship. The justices routinely decide cases on the bases of their political ideologies, but it is not so common for the justices to set aside their normal policy positions on issues such as federalism or equal protection to promote the interests of a favored candidate. *See* GILLMAN, *supra* note 6, at 185–206.

authority of relatively autonomous policy-making institutions such as agencies, commissions, central banks, or judicial bodies. Delegation is sometimes also a mechanism by which elected office-holders attempt to achieve political benefits by channeling contentious and potentially unpopular issues into the hands of "expert" decision-makers.[17]

The advantages of channeling are obvious when Congress sets up institutions, such as base-closing commissions, which are exclusively designed to facilitate decision-making on issues that raise political problems for elected officials.[18] More generally, institutions such as independent regulatory commissions (including the Federal Reserve Board) are also structured to enable more insulated policy-makers to pursue potentially controversial courses of action (such as an increase in interest rates). Legislators even benefit when they delegate more routine policy-making responsibilities to executive branch agencies. Traditional constitutional analysts are not wrong when they point out that delegation is often a natural and salutary part of the process by which the executive branch concretizes policy goals that are established by the legislature. However, this normative angle overlooks other political advantages for elected officials. Legislators also benefit when they put themselves in a position to claim credit for identifying important social problems without having to worry about the political costs of actually adopting specific policies that might alienate favored constituents. When bureaucracies adopt popular policies, legislators can take credit for results; when those same bureaucracies make unpopular decisions, legislators can join their constituents in complaining about bureaucrats and might even take steps to humiliate or punish the offending bureaucrats.[19]

As a general rule, the insulation or independence of courts is not best explained in terms of these political advantages. After all, most of what courts do (especially lower courts) is of little or no interest to policy-makers (beyond a general interest in relatively efficient case processing), which means that deference to courts is normally a byproduct of the overall political banality of the judiciary's work, rather than its sensitivity or salience. However, Mark Graber's path-breaking discussion of legislative deference to the Supreme Court has made it clear that under certain circumstances—such as the emergence of political disputes that threaten to disrupt established partisan coalitions—the Supreme Court's political insulation is self-consciously exploited by national party leaders.[20] To illustrate, Graber develops the following case studies: (1) the interest

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[17] For an overview of the political calculations that go into the decision to delegate power, see Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289 (2002).

[18] *See* Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901–2911, 104 Stat. 1808, 1808–19 (1990).

[19] MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 67–71 (1977).

[20] Graber, *supra* note 3, at 41.

of beleaguered party leaders in the late 1850s to have the justices take the lead in addressing slavery politics; (2) the assumption among Congressional leaders in 1890 that the Supreme Court would make the final determination on key aspects of antitrust policy; and (3) the perceived advantages to national elites in the early 1970s for the justices to declare unconstitutional certain kinds of abortion statutes.[21] Some national political leaders in the 1950s may have believed that federal courts were in a better position to address certain civil rights controversies than other institutions of the national government.[22] Additionally, conservatives who might have felt some political pressure to vote for laws such as the Gun-Free School Zone Act or the Violence Against Women Act may be silently grateful that the Rehnquist Court is attempting to reduce Congress's authority to pass laws for which they have little enthusiasm.[23] Whether this can be demonstrated in these cases, the overarching point is that it would not be unusual for elected officials to support courts when they insulate elected officials from having to make controversial decisions.

The justices in the *Bush v. Gore* majority may have revealed their own attachment to a political agenda when they decided to intervene in the presidential election dispute. However, the unwillingness of other power-holders to defend their own decision-making prerogatives suggests that they believed that there were perceived political advantages to having the Supreme Court take control of this dispute. Republican legislators in Florida were being pressured by legislative leaders to take the controversial step of challenging the Florida courts by appointing a new slate of Bush electors,[24] but there was some grumbling about the need to take this course of action, and there was a public expression of hope

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[21] *See id.* at 45–61.

[22] The Truman Justice Department urged the Supreme Court to rule against segregated schools in *Brown v. Board of Education*. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 90 (2000). Federal courts also addressed civil rights issues relating to workplace discrimination for decades after the New Deal, during a period when the Democratic Party felt constrained by its Dixiecrat contingent. *See* Paul Frymer, Courts, Electoral Politics, and Civil Rights Enforcement: Racial Integration in U.S. Labor Unions, 1935–1980, Lecture to the Washington University Department of Political Science (March 2002) (transcript on file with author) (arguing that, during this period, "while elected officials consistently avoided challenging union racism, courts succeeded in integrating resistant unions," in part because "elected officials during this time delegate[d] a great deal of institutional power to courts").

[23] *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[24] The New York Times reported on November 23, 2000 that "senior Republican legislators, led by men with strong political ties to the state's governor, Jeb Bush, searched with a partisan intensity today for a legislative stroke that would deliver Florida and the White House to George W. Bush." David Barstow & Somini Sengupta, *Florida Legislators Consider Options to Aid Bush*, N.Y. TIMES, Nov. 23, 2000, at A1; *see also* CORRESPONDENTS OF THE N.Y. TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS 139 (John W. Wright et al. eds., 2001) [hereinafter 36 DAYS].

that the Washington justices would make it unnecessary for them to go on record with that vote.[25] Similarly, Republican congressional leaders had been preparing for some weeks to take control of the outcome in the event that Florida courts were able to complete a recount that resulted in a Gore victory, but there was not a lot of enthusiasm for this outcome, and a number of Republicans publicly expressed the view that they would prefer it if the Supreme Court resolved the issue first.[26] It is reasonable to assume that the justices were quite aware that those other power-holders who might claim the prerogative to resolve the dispute nevertheless were in support of channeling the process into the federal courts, and it is no surprise that many of these legislators expressed relief rather than indignation after the justices decided the outcome.[27]

A related version of this interpretation is offered by those who characterize the Supreme Court's intervention as necessary and appropriate to avoid a constitutional crisis, or at least to end a prolonged political crisis that had tried the patience of the country and was not likely to result in a different outcome if it continued through the process of counting (and challenging) electoral votes in the Congress.[28] This version is different because it characterizes the political benefits for elected officials in a more bipartisan way. Rather than assume that Republican officials were supportive of the Court because it prevented them from having to face the possibility of handing the election to Bush after a Gore recount victory, the argument suggests that both Democrats and Republicans may have been relieved that the dispute was channeled into the Supreme Court rather than remain in the legislative branches. This interpretation probably overstates the extent to

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[25] On December 7, the New York Times reported that "Republicans here [in Florida] were worried about the potential fallout of convening a special session [of Bush electors]. They emphasized their reluctance in choosing this course and spoke of waiting until the very last moment." Dana Canedy & David Barstow, *Florida Lawmakers to Convene Special Session Tomorrow*, N.Y. TIMES, Dec. 7, 2000, at A35; *see also* 36 DAYS, *supra* note 24, at 252–53. Two days later, after the Florida Supreme Court ordered a state-wide recount of the undervote ballots, the paper reported that "if Mr. Bush's slim lead in the election dwindles during the recounting, the Republican leadership will have a much tougher time maintaining discipline among a rank and file composed largely of rookie legislators and those whose districts voted for Mr. Gore." Dana Canedy & David Barstow, *Ruling Fuels G.O.P. Resolve to Appoint Electors and Democrats' Will to Fight*, N.Y. TIMES, Dec. 9, 2000, at A14; *see also* 36 DAYS, *supra* note 24, at 271. Hours before the U.S. Supreme Court handed down its decision in *Bush v. Gore*, Republican state Senator Jim Horne said that he hoped "the Supreme Court would unilaterally slam dunk this thing so we could all go home." Jeffrey Gettleman, *Florida House OKs Slate of Electors Beholden to Bush*, L.A. TIMES, Dec. 13, 2000, at A28.

[26] House Republican Whip Tom Delay started organizing his colleagues just one week after election day. *See* 36 DAYS, *supra* note 24, at 83.

[27] *See* 36 DAYS, *supra* note 24, at 310 ("[M]ost politicians from both sides express relief that the drama is over .... [E]specially ... members of the U.S. House and the Florida Senate, who would have been involved in making decisions that carried considerable political danger for all concerned.").

[28] *See* POSNER, *supra* note 6, at 254–55.

which congressional Democrats actually supported the Court's intervention, although it might capture the sentiments of some Democrats—particularly more moderate or conservative Senate Democrats from states that supported Bush in the election—who had little enthusiasm for a Gore presidency and little interest in challenging House Republicans in a way that threatened a deadlock. Still, the argument offers another perspective on how the judiciary's independence can provide political benefits that would lead potentially competing power-holders to defer to judges when they address sensitive or controversial disputes.

III. LESSON THREE: BECAUSE INSTITUTIONAL INDEPENDENCE IS NEVER COMPLETE—AND IS EASILY OVERCOME BY DETERMINED POWER-HOLDERS—NOMINALLY INDEPENDENT DECISION-MAKERS STILL NEED TO ASSESS THEIR POLITICAL CONTEXT BEFORE CHOOSING POLITICALLY RISKY COURSES OF ACTION

Supreme Court justices are privileged to have an institutional setting that insulates them from direct political supervision or manipulation. "Good behavior" tenure, combined with having the last word on the interpretation of law in a given case cycle and the difficulties of mustering a consensus to retaliate against the Court, mean that the justices have enormous freedom to decide cases as they see fit. In fact, it is precisely these structural features that make it reasonable to assume that justices normally decide cases based mostly on their personal policy preferences (or views of the law) rather than other political motivations or influences, such as direct constituency pressures or the demands of party leaders.[29]

However, all structural protections for political independence can be overcome by sufficiently determined power-holders. Those who might threaten judicial autonomy are usually not tempted to interfere, both because judges typically decide cases that are of little interest to other power-holders (and thus benefit from the same considerations that protect low-level bureaucrats) and because judges typically decide more politically-sensitive issues in a way that is broadly consistent with the preferences of other power-holders. Nonetheless, on occasion, judges find themselves in situations that threaten to disturb the hornet's nest of politics.[30] In such situations, the normal practice of deciding cases as a

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[29] *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997).

[30] One familiar example involved the reaction of leading Republicans and Democrats to a decision of District Court Judge Harold Baer, Jr., after an evidentiary ruling that resulted in the suppression of a large amount of cocaine. *See* United States v. Bayless, 913 F. Supp. 232, 242–43 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996). President Clinton threatened to ask for the judge's resignation, and Senate Majority Leader Robert Dole indicated that the judge should be impeached if he did not reverse himself. The assault led this life-tenured judge to retreat on his ruling. For more on this and other examples, including House

judge sees fit may give way to a more complicated set of strategic calculations.[31] This is why, despite their nominal structural independence, Supreme Court justices are demonstrably attentive to the political environment within which they operate.[32]

Sometimes this results in outright refusal to decide cases that might trigger political retaliation, as with the justices' initial decision to avoid the issue of miscegenation in the wake of the regional firestorm surrounding *Brown v. Board of Education*.[33] Sometimes these political calculations result in strategic retreats from incipient policies that are under assault, as with the Court's decision in the late 1950s to pull back from offering modest due process protections to those who refused to cooperate with the House Un-American Activities Committee.[34] And sometimes the justices' assessment leads them to conclude that the climate is conducive to risky courses of action, either because they believe there is not enough political will to challenge the Court on the issue or because they believe

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majority whip Tom DeLay's general threat to begin impeaching "activist" federal judges, see Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 714 (1998–99); Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 737–40 (1997); Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1.

[31] It is not always the case that judges will act cautiously or strategically when faced with potentially explosive issues. Consider the more recent case of *Newdow v. U.S. Congress*, in which the Ninth Circuit declared unconstitutional school children's exposure to the phrase "under God" in the Pledge of Allegiance. *See* 292 F.3d 597 (9th Cir. 2002). For an overview of the reaction to this decision, including Senator Frank Murkowski's plan to divide the Ninth Circuit in two, see Henry Weinstein, *Judge Defuses Tension over Court's Pledge Ruling*, L.A. TIMES, July 17, 2002, at B1; and Michelle Munn, *Don't Split 9th Circuit, House Panel is Told*, L.A. TIMES, July 24, 2002, at B8. Munn reports the following statement made by Democratic Rep. Howard L. Berman at a committee hearing on dividing the Ninth Circuit: "One could take these unique circumstances of the calling of the hearing and conclude it is an attempt to punish the Ninth Circuit for its decision on the Pledge of Allegiance." Munn, *supra* at B8. Of course, it is not possible to know whether the two judges who ruled against the phrase "under God" would have made the same decision if they had anticipated the political consequences.

[32] This aspect of Supreme Court politics is best captured in the literature on strategic decision-making by the justices. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 13 (1998). For an earlier treatment, see WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 245–68 (1964).

[33] *See* Naim v. Naim, 350 U.S. 891, 891 (1955); 350 U.S. 985, 985 (1956). Frankfurter expressed the view in conference that "[t]o thrust the miscegenation issue into 'the vortex of the present disquietude' would risk 'thwarting or seriously handicapping the enforcement of [*Brown*].' " Memorandum from Justice Felix Frankfurter (Nov. 4, 1955), *reprinted in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 64 (1979).

[34] *See* WALTER F. MURPHY, CONGRESS AND THE COURT 229–30 (1962); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 48–53 (1961).

they can count on some protection from defenders who occupy strategically useful positions.

It is tempting to think that the political climate of the 2000 election was not conducive to a risky course of conduct by a bare majority of Court conservatives. No precedent existed for Supreme Court involvement in a dispute over a state's presidential electors.[35] Established processes were in place for resolving the dispute without the Court's participation—specifically, an initial resolution by state office-holders followed by a determination by the Congress. The legal issues raised were innovative and deeply disputed, and as it turned out, the justices were unable to arrive at a nominally non-partisan consensus on how best to address these issues. Moreover, despite arguments that there was a bipartisan interest in having the Court bring an end to a prolonged crisis, there was reason to believe that partisans on both sides would be upset with judges who took the wrong side.

In light of all this, it might be tempting to interpret the Court's involvement as an example of how structural mechanisms for political independence make it unnecessary for judges to take into account political considerations when deciding a course of conduct. In fact, though, the strategic political environment was actually quite hospitable to the course of conduct that the conservative majority set in motion around Thanksgiving when they voted to grant certiorari in the first Bush appeal of the Florida Supreme Court's decision to extend the deadline for hand recounts.[36] Assuming that the conservatives were interested in preventing any hand recounts that might overturn the initially reported results in favor of a Bush victory—an assumption that is consistent with the three anti-recount positions taken by these five justices across three separate legal issues[37]—then

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[35] Five justices (but not the Court as an institution) were involved in the Electoral Commission that addressed the disputed Hayes-Tilden election in 1876. Even this limited involvement by Court personnel was a byproduct of an explicit, formal invitation by congressional party leaders.

[36] The Florida Supreme Court's decision extending the recount deadline was *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000). The U.S. Supreme Court granted certiorari on November 24 in an appeal of the newly titled case *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 1004 (2000). In his *Bush v. Gore* dissent, in a part of his opinion that was joined by all four dissenters, Justice Souter declared that "[t]he Court should not have reviewed either Bush v. Palm Beach County Canvassing Board . . . or this case," which means that only the five most conservative justices supported the decision to intervene in the election 2000 controversy. *See* Gillman, *supra* note 6, at 145–46 (quoting Bush v. Gore, 531 U.S. 98. 130 (2000) (Souter, J., dissenting)).

[37] In *Bush v. Palm Beach County Canvassing Board*, the justices overturned the Florida Supreme Court's decision extending the deadline for manual recounts of votes using a legal argument based on Article II of the Constitution. *See* 531 U.S. 70, 78 (2000). In *Bush v. Gore*, the conservatives issued an injunction stopping the newly-authorized statewide recount of undervote ballots using a legal argument based on whether new recounts represented an "irreparable harm" to Bush. *See* 531 U.S. 1046 (2000) (Scalia, J., concurring). And in the final *Bush v. Gore* decision, the conservatives declared a statewide recount to be unconstitutional

what they needed to assess was whether they had enough support in the political system to avoid retaliation for a set of decisions that either blocked recounts or rolled back the results of recounts. While the political environment might not have been conducive to any imaginable course of conduct the Court might have adopted (such as one to require recounts), it was conducive to an anti-recount effort. The conservatives knew that they had a fully mobilized Republican constituency that would vehemently support such an intervention.[38] More importantly, Republicans were in control of virtually all of the potential competing political institutions, including the state legislature and executive branch of Florida and the U.S. House of Representatives. They also knew that the U.S. Senate and, of course, the presidency would be in Republican hands if they were successful in ensuring a Bush victory. Given this configuration of power, the conservatives could be confident that their decisions would not be met by any institutional resistance or short-term acts of retribution.

There were other strategic advantages as well. Immediately prior to the final decision, public opinion polls showed that 73% of respondents said they would consider any Supreme Court decision to be legitimate.[39] Conservatives also knew that a pro-Bush result would actually bring an immediate end to the dispute, since the Gore campaign had announced the weekend before *Bush v. Gore* that they would live with whatever decision the Court handed down.[40] While there might be lingering anger among disappointed partisans, there would not be the sort of ongoing struggle over judicial policy-making that one associates with the Court's most controversial decisions.

In considering the lessons for judicial independence presented by *Bush v. Gore*, it is too simple to assert that the formal, constitutional sources of the justices' independence were sufficient to give the conservative majority the political insulation it needed to intervene in the 2000 election controversy. Counterfactuals can only reach so far, but if the Court had been faced with a fully mobilized and determined Democratic Party in control of the U.S. Congress as well as Florida's legislative and executive branches, the *Bush v. Gore* majority would have had a lot more to consider before inserting themselves into this process. The main point is that Supreme Court independence is a function, not merely of formal structural protections, but also of historically contingent political alignments and the tendency of the justices to assess the strategic context within which they are operating. Without attention to these contextual and strategic variables, a lack of pressure, interference, or retribution might be explained as a

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using a legal argument based on the equal protection clause. *See* Bush v. Gore, 531 U.S. 98, 103, 110 (2000).

[38] For an account of the 2000 election that emphasizes the efforts of Republicans during the election crisis, see JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001).

[39] GILLMAN, *supra* note 6, at 128.

[40] *Id.* at 129.

function of well-functioning institutional barriers rather than the relation between these structural features and the constraints or opportunities generated by the background political climate.

IV. LESSON FOUR: GREATER DEGREES OF STRUCTURAL INSULATION FROM ELECTORAL ACCOUNTABILITY DO NOT NECESSARILY MAKE GOOD FAITH DECISION-MAKING MORE LIKELY

It is tempting to assume that greater degrees of structural independence will reduce the likelihood that political considerations will shape decision-making. In other words, if independence is considered a good thing, then perhaps appointive methods are better than elective methods; non-competitive retention elections are better than competitive elections; and longer terms of office are better than shorter terms. On this analysis, the federal structure of political appointment and life tenure might seem like a better way to reduce the corrupting effects of politics on judicial decision-making than state models that typically include some sort of electoral accountability.

It is a truism that when judges are insulated from elections, some of the dynamics of electoral politics are eliminated from their decision-making calculus. Judges who do not have to run for election or reelection will not have to raise money to run campaigns and may worry less about how their decisions might be used by electoral opponents in political advertising. However, it would be a mistake to assume that insulating judges from elections (or from easy removal by competing power-holders) will eliminate political motivations, pressures, or calculations from judicial decision-making. It would be more accurate to say that different structures of judicial selection and removal will produce slightly different political dynamics. Appointive systems marginally increase the influence of chief executives over the ideological make-up of the judiciary, although governors tend to dominate even elective and merit-based systems. Partisan election systems provide voters with one very salient cue that they would not be officially provided in non-partisan systems, although even in non-partisan systems parties may exert influence over the process by supporting particular candidates. Judges who enjoy life tenure have to worry less about whether voting their preferences will cause a political firestorm, although even life-tenured judges must pay attention to political opposition to their decisions.[41] It may be that there are good reasons to prefer the political dynamics associated with some of these structures and to oppose those created by others, especially in light of the

[41] For an overview, see LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY, 101–31 (5th ed. 1998).

increasing importance of money in some judicial elections.[42] However, in making these comparisons, we should debate the relative advantages and disadvantages associated with different political dynamics and try to avoid too much reliance on misleading, simplistic sloganeering about the elimination of political influence.

The role of state and federal judges during the 2000 election controversy provides a dramatic illustration of how greater degrees of political insulation do not necessarily lead to less political judicial decision-making. Examining the simple standard of whether judges were willing to decide cases inconsistently with their presumptive political preferences, it is clear that the judges who faced elections were much more willing to set aside their political preferences and offer good-faith interpretations of the law than judges who enjoyed the most structural "independence from politics."[43] For example, Florida Circuit Court Judge Terry Lewis, a Democrat, ruled that the Republican Secretary of State had the authority to disregard the results of manual recounts that were not completed until after a seven-day reporting deadline.[44] Lewis, along with another Democratic appointee, Circuit Court Judge Nikki Clark, also ruled against the Democrats in a lawsuit challenging the legality of certain Republican absentee ballots.[45] On the other side, when Republicans initially attempted to get a judge to throw out these absentee ballot challenges, they were disappointed by Judge Debra Nelson, who was a recent appointee of Republican Governor Jeb Bush.[46] At a time when the standards for evaluating chads were thought to be the difference between a Gore or a Bush victory, Republican state circuit Judge Jorge Labarga ruled that Palm Beach violated Florida law when it decided to only count those ballots with detached chads rather than any ballot where the intent of the voter could be discerned.[47]

Obviously, there was a storm of controversy surrounding some of the decisions of the Democratic Florida Supreme Court, especially when those justices frustrated Republicans by authorizing recounts that threatened Bush's

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[42] For "an investigation into how campaign cash is corrupting America's courts," see Frontline's "Justice For Sale" at http://www.pbs.org/wgbh/pages/frontline/shows/justice/ (last visited Nov. 9, 2002).

[43] For a more elaborate discussion of the issues raised in the next three paragraphs, see Gillman, *supra* note 3, at 172–96.

[44] McDermott v. Harris, No. 00-2700, 2000 WL 1714590, at *1 (Fla. Cir. Ct. Nov. 17, 2000) (order denying emergency motion to compel compliance with and for enforcement of injunction).

[45] Taylor v. Martin County Canvassing Bd., No. 00-2850, 2000 WL 1793409, at *5 (Fla. Cir. Ct. Dec. 8, 2000) (final judgment for defendants); Scott Gold, *Judges Let Absentee Votes Stand*, L.A. TIMES, Dec. 9, 2000, at A26.

[46] Mitchell Landsberg, *Judge Upholds Democrat's Lawsuit over Absentee Applications*, L.A. TIMES, Nov. 21, 2000, at A16.

[47] Florida Democratic Party v. Palm Beach County Canvassing Bd., No. 00-11078, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 15, 2000) (declaratory order).

nominal victory. It is reasonable to assume that the commitment of those justices to count ballots rather than disqualify ballots reflected their political attitudes. Still, in the five cases that this state high court decided that might have influenced the outcome of the controversy, the justices voted against Al Gore in three and gave Gore only partial victories in the other two. The justices voted against Gore on whether to order Miami-Dade to restart its recount after the local canvassing board suddenly decided to call it off; on whether to order a new election in Palm Beach County; and on whether to disqualify Republican absentee ballots.[48] Gore did get the state high court to approve an extension for when counties had to report the results of manually reviewed ballots. However, the extension was not as long as the Gore team hoped, and as it turned out, two of the three counties involved could not complete the recounts within the extended time frame.[49] A divided high court also authorized a statewide manual recount of the so-called "undervote ballots," but this was less favorable to Gore (and set in motion a less predictable course of action) than the limited recount in Democratic counties that the Gore team had requested.[50] Whatever one's interpretation of the reasonableness of any of these decisions, it is beyond dispute that these judges were not single-minded about deciding cases in a manner that reflected a political preference for one candidate over another. In cases where they voted against the interests of Al Gore, it is reasonable to assume that the decision reflected their good faith understanding of the law.

Of all the judges who were involved in the 2000 election dispute, the ones whose behavior appeared the most partisan, and the least motivated by good faith understandings of the law, were the ones who enjoyed the most extreme insulation from conventional political pressure. The five conservatives in the *Bush v. Gore* majority were the only judges involved in this election dispute whose decisions across a variety of legal issues were consistent with their political preferences and arguably inconsistent with their pre-election views on issues such as the meaning of the equal protection clause and the appropriateness of having federal courts second-guess state court interpretations of state law.[51] Whether these judges are viewed as loyal partisans, ideological policy-makers protecting their fragile constitutional agenda, or, most benignly, interested decision-makers

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[48] The cases were as follows: *Gore v. Miami-Dade County Canvassing Bd.*, 780 So. 2d 913 (Fla. 2000); *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000); and *Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517, 519 (Fla. 2000).

[49] Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000).

[50] Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000).

[51] The justices had no previously expressed views on the meaning of Article II as it relates to the authority of state courts to interpret state election law regulating the appointment of presidential electors. However, it is probably fair to say that no modern scholar of constitutional law had an opinion on that question before the 2000 election.

exhibiting the influence of "motivated reasoning,"[52] it is hard to resist the conclusion that their actions were tainted by political considerations or motivations.[53] This is just another way of pointing out that, while judicial independence may sometimes free a judge from unwanted political pressure, those structures do nothing to prevent an insulated judge from indulging her or his own political preferences or private agendas. To guard against those unwanted influences, one has to focus more on the character of the decision-maker than the characteristics of the office.

None of this is to deny the importance of debating the practical consequences of adopting one set of institutional structures over another. All power-holders are affected in some way, whether positively or negatively, by the political architecture of the institutions within which they operate.[54] Moreover, as these issues are analyzed and debated, it is essential to consider the relationship between these structural questions and the promotion of rule-of-law norms. However, it also is useful to keep in mind the full range of motivations and consequences that are related to the question of whether judge-politicians should be given more or less decision-making autonomy. After all, "the choice of judicial selection and retention mechanisms is inherently a political choice with political implications,"[55] including unintended implications, such as the use of that independence to choose a president.

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[52] For a general discussion of the insights of cognitive psychology on judicial decision-making, see Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998). Of course, one's susceptibility to the influences of motivated reasoning may itself be a byproduct of a preexisting willingness to indulge political preferences. Therefore, the phenomenon of motivated reasoning may not provide a persuasive defense against the charge of partisan decision-making. Obviously, not all judges involved in the 2000 election framed the legal issues in a politically convenient way.

[53] It should be emphasized that the charge of partisan bias is not easily applied to dissenting Justices David Souter and John Paul Stevens, each of whom were closely connected to the Republican Party before being appointed by Republican presidents.

[54] This is a central assumption of a political science school of thought known as "the new institutionalism." *See* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); *see also* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell W. Clayton eds., 1999).

[55] Lee Epstein, Jack Knight, & Olga Shvetsova, *Selecting Selection Systems*, *in* JUDICIAL INDEPENDENCE, *supra* note 2, at 201.