WERE THERE ADEQUATE STATE GROUNDS IN *BUSH v. GORE*?

*Michael L. Wells**

Few Supreme Court decisions provoke the immediate and intensely negative verdict that law professors passed on *Bush v. Gore*.[1] It usually takes some time for scholars to digest the opinions, reflect on the majority's reasoning, and render considered judgments. Not so in this case. Within a few days of the 5-4 ruling that halted the recounting of votes for presidential electors in Florida, the decision drew withering criticism from scholars across the ideological spectrum. Akhil Amar lamented in the Los Angeles Times that he must now tell his students not to put their trust in judges, even though he considers himself "a friend of the U.S. Supreme Court and of many of its current justices";[2] Jeffrey Rosen called the decision a "disgrace" on the cover of the New Republic;[3] and Herman Schwartz accused the Court of "trampl[ing] on . . . [b]asic principles of adjudication."[4]

Some of the criticism is deserved.[5] Professor Amar made a powerful case against the majority's ruling that the recount ordered by the Florida Supreme Court violated the equal protection clause for failure to use uniform standards throughout the state. Amar pointed out that vote counting standards vary from

* Alton Hosch Professor of Law, University of Georgia. The author wishes to thank Laura Fitzgerald, Barry Friedman, Lonny Hoffman, Richard Nagarada, and Robert Schapiro for helpful comments on a draft of this article.

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

2. Akhil Reed Amar, *Supreme Court: Should We Trust Judges?*, Los Angeles Times M1 (Dec. 17, 2000).

3. Jeffrey Rosen, *Disgrace*, New Republic 18 (Dec. 25, 2000).

4. Herman Schwartz, *The God That Failed*, The Nation 5, 6 (Jan. 1, 2001).

5. Some of it seems rather unfair. For example, Professor Rosen detects similarities between the five Justices in the majority and former President Clinton: "It will be impossible to look at O'Connor, Kennedy, Scalia, Rehnquist, and Thomas in the same light again, much as it was impossible to look at President Clinton in the same light after seeing him exposed in the Starr Report." Rosen, *Disgrace* at 20 (cited in note 3). Vincent Bugliosi thinks that his "background in criminal law is sufficient to inform you that Scalia, Thomas et al. are criminals in the very *truest* sense of the word." Vincent Bugliosi, *None Dare Call It Treason*, The Nation 11, 14 (Feb. 5, 2001).

locality to locality all over the nation, that they always have, and that the Court could cite no precedent to support its equal protection theory. Others have questioned whether the ruling rests on any general principle at all, given the care the Court took to limit its reasoning to the extraordinary circumstances of the Florida presidential election.[6] Even Michael McConnell, a well-known conservative scholar, was troubled by the implications of the holding. By reaching the equal protection issue, the Court evidently accepted the notion that recounts were appropriate in connection with the election contest. Yet the Court put a stop to the recount that was underway. McConnell observed that "[t]he court did not have the resolution to declare that no recount was necessary, or the patience to declare that a proper recount should proceed."[7]

It is all too easy to leap from this well-founded critique of the Court's reasoning to the conclusion that the majority—all of whom were appointed by Republican presidents—were bent on installing George W. Bush in the White House by any means they could find, and that the holding rests not at all on law but solely on naked politics.[8] Putting aside the majority's reasoning, a better ground on which to defend *Bush* is that the Florida Supreme Court (the "Florida Court") violated article II, § 1, clause 2 of the Constitution, which provides that "[e]ach state shall appoint, in such manner as the legislature thereof may direct, [presidential] electors."[9] In a concurring opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas (the "plurality"), advanced an argument along these lines, and the four dissenters devoted parts of their opinions to refuting it. Though the plurality grasped the basic issue in *Bush*, it did not make the best case for reversal. The dissenters understandably responded only to the plurality's weak arguments and not the stronger ones that should have been marshaled for reversal.

The Chief Justice was right to be concerned about article II, but committed a critical error in his treatment of the "adequate and independent state ground" doctrine. The plurality was confronted with a state court opinion that did not purport to rely on federal law. If we leave equal protection out of the analysis (as I

6. Amy Waldman, *Ruling Will Hold a Place, As Yet Unclear, in History,* N.Y. Times A32 (Dec. 14, 2000) (attributing this view to Frank Michelman).

7. Michael W. McConnell, *A Muddled Ruling,* Wall St. J. A26 (Dec. 14, 2000).

8. See, e.g., Bugliosi, *None Dare Call it Treason* at 11 (cited in note 5). (advancing this view); Jonathan Chait, *Not Equal,* New Republic 14, 15 (Dec. 25, 2000) (similar).

9. U.S. Const. Art. II, § 1, cl. 2.

do throughout the remainder of this article), the threshold question is how one justifies the Court's exercise of jurisdiction, for state courts are sovereign over matters of state law. The general rule is that the Supreme Court may review a case from a state court unless the state court judgment rests on an adequate and independent state ground. The plurality rightly found that, despite the Florida Court's failure to address federal article II issues, there was not an adequate state ground here.

But the plurality was right for the wrong reason. The "adequate state ground" doctrine is complex and sophisticated. It consists of not one but four principles for determining adequacy, with the choice among them depending on the relation between federal and state law in the case at hand. The plurality confused two of its branches and placed *Bush* in the wrong doctrinal category. Worse, the category in which the plurality put the case demands a stronger showing to justify Supreme Court review than the one to which *Bush* should have been assigned. The plurality cited cases which hold that the state ruling should stand unless the state court distorted state law in order to evade federal protections. The proper rule for *Bush* is that the state court's reasoning deserves no deference. The existence of a federal constraint on state court authority, such as article II, is sufficient to justify intervention. As a result of Rehnquist's miscue, the dissenters had little difficulty in rebutting the plurality's justifications for review. Had Rehnquist advanced the more compelling arguments for Supreme Court review that were available to him, the article II challenge could not have been rebuffed with such ease.

While my argument that the plurality and the dissents went astray in their treatment of the adequate state ground doctrine bolsters the result in *Bush*, it does not necessarily imply that the plurality was right on the merits. Whether the state grounds could withstand scrutiny under the proper test is a separate question from whether the Justices used the right test in the first place. My focus is on the latter issue. As far as the analysis in this paper is concerned, the Florida Court's judgment may still be defensible.

I

Chief Justice Rehnquist began by acknowledging 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."[10] But that principle did not apply to *Bush*, because this was not an ordinary state law case. Federal law is also relevant to its disposition, for article II—with its command that "the *Legislature* . . . direct[s]"[11] the manner of choosing electors—is one of "a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."[12] Therefore, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[13] A "significant departure" from that text by the Florida courts "presents a federal constitutional question."[14]

Having identified a federal interest at stake in the case, the plurality proceeded to invoke the doctrine on Supreme Court review of the adequacy of state grounds. It cited a number of cases in which the state court relied on state law, yet the Supreme Court reviewed and overturned the judgments. The general principle underlying such cases is that, in the event a ruling on state law has adverse impact on a federal right, "the Constitution requires [the] Court to undertake an independent, if still deferential, analysis of state law."[15] The plurality identified two major problems with the decisions of the Florida Court. First, the Florida Court had taken away authority that the election statute assigned to other officers, including the Secretary of State and the local canvassing boards, to determine when and for what purpose hand recounts would be undertaken.[16] Second, the Florida Court justified its intervention by broadly reading the statutory term "legal vote" as imposing an obligation on election officials to count ballots that the voting machines could not read. Rehnquist countered that the Florida statutes place the responsibility upon the voters to ensure that the machines can read their votes. Hence, "[n]o reasonable person" could find that a contest should succeed "when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify."[17]

---

10. *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring).
11. Id. Justice Rehnquist italicized the word "Legislature" when he quoted this language.
12. Id.
13. Id.
14. Id.
15. Id. at 114.
16. See *Bush*, 531 U.S. at 116 (discussing the authority of these officers).
17. Id. at 119.

In ruling differently, the Florida Court had rejected the Secretary of State's interpretation of the statutory provisions, though Florida law requires it to defer to her on such issues.[18]

Four members of the Court dissented from the judgment, and all of them took the time to address the plurality's theory of the case as well. The dissenters accepted the plurality's view that the key issue was the scope of Supreme Court review of the state law grounds on which the Florida judgment rested, but each of them found fault with Chief Justice Rehnquist's reasoning. Though they emphasized different aspects of the case, they all made the same point: While the Florida Court's reasoning could be faulted, it did nothing out of the ordinary.[19] The Florida Court engaged in the kind of legal reasoning that is typical of courts,[20] and the Supreme Court should not interfere with its rulings on issues of state law.[21]

All seven justices who addressed the relevance of article II took the wrong doctrinal path. As a result, none of them focused their attention on the constitutional issue that needed to be addressed in order to determine whether the Florida Court acted properly. In particular, the plurality's error in resorting to a particular group of "adequate state ground" cases deflected attention from the question of whether the Florida Court's ruling was compatible with article II, and enabled the dissenters to avoid that issue as well. The mistake is understandable, for all concerned were under tremendous time pressure, the Florida Court did focus on state law, and the case raises a novel constitutional issue. The Justices were dealing with an aspect of Supreme Court review doctrine that rarely arises in litigation and has never received sustained attention from the Court. Anyone can make a mistake about the application of an ill-defined doctrine in an unfamiliar constitutional context, especially when one is in a hurry.

II

In most legal systems there is one sovereign government, and all law making authority resides there. The more complex

18. Id. at 120.
19. Id. at 131 (Souter, J., dissenting).
20. Bush, 531 U.S. at 128 (Stevens, J., dissenting). (The decisions of the Florida Court "were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole.")
21. Id. at 136 (Ginsburg, J., dissenting).

American federal system divides lawmaking authority between the national government and the state governments. Moreover, federal law rarely displaces state authority entirely. Typically, some of the questions in a case are matters of federal law, but others may be governed by state law, and it is not always clear which body of law controls a particular issue. While federal law prevails in any contest between state and federal law, the states are free to proceed as they wish in the absence of conflict with federal law. The Supreme Court's role is to see that federal law receives the respect it deserves from the state courts, no more and no less. Consequently, the availability of Supreme Court review of a state court decision depends on whether the state ruling in some way implicates federal law. Even when federal law is at stake in a case, the rationale for Supreme Court review is a restraint on its scope. Because the Supreme Court may intervene only insofar as necessary to defend the federal interest and no further, review is ordinarily limited to the federal issues.[22]

At first glance these principles of federalism seem to stand in the way of Supreme Court review in *Bush*, for the Florida Supreme Court relied exclusively on state law. Of course, the state court opinion does not by itself determine what issues are at stake. Otherwise, state courts could evade review simply by refusing to address federal issues. In *Bush*, all nine Justices agreed that the Court should examine the equal protection issue, though the state court did not consider it. But I have, for purposes of isolating other aspects of the case, chosen to set aside the equal protection claim. With the equal protection issue out of the case, Supreme Court review can be justified only if there is some other federal element that the Florida Supreme Court should have, but did not, take into account. That federal element is supplied by article II, which grants authority to the state legislature to direct the manner of choosing presidential electors. According to George W. Bush, the Florida Court's decision violated article II by changing the legislative scheme.

The problem with the handling of this issue by the seven Justices who addressed it in *Bush* is that they put the case in the wrong doctrinal pigeonhole, and consequently employed the wrong standard of review for evaluating the state judgment. Four fact patterns give rise to Supreme Court review of a state judgment. Each of the four presents a different mix of policy

22. *Murdock v. City of Memphis*, 87 U.S. 590 (1875). See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 502-04 (1954).

considerations and each is governed by different principles. In order to show how the Justices erred, it will be useful to point out the differences between these four situations.

1. *Inadequate State Substantive Grounds.* In one set of cases, the state court purports to rely solely on state law, yet the state grounds are not sufficient by themselves to sustain the judgment. Suppose a state statute is challenged on both state and federal grounds, as where someone claims that the provision violates both the free speech clause of the First Amendment and a state free speech clause. If the state court strikes the statute down, relying exclusively on the state constitution to do so, the Supreme Court may not review the decision. The state ground is adequate to sustain the judgment invalidating the law, no matter how the federal due process issue is resolved. The same result would follow in a case where the state court relied on both the state and federal provisions, but made it clear that the ruling on state law was not influenced by federal law. By contrast, suppose the state court upholds the statute in an opinion that cites no federal authority and purports to rely solely on state law. The state ground is inadequate to support the judgment in such a case, simply because the statute would fall if the federal issue were resolved differently. The same result would follow, and for the same reason, if the state upheld the statute against both the state and federal attacks. The point is that in such a case it is irrelevant whether the state court does or does not address the federal issue.[23]

The federal interest in such a case is in assuring that federal rights receive due regard in the state courts. When the state court upholds the statute, with or without mentioning the federal grounds on which it was attacked, this federal interest is threatened, for the statute may in fact violate the federal right of free speech. But when the state court strikes down the statute on state law grounds, there is no danger that the value of free speech will get less respect than it deserves. Another factor that bears on the Court's refusal to review such cases is the policy of avoiding unnecessary constitutional decisions. In such a case, nothing the Court does will change the outcome in any event.

23. The doctrine summarized in this paragraph is discussed in detail in R. Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System* 525-27 (Foundation Press, 4th ed. 1996). I do not discuss the issues that arise when the state court opinion is ambiguous as to whether it relies on state or federal grounds, see, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983), as they have no apparent bearing on the aspect of *Bush* that I address in this article.

So long as the state court does not rely on federal principles in interpreting the state constitution, there is no federal interest in the resolution of the state law issue, and no justification for Supreme Court review.[24]

2. *The Remote Federal Premise.* Suppose, however, that the state court *does* rely on federal free speech principles in the course of ruling that the statute offends the state constitution. For example, the state court may cite federal cases in deciding that the state constitution forbids interference with commercial speech. Or it may hold that the state's tax law exempts the salaries of federal workers from the state's income tax *because* there is a federal constitutional prohibition on state taxation of certain federal salaries. In such a case there is no danger that the state court has failed to show sufficient respect for the federal interest. On the contrary, the state court has done its utmost to avoid a decision that is at odds with federal law. These have been called "remote federal premise" cases[25] because the ruling on state law depends in some way on a premise derived from federal law.

Though the supremacy of federal law is not threatened by the state judgment, Supreme Court may review a case of this type. The policy underlying review is that the Court's role goes beyond guaranteeing that state courts give federal law the respect it deserves. In addition, the Supreme Court must guard against state courts giving *too much* weight to federal law.[26] In *State Tax Commission v. Van Cott,*[27] the Court faced the state tax immunity issue and ruled that the state court's federal premise was wrong. There is no federal rule forbidding the taxation of federal salaries.[28] In *Van Cott,* the Court did not simply reverse the judgment. It remanded the case so that the state court could decide the state tax immunity issue free of the influence of a faulty federal premise. As it happens, the state court affirmed its

24. See Fallon, et al., *The Federal Courts and the Federal System* at 524 (cited in note 23).

25. Peter W. Low and John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 86 (Foundation Press, 4th ed. 1998).

26. Of course, one could argue, as Justice Stevens has, that this federal interest is ordinarily not strong enough to warrant a grant of certiorari. See, e.g., *Delaware v. Van Arsdall,* 475 U.S. 673, 695, 697 (1986) (Stevens, J., dissenting); Fallon, et al., *The Federal Courts and the Federal System* at 536 (cited in note 23). No one questions the existence of a federal interest in such cases, though its strength may be debatable.

27. *State Tax Comm. of Utah v. Van Cott,* 306 U.S. 511 (1939). See Ronald J. Greene, *Hybrid State Law in the Federal Courts,* 83 Harv. L. Rev. 289, 320 (1969).

28. The state court's error was understandable. It had relied on an earlier Supreme Court case that the Court overruled on the same day it decided *Van Cott.* See *Van Cott,* 306 U.S. at 515.

earlier ruling.[29] Similarly, in cases where some of the state judges whose votes are necessary to the judgment have relied on state law and others on federal law, the Court may review the judgment, correct any errors in the relevant judges' understanding of federal law, and remand for the state court to proceed as it sees fit.[30]

3. *State Procedural Grounds.* Federal substantive rights are often litigated in state court proceedings, especially criminal proceedings in which various provisions of the bill of rights may be at issue. Litigants seeking to assert federal rights in state court are ordinarily expected to comply with state procedural rules. For example, the state rule may require that objections to the introduction of evidence be made contemporaneously with the proffer, so that the issue can be decided before any problem of jury prejudice arises. Now suppose a criminal defendant has federal law grounds for challenging the introduction of evidence, for example, an argument that the evidence was obtained by a search that violated his fourth amendment rights. If his lawyer does not make the objection at the proper time under state law, the client will ordinarily be deemed to have waived the right.[31]

On a superficial level cases of this type resemble the adequate state ground cases. In both fact patterns, the state ground may be adequate to support the judgment. Indeed, the Supreme Court will generally respect a valid state procedural rule and uphold the state court's refusal to ignore the litigant's "procedural default." But the similarity vanishes when one considers the policy issues bearing on the state procedural grounds cases. While federal rights are not threatened by a state court decision striking down a state statute on state substantive grounds, the same cannot be said of a decision to uphold a state judgment resting on state procedural grounds. In such a case the state court has refused to protect federal rights *because* of a state procedural rule, and the effect of respecting the state ground is precisely the opposite of that in the inadequate state ground cases.

No doubt for that reason, the Supreme Court shows less respect for state procedural grounds than for substantive grounds.[32] Instead of simply accepting the state's claim that it

29. *Van Cott v. State Tax Comm.*, 98 Utah 264, 96 P.2d 740 (1939).

30. See *United Airlines, Inc. v. Mahin*, 410 U.S. 623 (1973).

31. For a collection of materials dealing with this problem, see Fallon, et al., *The Federal Courts and the Federal System* at 566-90 (cited in note 23).

32. See id. at 576-77; Daniel Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1131-32 (1986).

has a sufficiently strong interest in its rule to warrant the state court's decision to ignore the federal claim, the Supreme Court will make a judgment as to the importance the state actually accords its rule. Sometimes the Court will carefully examine the state courts' application of state procedures in earlier cases in order to determine just how much respect the procedural rule at issue actually receives in the state courts. If the requirement is a novel one or has been inconsistently applied, the Supreme Court may pay no attention to it and reach the merits of the federal constitutional issue.[33] Thus, in *NAACP v. Alabama ex rel. Flowers*[34] the Court refused to follow a state procedural rule that state courts had not previously applied "with the pointless severity" shown in this case.

Sometimes, the Court seems to make a judgment as to the whether the state procedural rule actually serves any worthwhile purpose. For example, in *James v. Kentucky*[35] it faced a state rule requiring that a certain kind of objection to the charge to the jury be called an "instruction" rather than an "admonition," as the criminal defendant's lawyer had labeled it. The Court reached the merits of the constitutional issue–which related to inferences to be drawn from a defendant's failure to testify—and explained that the state rule was "an arid ritual of meaningless form."[36] Though the Court in *James* and other procedural ground cases often disparages the state rule, a key feature of them is that it does not go so far as to hold the state rule unconstitutional, even as applied to the case at hand.[37] If the Court went that far in every case where it ignored a procedural ground, the state procedural grounds category would collapse into the inadequate state grounds category.

4. *Antecedent State Substantive Grounds.* These are cases in which state law creates a right and federal law protects that "antecedent" state right. State law is the source of most property rights, as well as the primary source of legal protection of liberty. Freedom of contract, for example, is mainly a product of state law. At the same time, the federal constitution protects the property and liberty rights that are created by state law. The just

33. See Fallon, et al., *The Federal Courts and the Federal System* at 580 (cited in note 23).

34. *NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 294-302 (1964). See also Fallon, et al., *The Federal Courts and the Federal System* at 581 (cited in note 23).

35. *James v. Kentucky,* 466 U.S. 341, 345-48 (1984).

36. Id. at 349 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958)).

37. See Meltzer, 99 Harv. L. Rev. at 1160 (cited in note 32).

compensation clause forbids governments from taking property without paying for it, and the contracts clause obliges states to respect their contractual obligations.[38]

When a dispute arises between government and a person who claims to hold such a right, the state court may deny relief either because the state's interference with the right is not a constitutional violation or because the right never existed in the first place. The former is a matter of federal law that is plainly subject to Supreme Court review. Though the latter is a ruling on state law, there is a federal interest in its resolution, for the state court may be suspected of having distorted its analysis of state law in order to thwart federal protection of the right. If the state law claim of right is a good one despite the ruling of the state court, then the federal law protecting that right means that there is a federal interest in the outcome of the litigation. In that event, Supreme Court review can be justified. An example is *Indiana ex rel. Anderson v. Brand*,[39] in which a state statute regulated the employment rights of school teachers. When a teacher was fired, she claimed that the state law had created a contractual right to tenure and sued for reinstatement on the ground that this right was protected by the Contracts Clause. The state court ruled, as a matter of state law, that no contract existed in the first place. The Supreme Court examined the reasoning behind this holding, found it wanting, and held that state law did indeed create a contract between the state and the teacher. Thus, the state law ruling against the teacher violated her rights under the Contracts Clause.

In order to grasp the policy issue raised by these claims, one must pay attention to their structure. Their distinctive feature is that the only substantive right at stake is a matter of state law, yet the federal constitution is also relevant on account of the protection it gives the state-created right. These cases differ from those resting on inadequate state grounds, in that here a ruling against the litigant who asserts state law claims does threaten the federal interest in the case. They differ from category # 2, simply because there is no claim that the ruling on state law depends on a remote federal premise. Unlike category # 3, they do not concern state procedures through which federal

38. See Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1050-52 (1977); Fallon, et al., *The Federal Courts and the Federal System* at 520-21, 551-65 (cited in note 23).

39. *Indiana ex rel. Alderson v. Brand*, 303 U.S. 95 (1938).

rights are adjudicated, but state substantive rights that receive federal protection.

Antecedent state substantive grounds cases present an especially complex relation between state and federal law. There is a federal interest in the outcome of the state law question, yet it remains a state law question. The latter aspect weighs in favor of leaving its resolution to the state court, and sometimes the Court does take a deferential view of state law. On the other hand, the Supreme Court occasionally seems to begin from the premise that vindicating the federal interest is important enough to justify a de novo review of state law. A third approach is a kind of intermediate scrutiny. The Court will "inquire whether the decision of the state court rests upon a fair or substantial basis,"[40] and uphold the state judgment "if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support."[41] Notice that the standard of review here resembles that of cases resting on state procedural grounds, perhaps because the underlying problem of balancing state and federal issues is roughly similar in the two types of cases. Though the fact patterns differ, there are both state and federal interests at stake in each category, and the federal interest cannot be vindicated without paying some attention to the state ground.

Before turning to *Bush*, notice one other feature of the adequate state ground doctrine: there is a significant difference between the inadequate state grounds and remote federal premises categories, on the one hand, and the state procedural grounds and antecedent state grounds categories on the other. If a case falls within the first two categories, the federal interest is merely in resolving the federal issue. So long as the state court follows the Supreme Court's ruling on the federal issue, it may do as it pleases with regard to state law. In the latter two categories, the Supreme Court may not content itself with correcting issues of federal law, for the federal interest can be vindicated *only* by Supreme Court review of the state court's resolution of state law issues. In one sense, Supreme Court review may be more deferential in such cases, as the Court acknowledges that the primary responsibility for making state law remains with the state courts. In another sense, Supreme Court review is more searching, sim-

40. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944) (quoting *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930)).

41. Id. See Alfred Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 941, 965 (1965).

ply because the Court must go beyond the federal issues to examine state court rulings on state law as well.

III

Chief Justice Rehnquist committed a fatal error midway through his opinion. The critical paragraph reads as follows:

> In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law . . . there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.[42]

Notice that, after identifying the article II issue and the need to "examine the law of the State as it existed prior to the action of the court" in order to resolve it, the opinion quite abruptly shifts gears and moves into a discussion of Supreme Court review of the state law grounds relied upon by state courts, by "an independent, if still deferential, analysis of state law." In the ensuing discussion, he cites one procedural state ground case, *NAACP v. Alabama ex rel. Patterson*,[43] in which the state had imposed a novel procedural requirement as a ground for finding a forfeiture of federal rights.[44] Rehnquist also cites *Bouie v. City of Columbia*,[45] in which the Court held outright that the state court's interpretation of a criminal statute broadened the law "beyond what a fair reading provided, in violation of due process."[46] This constitutional ruling takes the case out of the procedural category. Since the state ground was accordingly inadequate to support the judgment without the need for any delicate weighing of state and federal interests, this case belongs in the inadequate state grounds category. Finally, Rehnquist cites a as antecedent state grounds case, in which the state had created property rights, those rights were protected by federal law, and the Supreme Court asserted the power to examine the state law underpinnings of rulings that no property right existed in the first

42. *Bush*, 531 U.S. at 114 (Rehnquist, J., concurring).
43. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
44. The reason why the case belongs in the procedural default category is that the Court in *NAACP* did not find that the state's procedural rule or its application was unconstitutional.
45. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).
46. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

place.[47] *Bush* was "precisely parallel,"[48] Rehnquist claimed, because the Florida Court had "impermissibly distorted" the Florida election laws "beyond what a fair reading required."[49]

Pursuing this framework of analysis throughout the remainder of his opinion, the Chief Justice concluded that "[n]o reasonable person"[50] would read one provision of state law as the Florida Court had done. Another aspect of the ruling was "absurd,"[51] and another was "peculiar."[52] Rehnquist's reasoning takes for granted the proposition that his task is to examine the state law grounds under the deferential standards of the state procedural grounds and the antecedent state grounds categories.[53] The dissents eagerly endorsed the plurality's focus on the state court's state law reasoning and the plurality's willingness to employ a deferential standard of review of that reasoning. Justice Stevens found that the "Florida Supreme Court [did not] make any substantive change in Florida electoral law."[54] Justice Souter insisted that "[n]one of the state court's interpretations is unreasonable to the point of displacing the legislative enactment."[55] Justice Ginsberg found "no reason to upset [the Florida Court's] reasoned interpretation of Florida law."[56] Justice Breyer examined the state law grounds and found no "impermissible distortion" of the election law.[57]

In citing state procedural grounds precedent and especially in characterizing *Bush* as a "fair support" case, the plurality made both an analytical error and a strategic blunder. The analytical error was a failure to appreciate the structural differences between *Bush* and there procedural ground and fair support

47. Id. at 115 n.1 (citing *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813)). In this footnote the Court also cited *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The case is analytically similar to *Fairfax's Devisee*, in that both concern federal protection of antecedent state rights. But the state did not contest the existence of the plaintiff's state law property right in *Lucas*, focusing instead on the scope of its power to regulate the use of the property consistent with the Takings Clause. Accordingly, the Supreme Court faced no "adequate state ground" issue.

48. Id.

49. Id.

50. Id. at 119.

51. Id.

52. Id. at 120

53. Since the state law rulings here are plainly substantive rather than procedural, I assume Rehnquist would, if pressed for specifics, put the case in the antecedent grounds category.

54. *Bush*, 531 U.S. at 128-29 (Stevens, J., dissenting).

55. Id. at 131 (Souter, J., dissenting).

56. Id. at 136 (Ginsburg, J., dissenting).

57. Id. at 150 (Breyer, J., dissenting).

category is of cases. But the plurality not only misapplied the doctrines. By doing so, it carelessly handed its adversaries a powerful weapon as well. As the dissenters said over and over again, in procedural and fair support cases, the review of state law is typically deferential, as the state has a strong claim to make whatever rules it pleases on matters of state law in cases with these characteristics.[58] *Bush* is actually a simple case of federal law constraining state authority, and falls within the category of cases resting on inadequate state substantive grounds. No deference toward the state court's interpretation of state law is called for in such a case.

The procedural and antecedent grounds fact patterns raise subtle problems of federal-state relations. It is far harder to fashion suitable rules for resolving such cases than it is to deal with the other types of Supreme Court review. Compare them with the inadequate grounds and remote premise categories. When the state court purports to rely on a state ground, but the judgment cannot stand without the resolution of a federal issue inadequacy, the case for Supreme Court review of the federal issue is straightforward. Whatever else the Court should be doing, its essential role is to vindicate federal rights. When the state's ruling depends on a "remote federal premise," the case for federal intervention depends on the equally plain, if less compelling, argument that federal interests should receive no more weight than a correct reading of federal law would give them.[59]

By contrast, when a litigant fails to follow a concededly valid state procedure in asserting his federal claim, *both* federal and state interests are at stake. Similarly, antecedent grounds cases arise when a right that is created by state law is coupled with federal protection of that right. The federal interest is not in defining the scope of the right. If there were a federal constitutional, statutory, or common law doctrine setting up such a right, the case would raise no hard Supreme Court review issue at all. But in these cases the right is purely a creature of state law. Since there is no federal interest in the question of whether the right exists in the first place, the Supreme Court defers to the state court on state law. And yet there *is* a federal interest in the *protection* of the state-created right. Consequently, the review of state court rulings on the state law issue of whether there is a

58. See, e.g., *Bush*, 531 U.S. at 123-24 (Stevens, J., dissenting); id. at 133 (Souter, J., dissenting); id. at 139 (Ginsburg, J., dissenting); id. at 148-51 (Breyer, J., dissenting).

59. See text accompanying notes 25-29.

right must not be *too* deferential. The Supreme Court must ascertain whether the state court has, under the guise of interpreting state law, in effect denied the pre-existing state-created right the protection federal law accords it. To this end, the Court does not usually engage in an independent examination of state law, but instead asks whether the state law provides fair support for the state court's ruling.[60]

In the real world, the context in which these procedural grounds and antecedent state law cases arise will matter greatly in their resolution. It is not a coincidence that two of the cases the plurality cited concerned litigation in southern courts over the civil rights in the 1960s.[61] At that time and place, anyone could see that those courts would employ whatever means they could to avoid recognizing the constitutional rights of blacks. Accordingly, the Supreme Court approached the examination of the state law issues with more than normal skepticism. A third was an episode in a battle over the scope of national power, between the state of Virginia and the Supreme Court, in the early years of the nation.[62] When there is no evidence of such "recalcitrance,"[63] the state court ruling is more likely to withstand scrutiny, though there are still plenty of examples of cases where it does not.[64]

This delicate balancing of state and federal interests is a consequence of the complex relationship between state and federal law in procedural ground and antecedent state law cases, in which rights are created by state law and protected by federal law, or created by federal law and adjudicated under state procedures. When the relation between state and federal law is the more typical arrangement, in which federal law imposes constraints of one kind or another on state law, the rationale for "measured deference" to state court determinations disappears.

---

60. Compare *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("accord[ing] respectful consideration and great weight to the views of the state's highest court") and *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930) ("fair support") with *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (independent evaluation of state law).

61. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See R. Fallon, et al., *The Federal Courts and the Federal System* at 576-77 (cited in note 23) & n.2 (discussing the context in which these cases were adjudicated).

62. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813).

63. This is Justice Ginsburg's characterization of the state court attitude that can give rise to reversal in such a case. See *Bush*, 121 S. Ct. at 549 (Ginsburg, J., dissenting).

64. See Fallon, et al., *The Federal Courts and the Federal System* at 551-65 (cited in note 23) (discussing the case law).

The same is true of a case, in which the state court relies on a federal premise in making state law. In these cases, the state court's rulings on matters of federal law will receive no deference at all.

Now consider the relation between state and federal law in *Bush*. Article II, whatever it may mean, does not protect a state-created right to vote. Indeed, the background of article II suggests that the framers avoided taking a position on whether states should use popular election to choose presidential electors.[65] Article II is properly characterized as a constraint on the way the state goes about choosing the electors. Whether it is a very loose constraint that imposes few restrictions, or a strict one that keeps state courts on a short leash is the central substantive question at issue in *Bush*, and one that I do not reach here. The present point is that the *Bush* fact pattern lacks the key attribute of a "fair support" case, namely federal protection of an antecedent state law right. Lacking that attribute, there is no ground for any deference at all to the state court's rulings on matters of state law. Nor, of course, is *Bush* a case where federal rights are at stake in a state case, and a state procedural default has resulted in their forfeiture.

IV

Despite these criticisms of Chief Justice Rehnquist's opinion, he was right in his intuition that a proper resolution of the case required some examination of the Florida Court's reasoning. In most inadequate state grounds cases the Court can take the state court's rulings on state law at face value and focus solely on whether those decisions are compatible with federal law. *Bush* is different from other cases in this category, because the constitutional issue at stake here is whether the Florida Court properly applied the state law materials bearing on election contests. Though the plurality and the dissents differed on whether the Florida Court had gone too far, they agreed that re-

65. Historical materials bearing on article II. § 1 can be found in Philip B. Kurland and Ralph Lerner, eds., 3 *The Founders' Constitution* 534-61 (U. Chicago Press, 1987). The big issue for the framers was whether the president should be elected by a plebiscite, or by the Congress, or by some other method. Part of the compromise was to create the electoral college, with the idea that it could at least narrow down the field, and to delegate to the state legislatures the choice of a methodology for choosing electors. The framers seem to have contemplated that the state legislatures would be free either to pick the electors themselves or to hold a plebiscite.

solving this federal issue required the Court to examine the Florida Court's treatment of state law.[66]

Rehnquist's error was to suppose that, in the course of examining the Florida Court's application of state law, the Supreme Court must show some deference to the state court, just because it must do so in certain other situations. Pressed for time, he confused the substantive article II issue with the wholly irrelevant body of law on Supreme Court review of procedural default and fair support/antecedent grounds cases. There is a superficial similarity between article II issue and Supreme Court review, for both queries demand scrutiny of state law. By coincidence, they may produce the same result in any given case. Still, they require rather different inquiries. The federalism issues raised by Supreme Court review demand deference to state law when a procedural default has occurred or when federal rights depend on a state law antecedent. By contrast, article II is a constraint on what the state court can do and article II challenges belong in the category of nondeferential cases involving inadequate state substantive grounds.[67] While the exact content of the limits on state courts remain uncertain after *Bush*, we know that article II may demand scrutiny of the state court's reasoning and a comparison between Florida's election law before and after the Florida Court's intervention.[68] Whatever the

66. See *Bush*, 531 U.S. at 114-22 (Rehnquist, C.J., concurring); id. at 127 (Stevens, J., dissenting) (Florida Court's "decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole"); id. at 131 (Souter, J., dissenting) ("[n]one of the state court's interpretations is unreasonable to the point of displacing the legislative enactment"); id. at 136 (Ginsburg, J., dissenting) (finding "no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office' and no cause to upset their reasoned interpretation of Florida law" (quoting *Sumner v. Mata*, 449 U.S. 539, 549 (1981)); id. at 147-52 (Breyer, J., dissenting) (examining the state court's reasoning and finding no "impermissible distortion" of state law).

67. Whether Article II is better viewed as a kind of "state separation of powers" provision, as Rehnquist seemed to conceive of it, or in some other way is a question best left for another day. In my view a strong case can be made for reversing the Florida Court on the ground that Article II is, among other things, a safeguard against judicial efforts to change the rules governing an election after the election has taken place. See Michael L. Wells and Jeffry Netter, *Article II and the Florida Election Case* 61 Maryland L. Rev. (forthcoming, 2002).

68. In advancing the argument that the Supreme Court must examine state law in order to resolve the article II issue, my premise is that article II is a source of judicially enforceable rules regulating state presidential election practices. A serious constitutional argument can be made that the Supreme Court has no role in evaluating the outcome of the state's process for choosing electors. If two (or more) sets of electors claim to vote for the state, it is, under this view, up to Congress to resolve the dispute. Justice Breyer, joined on this point by Justices Stevens and Ginsburg, advanced this thesis in his dissent. See *Bush*, 531 U.S. at 152-58 (Breyer, J., dissenting). If he is right, there is no "adequate

precise standard by which the Florida Court's work is evaluated, the doctrine on Supreme Court review of state judgments imposes upon the Court no obligation to defer to the Florida Court's rulings on state law issues. George W. Bush did not need to show that the Florida Court "impermissibly distorted"[69] state law in order to win; nor does the state ruling survive scrutiny merely because it may be a "reasonable"[70] construction of the Florida election statute.

state ground" issue to cope with, simply because there is no Supreme Court review in the first place.

69. Id. at 149 (Breyer, J., dissenting).

70. Id. at 119 (Rehnquist, C.J., concurring).