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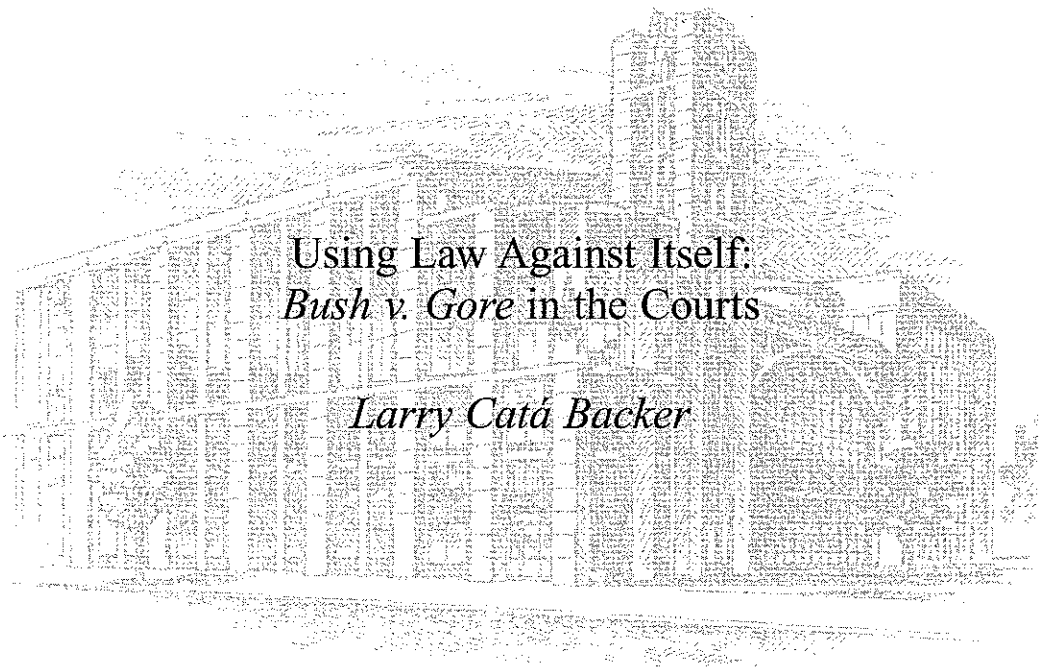

Using Law Against Itself: *Bush v. Gore* in the Courts

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USING LAW AGAINST ITSELF: *BUSH V. GORE* APPLIED IN THE COURTS

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The decisions in Bush v. Palm Beach County Canvassing Board ("Bush I") *and* Bush v. Gore ("Bush II") *evidence the extent to which it now appears unremarkable for courts to play a role in even the most basic political issues. While the doctrinal value of the* Bush *decisions is certainly important, the* Bush *decisions are far more valuable for their endorsement of methodologies available to anyone seeking political advantage under the cover of judicial legitimacy. This article explores those principles, practices and procedures. I start with an appropriate theoretical context. For that purpose I look to LatCrit theory rather than more ideologically traditional or doctrinal theories. Ironically, this expression of critical theory, grounded in progressive political programs, provides the best conceptual basis for interpreting the ostensibly traditionalist Bush cases. I use this theoretical context to identify eight core methodological lessons of the* Bush *cases: (1) "Be Consciously Political;" (2) "Be Literal;" (3) "Attack Precedent;" (4) "Create Contradiction;" (5) "Appropriate;" (6) "Exploit Uncertainty and Sentimentality;" (7) "Recruit Legitimacy;" and (8) "If All Else Fails, Overwhelm Law Through its Own Devices." I then explore the way these lessons have been internalized by the courts and applied in nearly one hundred published and unpublished judicial opinions issued since the publication of the* Bush *cases. Those opinions are windows through which one can see the ways in which litigants have attempted to extract meaning from the* Bush *decisions far beyond their officially sanctioned reading, and the ways in which judges have attempted to situate the* Bush *decisions within the body of American case law. In their least dangerous sense, the lessons, as applied, suggest the ways in which the juridification of politics has become institutionalized in federal and state courts. The courts now rival the legislature as the*

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venue par excellence for the resolution of political issues of every description. But the lessons also suggest the naturalization, within an ostensibly conservative political jurisprudence, of methodologies of legal perversion, of the use of law against itself. Having made a vocation of criticizing the political left for the nihilistic evils of critical and other progressive approaches to law, a so-called conservative court has gone a long way to implement a jurisprudence of ultimate relativism and indeterminacy. Now that is irony!

I. INTRODUCTION

What we in the West have come to call the "rule of law"[1] has always been a multi-edged sword. It is most commonly deployed to guard against arbitrary use of state power by people with access to that power.[2] It is in this sense that the rule of law is perhaps best understood.[3] In its basic political sense it encompasses ideals such as

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1. The concept can be traced back to Aristotle. *See* ARISTOTLE, *Book III, in* A TREATISE ON GOVERNMENT TRANSLATED FROM THE GREEK OF ARISTOTLE 66, 101 (William Ellis trans., 1912) ("Moreover, he who would place the supreme power in mind, would place it in God and the laws; but he who entrusts man with it, gives it to a wild beast, for such his appetites sometimes makes him; for passion influence those who are in power, even the very best of men: for which reason law is reason without desire."). For an influential description of the transposition of the Aristotelian conception of "rule of law" into American legal culture, see JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY 190-211 (1942); *see also* Giuseppe v. Walling, 144 F.2d 608, 615-16 (2d Cir. 1944).

The "rule of law" has acquired a global dimension, as well as an elastic meaning. Anwar Ibrahim, a Muslim intellectual once considered a successor to the premiership of Malaysia but currently jailed after a conviction on questionable corruption and sodomy charges, once, at the height of his power, wrote of the "rule of law" that it:

> encapsulates three principles. The first is the predominance of regular law so that the government has no arbitrary authority over the citizen. Secondly, all citizens are equally subject to the ordinary law administered by the ordinary courts. And thirdly, perhaps the most significant, the citizen's personal freedoms are formulated and protected by the ordinary law, rather than by abstract constitutional declarations.

ANWAR IBRAHIM, THE ASIAN RENAISSANCE 63 (1996).

2. *See, e.g.*, F.C. DeCoste, *Redeeming the Rule of Law: Constitutional Justice: A Liberal Theory of the Rule of Law, T.R.S. Allan*, 39 ALB. L. REV. 1004, 1012 (2002); Frances Raday, *Privatizing Human Rights and the Abuse of Power*, 13 CAN. J.L. & JURIS. 103, 130 (2000); Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law*, 34 VAND. J. TRANSNAT'L L. 931, 946 (2001).

3. The source of the classic Anglo-American understanding of "rule of law," that is the rule of law in states with strongly developed and integrated independent judiciaries, can be found in A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107-277 (Liberty Classics ed., 8th ed. 1982).

free and fair elections,[4] protected through the instrumentalities of the state[5]—principally the independent judiciary,[6] against abuse by individuals.[7] The rule of law can also be used to protect a polity against its own excesses.[8]

But the concept "rule of law" can also be used against itself. It can be used as the very instrument through which legal orders can be perverted, subverted, or reinvented. The legal bases of Vichy France,[9] and the German Third Reich,[10] are the best known modern examples

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4. The democratic principle of political organization has become virtually mandatory since the twentieth century. *See, e.g.*, NOMOS XXXV: DEMOCRATIC COMMUNITY (John W. Chapman & Ian Shapiro eds., 1993).

5. *See, e.g.*, Elizabeth F. DeFeis, *Proceedings of the 2001 Symposium: International Elections Monitoring: Should Democracy Be a Right?: Elections A Global Right?*, 19 WIS. INT'L L.J. 321 (2001); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1362 (2001). *But see* Lieutenant Colonel Susan S. Gibson, *The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of the Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT'L L. 1 (1998).

6. An independent judiciary is necessary for the protection of the rule of law. *See* Adama Dieng, *The Legal Profession and Human Rights: Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT'L L. J. 550, 550 (1997); *see also* Emily Johnson Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT'L L. J. 361, 363 (2002). .

7. This notion was at the heart of the litigation which eventually led to President Nixon's resignation. *See generally* United States. v. Nixon, 418 U.S. 683 (1974). Legal rules, read, deployed and interpreted in a particular way, were raised as a defense against what was then seen as abuse of power by the American President. *Id.* For a criticism of the case as inappropriate judicial involvement in the midst of the political process leading to impeachment, see Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process,* 22 U.C.L.A. L. REV. 30 (1974).

8. For example, within the modern German constitutional tradition, certain portions of the *Grundgesetz*, the Basic Law, may not be amended. *See* Southwest State Case, 1 BverfGE 14, (1951), *translated and reprinted in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 62, 66-69 (2d ed. 1997). The Federal Constitutional Court has, however, declared almost from the inception of the current Republic, that there can exist a class of unconstitutional amendments which the court is empowered to nullify. *Id.*

9. *See generally* RICHARD WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (1996); *see also* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1, 17 (1998) ("Law thus had a dual role: it was a factor in preparing a smooth transition from constitutional democracy to fascism, but also in disguising that transition under a façade of continuity.").

10. "The German revolution was legal—that is, it was formally correct in accordance with the earlier tradition . . . . Besides, its legality derives from the Weimar Constitution—that is, it is legal in terms of a discarded system." CARL SCMITT ET AL., VOLK: DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT 7-8 (1933) *translated and reprinted in* GEORGE L. MOSSE, NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH 323-324 (Salvatore Attanasio trans., 1966); *see also* Vivian Grosswald Curran, *Fear of Formalism: Indications From the Fascist Period in France*

of unsuccessful attempts. The trials and executions of Charles I in England in 1649,[11] and Louis XVI in France in 1792,[12] provide more ancient examples of the form. The adoption of the form of the secular state in Europe in the Eighteenth century,[13] and theocratic states increasingly popular in certain parts of the world since the last third of the Twentieth Century,[14] perhaps provides the modern example of the form in a global context.

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and Germany of Judicial Methodology's Impact on Substantive Law, 35 CORNELL INT'L L.J. 101, 167 (2001/2002) ("Anti-individualism in repudiation of Weimar legal values was a common thread of Nazi legal writing, as was the repudiation of any legal value or source of law other than the Fuhrer. Contrary to Kantorowicz's insistence on enacted law as the most privileged source of legal authority, Nazi legal theory explicitly rejected the authority of enacted law if it did not comport with Hitler's wishes."); Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997).

11. Much of the trial of Charles I involved the refusal by Charles to recognize the authority of the court, since as a legal matter, from his perspective, such a court could not exist. *See* ROBERT B. PARTRIDGE, 'O HORRIBLE MURDER': THE TRIAL, EXECUTION AND BURIAL OF KING CHARLES I (1998); CICELY V. WEDGWOOD, COFFIN FOR KING CHARLES: THE TRIAL AND EXECUTION OF CHARLES I (1964). From the perspective of the Cromwellian faction, the opposite was true B all the legal forms having been observed, the proceedings were vested with the requisite authority to hold and dispose of the body of the king. *See* PARTRIDGE, *supra*; WEDGWOOD, *supra*. Moreover, revolutionary action did not necessarily lead to the installation of a popular democracy or Republic based on the principles of popular sovereignty. In this sense the great Western politician Oliver Cromwell presaged a great politician of the Twentieth century, Iran's Ayatollah Khomeni. For Cromwell's views of democracy, see CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 204 (1970).

12. *See* DAVID JORDAN, THE KING'S TRIAL: THE FRENCH REVOLUTION V. LOUIS XVI (1979).

13. *See, e.g.*, SAMUEL PUFENDORF, OF THE NATURE AND QUALIFICATION OF RELIGION IN REFERENCE TO CIVIL SOCIETY (Jodocus Crull trans., Simone Zurbuchen, ed., 2002) (1687) (applying natural law theory to the division of authority between state and church); DAVID SAUNDERS, ANTI-LAWYERS: RELIGION AND THE CRITICS OF LAW AND STATE (1997) (explaining that the seperation of law and religion, through the reinvention of the relationship between the two, functioned as a means of ending religious warfare in early modern Europe).

14. In Nigeria, for example:

> Many observers correctly view these states' adoption of Shari'a law as politically motivated attempts by Hausa-Fulani leaders to undermine the strength of Obasanjo's administration, whose policies they consider unfavorable to northern interests. Manifestation of regionalism in the country includes a northern fear of a 'southern tyranny of skills' matched by a southern fear of a northern 'tyranny of population.'

Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 B.C. THIRD WORLD L.J. 225, 233 (2002). Ayatollah Khomeni stated after the Iranian Revolution:

> A body of laws alone is not sufficient for a society to be reformed. In order for law to ensure the reform and happiness of man, there must be an executive power and executor. For this reason, God Almighty, in addition to revealing

In yet another guise, the rule of law can be used to call into question the very legal structure on which the legitimacy of state organization rests. In this sense, the rule of law can be turned inward to excise law which may subvert the fundamental principles on which the very rule of law is grounded.[15] Among the most celebrated recent examples, more or less successful depending on the measuring stick used,[16] was the use of law to subvert the legitimacy of slavery as law and constitutional norm within the United States.[17] In the Twentieth Century, the rise of regimes of individual rights may also serve as a significant example.[18] The conflation of "rule of law" with principles of democratic state organization may serve as an

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a body of law (i.e., the ordinances of the *Shari'a*), has laid down a particular form of government together with executive and administrative institutions.

IMAM KHOMENI, ISLAM AND REVOLUTION 40 (1981). In both, the rule of law now has a more troublesome relationship with expression of ideas that do not conform to the ruling ideology. For an inflammatory account, see, for example, NINA SHEA, IN THE LION'S DEN: A SHOCKING ACCOUNT OF PERSECUTION AND MARTYRDOM OF CHRISTIANS TODAY & HOW WE SHOULD RESPOND (1996); Nathan A. Adams IV, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 31-32 (2000).

15. This notion has been institutionalized within the fundamental principles of regional human rights charters. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, Dec. 10, 1950, Eur. T.S. No. 5.

16. Race and racial equity, of course, both remain one of the great unresolved issues of the American polity. *See, e.g.*, RICHARD DELGADO, THE COMING RACE WAR?: AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE (1996) (discussing pessimistic views about the progress of race relations since emancipation); Derrick Bell, *Racial Realism,* 24 CONN. L. REV. 363 (1992). For a more nuanced view, see CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996).

17. For the best known of the constitutional arguments, see WENDELL PHILLIPS GARRISON & FRANCIS JACKSON GARRISON, WILLIAM LLOYD GARRISON, 1805-1879: THE STORY OF HIS LIFE: TOLD BY HIS CHILDREN, Vol. III, 1841-1860 (1889); *see also* PAUL FINKELMAN, SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM, 1700-1872, at 93-225 (1988) (discussing Garrison's position).

18. The imposition of a set of rules of law superior to nation-state rule of law regimes has acquired a significantly common agreement among many actors on the world stage. An interesting manifestation of this notion appears in the web pages of the International Bar Association (IBA). "The IBA's Human Rights Institute works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide." IBA, MISSION STATEMENT, *at* http://www.roldirectory.org/objective.htm (last visited Aug. 7, 2003). The IBA maintains a International Rule of Law Directory, an "online directory of worldwide organizations establishing and implementing rule of law assistance." IBA, INTERNATIONAL RULE OF LAW DIRECTORY: WELCOME, *at* http://www.roldirectory.org/index.htm (last visited Aug. 7, 2003); *see generally* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH (1999); AIWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY (1999).

increasingly important example.[19] "[F]or which reason it is as much a man's duty to submit to command as to assume it, and this also by rotation; for this is law, for order is law; and it is more proper that law should govern than any one of the citizens."[20]

In the United States, the litigation leading to two Supreme Court decisions,[21] evidenced the ease with which the "rule of law" could be used against itself for the attainment of particular political ends.[22] In the face of a tightly contested political election, the Republican Party resorted to the outward invocation of the *form* of the rule of law to give legal legitimacy to their political acts in Florida.[23] This deployment of the forms of the rule of law was effected

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19. *See, e.g.,* DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY 21 (1996) ("The democratic form of government exists today, or has been tried, in every corner of the world. In some parts, it has been planted only recently, and perhaps in infertile soil, and so it is not very surprising that it has not taken firm root."). Large foundations, like the Carnegie Endowment for International Peace, unexceptionally conflate the two concepts. *See* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DEMOCRACY AND RULE OF LAW PROJECT, *at* http://www.ceip.org/files/projects/drl/drl_home.asp (last visited Aug. 7, 2003).

20. ARISTOTLE, *supra* note 1, at 101.

21. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) [hereinafter *Bush I*]; Bush v. Gore, 531 U.S. 1046 (2000) [hereinafter *Bush II*]. *Bush II* is particularly interesting because, though it is a per curiam opinion with a concurrence and a number of dissents, it is clear, reading the concurrence and the dissents, that the per curiam opinion was designed as political window dressing—the bland face of a neutral court presenting its opinion in understated tones. The real battle lines are illuminated in the concurrence and the dissents.

22. For an argument on this point, see Larry Catá Backer, *Race, "The Race," and the Republic: Reconceiving Judicial Authority After* Bush v. Gore, 51 CATH. U. L. REV. 1057, 1107 (2002) ("In the name of equal protection and the new realities of federalism, *Bush II* applied *Patterson* and *Bouie* to foreclose Florida's opportunity to recount ballots that were disproportionately cast by African-American and Jewish voters.") (referring to the two civil rights cases relied on by the *Bush II* majority—*NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958) and *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

23. These acts included not only those in connection with the casting of the votes in the November, 2000 election, but also certain acts leading to the election itself. Much of this was explored in the course of investigations of the Republican Party prompted by civil rights complaints made after the election. *See, e.g., Nation Investigation Reveals Florida Officials Shut Out Tens of Thousands of Black Voters on Election Day*, U.S. NEWSWIRE, Apr. 12, 2001, *available at* LEXIS, Nexis Library, News file (describing pending NAACP lawsuit charging state officials with violating the Fourteenth Amendment and the 1965 Voter Rights Act and March interim assessment of the U.S. Civil Rights Commission which uncovered evidence that will likely lead to findings of probable discrimination). The Civil Rights Commission eventually issued a report concluding that the November 2000 election in Florida was marred by widespread discrimination against minorities. *See* Jonathon L. Entin, *Equal Protection, the Conscientious Judge, and the 2000 Presidential Election*, 61 MD. L. REV. 576, 589 n.91 (2002). Two commissioners dissented from the report. Entin, *supra*, at

primarily through the invocation of the judicial power. By cloaking their actions in judicial legitimacy, the political parties litigating a political dispute were able to extend the character of that legitimacy to their actions: objectivity, fairness, neutrality, and respect for the superiority of law.

I do not intend to speak to the doctrinal nuance of the *Bush I* or *Bush II* decisions. I will not laud or decry the anti-judicial or counter-judicial character of the decisions.[24] Instead, I will accept them at face value. So accepted, I believe that the *Bush* decisions contain a substantial silver lining. The *Bush* decisions demonstrate the potential for invoking the rule of law, manifested in the courts as judicial legitimacy, against itself. The cover of neutrality, objectivity, and fairness offered by judicial proceedings, converts politics into its opposite, and makes political decisions, masquerading as judicial decisions, all that much harder to undo. It is to the political potential of the juridification of political struggle, the silver lining of the *Bush* decisions, that I mean to draw your attention in this Article. My object, then, is to look at the possibilities that the *Bush* decisions offer any group seeking the cover of judicial legitimacy to advance their various causes.[25] This is an equal opportunity silver lining—available to any who invoke its forms and methods. Both *Bush* opinions evidence the extent to which it now appears unremarkable that courts have become part of the process of deciding even the most fundamental of political issues.[26] To that end, the only things needed

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576; *see also* Edward Walsh, *Settlement Reached in Fla. Election Suit*, WASH. POST, Sept. 4, 2002, at A04.

24. For a discussion, see Backer, *supra* note 22, at 1096 ("Ironically, the assertion of authority by the Supreme Court in *Bush I* and *Bush II* might provide a principled basis for future application of the Supreme Court's new doctrine of lawmaking as an extra-judicial act and may invalidate the actions of the Supreme Court itself.").

25. In another context I have explained:

> The instrumentalities of law, like those of theory and philosophy, have been used both to cloak and unmask the relationship between authority and power. '[T]he legal system itself was merely a way of exerting violence, of appropriating that violence for the benefit of the few, and of exploiting the dissymmetries and injustices of domination under cover of a general law.' Yet, law accomplishes these tasks under a cover of neutrality and impartiality.

Larry Catá Backer, *Foreword: Constituting Nations-Veils, Disguises, Masquerades*, 20 PENN. ST. INT'L. L. REV. 329, 330 (2002) (quoting MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 88 (Robert Hurley trans., Vintage Books 1990) (1976)).

26. "In other words, representation increasingly is being channeled through the para-parliamentary routes of the bureaucracy, the judiciary, and neo-corporatist partnerships with the consequent diminution in importance of the democratic institutions of parliament and parties." Susan D. Philips, *New Social Movements and Routes to Representation: Science versus Politics, in* THE POLITICAL INFLUENCE OF IDEAS: POLICY COMMUNITIES AND THE SOCIAL SCIENCES 57, 60 (Stephen Brooks ed., 1994).

are an attention to the appropriate form of addressing courts in these matters, and an invocation of those verbal formulae, which like wizard's incantations, turn politics into a dispute cognizable before the courts.

The American polity, from its highest to its lowest members, have been quick to see this fundamental lesson of the *Bush* cases. Litigants have been quick to cite the *Bush* opinions in a variety of different cases, which, in the very little time that has elapsed since the decision was rendered, has generated nearly one hundred references in published and unpublished judicial opinions.[27] The courts have been less enthusiastic. But resistance has been sporadic, at best. To frame the response of litigants to the *Bush* vases, I first invoke the methodologies and outlook of LatCrit theory. LatCrit theory, one of the several critical legal movements with a progressive political agenda emerged as theory principally within the academic legal community in the United States,[28] ironically provides one of the best conceptual bases for understanding the form and nature of the success of traditionalist political communities in the *Bush* cases. This grounding in theory provides the basis for identifying eight core lessons which can be extracted from the *Bush* cases. The Bush cases provide lessons in traditionalist garb, lessons that are crucial for effectively using the law against itself. I then examine the ways courts have struggled to identify and internalize these lessons of the *Bush* decisions in the cases producing opinions citing to either *Bush* case. The principal moral from this romp through the cases should be a cause for concern. The rule of law, treated as object rather than as foundation, runs the danger of being reduced to mere niceties of behavior and linguistic facades for academic, judicial or institutional discourse. When anyone can use the law against itself, the system itself is more open to failure.

II. THE *BUSH* OPINIONS: LATCRIT THEORY APPLIED

LatCrit theory is still in its formative stages of development as theory applicable to an understanding of the enterprise of law.[29] Its

27. For purposes of this article I used all relevant cases retrieved from a Westlaw search using the search terms—Bush /6 Gore—from the "All Federal and State Cases" database on March 9, 2003. This search retrieved 97 cases.

28. For a review of LatCrit as a theorizing stance, political movement, and community, see generally LATCRIT, LATINA AND LATINO CRITICAL THEORY, *at* http://www.latcrit.org (last visited Oct. 10, 2003).

29. For a discussion of one of the origins of LatCrit theory in the rich history of Chicano Studies, see Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143, 1159 (1999) ("The study of language rights, immigration, and citizenship issues—all central to the Latina/o experience in the United States—had not been focused upon by CRT. Consequently, the unexplored questions deserved the scrutiny

meaning and scope has not yet been bound by a *credo* or subjected to an ideological test for purity. These "deficiencies" constitute its strength as a means of approaching problems of American law in contemporary society.[30]

> LatCrit theory provides us with a basis for approaching *law* in this country; it provides the basis for judging the results of and participating in the political, legislative and judicial life of this country with equality and dignity.[31] In this way, LatCrit theory provides us with a roadmap. It provides us with the means of becoming conscious of the meaning and effect of the choices we make in living our lives as individuals and as part of such multiple communities to which we belong.[32]

Frank Valdes argues that "for [a] legal theory to work—to be 'worth it'—it must embrace and perform four interrelated or overlapping functions."[33] Professor Valdes identifies these as: (i) the production of knowledge; (ii) the advancement of transformation; (iii) the expansion and connection of struggles; and (iv) the cultivation of community and coalition.[34] "In the critical race and LatCrit context, this call to a more self-reflective form of scholarship amounts to a re-visioning of the political to include pragmatist knowledge

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offered by LatCrit theorists. Indeed, Latina/o subordination, and racial oppression generally, cannot be fully understood without consideration of these important issues.").

30. For a discussion of approaches to the "meaning" and "scope" of LatCrit Theory, see, for example, Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1096 & n.23 (1997) [hereinafter Valdes, *Under Construction*]. For a discussion of the early history of LatCrit Theory, see Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) [hereinafter Valdes, *Poised at the Cusp*].

31. For just one of a growing number of examples of this type, see, for example, Yvonne A. Tamayo, *"Official Language" Legislation: Literal Silencing/Silenciando la Lengua*, 13 HARV. BLACKLETTER L. J. 107 (1997). One should remember, however, that "[l]aw is neither the truth of power nor its alibi. It is an instrument of power, which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other, non-juridical mechanisms." MICHEL FOUCAULT, *Powers and Strategies, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 134, 141 (Colin Gordon ed., 1980).

32. Larry Catá Backer, *Not a Zookeeper's Culture: LatCrit Theory and the Search for Latino/a Authenticity in the U.S.*, 4 TEX. HISP. J. L. & POL'Y 7, 11 (1998).

33. Valdes, *Under Construction*, *supra* note 30, at 1093.

34. *Id.* at 1093-94; *see also* Valdes, *Poised at the Cusp*, *supra* note 30, at 53-59. There are several articulated variations of this basis of theory: "LatCrit embraces postmodern concerns through four emphases: 1) production of partial, specific, and subjugated knowledge; 2) construction of transformative knowledge applicable to concrete social change; 3) anti- essentialist/intersectional ideals; and 4) coalitional/community organizing." K.L. Broad, *Critical Borderlands and Interdisciplinary, Intersectional Coalitions*, 78 DENV. U. L. REV. 1141, 1144 (2001) (citing SHANE PHECAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS (1994)).

production."[35] The turn to practical knowledge—to a theoretics merged with the contextual to produce knowledge finely tuned for the problems—is the solution to which requires a resort to theory.[36] Thus, the four overlapping functions can work well together within the context of LatCrit.[37]

A. *The Production of Knowledge*

Knowledge functions as both a conduit and a barrier to socio-political and legal change.[38] In law, these dual functions are clearly apparent in connection with the struggle of sexual minorities for toleration[39] and acceptance in the United States.[40] The way that

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35. Gil Gott, *Identity and Crisis: The Critical Race Project and Postmodern Political Theory*, 78 DENV. U. L. REV. 817, 834 (2001).

36. *See, e.g.*, ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN A POST-CIVIL RIGHTS AMERICA 128-49 (1999) (noting the increase focus on contextualized knowledge within critical race theory).

37. As Berta Hernandez-Truyol suggested:

> Yet, we have the struggles in common. We have experienced colonization both within and outside these *fronteras*; we have been subordinated peoples. These commonalities are valuable assets for the production of knowledge, which in turn will better prepare us for the transformations that are prerequisites for liberation. These shared struggles can be a location in which to commence valuable coalitional work and community building.

Berta Esperánza Hernandez-Truyol, *LatIndia II—Latinas/os, Natives, & Mestizajes—A LatCrit Navigation of Nuevos Mundos, Nuevas Fronteras, and Nuevas Teorias*, 33 U.C. DAVIS L. REV. 851, 872 (2000).

38. Knowledge, and especially the basis of scientific knowledge, or truth, has been contested since the mid-twentieth century. *See* LEWIS PYENSON & SUSAN SHEETS-PYENSON, SERVANTS OF NATURE: A HISTORY OF SCIENTIFIC INSTITUTIONS, ENTERPRISES AND SENSIBILITIES 5-22 (1999) (summarizing the traditional understanding of knowledge and offering a critical, but good, summary of the central points of the post-modernist critique).

39. *See* Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 U. FLA. L. REV. 755, 759 (1993) ("[C]urrent notions about protecting society from offensive conduct are fundamentally incompatible with freeing consensual sexual conduct from criminal regulation.").

40. *See* Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 541 (1996), explaining:

> [I]t is necessary to appreciate the position of courts both within law (understood as a kind of systematizing of social (hortatory) reality) and within the popular culture which gives both courts and law their form and function. This position becomes most apparent in the context of formal social control of sexual practice. It is especially acute when courts are confronted with the task of delineating the relationship of law (as formalized hortatory reality) to social sexual practices (as temporal popular reality) because courts serve as both a source and reflection of the popular culture in which they reside. Popular culture feeds the courts with the materials ('real life

knowledge is constructed and then disseminated by and through the courts can have significant effects on the course of litigation and the character of legal development. Again, the examples from the struggle by sexual minorities are telling.[41] "Knowledge in this perspective is not only or even primarily the systematized, formalized knowledge of the academic world, nor (merely) the scientific knowledge produced by sanctioned professionals."[42] Knowledge is both an ends and a means. To control the production of knowledge is to control a fundamental lever of power within any organized society.

The *Bush* cases demonstrate the power inherent in the cultivation and production of knowledge. The knowledge produced was of a peculiar kind—LatCrit's "partial, specific, and subjugated knowledge."[43] It evidences the power of the successful manipulation of popular visions of the world. Deployment of forms of knowledge of both the voters involved and the voting methods used, the former as foreign, stupid or non-white, the latter odd but easy enough to understand by other Americans, served as an effective sub-text to the litigation's search for the meaning of "fairness."[44] The *Bush* cases internalize the LatCrit focus on the production of knowledge by appropriating[45] and recruiting legitimacy.[46]

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situations') through which courts can engage in the constant telling and retelling of these stories through 'cases.'

41. Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 612 (1998) (examining "the way courts transmogrify narrative in the construction of judgments that serve to regulate the sexual conduct of sexual minorities").

42. RON EYERMAN & ANDREW JAMISON, SOCIAL MOVEMENTS: A COGNITIVE APPROACH 49 (1991) ("It is rather the broader cognitive praxis that informs all social activity. It is thus both formal and informal, objective and subjective, moral and immoral, and, most importantly, professional and popular."); *see also* HARRY REDNER, *Knowledge and Authority*, *in* THE ENDS OF SCIENCE: AN ESSAY IN SCIENTIFIC AUTHORITY 95 (1987) (explaining that the relationship between scientists and scientific critics is "mutually dependent" and attempting to establish "a political science of science").

43. Broad, *supra* note 34, at 1144.

44. The *Bush* cases, of course, were neither the only nor the first instances of this crafting of knowledge on which a certain jurisprudence is built. *See, e.g.*, PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999) (examining the creation of multiple versions of Reconstruction history and its effects on constitutional law development).

45. *See* discussion *infra* Part III.E.

46. *See* discussion *infra* Part III.G.

B. *The Advancement of Transformation*

Knowledge is a critical tool for transformation. To advance a particular knowledge is to advance social change. LatCrit shares much with the emerging disciplines of critical race theory and queer theory. "The study of how race, ethnicity, and culture join ranks with gender and sexual orientation to erect hierarchical social barriers must be central to Critical Race Theory scholarship if inclusiveness is to be achieved in its project of social transformation."[47] For some within LatCrit, the embrace of the transformative potential of law, theory, and action, alone or in some combination, is a critical justification for the theoretical stance.[48] A sense of the impossibility of changing the structure and forms of hegemony within our society sometimes leads to the call for the establishment of a counter-hegemony as the optimum form of resistance.[49] I am less sure about the revolutionary potential of even the most radical stance.[50] The power of the hegemony of a system of norms provides the basis of the disciplines that infiltrate all aspects of social and economic life. [51] While resistance to the strictures of formal rules and law is possible—the black letter is easy to identity and thus resist. [52] It is far harder to overcome the application of the normative framework underlying those rules. That application exists in virtually every aspect of lives lived. The disciplines, as Michel Foucault has well explained, can wear us down and exact the sort of conformity that the black letter might be incapable of achieving.[53]

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47. Celina Romany, *Gender, Race/Ethnicity and Language*, 9 LA RAZA L. J. 49, 50 (1996).

48. "The importance of practicality commits LatCrit theory to the advancement of transformation—the creation of material social change that improves the lives of Latinas/os and other subordinated groups." Valdes, *Under Construction*, *supra* note 30, at 1093.

49. RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION 143 (1994).

50. "Revolution is perverse; it is ultimately little more than an extreme form of the traditional hegemonic enterprise of 'community.' Revolution has no place in the revaluation enterprise. And worse, it seeks stasis, permanence, cultural immobility within the norms its chooses. Once the optimum state is reached so will some sort of eternal cultural equilibrium . . . . There can be no victory 'against' culture, there are only small revolutions within culture." Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law, in* LEGAL QUEERIES LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185, 191 (Leslie J. Moran et al. eds., 1998).

51. *See id.*

52. *See id.*

53. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 182-183 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1975) (explaining that discipline is a "'value-giving' measure" through which conformity is achieved).

But transformation does not guarantee either the direction of changes (progressive or traditionalist), the extent of change (large or small), or the moral value of the change (good or bad). The *Bush* cases evidence again the power of ideas to escape the containment of their origins. From the perspective of the status quo, the *Bush* cases do not suggest transformation so much as perversion.[54] Indeed, the lessons I draw from these cases comprise a catalogue of abuse long in the making by those of all political persuasions who have resorted to the courts as the forum of politics of last resort.[55] It is thus with a bit of irony that the lessons of the *Bush* cases are consonant with Professor Levinson's expression of the notion that:

> *Bush v. Gore* has made [her] more aware not only of "developments" in American constitutional culture such as the ever-increasing supremacy the Supreme Court has assigned to itself, but also of unchanging elements of our culture that are extremely important and deserve to be recognized, discussed, and even criticized.[56]

The *Bush* cases internalize the LatCrit focus on transformation by being literal[57] and by recruiting legitimacy.[58]

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54. On the long term changes to the structural dynamics of the Republic, see Larry Catá Backer, *Race*, *supra* note 22, at 1069-79 (arguing that the *Bush* cases narrow the traditional judicial power to interpret statutes by creating a new interpretation/legislation distinction and broaden the power of the federal courts by creating a "negative federal question doctrine").

55. "Students of law and politics . . . have long regarded the transformation of political questions into litigation as distinctive of the United States." Jefferey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies Over Land Use in France, Germany, and the United States*, 29 LAW & SOC'Y REV. 475, 475 (1995) (describing the rise of similar patterns in France and Germany). Compare the use of the courts by the National Association for the Advancement of Colored People in the first half of the twentieth century, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976), and the role of judicial action for gay rights organizations attempting to effect social and political changes with respect to sexual orientation discrimination, see William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship*, 1961-1981, 25 HOFSTRA L. REV. 817 (1997), with the equally judicially sensitive activities of advocates of the so-called pro-choice movement, see DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT : FROM POLITE TO FIERY PROTEST (1994).

56. Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons,* 5 LAW & CONTEMP. PROBS. 29 (Summer 2002) (discussing the alterations and development of the Federal Constitution).

57. *See* discussion *infra* Part III.B.

58. *See* discussion *infra* Part III.G.

C. *The Expansion and Connection of Struggle*

In order to build a school of thought, and to maximize the power of that school to participate in discussions with political, cultural, and legal effect, a certain critical mass must exist. This basic understanding of political science forms a core of the LatCrit project. In the case of critical studies in general, and LatCrit in particular, the most promising connections may be found between groups with common characteristics.[59] Shared subordination can be a powerful glue for engaging in common political and legal struggle. Yet, there is tension even within similarities.[60] More importantly, perhaps, those at the top of the hierarchy do strike back—and hard:

> The response of the dominant, norm-setting groups in the United States has been evident in the two campaigns which those groups have so effectively waged since the 1970s. The first is that of the "equality of opportunity" crusade. The second is that of expansion; the willingness of dominant society to bring certain portions of the populations of once marginalized groups "into the fold." . . . By saying, in effect, "you are white," by arguing that critical basic cultural norms are shared, and by making subtle distinctions based on home country, racial hierarchy, and economic status, dominant culture can minimize the actual threat to its dominance and isolate more clearly those who would challenge the application of its norms . . . .[61]

59.

> The disruption of hegemonic tranquility, the ambiguity of discursive variability, the cacophony of polyglot voices, the chaos of radical pluralism, are the desired by-products of transculturation, of mestizaje. The pursuit of mestizaje, with its emphasis on our histories, our ancestries and our past experiences can give us renewed appreciation for who we are as well as a clearer sense of who we can become.

Hernández-Truyol, *supra* note 37, at 871 (quoting Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 220 (1994)).

60. Consider the tensions between Afro-Mexicans and others. "[I]n spite of [the] impressive historical, social and cultural legacy [of Afro-Mexicans], Afro-Mexicans exist today as a marginalized group. They are arguably, the least represented and most oppressed of all of Mexico's ethnic groups, and have yet to enter the mainstream and be recognized as full citizens." Jameelah S. Muhammed, *Mexico, in* NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY 163, 164 (Minority Rights Group eds., 1995).

61. Larry Catá Backer, *Pitied But Not Entitled: The Normative Limitations of Scholarship Advocating Change*, 19 W. NEW ENG. L. REV. 59, 63-64 (1997); *see also* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1426-43 (1998) (describing dominant group strategies and action).

The *Bush* cases provide a masterful example of LatCrit's notion of the need for the expansion and connection of struggle.[62] The great irony in the *Bush* cases, an irony which can be found throughout the opinions, is that LatCrit's ideas have been turned upside down—that is, they have been used against LatCrit itself. Here, the "struggle expanded" is that of a traditionalist view of law, politics, and social ordering and the "connection of struggle" is made by deploying the instruments of progressive change to connect groups resisting socio-political movement in that direction. Ironically, perhaps, the *Bush* opinions can also be read as suggesting no more than the notion that social elites constantly struggle over the "value" of the variables which constitute our conceptions of "justice" and "fairness."[63] But communities can be built around those conceptions.[64] And the values assigned can change as the character and composition of social elites change.[65] The *Bush* cases evidence participants in the legal system deliberately internalizing the LatCrit focus on struggle through law. The *Bush* cases do LatCrit one better, by being literal,[66] attacking precedent,[67] creating contradiction,[68] exploiting uncertainty and sentimentality,[69] and by overwhelming the law through its own devices.[70] The embrace of struggle by the political communities engaged in the litigation leading to the *Bush* decisions produces a great irony: the great lessons of LatCrit are being deployed most successfully by the communities against which LatCrit theorizing was originally deployed.

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62. *See Bush I*, 531 U.S. at 70; *see also Bush II*, 530 U.S. at 1046.

63. *See generally* Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 6–10.

> Such values do not exist, finite and substantially immutable, like so many pebbles on a shore. Rather, they exist as an expression of the aggregate effect of our taboos as mixed together and digested by those who are called to give this expression effect. Value, in this sense, is judgment and ordering. It is the means by which we take our taboos and order them, rank them, blend them, in a way that makes sense to the 'valuer'. Valuation is both time and input sensitive. It changes even as events giving rise to the need for valuation change.

Id. at 6.

64. *See id.*

65. *See id.*

66. *See* discussion *infra* Part III.B.

67. *See* discussion *infra* Part III.C.

68. *See* discussion *infra* Part III.D.

69. *See* discussion *infra* Part III.F.

70. *See* discussion *infra* Part III.H.

D. *The Cultivation of Community*

Professor Valdes suggests that "[t]he task awaiting LatCrit theory consequently must be to generate frameworks and postulates of inquiry, understanding and action designed to yield intra-Latina/o cooperation, accommodation and coordination in varied social or legal contexts."[71] But Professor Iglesias has cautioned that:

> If LatCrit II counsels the need to remain ever-vigilant lest we be confused, seduced and ultimately betrayed by the human tendency to seek community in the sentimentality and pseudo-security of sameness, the intellectual and political advances made at LatCrit III show us the substantial pay-offs to be gained by resisting the impulse to seek or settle for sentimentalist communities.[72]

The *Bush* cases evidence nicely the power of forging community.[73] More importantly, the *Bush* cases demonstrate that the power of forging community is not unique to progressive communities or even established communities. All sorts of individuals can be forged into malleable communities through which the project of struggling can

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71. Valdes, *Poised at the Cusp*, *supra* note 30, at 16; *see also* Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199, 203-04 (1997) (stating that LatCrit theory itself may evidence possibilities of political pan-ethnicity based on accommodation and coordination respecting difference).

72. Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 576-77 (1999). Iglesias writes:

> By this I mean communities where solidarity is more an image conjured through superficial feelings of identity and hence of momentary closeness, rather than a lived commitment, in solidarity, to relentlessly reveal and steadfastly dismantle relations of dominance and subordination that subvert the potential for authentic human sharing and connection—not just *outside*, but also *within* the LatCrit community we aspire to construct.

Id. (citing Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996/1997)). Professor Valdes writes that:

> critical coalition is based not simply on a fortuitous or temporary convergence of interests but, rather, on a critical and self-critical commitment to anti-subordination principles and practices—which must be applied and respected both inwardly (in the operation of the coalition) as well as outwardly (toward the dismantlement of external structures of oppression).

Francisco Valdes, *Theorizing "Outcrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—Racecrits, Queercrits and Latcrits*, 53 U. MIAMI L. REV. 1265, 1269 n.17 (1999); *see also* Yxta Maya Murray, *Towards Interest Convergence: Coalition Building Requires Connection Within as Well as Without*, 33 CAL. W. L. REV. 205 (1997) (discussing overcoming racism and homophobia within the Mexican-American community).

73. *See Bush I*, 531 U.S. at 70; *see Bush II*, 531 U.S. at 1046.

be advanced.[74] Through the *Bush* cases, the communities that came together consisted of certain self-described traditionalist judicial and political communities. The coming together took identifiable form in the course of the juridification of a political battle that provided a means for using the authority of the judge to advance the transformative agenda of its group. The *Bush* cases evidence the effectiveness of LatCrit community—building ideals grounded on the core progressive concepts of justice and fairness, even when deployed by non-progressive communities.[75] More successfully than the progressive communities from which these concepts are borrowed, the *Bush* cases internalize the LatCrit focus on community by being consciously political[76] and exploiting uncertainty and sentimentality.[77]

LatCrit addresses both theory and practice. Theory is less than half the story, and for purposes of the practicing bar, perhaps the least interesting part of the story. Much more important to those elements of the bench and bar that deploy theory are the lessons of the *Bush* cases as practiced—as digested and reintroduced within the everyday work of the courts. It is to an analysis of those lessons of the *Bush* cases, and the absorption of LatCrit ideal within the everyday practices of the courts, that this article now turns.

III. *BUSH* IN THE COURTS: THE EIGHT GREAT LESSONS OF THE *BUSH* CASES APPLIED

The character of the lessons I have drawn are substantially methodological, and necessarily judicial. These lessons are not hypothetical, nor are they the product of wishful thinking. Rather, these are the lessons, crystallized in the *Bush* cases that have been internalized by the courts and applied by them in the ninety-seven

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74. *See Bush I*, 531 U.S. at 70; *see Bush II*, 531 U.S. at 1046.

75. Commentators whom are generally viewed as influential, if only because of their positions within elite law schools have suggested a variant of this view:

> In the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will draw the constitutional map as we have known it. . . . And, not surprisingly, this same bloc of five conservatives handed the presidency to George W. Bush in *Bush v. Gore*. By doing so, they helped ensure a greater probability for more conservative appointments and more changes in constitutional doctrine. The conservative five are not through yet. They have selected a president to keep their constitutional transformation going. And if George W. Bush has his way, they may have only just begun.

Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052-53 (2001).

76. *See* discussion *infra* Part III.A.

77. *See* discussion *infra* Part III.F.

judicial opinions, published and unpublished, issued since the publication of the *Bush* decisions.[78] In these opinions we are provided with a window onto the ways in which litigants have attempted to extract meaning from the *Bush* decisions far beyond its officially sanctioned reading, and how judges have attempted to situate the *Bush* decisions within the body of traditional American case law.

For purposes of this article I have split these methodologies into eight categories: (1) "Be Consciously Political;" (2) "Be Literal;" (3) "Attack Precedent;" (4) "Create Contradiction;" (5) "Appropriate;" (6) "Exploit Uncertainty and Sentimentality;" (7) "Recruit Legitimacy;" and (8) "If All Else Fails, Overwhelm Law Through its Own Devices." Each of the categories suggests a lesson for litigation derived from the *Bush* decisions as expressed in subsequent litigation. Each presents a unique mechanism for the deployment of law in courts. These methodologies are neither mutually dependent not consistent. They are not elements of a singular system or political philosophy. They are not unidirectional in a political or ethical sense. These methodologies are the tools through which one can reach through the veil of form to reach the substance of power.[79]

In its least dangerous sense, the lessons suggest the ways in which the juridification of politics has become institutionalized in federal and state courts. This is not juridification in the sense that Habermas has used it.[80] The term, as I use it here, refers to the imposition of *judicial* control of the mechanics of the "rule of law" in

78. See *supra* note 27 for an explanation of the methods used to find the cases examined.

79. Veiling is both necessary and valuable to those profiting from the operation of the mechanics of state power:

> Much of what passes for the study of law in the United States assumes the answers to the difficult foundational questions, so that time can be spent worrying about the most efficient means of enforcing those assumptions through law, or investigating the utility of law to serve the assumptions. Even at its most theoretical, this American approach is practical law in the service of the status quo, of the *grundnorm*, the justificatory principles on which social ordering is based. The more difficult task, the more discomfiting task, requires focusing a critical eye on the very foundations on which legal and other ordering systems are based. Such an undertaking constitutes the core strength of any normative system—the power to provoke, survive and transform itself on the basis of invited constant self-examination.

Backer, *supra* note 25, at 331 (citing HANSKELSON, GENERAL THEORY OF LAW AND STATE (1945)).

80. Habermas identifies the process as one of instrumental legalism serving post-Westphalian nation-states and free market economies which necessarily fractures an otherwise potentially singular human community. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (II, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON) (1987).

spheres previously governed by the legislature or the executive, or shared between the three.[81] The courts now rival the legislature as the venue *par excellence* for the resolution of political issues of every description. This is a worldwide phenomenon.[82] But the lessons drawn from these cases also suggest the possibilities of positive methodologies for the use of law against itself as both the very instrument through which legal orders can be perverted, subverted, or reinvented, and as the means of calling into question the very legal structure on which the legitimacy of state organization rests.[83] Each illustrates the extent to which even the most politically conservative forces in our country can use the law against itself through the invention or deployment of tools that are then available for use by anyone else clever enough to seize the potential each represents. Lastly, each of these methodologies suggests the enormity of the possibilities of consequences for politically expedient actions, and might remind one of the utility of the sort of judicial conservatism that has been too little heard since the retirement of Justice John Marshall Harlan.[84]

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81. For a discussion of the character of this judicial revolution in rule of law regimes, see Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges* (May 1, 2003) (unpublished manuscript, on file with author).

82. Ran Hirschl, *Resituating the Judicialization of Politics:* Bush v. Gore *as a Global Trend,* 15 CAN. J.L. & JURISP. 191 (2002). Hirschl argues that judicialization must be understood as encompassing four significant new areas of judicial decision making: "(a) core executive prerogatives (for example national security matters and macroeconomic policy-making); (b) foundational 'nation-building' processes; (c) fundamental restorative justice dilemmas; and (d) political transformation, regime change, and electoral disputes." *Id.* at 192; *see also* RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION 97-117 (1998) (discussing the strategic use of litigation by institutions of the European Union and others resulting in the broadening of the scope of judicial involvement in disputes).

83. *See* Bernard Schwartz, *"Brennan vs. Rehnquist"—Mirror Images in Constitutional Constructions*, 19 OKLA. CITY U. L. REV. 213 (1994), for a discussion of judicial activism on the left and the right. Applying a conservative measure to the word, "activist", Judge Easterbrook recently concluded that:

> By my standard, *all nine [current U.S. Supreme Court justices] are activist.* That all nine subscribe to in principle, and use in practice, the noxious canon of constitutional doubt is proof enough of this. Each of the nine declared more federal statutes unconstitutional in each Term I examined than John Marshall did in a 34-year career. And there does not appear to be any significant difference on the 'activism' scale between liberals and conservatives.

The Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?,* 73 U. COLO. L. REV. 1401, 1409-10 (2002).

84. On the jurisprudence of Justice Harlan, see, for example, Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan,* 51 U. CIN. L. REV. 545 (1982). Dane writes:

A. *Be Consciously Political*

Suits with political thrust amplify the voices of litigants by invoking the legitimacy of the forum in which they speak.[85] The courts have traditionally provided a space where culturally significant speech may sometimes be made and recorded for future use outside the legal sphere.[86] "[T]he Supreme Court's voice in the national dialogue is obviously heard, and its views shift the focus of national discourse."[87] There is now a cottage industry devoted to the production of books and articles describing the business of politics by judicial means.[88]

The courts provide a forum for legitimating discourse. The possibility of legal liability amplifies the sound of the discourse

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> Patient, unhurried reflection insures that the Court does not make unwise, unnecessary decisions which may only confuse lower courts or make their functions needlessly difficult. But there was for Harlan an even more basic tenet of sound judicial decision-making that compelled the meticulous exercise of self-restraint: an individual Justice must avoid making decisions solely on his individual predilections. Harlan abhorred a judicial decision founded on the impulse that 'something should be done' or that looks no further than to the 'justice' or 'injustice' of a particular case; such decisions are not likely to have lasting influence.

Id. at 565-66; *see also* Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251; Drew S. Days, III, *Justice John M. Harlan*, 12 N.C. CENT. L.J. 250, 251 (1981).

85. I have, in other contexts, spoken of the "prophetic" possibilities of litigation, especially with respect to demands for results at odds with current expressions of social norms. *See* Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000); *see also* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1333 (1995) ("The traditional lawyer seeks to win some judgment for her client, the law reform litigator to achieve some structural change through a successful court challenge.").

86. The courts in the United States have traditionally served as the place for:

> the struggles and contestations which may produce cultural movement. It is the site where "losing" arguments are articulated and memorialized. Thus produced, these visions find their way back into non-judicial social discourse. In this function, and in this function only, might courts *indirectly* serve as a means of cultural movement.

Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845, 869 (1999).

87. Roy B. Fleming et al., *One Voice Among Many: the Supreme Court's Influence on Attentiveness to Issues in the United States, 1947 - 1992*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 21, 53 (David A. Schultz ed., 1998) (arguing that the Supreme Court action appears to have an influence on political discourse).

88. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); *see also* Levinson, *supra* note 56.

within society.[89] This is litigation that educates even as it legitimates. It is a cost-effective way of getting the attention of political and media elites. Those elites, when attentive, can do much to spread a message or influence the course of democratic debate within our society.[90] Litigation is politics by other means.

This joining of politics and litigation is nothing to be ashamed of. Indeed, there is nothing more traditional in the West than this union of politics and litigation. Its origins go back to the Roman Republic.[91] Americans have understood since the founding of the Republic that the judicial branch could be used for two purposes—to settle private disputes and to derive political advantage.[92] A well-established school of political theory is based on the characterization of the American polity as a multi-leveled amalgamation of groups fighting for political influence and advantage over other groups.[93]

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89. For example, Southern segregationists might have been comfortable ignoring *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that separate but equal educational facilities violate constitutional rights of children and ordering remedial action), but found the cases far reaching remedies far more difficult to disregard. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 46 (1971) (affirming an extensive judicial remedial power to order school busing to enforce school desegregation orders). For an excellent discussion of *Swann*, see BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986).

90. *See, e.g.*, Kevin J. McMahon and Michael Paris, *The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism, in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 63 (David A. Schultz ed., 1998).

91. In his study of the last generations of the Roman Republic, Erich Gruen notes that:

> Waging of political warfare in the criminal courts had a long history. . . . From their inception the interests of justice were tempered with a generous mixture of politics. Two generations prior to the Ciceronian age established that pattern. It persevered to the end of the Republic. . . . Political significance resided in the opportunities available for prominent individuals or groups to gain ground on rivals and competitors.

ERICH S. GRUEN, THE LAST GENERATION OF THE ROMAN REPUBLIC 260 (1974).

92. Much of Hamilton's defense of judicial independence through lifetime appointment was grounded in fears that, in the absence of the independence afforded by serving during good behavior, judges would be subject to the whims of those who have control of judicial appointment. THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). As Hamilton explains:

> But it is not with a view to infractions of the [C]onstitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.

Id.

93. The value of that theory or its nuanced variations and successors, lies outside the scope of this paper. For a sampling of the mountain of material available, see FRANK BAUMGARTNER & BETH LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS AND POLITICS IN POLITICAL SCIENCE (1998). For some classic works, see ROBERT DAHL,

The last half of the Twentieth Century saw a proliferation of issues dressed up as "cases or controversies"[94] serving the political goals of an increasing number of both traditionalist[95] and progressive[96] causes. Currently, a host of non-governmental organizations and other litigants continuously use the courts to effect the sort of political and social change that is deemed unavailing in the political branches of government or in the hearts of the people.[97] Thus, for example, traditionalist religious groups have created an extensive network of organizations to impose conformity with their religious values, reconfigured as secular norms, on the general population.[98] One of the most prominent organizations in this war is

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WHO GOVERNS? (1961); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); PETER H. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE (1928).

94. Article III of the Federal Constitution limits the federal judicial power to cases or controversies. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

95. *See, e.g.*, LEE EPSTEIN, CONSERVATIVES IN COURT (1985) (discussing the modern rise in conservative activism and comparing the ways conservative and liberal interest groups use the judicial system); *see generally* ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA (1999) (examining the costs of religious involvement in politics and the extent of religious influence in politics).

96. For a discussion of two of the more well known examples, see GREGG IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE (1995), and KAREN O'CONNOR, WOMEN'S ORGANIZATIONS USE OF THE COURTS (1980); *see generally* Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOCIAL FORCES 944 (1980).

97. *See generally* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (2000); Kim Lane Scheppele & Jack Walker, *The Litigation Strategies of Interest Groups, in* MOBILIZING INTEREST GROUPS IN AMERICA 157 (Jack L. Walker, Jr. ed., 1991). Marc Galanter has suggested that in the context of political or "interest group" litigation, organized repeat players—whether business, social or political groups—most successfully pursue litigation. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95(1974).

98. *See* Jayanth K. Krishnan & Kevin R. den Dulk, *So Help Me God: A Comparative Study of Religious Interest Group Litigation*, 30 GA. J. INT'L & COMP. L. 233 (2002). The authors argue that the willingness of religious groups to achieve their public policy objectives depends not only on conventional factors—the normative rules for group behavior within the society, the availability of resources, the properties of the courts and the costs of alternative (usually legislative) approaches but also on "an *ideational* factor—that is, the normative and explanatory ideas of the groups themselves." *Id.* at 237. As the authors suggest:

> The call to litigation was not undifferentiated; legal advocacy took many different forms. Some of the earliest advocacy was designed largely to defend the evangelical sub-culture. . . but over time groups became increasingly concerned with what they perceived as the secularization and moral decay of the broader culture, as evidenced in greater mobilization in opposition to abortion rights. Some firms mobilized to protect abortion protestors against

the Rutherford Institute[99] and other similar groups have recently used the courts to educate the general population and move government to further its political, moral, and religious agenda.[100] The socio-cultural and political left has been no slouch either. The LAMBDA Legal Defense and Education Fund,[101] on the left, has been instrumental in mounting challenges to sodomy statutes and limitations on same sex marriage, and in promoting the adoption of

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considerable opposition; other groups such as Legal Action for Women and Life Dynamics facilitated malpractice lawsuits against abortion providers; still others focused on incremental policy-oriented litigation (e.g. bans on late term abortions, restrictions on stem cell research, parental and spousal notification).

Id. at 253.

99. The Rutherford Institute describes itself as follows:

> The Rutherford Institute is an international legal and educational organization dedicated to preserving human rights and defending civil liberties. . . . [T]he Rutherford Institute has emerged as a prominent leader in the national dialogue on civil liberties and equal rights. The Institute, a nonprofit, nonpartisan organization whose international headquarters are located in Charlottesville, Virginia, is comprised of a full-time staff of 50 and a network of more than 1,000 volunteer attorneys across the United States. Institute attorneys handle a full range of cases in the realm of civil liberties and human rights. The Institute's multi-faceted approach of integrating litigation and educational opportunities has made it a formidable leader in defending and teaching the Constitution. The defense of civil liberties and human rights through litigation and education are at the heart of the Institute's purpose.

THE RUTHERFORD INSTITUTE, ABOUT THE RUTHERFORD INSTITUTE: VISION OF THE INSTITUTE, *at* http://www.rutherford.org/about/default.asp (last visited Aug. 22, 2003). The Rutherford Institute was apparently also one of the forces behind the constellation of litigation against President Clinton, his wife, their friends and business associates. *Jones v. Clinton*, 57 F. Supp. 2d 719, 728 (E.D. Ark. 1999) (awarding Rutherford Institute costs related to President Clinton's misleading deposition testimony); *see also* Carol Rice Andrews, Jones v. Clinton: *A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV 1 (2001).

100. For a recent study of politically motivated litigation by religious groups for the purpose of imposing their legislative program on the polity through the courts, see Dale M. Schowengerdt, Note, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage,"* 14 REGENT U.L. REV. 487, 490 (2001/2002) (arguing "because judges have become potent agents of social change, they have become a particularly effective and salient weapon for groups with (minority especially radical minority) opinions.").

101. The mission statement of this organization provides that "Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work." LAMBDA LEGAL DEF. & EDUC. FUND, ABOUT LAMBDA: MISSION STATEMENT, *at* http://www.lambdalegal.org/cgi-bin/iowa/about (last visited Aug. 23, 2003). "Lambda Legal carries out its legal work principally through test cases selected for the likelihood of their success in establishing positive legal precedents that will affect lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS." *Id.*

anti-discrimination laws.[102] Politically motivated litigation can bring claims or public policy issues to the forefront of national (and legislative) attention. One of the conscious by-product goals of the recently filed reparations cases[103] has been to spur debate about the condition of the descendants of African slaves in modern day America.[104] On the other hand, litigation can as easily be used to

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102. For a description of Lambda's marriage project, see LAMBDA LEGAL DEF. & EDUC. FUND, MARRIAGE PROJECT, *at* http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=9 (last visited Aug. 2, 2003) ("Many lesbian and gay couples share in the same responsibilities as married couples but are denied the same legal and social support. The Marriage Project works to end this second-class status . . . .").

Lambda has been instrumental in the attempts to use the judicial and legislative processes to overturn the criminal law of sodomy:

> As recently as the early 1960s, all fifty states had some sort of criminal law that outlawed consensual sodomy. Today, a small handful of states do. Lambda's work, throughout our 30-year history, has always emphasized legal challenges and advocacy against such laws—because of both their direct and indirect harm to gay people. Our efforts will not stop until all of United States are "free."

LAMBDA LEGAL DEF. & EDUC. FUND, STATE-BY-STATE SODOMY LAW UPDATE, *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=275 (last visited Aug. 2, 2003). For the organization's anti-discrimination materials, see LAMBDA LEGAL DEF. & EDUC. FUND, ANTI-DISCRIMINATION, *at* http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=18 (last visited Aug. 2, 2003).

103. *See, e.g.*, Farmer-Paellmann v. Fleetboston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002) (seeking reparations for descendants of African-American slaves against, among others, the successors in interest to entities alleged to have profited from the institution of slavery). For a discussion of this action, see Paige A. Fogarty, Comment, *Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery*, 9 CONN. INS. L.J. 211 (2002); Andrew Brownstein, *Suits Bring Debate Over Slavery Reparations Into the Courtroom*, TRIAL, Dec. 2002, at 68-72. For a discussion see generally ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AN NEGOTIATING HISTORICAL INJUSTICE 283-307 (2000).

104. Thus, for example, Professor Ogletree, one of the important participants in the reparations lawsuits, explained in answer to the question:

> Do you think there is a way for this to be a non-divisive issue, for it to perhaps spark a national dialogue?:
>
> > I think that the dialogue is going to occur whether or not there is agreement on the merits of it. Any issue that involves race will spark dialogue. The hope is that it is a dialogue and not simply a monologue that people are talking to each other, and not past each other. That's the real challenge.

Alex P. Kellogg, *Talking Reparations With Charles Ogletree*, AFRICANA. (Aug. 28, 2001), *at* http://www.africana.com/articles/daily/index_20010828_1.asp; *see generally* Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (advocating reparations to bring African-Americans to full political citizenship in the U.S.); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) (containing a critical review of reparations for the internment of U.S. citizens of Japanese descent during the Second World War). This is a debate that has been a long time coming. *See, e.g.*, BORIS BITTKER, THE CASE FOR BLACK REPARATIONS

silence debate. SLAPP suits have been successful, to some extent, in this respect.[105]

The *Bush* cases are thus hardly unique in that respect. What makes the *Bush* cases different in effect, if not in kind, were the stakes and consequences involved. The justices were well aware of what they were doing. The Chief Justice declared that "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."[106] The Chief Justice and his allies suggest that the Supreme Court must intervene if an issue is important. "Count first, and rule upon the legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires."[107] The per curiam justices in *Bush II* suggest that "[w]hen contending parties invoke the process of the courts,"[108] the Supreme Court *must* act as referee. The Chief Justice exclaims that if the Supreme Court considers an issue, it must act.[109]

Political litigation has been moved up a notch—those who stood at the forefront of criticism of the activist judicial role in national politics and faulted the so-called liberal courts of the third quarter of

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(1973); Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations,* 147 U. PA. L. REV. 677 (1999) (arguing that a prerequisite to improving race relations is reparations)..

105. SLAPP is the acronym for strategic lawsuit (or litigation) against public participation. For a discussion of the effectiveness of SLAPP suits in environmental disputes, see GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 83-104 (1996). For a discussion of the reaction to SLAPP suits, see Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California,* 32 U.C. DAVIS L. REV. 965 (1999); Erin Malia Lum, *Hawaii's Response to Strategic Litigation Against Public Participation and the Protection of Citizens' Right to Petition the Government,* 24 U. HAW. L. REV. 411 (2001).

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

107. *Id.* (Scalia, J., concurring) (joining Court's issuance of a stay).

108. *Id.* at 100 (per curiam).

109. "[W]e must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe-harbor' provided . . . ." *Id.* at 111 (Rehnquist, C.J., concurring). Indeed, the Supreme Court itself has created a strong pattern of intervention in political (*Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Romer v. Evans*, 517 U.S. 620 (1996)), moral (*Davis v. Beason*, 133 U.S. 333 (1890); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973)), social (*Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)), and economic (*Lochner v. New York*, 198 U.S. 45 (1905); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Saenz v. Roe*, 526 U.S. 489 (1999)) affairs when it has suited the Court. Though it has on occasion repudiated earlier interventions, it has never repudiated the power to intervene.

the Twentieth Century,[110] have succumbed to the very political evil on which they made such a noise for themselves.[111] Courts, heretofore sometimes reluctant to embrace their political role, now appear to have the permission of the political left *and* right to abandon judicial conservatism and to become a full fledged member of the political branches of government.[112] *Bush* represents, then, the capstone to a century's worth of changes and lights the way to the future, one in which a necessary component of political action must be litigation.

The political possibilities inherent in *Bush* have not been lost on litigants. For example, political action groups have been successful in forcing the state of California to abandon punch-card election ballots.[113] This case is particularly interesting because of the way in which the rhetoric of *Bush* was used against a state government seeking to minimize its obligations to pay the legal fees of the successful parties.[114] Soon after *Bush*, litigants in Florida sought to

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110. Among the most influential and representative exponents of this view is former judge Robert Bork. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

111. For an argument suggesting that this is neither such a bad thing, nor "unconservative," see Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

112. *See, e.g.*, Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Mark Tushnet, *Law and Prudence in the Law of Justiciability: the Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002). This embrace, rather than acceptance, of the judicial role in political questions has occurred at the state level as well. *See* DONALD J. FAROLE, JR., INTEREST GROUPS AND JUDICIAL FEDERALISM: ORGANIZATIONAL LITIGATION IN STATE JUDICIARIES (1998). For an example of recent scholarly discussion of the abandonment of the restraints of the political question doctrine in context, see Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2003).

113. Common Cause v. Jones, 235 F. Supp. 2d 1076, 1076 (C.D. Cal. 2002). But the issue has gotten more complicated there as a result of the unexpectedly successful recall of California's governor in 2003. *See* Southeast Voter Registration Educ. Project v. Shelly, 344 F.3d 882 (9th Cir. 2003) (holding that use of punch card ballot machines in California gubernatorial recall election violated the equal protection of voters), *rev'd*, 344 F.3d 914, 914 (9th Cir. 2003) (hearing en banc) (holding that district court "did not abuse its discretion in concluding that plaintiffs would suffer no hardship that outweighed stake of State of California and its citizens in having election go forward as planned and as required by California Constitution.").

114. The state sought to reduce its payment obligation by arguing that:

> [T]he rates of some of Plaintiffs' attorneys are inappropriate to litigation of this type—in essence, "'that [a] Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn.'" This case hardly constituted a "farmer's barn." Quite the contrary, it affected at least 8.4 million registered California voters, and presented issues touching on fundamental—perhaps the most fundamental—democratic interests.

Common Cause, 235 F. Supp. at 1081 (citations omitted).

extend the Supreme Court's new equal protection standards from judicial to legislative acts.[115] The judiciary tends, for the moment, to give this short shrift.[116] Even the government has sought to use *Bush* for political ends.[117] The case was unsuccessfully asserted by the Charlotte County Florida Supervisor of elections as a basis for resisting otherwise statutorily lawful requests by newspapers "to provide to the [newspapers] for inspection the 'undervote' and 'overvote' ballots from the November 7, 2000 presidential election, segregated from all other ballots cast in the election."[118]

More interesting is the use of *Bush* in the political fight, conducted partly within the court system, to obtain voting rights in Presidential elections for United States citizens living in the territories of Guam, the Virgin Islands, and the Commonwealth of Puerto Rico.[119] One court used *Bush* as support for the proposition that the right to vote in Presidential elections belongs to the states (and its citizens) and not to individual citizens unconnected to a state.[120] On the other hand, there has been the glimmering use of

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115. "The Attorney General and various other parties who have filed comments argue that the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), should be construed to mean that an absence of specific reapportionment standards articulated by the Legislature beyond the constitutional standards results in arbitrarily drawn districts and a violation of equal protection." *In re* Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 831 & n.17 (Fla. 2002) (refusing declaratory judgment that state reapportionment plan is invalid).

116. Thus, the Florida court concluded that it would not "read the Supreme Court's decision in *Bush* as requiring the Florida Legislature to announce extraconstitutional standards which the Legislature would be required to follow in its reapportionment decisions. We therefore decline the invitation to expand upon the Supreme Court's decision in *Bush* in this regard." *Id.*

117. Sentinel Communications, Inc. v. Anderson, No. 01-48CA-SW, 2001 WL 688528, at *1 (Fla. Cir. Ct. Jan. 19, 2001) (describing request for ballots resisted by governmental agency on basis of *Bush*).

118. *Id.* In granting the writ of mandamus, the court rejected the argument that the request for ballots amounted to a vote recount prohibited by the mandate of the Supreme Court in *Bush*. *Id.* at *3.

119. This effort has been rejected by the courts. Iguartua de la Rosa v. United States, 32 F.3d 8, 9-10 (1st Cir. 1994); Attorney General of Territory of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984). Part of the effort involves the overturning of near century old precedent which limited the extension of Constitutional rights within the unincorporated territories of the United States. *See* Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197, 211, 217-18 (1903) (holding that only principles of fundamental justice, which are not co-extensive with Constitutional rights, extend to the inhabitants of the unincorporated territories).

120. Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001) (involving a U.S. citizen, formerly a resident of New York, seeking to invalidate New York election law that denied him an absentee ballot, available to N.Y. residents living abroad, but not to N.Y. residents now resident in a U.S. territory). The court explained that the "Constitution thus

Bush principles to attack, on international law grounds, the dependency status of unincorporated U.S. territories.[121] In ordering supplemental briefing, the district court expressed a strong belief in the questionable validity of the *Insular Tariff Cases*.[122] Judge Moore suggested that *Bush* confirmed the rule that "an individual citizen will be represented in a presidential election by her state electors, in a manner directed by her (elected) state legislature."[123] But U.S. citizens residing in unincorporated territories like the Virgin Islands have no representation in presidential elections, and that denial of the franchise might violate international law that is binding on the United States[124] An indirect use of the *Bush* case, no doubt, but an interesting political use of the consequences of *Bush* nonetheless!

B. *Be Literal*

Being literal invokes the principle—use of the law against itself—in the third form of its manifestation—to eliminate hypocrisy and double standard application of foundational norms. As much as people may hate to admit it, the strategy pursued by the NAACP after *Plessy*[125] does work, if only after a fashion.[126] Literal application of judicial holdings can have transformative effect. Being literal, forcing the courts, the legislature, and even society at large, to comply with the literal expression of judicial holdings becomes an indispensable part of any strategy seeking the use of law against itself.

The *Bush* cases again prove instructive. Consider how Chief Justice Rehnquist was able to deploy the race cases of the 1950s-70s against themselves. The Chief Justice applied these cases literally to

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confers the right to vote in presidential elections on electors designated by the States, not on individual citizens." *Id.* at 123 (citing *Bush*).

121. Ballentine v. United States, No. CIV. 1999-130, 2001 WL 1242571 (D.V.I. 2001) (involving a plaintiff, Ballentine, who sought a judicial declaration that the Revised Organic Act of 1954 serving as the basis of governance for the Virgin Islands, was null and void as exceeding Congress's power under Art. IV).

122. For a listing of the cases, see *Ballentine,* 2001 WL 1242571, at *5 n.11; *see, e.g.*, Balzac v. Porto Rico [sic], 258 U.S. 298 (1922).

123. *Ballentine,* 2001 WL1242571, at *14.

124. Judge Moore wrote: "Does such an arrangement violate international law in that it prevents, by constitutional structure coupled with the unilateral power of Congress, the United States citizen residing in the Virgin Islands from voting for those who make the laws that directly affect her?" *Id.* at *15.

125. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate but equal laws).

126. During the 1920s, the NAACP pursued a policy of litigation designed to use the courts to force states to provide equal facilities as required under *Plessy*. *See, e.g.*, KLUGER, *supra* note 55, at 132-37. A decade or more of precedents establishing the difficulty of enforcing the literal requirements of *Plessy* made it easier, after the 1930s, for the NAACP to directly attack *Plessy* itself. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

effect a confirmation of the election of George Bush. Ignoring Justice Ginsburg's plea to contextualize,[127] the Chief Justice applied *Patterson*[128] and *Bouie*[129] literally to permit the Supreme Court to discipline state supreme courts' power to interpret state statutes.[130] Shorn of their context, the Chief Justice reduced those cases to the proposition that state judiciaries have a much smaller ambit of authority with respect to the interpretation of statutes, generally, than the Supreme Court. That ambit was now reduced to those interpretations a superior (federal) court could decide did not "impermissibly broaden[] the scope of that statute beyond what a fair reading provided, in violation of due process."[131] It was this interpretation that the Chief Justice then applied in the now not so novel circumstances of *Bush II*: "What we would do in the present case is precisely parallel: hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."[132] The *Bush* cases illustrate consequences of a decontextualizing embrace of the literal. The *Bush* cases show courts that the meaning of cases can be broadened beyond recognition for the purpose of

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127. *Bush II*, 531 U.S. at 140 (Ginsburg, J., dissenting). Thus, according to Justice Ginsburg, *Patterson* stood merely for the proposition that federal question jurisdiction is not defeated even where the claim is not vindicated, and *Bouie* stood for the proposition that it was unfair in the circumstances to retroactively apply a novel interpretation of a statute. *Id.* Both of the cases are limited to their historical and racialized context out of which broader application is inappropriate. Justice Ginsburg noted:

> [T]hose cases are embedded in historical contexts hardly comparable to the situation here . . . .The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold.

Id.

128. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 456-57 (1958) (reasoning that the United States Supreme Court could permissibly assume jurisdiction where the Alabama Supreme Court's procedural holding was irreconcilable with prior Alabama precedent).

129. Bouie v. City of Columbia, 378 U.S. 347, 456-57 (1964) (reasoning that the United States Supreme Court was entitled to assume jurisdiction where the South Carolina Supreme Court violated the Due Process Clause of the Fourteenth Amendment by "impermissibly broaden[ing] the scope of [a criminal] statute beyond what a fair reading provided").

130. For an extended discussion of the ironies of the *Bush* cases on this score, see Backer, *supra* note 22, at 1096-1108 (discussing the ironies of the *Bush* cases on this score).

131. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

132. *Id.* Here the Florida Court assumes the character of a rouge court of the kind disciplined in *Patterson* and *Bouie*. *Id.* The form of roughish behavior in this instance is the lawless distortion of the judicial function of interpretation.

crafting a (self-policed) rule that can limit the a judicial power to apply statutes in particular ways.[133]

Those consequences are already evident in recent attempts to use the *Bush* cases in the same decontexualized way that the *Bush II* court used the desegregation cases. Thus, *Bush* has been used to support a motion to overturn residency requirements for qualification to serve as mayor of New Haven, Florida and the Marianna Islands.[134] Also, *Bush* has been used to void provisions of Maine's law that disenfranchises individuals for being mentally ill.[135]

Teachings extracted from the cases have also been asserted in contexts much farther a field. However, for the moment, the attempts to push *Bush* in new directions have not been successful. For example, *Bush II* found its way into a case in which plaintiffs unsuccessfully sought to enjoin the President and the Secretary of Defense from initiating a war against Iraq.[136] In the context of a discussion of the political question doctrine, *Bush II* was understood by the First Circuit panel as an example of the sort of case in which

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133. In this context, arguments defending *Bush* against claims of hypocrisy assume a heightened level of irony. *See, e.g.,* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1270 (2002) ("The hypocrisy objection is never framed in precise legal terms, nor could it be by any honest and knowledgeable commentator, for there is no legal tension between the holding in *Bush v. Gore* and the holdings in any of the Court's other recent decisions.").

134. Schiavone v. Destefano, No. 444181, 2001 WL 195345, at *1 (Conn. Super. Ct. 2001). The *Schiavone* Court explained that:

> The Supreme Court revisited some important aspects of the rights of citizenship in *Bush v. Gore, supra. Bush,* as is extremely well known, applies a rigorous equal protection analysis to the counting of ballots. . . *Bush,* unlike *Thornton,* does not consider the rights of candidates, but its reasoning, based on fundamental notions of democracy, equality, and citizenship, is plainly cut from *Thornton*'s bolt of constitutional cloth. If government may not, by arbitrary and disparate treatment, value one person's vote over another, it is difficult to see how it can, by arbitrary and disparate treatment, value one person's political candidacy over that of another.

Id. at *9; *see also* Charfauros v. Bd. of Elections, 249 F.3d 941, 951 (9th Cir. 2001) (involving a section 1983 action against members of North Marianna Islands Board of Elections, challenging new pre-election day voter challenge procedures resulting in preclusion of voting in Rota Island school board election; "we must determine whether the voter challenge procedures adopted by the Board are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."); Miller v. City of Belle Glade Canvassing Bd., 790 So. 2d 511, 512-13 (Fla. Dist. Ct. App. 2001) (involving election recount in local election; relying on protest and contest interpretation of Florida Supreme Court decision reversed in *Bush*).

135. *See* Doe v. Rowe, 156 F. Supp. 2d 35, 51-52 (D. Me. 2001).

136. Doe v. Bush, 323 F.3d 133, 141 (1st Cir. 2003).

"the Court has merely proceeded to the merits without explicitly rejecting the political question doctrine."[137]

In a Louisiana state appellate court case, *Vallien v. State ex rel. Department of Transportation & Development*,[138] a dissenting member of the panel would have treated the *Bush* opinion as announcing a new standard for application in "equal protection" cases.[139] The dissenting member wrote that "[t]he minimum procedural safeguards which are the essence of the equal protection test announced by *Bush v. Gore* are simply absent in this case."[140] In *State v. Gallion*,[141] the defendant, appealing from the imposition of the sentence, sought to rely on a decontexualized *Bush* through a process of reasoning by analogy that was successful in the Louisiana appellate court.

> Relying on *Bush v. Gore*, 531 U.S. 98 (2000), Gallion states: "Due Process and Equal Protection of Law under the Fourteenth Amendment to the United States Constitution require the adoption of 'specific standards' so that all persons are dealt with fairly and equally." Gallion asserts: "If 'specific standards' are required—as a matter of Due Process and Equal Protection—when counting ballots, *a priori* such standards should be applied to the deprivation of the most basic of human right—liberty."[142]

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137. *Id.*

138. 812 So. 2d 894, 896-97 (La. App. Ct. 2002) (challenging a state statute imposing a cap on damage awards when assessed against the state).

139. *Id.* at 904 (Thibodeaux, J., concurring in part and dissenting in part).

140. *Id.* Judge Thibodeaux argued that the current provision resulted in a:

> lack [of] uniform treatment for seriously injured victims whose damages exceed the $500,000 cap and those victims whose damages fall below the cap and who receive full compensation for their injuries. Additionally, there is no uniform treatment of multiple victims who are limited to the $500,000 recovery and an individual victim whose damages may fall below $500,000 and who recover full compromise.

Id. Such unequal treatment, along with a lack of standards, must be as fatally defective as the standards rejected by the Supreme Court in *Bush*. "The lack of guidance and specificity is inconsistent with the obligation to avoid nonarbitrary and disparate treatment of injured victims. Rather, there should be 'specific rules designed to insure uniform treatment.'" *Id.* (quoting in part *Bush II*, 531 U.S. at 106). The majority opinion agreed that the new limitations rules resulted in unequal treatment but preferred to ground the validity of this result on an act of popular will—the amendment of the Louisiana Constitution. As such, it did not consider the equal protection argument or the applicability of *Bush*. *See id.* at 903.

141. 654 N.W.2d. 446, 448 (Wis. Ct. App. 2002) (involving an appeal from a sentence for vehicular homicide, while defendant was under influence of alcohol, that was imposed under the state truth-in-sentencing act; the defendant alleged that the sentence violated his due process and equal protection rights).

142. *Id.* at 450 (emphasis added).

The court, however, resisted decontexualization: "The determination of voter intent based on 'marks or holes or scratches on an inanimate object, a piece of cardboard or paper, . . . is a far cry from individualized sentencing."[143]

The attempt to decouple *Bush* from both its factual and contextual moorings is not subtle. Just as the desegregation cases on which much of *Bush* is grounded became the foundation for *Bush*, so *Bush* may come to stand for the principle that "all rights recognized by state law as 'fundamental' for Equal Protection purposes."[144] In rejecting this claim, the court applied the old conception of equal protection.[145] But is the genie out of the bottle? Even the *Bush* Court's warning against decontextualizing its decision, of extending the rule of the decision beyond its specific facts,[146] has itself been

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143. *Id.* at 450-51. Interestingly, the court resisted applying the analogy because "whatever the number of variables involved in ascertaining voter intent based on a cardboard or paper ballot, that number pales in comparison with the vast number of variables involved in sentencing." *Id.* at 451. For a similar assertion as well as a similar reaction by the court, see State v. Jorgensen, No. 01-2690-CR, 2003 WL 21589153, at *9 (Wis. Jul 11, 2003) (holding that a provision permitting judicial districts to establish sentencing guidelines for drunk driving did not violate due process or equal protection rights, relying in part on *State v. Smart*); State v. Smart, 652 N.W.2d 429, 433 (Wis. Ct. App. 2002) ("Application of the *Bush* case does not suggest the sentencing scheme violates equal protection.").

144. Daly v. Harris, 215 F. Supp. 2d 1098, 1100 (D. Haw. 2002) (involving an action to set aside a small use fee assessable only against non-residents).

145. *Id.* at 1116. The court concluded:

> Contrary to Plaintiffs' contention, in stating that "the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments," the [Charfauros v. Bd. of Elections, 249 F.3d 941 (9th Cir. 2001)] Court recognized that "having once granted the right to vote on equal terms, [a] State may not, by later arbitrary and disparate treatment, value one person's vote over that of another's," *Bush*, 531 U.S. at 104-05; it did not proclaim that all rights guaranteed by a state to its residents are "fundamental rights" for equal protection purposes.

Id.; *see also* Cuno v. Daimler Chrysler, Inc., 154 F. Supp. 2d 1196, 1201-02 (N.D. Ohio 2001) (attacking the legality of property tax exemptions and investment tax credits to car manufacturer to induce it to remain in city; equal protection argument based on *Bush* rejected).

146. *See Bush*, 531 U.S. at 109. Some courts have refused to extend *Bush* even to other cases involving voting rights on the basis of this admonition to contextualize that was set forth in *Bush*. *See* Walker v. Exeter Region Coop. Sch. Dist., 157 F. Supp. 2d 156, 159-60 (D.N.H. 2001) (rejecting claim that New Hampshire statute setting forth the percentage of votes required for a school district or municipality to issue bonds or notes violated constitution), *aff'd*, 284 F.3d 42 (1st Cir. 2002). The district court took the position that "the Supreme Court was cautious to limit its ruling in that case to the circumstances before it, which involved a statewide election for the President of the United States. . . . [T]herefore, its applicability to this or any other case involving concerns over voting rights and equal protection is dubious." *Walker*, 157 F. Supp. 2d at 159-60 n.6. The appellate court distinguished *Bush* on its facts. *Walker*, 284 F.3d at

decontextualized.[147] And with respect to other issues of constitutional interpretation, some courts have suggested that the genie is indeed now well on its way to other fields of law.[148]

But even contextualized literalness can be subversive. Consider *Graham v. Reid*,[149] in which the court resisted application of *Bush*, in part, because the Illinois court chose to take seriously the *Bush* court's declaration that *Bush* would be limited to the unique circumstances of that case.[150] The Ninth Circuit used *Bush* to the same effect in a habeas corpus case.[151] "The decision in this case is similar to [*Bush*]—good for this case and this case only—except that here the decision is not even good for this case."[152] But in California, literalness can also produce a tease—the "we acknowledge that something is happening in law but will refuse to confront it until commanded to do so" approach to legal evolution.[153]

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46 (concluding "there is no issue here of a state-wide vote tabulated differently in constituent districts").

147. In Sorchini v. City of Covina, 250 F.3d 706, 708-09 (9th Cir. 2001), in a sanctions action for failure to follow the rule prohibiting citation to unpublished opinions, the court determined that counsel's excuse in that case justified forgoing the imposition of sanctions. In limiting that result to the case at bar, the court sought to rely on *Bush*. *Id.* at 709 n.2. "This excuse is valid only in this case." *Id.* (citing *Bush*) This citation in this context is utterly ironic, either consciously or unconsciously, on the court's part. In *Port Arthur Indep. Sch. Dist. v. Klein & Assocs. Political Relations*, 70 S.W.3d 349 (Tex. Ct. App. 2002), Justice Burgess' concurring opinion cited *Bush* as authority for "restrict[ing] this holding to these specific parties and facts." *Id.* at 353 (Burgess, J., concurring).

148. Thus, for example in *Gonzalez v. United States*, 135 F. Supp. 2d 112, 113-14 (D. Mass. 2001) (appealing a sentence after conviction on drug charges; issue turned in part on applicability of Antiterrorism and Effective Death Penalty Act (AEDPA)) the court noted, in connection with the AEDPA's effect on the availability of habeas corpus, that:

> jurisdiction stripping legislation, a legislative technique that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing, ... Sadly, the fallout from *Bush v. Gore* makes it likely that resort to this technique will become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect."

Id. at 115 n.5 (citation omitted).

149. 779 N.E.2d 391 (Ill. App. Ct. 2002).

150. *Id.* at 395.

151. Spears v. Stewart, 283 F.3d 992, 996 (9th Cir. 2002).

152. *Id.* at 996 (footnote omitted).

153. *See* People v. Arconti, No. A099097, 2003 WL 21279674, at *6-7 (Cal. Ct. App. June 4, 2003). The court in that case recognized:

> *Bush* touched off a debate over whether its equal protection analysis can be reconciled with established precedent. That debate is immaterial to the present appeal. The Supreme Court cautioned that the application of equal protection principles in *Bush* should not be generalized beyond the factual

Most interesting of all, perhaps, is the beginnings of a construction of a complicated jurisprudence of literalness. In *Hawkins v. Wayne Township Board of Marion County, Indiana*,[154] the court applied *Bush* to support a determination that plaintiffs had standing.[155] The court, well aware of the declared limitations of the applicability of *Bush*, declared that the literal limits of *Bush* could only apply to the *merits* of the claims.[156] Apparently, everything else in the opinion was fair game. The case provides a fine example of *Bush* literalism as bathos.[157]

C. *Attack Precedent*

The *Bush* decisions make clear now that every judicial decision can be attacked as illegitimate, when made by subordinate courts.[158] Indeed, the *Bush* cases can be well understood as an invitation to reconstitute any attempt at interpretation by a judicial body as arbitrary (and thus unconstitutional),[159] as legislation (and thus *ultra vires*),[160] or as a violation of a fundamental principle of superior law (and thus destructive of the regime of negative federalism created by

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> context in which the case arose, and we will not do so. Instead, we apply traditional equal protection analysis to defendant's claim.

Id. (citations omitted); *accord* People v. Ryden, No. A100748, 2003 WL 21404697, at *1-2 (Cal. Ct. App. June 19, 2003). *But see* People v. Hunter, No. A091583, 2003 WL 21666817, at *54-56 (Cal. Ct. App. July 17, 2003) (holding, after analysis, that *Bush* did not support appellant's position). For a complete discussion of the issue in the California context, see discussion *infra* notes 270-77.

154. 183 F. Supp. 2d 1099 (S.D. Ind. 2002) (noting suit by "unsuccessful candidate for township board and current member of board . . . alleging that erroneous designation of districts in township elections violated Fourteenth Amendment and state law").

155. *Id.* at 1103 ("If candidate Hawkins did not have standing to raise equal protection rights of voters, it would be difficult to see how then candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court found decisive in *Bush* . . . .").

156. *Id.*

157. I mean bathos here in all of its commonly understood senses: anti-climax; false or overdone pathos; and triteness.

158. *See* Backer, *supra* note 22, at 1070-71. State Supreme Courts, now clearly subordinate to the federal Supreme Court in all matters of interpretation of state law, at least to the extent a colorable positive or negative federal law effect can be articulated, have both understood this characteristic of the decision in *Bush* and might resist it. At least one of the justices of the Florida Supreme Court subtly suggested disagreement with the Supreme Court's approach. *See* Gore v. Harris, 773 So. 2d 524, 527 (Fla. 2000) (on remand from *Bush*) (Shaw, J., concurring). "A unanimous Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris* applied traditional rules of statutory construction to resolve several conflicts and ambiguities in the Florida Election Code . . . ." *Id.* at 527 (citation omitted).

159. *See* Backer, supra note 22, at 1066-77.

160. *See id.* at 1079-82.

the Supreme Court).[161] Federal appellate courts now well understand the new teaching that:

> as a federal court, we defer to state courts on questions of state law. Indeed, we wade into such questions only in the most dire of circumstances, for instance where state law is being intentionally tortured to discriminate against a protected minority, *see, e.g., Bouie v. City of Columbia,* 378 U.S. 347 . . . (1964), or where an error of state law works a singular national impact, *see, e.g., Bush v. Gore,* 531 U.S. 98.[162]

Every judicial decision, whether made by superior or inferior courts can be attacked indirectly as well. The art of narrowing precedent to its facts and the art of distinguishing cases, are all well known and routinely practiced by litigators,[163] and by the courts.[164] To the extent expedient, courts should be prevented the luxury of a mechanical reliance on precedent. For that purpose, the sanctions rules can serve as a rough guide.[165] Any mere mechanical,

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161. *See id.* at 1084-91.

162. Republican Party of Minn. v. Kelly, 247 F.3d 854, 891 (8th Cir. 2001), *rev'd,* 534 U.S. 1054 (2002) (Beam, J., dissenting) (attacking the state ethical rule prohibiting state judicial candidates from engaging in certain activities). Judge Beam better understood the implications of *Bush* than did the majority, whose opinion resorted to *Bush* for the opposite proposition:

> The same federalism principles which require us to defer to state courts' interpretations of state law and to recognize that state laws embody the will of a State also dictate that we recognize Canon 5 as a regulation that expresses Minnesota's will as a sovereign entity. *See* [*Bush*] (Rehnquist, C.J., concurring) ("in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character").

Id. at 866 n.13 (citation omitted)

163. *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994) (discussing litigation during the civil rights movement). This vision is critiqued in DELGADO & STEFANCIC, *supra* note 49, at 143 (stating that political lawyering reflects the failings of the legal and political system as a whole and gives rise to false hopes in progress through incremental change).

164. The reconstitution of the interpretation of the Commerce Clause in the Court provides an excellent example. *See* United States v. Lopez, 514 U.S. 549, 567 (1995). Chief Justice Rehnquist, in reorienting the analysis of half a century of precedent, engaged in a matter-of-fact form of transformation without giving the formal appearance of change. *Id.* In the *Lopez* opinion, the Chief Justice effected this transformation by characterizing his modification to doctrine as inherent in the very cases he was setting out to change. *Id.* at 556-57. "But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Id.*

165. The lawyer misconduct sanction rules of the Federal Rules of Civil Procedure thus are inapplicable to good faith arguments for changes in the law. *See* FED. R. CIV. P. 11(b)(2) (stating that a court may impose sanctions where signatory's claims or

thoughtless, reliance on precedent, we have been told by traditionalist judges themselves, may hinder conceptual innovation and generally disadvantages progressive causes.[166] "The uncontrollable proliferation of judgments may have a liberating effect, in that, faced with too much precedent, the judge may be tempted to ignore it,"[167] mold it,[168] or consolidate it,[169] to push law in new directions.

Ironically, *Bush* itself may have provided the ammunition necessary to attack the validity of prior federal Supreme Court decisions themselves. An excellent early example of this genre—Judge Ferguson's attempt in his dissent in *Costo v. United States*,[170] "to demonstrate that the *Feres* Doctrine is unconstitutional and to present the Supreme Court with a case and controversy in order for it to be able to review the doctrine,"[171] in part on the basis of the teachings of *Bush*.[172] Here the highest and best use of *Bush*—against itself.

Moreover, like an amoeba, *Bush* will also grow through a constant mitosis. The process has already begun. On the one hand, state courts have already begun to resist litigant's claims attacking the authority of courts over certain matters. Among these, of course, would be those matters most closely related to the exercise of the franchise.[173] Thus, at least in Missouri and Arkansas, state court judges no longer have equitable authority to extend the statutorily created voting hours, even when the extension is granted to ensure

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defenses are not supported by existing law or a good faith argument for the extension or change in existing law).

166. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 324 (1996).

167. Takis Tridimas, *Judicial Review and the Community Judicature: Towards a New European Constitutionalism?*, 3 TURKU L.J. 119, 123 (2001).

168. The functionalist school of constitutional interpretation provides an excellent jurisprudential basis for this effort. Its tactics and approach can be as much a tool of the litigator as it has been of the judge. For an excellent example of the molding function of functionalism, see *Morrison v. Olson*, 487 U.S. 654 (1987) (upholding legislation creating independent counsel system).

169. *See* Lopez, 514 U.S. at 549 (1995); *supra* text accompanying note 165.

170. 248 F.3d 863 (9th Cir. 2001).

171. *Id.* at 869 (Ferguson, J., dissenting).

172. Judge Ferguson used *Bush* for the proposition that judicially created classifications must be applied on the basis of specific standards to ensure equal application, which the Supreme Court itself failed to ensure in crafting an "ill-defined standard 'incident to service' that has lead to very unequal applications even within the military." *Id.* at 873-74.

173. *See, e.g.*, Alexander v. Taylor, 51 P.3d 1204, 1210 ¶.18 (Okla. 2002) ("We see nothing in any of these opinions that supports Appellants' contention that state courts are constitutionally prohibited from granting relief for mal-formed congressional districts when their state legislatures have failed to do so.").

the enfranchisement of voters.[174] Judicial elaboration of the criminal law has also been a target of attack as exceeding the authority of courts after *Bush*.[175] Federal courts, too, have also used *Bush*. In one case, a Massachusetts district court used *Bush* to criticize the tendency of federal appellate courts to weigh in on complex matters of state law.[176]

On the other hand, the *Bush* case itself can serve as a direct basis for an attack on legal normative accommodations reached within state jurisprudence. The initial attack appears concentrated in the field of criminal law. In Oregon, a defendant mounted an attack on death sentence proportionality reviews limited to the county in which the trial was conducted.[177] The defendant argued that Oregon case law and practice were inconsistent with the equal protection standards mandated in *Bush*, all of which "demand state wide standards, at a minimum, for charging and sentencing

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174. Republican Party of Ark. v. Kilgore, 98 S.W.3d 798 (Ark. 2002); State *ex rel.* Bush-Cheney 2000 v. Baker, 34 S.W.3d 410 (Mo. Ct. App. 2000). A majority of the Arkansas Supreme Court put it this way: "The legislative branch of our state government has spoken on this issue, and there is no provision in our Election Code authorizing an extension of voting times by the judiciary. No argument was made that these statutes are unconstitutional, and Judge Kilgore made no findings to that effect." *Kilgore*, 98 S.W.3d at 800.

175. *See* Black v. Bell, 181 F. Supp. 2d 832, 867 (M.D. Tenn. 2001) (rejecting the petitioner's argument that "the Tennessee Supreme Court could not constitutionally apply a broadened definition of 'mass murder' on appeal" because "[none] of the cases cited by petitioner, including *Bush*, "hold that a state court cannot disregard dicta set forth in a prior case in construing a statute.")

176. Filson v. Langman, No. 99-30021-FHF, 2002 WL 31528616, at *1 (D. Mass. 2002) (raising various state and federal claims relating to a failed investment strategy, granting summary judgment in part for defendants and remanding the pendant state claims to state court). In examining the issue of claim accrual the court noted:

> These issues are complex, fact-sensitive and ultimately controlled by Massachusetts's law. Even though the court understands that "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns," the Court specifically notes the First Circuit's conflicting application of the Massachusetts fraudulent concealment statute and claim accrual and equitable tolling principles in the fiduciary context.

Id. at *5 (citation omitted).

177. Cunningham v. Thompson, 62 P.3d 823, 845 (Or. Ct. App. 2003) (imposing a death sentence imposed after conviction for aggravated murder and first degree rape). In the post-conviction proceedings, the defendant argued that trial counsel was inadequate for failing to obtain a state-wide proportionality review of standards for seeking and imposing the death penalty. *Id.* The defendant also introduced deposition evidence to demonstrate that the district attorney had no system in place for determining the circumstances under which the death penalty would be sought. *Id.* The trial court determined that the district attorney did maintain a "coherent [and] systematic policy" for charging and penalty determinations. *Id.*

decisions."[178] The appellate court dismissed the argument on the basis that it found no discriminatory motive in the charging of the defendant and that the *county* charging and penalty determination process constituted a coherent and systematic policy.[179] A recent uncertified opinion[180] from California, *People v. Patlan*,[181] provides

178. *Id.* Curiously, the state did not necessarily reject the equal protection arguments of *Bush*. The State argued only that *Bush* was not applicable "because, unlike the statewide ballot-counting process at issue in that case, charging decisions are made at the county level." *Id.* at 846. Because state law created state-wide regulation of ballots, then the basic unit for equal protection purposes had to be the state. *See id.* at 845-46. In contrast, where the regulating unit is the county, as with charging and penalty decisions under state criminal law, then the equal protection unit had to be the county. *See id.*

179. *Id.* at 846. The court concluded, summarily, that:

> Nothing in *Bush* suggests that it is improper for a county to develop and implement a particularized policy regarding the charging of state criminal offenses or that the county's policy pertaining to those decisions is not the proper subject of inquiry regarding the decision's constitutionality under the Equal Protection Clause.

Id. Of course, neither side addressed what might have been the stronger argument here—that because the state was the basic unit of criminal regulation in the state, then even with respect to matters devolved to the counties, the state remains the basic unit for equal protection purposes. Since it is state law, rather than local law, that is being enforced for the benefit of the state by local prosecutors and local courts, it is the state, not the locality, that serves as the basic governmental unit for purposes of equal application of its laws across its territory. Perhaps in a future case such an argument will be more successfully made.

180. CAL. CT. R. 977(a) prohibits courts and parties, subject to certain exceptions, from citing or relying on opinions not certified for publication or ordered published. One of the more interesting results of this rule was nicely exposed during the course of research for this article. It seems that while courts may not cite or rely on earlier unpublished opinions, there is nothing to prevent them from adopting the reasoning of prior opinions without citation. For a near verbatim adoption of the reasoning rejecting the applicability of *Bush* to a challenge of the constitutionality of the reasonable doubt jury instruction, compare *People v. Williams*, No. C038590, 2003 WL 245716, at *11 (Cal. Ct. App. Feb. 5, 2003), with *People v. Denton*, No. C036764, 2002 WL 453733, at *4 (Cal. Ct. App. Mar. 25, 2002).

181. No. F037794, 2002 WL 1897963 (Cal. Ct. App. Aug. 19, 2002) (considering appeal from sentencing after conviction on a variety of criminal offenses). For similar cases where a comparable argument was made and rejected by the court, see *People v. Kemp*, No. E030633, 2003 WL 1827295, at *13 (Cal. Ct. App. Apr. 9, 2003); *Williams*, 2003 WL 245716, at *11; *People v. Ferrel*, No. A095869, 2002 WL 31781158, at *11-13 (Cal. Ct. App. Dec. 12, 2002); *People v. Lee*, No. A091751, 2002 WL 31431509, at *6 (Cal. Ct. App. Oct. 31, 2002) ("We consider the *Bush* opinion to be entirely unpersuasive in resolving an equal protection challenge to the reasonable doubt instruction . . . ."); *People v. Choeun*, No. C036023, 2002 WL 502523, at *8 (Cal. Ct. App. Apr. 4, 2002); *Denton*, 2002 WL 453733, at *4 ("Defendant claims a result contrary to *Hearon* is now required by the United States Supreme Court's landmark decision in [*Bush*]. We disagree.") (citation omitted); *People v. Warren*, No. C039112, 2002 WL 307579, at * 1 (Cal. Ct. App. Feb. 27, 2002)(applying the same reasoning as *Denton*).

another window into the ways in which litigants are already attempting to use *Bush* to attack precedent. As framed by the appellant:

> If a majority of the United States Supreme Court now believes that an undefined standard like the "clear intent of the voter" is so non-specific that allowing experienced election officials employing that standard across the State of Florida to assess so-called "undervote ballots" in an election context (even one for presidential electors) violates the rights of voters to equal protection under the law, then the essentially standard-less phrase regarding proof beyond a reasonable doubt set forth in CALJIC No. 2.90 that is given to laypersons serving on juries must also run afoul of the same constitutional equal protection guarantee.[182]

The court rejected, but did not dismiss the claim.[183] In another unpublished opinion, a California appellate court rejected an argument that *Bush* overturned state law precedent permitting the California Three Strikes Law to be enforced differently in different counties.[184]

D. *Create Contradiction*

Specificity is both the great blessing and curse of the American judicial system. Specificity makes judgment in any particular case efficient. But specificity makes it possible to create an infinite variation of result in the application of even a simple doctrine. To the extent that specificity can be used to create distinction, specificity can be used to subvert the system itself. "The byproducts of this system, difficult to flush, may eventually cause the collapse of this system of its own weight, or its abandonment because, having

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182. *Patlan*, 2002 WL 1897963, at *5.

183. *Id.* (rejecting appellant's misplaced reliance on *Bush*). The Court in *Patlan* held:

> The Legislature has defined the reasonable doubt standard and this statutory definition of reasonable doubt is applicable in all criminal trials in all courts in California. There is no alternative statutory definition of reasonable doubt, nor are juries given the authority to determine for themselves the standard of proof in a criminal case. Appellant has failed to show that persons similarly situated are treated in an unequal manner. Appellant's equal protection argument fails at the threshold.

Id.

184. People v. Pena, Nos. B148324 & B150296, 2002 WL 118650, at *10 n.10 (Cal. Ct. App. Jan. 30, 2002).

become so engorged with detail, point and counterpoint, thrust and counter-thrust, rule and exception, it will prove useless."[185]

The greater the pool of precedent, the more likely the probability of contradiction and inconsistency. Contradiction and inconsistency can be exploited. In a narrow sense, the exploitation can result in gain within the juridical sphere. That, in a sense, can be a focus of the prior point. But it can also result in additional benefit when applied within the juridical sphere. The larger the pool of facts within which a doctrine is applied, the greater probability of misapplication—to the benefit of the litigant seeking confusion. An excellent example is provided by the development of the veil piercing doctrine in corporate law, used to impose liability among the shareholders, under certain circumstances, for corporate actions.[186]

The confusion resulting from the explosion of cases has several significant effects. Confusion is expensive. Expense arises in a variety of ways. The more inconsistent and subtle the application of law to fact, the more difficult it is to predict the outcome of particular actions and thus either to avoid liability by changing behavior or determine the extent of liability. It also works to the benefit of plaintiffs. The more difficult the cause of action to avoid through summary devices—attacks on the pleadings or summary judgment motions, the greater the settlement value of even the more marginal case. Contradiction and uncertainty can then result in a change in behavior as effective as any change in law. A cautious corporation might overcompensate in order to minimize exposure to liability.

This effect is also useful in the area of public law—especially constitutional law. The greater the subtlety in doctrine, the more intricately explained the rule, the more likely that decision can be exploited, if only to cause confusion and raise the expense of action by others.[187] Consider, for example, the exploitive possibilities now

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185. Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 127 (2000).

186. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). In addition, the problems of this often litigated doctrine is not limited to the United States. *See* Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L.J. 73 (1998). For the classic modern study of the value of limited liability, see Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); *see also* Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 DENV. U. L. REV. 763 (1998). For an early, and famous, judicial criticism of the veil piercing doctrine, see *Berkey v. Third Avenue Realty Co.*, 155 N.E. 58, 61 (N.Y. 1926).

187. *See, e.g.*, Norman J. Fry, Note, Lamprecht v. FCC: *A Looking Glass into the Future of Affirmative Action?*, 61 GEO. WASH. L. REV. 1895 (1993).

offered in First Amendment jurisprudence by the element of contradiction inherent in the reconstruction of the expressive association doctrine articulated in *Boy Scouts of America v. Dale*.[188]

The *Bush* case demonstrates a mastery of the use of contradiction as well. The case provides excellent examples of judicial legerdemain in the context of electoral equal protection,[189] federalism,[190] and race.[191] Yet even within the arguably very narrow area in which the *Bush* Court is a binding matter, the case left questions unanswered.[192]

The *Bush* case has already begun its tentative march towards the creation of contradiction within the judicial language of interpretation through which political battles over power distribution are now fought. In particular, *Bush* provides fodder for the

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188. 120 S. Ct. 2446 (2000).

> The expressive association doctrine is shorthand for the rule that First Amendment protection for association speech can extend only to those ideas that the organization was formed to express. As such, it is a *gateway doctrine*. The application of the public accommodation and germane speech doctrines to limit an association's First Amendment rights depends on this critical assessment of the expressive purpose of associations. Prior to *Boy Scouts of America*, the expressive association had a burden of proving the range and purpose of its expressive association, and the courts were free to arrive at their own conclusions with respect to the expressive purposes of association. *Boy Scouts of America* adds a wrinkle that critically affects the applicability of the germane speech and public accommodation doctrines—it adopts a rule of discretion which appears to limit a court's ability to question assertions of associative purposes.

Backer, *supra* note 185, at 132.

189. *See, e.g.*, Steven G. Gey, *The Odd Consequences of Taking* Bush v. Gore *Seriously*, 29 FLA. ST. U. L. REV. 1005, 1009 (2001) (stating that contradictions and inconsistencies flow from the "dichotomy the majority draws between a purely localized electoral system and one operated under the aegis of statewide rules.").

190. *See, e.g.*, Bradley W. Joondeph, Bush v. Gore, *Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781 (2001) (contending that the Court's decision was not inconsistent with constitutional federalism).

191. *See, e.g.*, Backer, *supra* note 22, at 1096-1108

192. *See, e.g.*, Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002) (considering whether a state may allow the use of different types of voting equipment with substantially different levels of accuracy, or if such a system violates equal protection). The district court applied *Bush* even though it acknowledged the limited holding of *Bush*. *Id.* at 899. "However, we believe that situation presented by this case is sufficiently related to the situation presented in *Bush* that the holding should be the same." *Id.*; *see also In re* McDonough, 816 A.2d 1022 (N.H. 2003) (rejecting a challenge to election results in which it was asserted that straight party voting instructions were ambiguous and incorrectly applied based on the intent of voter standard). The concurring opinion would apply *Bush* to support a state policy of interpreting ballots liberally to enfranchise voters, and stated that "'[t]he search for intent can be confined by specific rules designed to ensure uniform treatment.'" *Id.* at 1031 (McGuire & Arnold, J.J., concurring specially) (quoting *Bush*, 531 U.S. at 106).

complication of the meaning and application of the principles of voting equality developed in *Baker v. Carr*[193] and its progeny.[194] A significant battleground in this struggle involves procedures for state-created rights of popular initiative.[195] Courts have recently confronted the question of the applicability of the "one person-one vote" principle beyond its traditional confines—the election of representatives to state or federal office. In *Gallivan v. Walker*,[196] the potential for contradiction in this borderland of federal and state constitutional law is nicely manifested. The complication presented to the Utah court was of the usual sort—whether the principles enunciated by the Supreme Court in one line of cases, rather than those in another line, apply to mandate a particular conclusion in the case before the Utah court.[197] The parties and the dissent agreed that one of the lines of cases applied.[198] The *Gallivan* majority deployed

193. 369 U.S. 186 (1962).

194. *See* Burdick v. Takushi, 504 U.S. 428, 441-42 (1992) (permitting Hawaii's ban on write-in voting); Moore v. Ogilvie, 394 U.S. 814, 818-19 (1969) (applying "one person, one vote" principle to nominating petitions by independents to obtain a place on the Illinois ballot); *Reynolds*, 377 U.S. at 565-66 (overturning Alabama's legislative apportionment system); Gray v. Sanders, 372 U.S. 368, 379-81 (1963) (overturning Georgia's county unit system for counting electoral votes).

195. The right of the people to directly legislate through ballot initiatives is significant, particularly in Western states. Twenty-three states allow legislation by referendum. Gallivan v. Walker, 54 P.3d 1069, 1083 n.7 (Utah 2002). For a discussion of the utility of ballot initiatives by politically motivated groups of all stripes, see David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 15 (1995). For example, ballot initiatives have been used by progressives to permit euthanasia in Oregon. *See* David Brown, *Medical Community Still Divided on Oregon's Assisted Suicide Act*, WASH. POST, Nov. 13, 1994, at A20. Traditionists in Colorado have also used ballot initiatives in their attempt to disenfranchise sexual non-conformists. *See Romer*, 517 U.S. at 623, 625.

196. 54 P.3d 1069, 1080-83 (Utah 2002).

197. One line of cases, ending with *Moore*, 394 U.S. at 814, suggests a broad application of the "one-person, one vote" rule to be judged under a strict scrutiny standard. But the application of that rule appeared to be modified by the more flexible standards developed in a later case, *Burdick*, 504 U.S. at 428. As a result, the question appeared to be not necessarily whether one or the other standard applied, but whether state regulation of the petition portion of the ballot initiative right could pass muster under the more relaxed standard of *Burdick*. *Gallivan*, 54 P.3d at 1093-97.

198. Thus, the dissenting opinion pointed out that:

> Petitioners acknowledge that "to avoid performing a strict scrutiny analysis [each] time a plaintiff complains that a state election law violates the First or Fourteenth Amendments, [the federal courts] have softened the test to require that a plaintiff show that her First or Fourteenth Amendment rights are subject to 'severe' or 'discriminatory restrictions' before strict scrutiny is triggered."

Gallivan, 54 P.3d at 1108 n.9 (Thorne, J., dissenting) (quoting, in part, Petitioners' Supplemental Brief at 18 n.20). The dissenting opinion, itself explained that:

Bush first as the articulation of a constitutional principle to support the extension of *Baker* principles to the procedures for placing a voter initiative on the ballot.[199] It then relied on *Bush* as mandating the particular result in that case, and resurrecting *Moore*, rather than *Burdick*, as the applicable standard.[200] It seems that *Bush* has added to complication, rather than to simplification.[201] The complication applies with equal force to the now plain vanilla issue of the

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> The majority has chosen to follow *Moore* and not the more cautious and more recent approach used in *Burdick*. The majority ignores the fact that *Moore's* treatment of a voting rights claim represents an evolutionary dead end. . . . It is also noteworthy that since deciding *Moore*, with the exception of *Illinois State Bd. of Elections v. Socialist Workers*, the United Supreme Court has not cited *Moore* as controlling authority in any election or voting case, thereby reaffirming my belief that *Burdick* is the proper statement of the law to be applied.

Id. at 1107-08 n.8 (citations omitted).

199. The majority sought the cover of *Bush* to support its conclusion that *Baker* principles must be extended to the petition rules for ballot initiatives. Quoting *Bush*, the majority stated:

> [T]he Equal Protection Clause requires states generally to treat voters similarly and not to unreasonably subject voters to disparate treatment. The United States Supreme Court recently stated:
>
> > The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

Gallivan, 54 P.3d at 1092 (quoting *Bush*, 531 U.S. at 104-05); *accord* Idaho Coalition United for Bears v. Cenarrusa, 234 F. Supp. 2d 1159, 1164-65 (D. Idaho 2001).

200. The majority noted, in support of its conclusion, that " [m]ore recently, in *Bush*, the United States Supreme Court reiterated the rule that states cannot treat voters differently under the Equal Protection Clause simply because they reside in different counties." *Gallivan*, 54 P.3d at 1094 n.12 (citations omitted).

201. Compare the majority's argument in *Gallivan* that:

> The only difference between the case of a petition to place a candidate on the ballot and the case of a petition to place an initiative on the ballot is that the first involves a person and the second involves an idea that possibly could become law. The voters' suffrage right is fundamental and not to be infringed, regardless of whether the voters are voting for candidates or initiatives. Additionally, in either case, a multi-county requirement like the requirement at issue in this case would mitigate or eliminate the voters' right to vote because neither the candidate nor the initiative would ever be placed on the ballot . . . . Therefore, we apply *Moore*.

Id. at 1095, with the dissent's argument that "[o]ther courts have agreed, concluding that limiting access to the ballot via the initiative process does not equate to restricting one's voting rights," and "a close reading of *Meyer* supports the conclusion that the United States Supreme Court has accepted the proposition that the ability to change the law via the initiative process is not a right granted either under the United States Constitution or implicated within the right to vote." *Id.* at 1107 (Thorne, J., dissenting).

constitutionality of punch card voting systems.[202] *Bush* applied but did not resolve the question of the appropriate level of scrutiny to be applied in fundamental right to vote cases. Indeed, the court suggests that *Bush* might well have confused this issue farther. According to the district court in *Jones, Bush*:

> did not articulate a standard of review in this case. It merely said that the State may not value one person's right to vote over another via 'arbitrary and disparate treatment.' 531 U.S. at 104-05 . . . . While this language connotes a more lenient test akin to rational basis, the Court cited to *Harper* and *Reynolds* when discussing this standard. Though *Reynolds* does not provide a clear standard, *Harper* adopts a standard of at least intermediate, and possible, strict scrutiny. Thus it appears that perhaps the Court was using a heightened standard of scrutiny but also was finding the Florida recounts to be arbitrary and discriminatory.[203]

What *Bush* has certainly produced is uncertainty.

The Tenth Circuit, in *Save Palisade Fruitlands v. Todd*,[204] considered the effect of *Bush* on voter initiatives at the county

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202. *See* Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001). However, even punch cards may not be entirely plain vanilla in the pose *Bush v. Gore* universe. It seems that while punch cards are suspect as a means of ensuring the franchise to voters, and therefore must be eliminated, their elimination is not a condition precedent to holding valid elections. The 2003 recall election of Governor Grey Davis of California, and the subsequent election of a replacement was conducted using punch cards of the kind condemned in *Common Cause*. *Id.* In the litigation leading to the recall election, in which use of punch cards was challenged, a Ninth Circuit panel relied heavily on the learning it gleaned from *Bush* to ground a holding that the use of the punch cards violated voters' equal protection rights. *Southwest Voter Registration Educ. Project*, 344 F.3d. at 882. That holding was reversed *en banc*, 344 F.3d 914, not because there might be a violation of certain voters' equal protection rights, but because the need to go forward with the election was more important than the harm caused to the voters whose franchise rights might be affected by the need to hold an election. In an interesting use of illogic, the reversing court concluded:

> We have not previously had occasion to consider the precise equal protection claim raised here. That a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ. In Bush v. Gore, the leading case on disputed elections, the court specifically noted: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." We Conclude the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim.

Id. at 914 (citation omitted).

203. *Id.*

204. 279 F.3d 1204 (10th Cir. 2002).

level.[205] The Federal Court concluded that, although voters in different counties having disparate rights to bring an initiative violated the state constitutional voting rights of Colorado citizens, it did not infringe on any federal constitutional voting rights.[206] For similar reasons, a federal district court refused to apply *Bush* to a challenge to an internal union election of the federal Civil Service Employees Association.[207] In contrast to reticence of the courts in *Todd* and *Ellis*, another federal court invoked *Bush* in a suit contesting disqualification of a candidate for a position in the student government of the University of California, Irvine.[208] In granting the plaintiff's motion for a preliminary injunction restoring the affected student to his position in student government, the court relied on *Bush*, in part, for satisfying plaintiff's requirement that he show that the public interest favored granting the injunction.[209] In *Todd* and *Ellis*, the courts took the easy road—grounding their effective refusal to consider the argument based on *Bush* on a facile distinction. But it is not clear, however, whether either court barred the door to further, similar, actions. *Welker* presents a different and more traditionally expansive approach to the "learning" that might be "gleaned" from

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205. *Id.* at 1213 (upholding the constitutionality of difference in scope of the power of initiative and referendum between statutory counties, with limited range of issues subject to this power and home rule counties with a much greater range of issues subject to referendum).

206. *Id.* The court distinguished *Bush* on the basis that Colorado voters "in statutory and home rule counties never have their votes weighed differently on the same question. A statewide ballot is the only opportunity for true comparison." *Id.* Of course, the court refused to find the difference identified by plaintiffs—that the voters of statutory counties enjoyed a smaller scope of voting rights within Colorado than the voters of home rule counties by operation of state law. *Id. Bush* might yet provide the basis for determining that this difference is indeed one worth constitutional protection.

207. *See* Ellis v. Chao, 169 L.R.R.M. (BNA) 2016, 2001 WL 1550809, at *1 (S.D.N.Y. 2001). The loser of an election for statewide President of the Civil Service Employees Association alleged improprieties in the conduct of the election. *Id.* at *1. After exhausting internal remedies and a rejection of his complaint by the Secretary of Labor, he brought suit in federal court. *Id.* The plaintiff argued that the Secretary's rejection of his claim constituted a violation of his equal protection rights, citing *Bush*. *Id.* The court, focusing on a narrow characterization of the Secretary's action concluded that while Ellis' claim was "imaginative, [it] is inapposite." *Id.* at *5. The Secretary's rejection of Ellis' claim did not have the effect of "'valuing one person's vote over that of another.'" *Id.* (citing Bush, 531 U.S. at 104-05). Rather, the rejection merely constituted a determination that the statutory requirements governing the election had not been violated in a way that "affected the outcome of the election." *Id.* The court also expressed doubt that the holding of *Bush* applied to internal union elections. *Id.*

208. *See* Welker v. Cicerone, 174 F. Supp. 2d 1055, 1067 (C.D. Cal. 2001).

209. "Moreover, ensuring that a duly elected official has the opportunity to represent her constituents is unquestionably in the public interest." *Id.* (citing *Bush*, 531 U.S. at 135).

Bush. Future courts may find it harder to avoid the contradictions inherent in the different approaches taken by these courts.

Another significant battleground involves procedures for the state created voting process and funding. In *Green Party of the State of New York v. Weiner*,[210] the complication involved the use of voting machines for the traditional parties, and paper ballots for the smaller party primaries.[211] The Green Party, one of the smaller parties consigned to the paper ballot procedure for its primary election, sought to enjoin the practice. [212] The party argued that *Bush* "broadens the constitutional protection afforded to voting rights by precluding different procedures for tabulating votes, and by extension invalidates the use of paper ballots and voting machines for different parties' primaries."[213] The district court did not agree, distinguishing *Bush* on fairly narrow grounds.[214] In *Ostrom v. O'Hare*,[215] the court rejected the contention that the denial of matching campaign financing to the Green Party of New York was contrary to *Bush*.[216] *Bush* has also been cited generally in support of the state legislature's broad power over state election processes.[217]

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210. 216 F. Supp. 2d 176 (S.D. N.Y. 2002).

211. *Id.* at 180.

212. *Id.*

213. *Id.* at 192.

214. The district court concluded that *Bush* was to be limited to its facts, that *Bush* "involved a general election, in which different methods of tabulating votes could advantage one candidate" over another, but even the *Bush* court "did not question the use of entirely different technologies of voting in different parts of the state." *Id.*

215. 160 F. Supp. 2d 486 (E.D.N.Y. 2001).

216. *Id.* at 497. The Green Party argued "that the lack of campaign finance somehow 'diluted' the Green Party votes because, in plaintiffs' own words, '[i]t is black-letter law that money equals votes.'" *Id.* (internal citation omitted). This argument, the court concluded, "does not make sense." *Id.* One might wonder what was so nonsensical about the Green Party's argument. The federal courts have long held that money constitutes an important and protected, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775-95 (1978) (holding unconstitutional a Massachusetts statute that prohibited corporate participation in popular referenda), though sometimes corrupting, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990) (upholding a Michigan statute that prohibited corporations from using corporate funds for contributions or independent expenditures in support of or in opposition to any candidates running for state office) part of the political process. The *Bush* cases lend themselves to the arguments made by the Green Party. We may well see the Green Party's argument reasserted in more sophisticated form in a future case. And for this, the rhetoric of *Bush* ought to take substantial credit.

217. *See* Arizona Libertarian Party v. Schmerl, 28 P.3d 948, 953, 956 (Ariz. Ct. App. 2001) (holding that state statutes governing selection of parties leadership did not unconstitutionally burden speech and association rights and that compliance with those statutes was mandatory in the context of a factional fight for control of the state benefits made available to political parties.). The court explained that "[a]lthough *Bush v. Gore* discusses the states' authority to direct the method for selecting

The complications of *Bush* have added a new dimension to the traditional battlegrounds of the political parties as well—and additional layers of contradiction. In *Graham v. Reid*,[218] an Illinois appellate court determined that *Bush* did not overrule settled Illinois law regarding recounts in disputed elections.[219] In *Republican Party of Arkansas v. Kilgore*,[220] and *State of Missouri ex rel. Bush-Cheney 2000, Inc. v. Baker*,[221] *Bush* played a role in a dispute over the extension of the voting hours of polling places in one county beyond the statutory closing time.[222] In these cases, the courts apparently were stripped of their equity powers by indirect legislative action. But in other cases it did not. *Bush* hovered in the background of the Minnesota Supreme Court's decision respecting the conduct of an election upon the death of one of the candidates and the substitution of another in the days immediately preceding the vote.[223]

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presidential electors, the state legislatures' authority in state election processes is equally obvious." *Id.* at 954 n.5.

In *Beaver v. Clingman*, 2003 WL 745562 (W.D. Okla. Jan. 24, 2003), the district court rejected an attempt by the Libertarian party to force Oklahoma to permit a party-option open primary system. *See id.* at *23. In attempting to apply federal law, the court cited to Bush for the proposition that "it falls to the states to regulate elections." *Id.* at *20.

218. 779 N.E.2d 391, 396 (Ill. App. Ct. 2002).

219. *See id.* at 782. The appellate court reasoned that *Bush* was applicable only where a state is found to have no explicit statewide standards for the manual tabulation of votes, whereas in that instance Illinois case law provided sufficiently protective standards. Since the court did "not read *Bush v. Gore* to now require that, any time a recount is ordered and ballots are missing, a new election must be held . . . [the court] conclude[d] that the state law protections, both statutory and as established by Illinois Supreme Court case law, are sufficient." *Id.*

220. 98 S.W.3d 796 (Ark. 2002).

221. 34 S.W.3d 410 (Mo. Ct. App. 2000).

222. *Kilgore*, 98 S.W.3d at 799 (considering plaintiff's argument, supported by *Bush*, that extension of voting hours by the judiciary violated the Equal Protection Clause). The lower court ordered county polling places to remain open until 9:00 P.M., well beyond the 7:30 P.M. state statutory closing time. *Id.* at 798, 800.

223. Erlandson v. Kiffmeyer, 659 N.W.2d 724, 734 (Minn. 2003) (concluding that absentee ballots returned before new ballots were issued should be counted, and that a law prohibiting the mailing of the new ballots to absentee voters who received the original ballots violated equal protection). Justice Page, concurring in part and dissenting in part, argued, on the basis of *Bush II*, that the Court's decision to count supplemental ballots of those who requested them but count the original ballot of those who had already submitted the original ballot effectively disenfranchised those who used the original absentee ballots to vote for the dead candidate:

> [T]he proper remedy cannot be one in which some voters must necessarily be disenfranchised. Implicit in the court's resolution is the suggestion that there is no constitutional problem with the "shall be counted in the same manner" language of Minn. Stat. §§ 204B.41. In fact, there are fundamental problems with allowing the votes for United States Senator on some regular absentee ballots to be counted while not counting others.

But contradiction within the sphere of a legitimizing institution can produce substantial cultural and political benefit as well. Contradiction and its exploitation can breed solidarity. Ward Churchill's roller coaster ride through the logical non-linearity of U.S. relations with the Indian Nations provides a case in point.[224] The judicial history of "separate but equal" provided a focal point for the political unity of African-American political movements.[225]

E. *Appropriate*

Successfully deployed images and other means of culturally significant communication[226] can be appropriated by any group with the imagination necessary to create useful linkages.[227] Such appropriation is fundamentally necessary to successfully pursue litigation with political sensitivity. "It is not enough that the social order is 'legal'; it must also appear culturally legitimate. It must draw its inspiration from values recognized by society as

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Id. at 735-36 (citing *Bush*, 531 U.S. at 104-05).

224. *See generally* WARD CHURCHILL, INDIANS ARE US? CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA (1994); Ward Churchill, *The Crucible of American Indian Identity*, Z. MAGAZINE (1998), *available at* http://www.zmag.org/zmag/articles/jan98ward.htm (last visited Aug. 10, 2002).

225. *See* KLUGER, *supra* note 55.

226. *See* Backer, *supra* note 86, at 845 (explaining the meaning of culturally significant communication within the United States).

227. Indeed, Michel Foucault has shown how the obsession to differentiate and then appropriate the mechanics of differentiation has been successfully used to create all sorts of classes of people, distinct from and subordinate to others. *See* MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION (A.M. Sheridan Smith trans., 1973) (discussing illness); FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 53 (discussing criminality); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION (Robert Hurley trans., 1978) (1976) (discussing sexual conduct/orientation); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., 1965) (discussing mental illness).

The ability to invoke the mechanics of differentiation that places a group within the disadvantaged ambit of another has significant political ramifications. In the field of welfare legislation, the politics of depiction has been crucial to the type of legislation enacted and the form of judicial interpretation of that legislation. *See* Larry Catá Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It"* 30 HARV. C.R.-C.L. L. REV. 339 (1995). From the 1930s to the 1960s, the great image invoked was that of the poor widowed or otherwise destitute mother struggling to raise her children without the help of a husband. *Id.* After the 1960s, the image was of a (usually non-white) woman taking advantage of an opportunity offered by the welfare laws to breed herself a salary in the form of welfare payments. *Id.* Changes in legislation, culminating in the great welfare reforms of 1996 reflect these changes in the imagery of women and welfare. *Id.*

fundamental, reflect them and encourage them. Or it must at least seem to do so."[228]

> The best trial lawyers seek highly compelling images and story plots to advance their cause . . . . As one seasoned litigator put it, "I see what I do as playing into certain standard accepted stories that flow through society. What I do is take my client's story and fit it into one of those narrative paths that make people go, 'Okay. Yeah."[229]

Social scientists have studied the ways, especially in political trials, in which appropriation of images with culturally significant effect can affect outcome.[230]

In the *Bush* cases, the language of ethno-racial justice invoked to enhance the social, economic and political rights of subordinated groups was appropriated to subordinate those very groups in the contest over the presidential election.[231] It is equally possible to appropriate the language of fairness and responsibility—of compassionate (or otherwise) traditionalism or conservatism—in the service of its opposite. Sexual minorities have been particular adept at this in litigation with respect to the rights of sexual minorities to decriminalize same sex sexual activity and to advance the cause of same sex marriage.[232] But then again, so have traditionalists warring, in the courts, against an expansion of the social and legal dignity to be accorded sexual minorities.[233] Sometimes the imagery successfully deployed against one group is transferred for use against another.[234]

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228. Franco Moretti, *The Comfort of Civilization*, 12 REPRESENTATIONS 115, 115-16 (1985).

229. RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 41 (2000) (citation omitted).

230. *See, e.g.*, Barkan, *supra* note 96, at 950 (discussing image appropriation in jury trials).

231. *See* Backer, *supra* note 22, at 1096-1108 (deploying the core of the Warren Court's racial justice cases against arguments that voters of color were unequally denied the vote).

232. *See, e.g.*, Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997). For an example of the positive use of imagery in connection with litigation in Kentucky that resulted in the invalidation of laws criminalizing some forms of same sex conduct, see Backer, *supra* note 41, at 611.

233. *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996). The language of state Supreme court opinions, especially those resisting extending equality rights to sexual minorities is replete with this sort of imagery. *See* Backer, *supra* note 40, at 529.

234. *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 78-79 (1997) (describing the transfer of the standard imagery of the Jew as various incarnations of evil, filth, and danger for use against sexual minorities).

Litigants have already begun to appropriate the imagery of equal treatment at the heart of the opinion in *Bush*. It may soon acquire a life of its own.[235] Consider the way the highly publicized *Bush* case has begun to change commonly held notions of the meaning of "equal protection," and how the cultural incursion of *Bush* has reverberated back into the judicial field. In a Nebraska case, *Ways v. City of Lincoln*,[236] a litigant seeking to void a local ordinance argued, in a clumsy, but telling way, of the manner in which the equal protection imagery of *Bush* has been seeping into the culture of the American "heartland."[237]

F. *Exploit Uncertainty and Sentimentality*

Contradiction can be made to breed uncertainty as well as solidarity. Appropriation can nurture sentimentality as well as justice.[238] Both uncertainty and sentimentality can be used to cloak action in legitimizing the vestment of fairness and respect for the superiority of law.

To create uncertainty is to suggest error in the object, decision, norm, or other thing made uncertain. Law demands clarity, applicability and a certain choice. To be able to advance a certain clear alternative in the face of a decadent, contradictory and confused

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235. *See* Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law, and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000) (discussing the cultural utility of courts).

236. No. 4:00CV3216, 2002 WL 1742664, at *1 (D. Neb. July 29, 2002).

237. The district court quoted the plaintiff's allegations in this regard:

> It is clear that under that case that citizens of the Federal Government are entitled to the same immunities, enjoyments of life, liberty, and property of other citizens throughout the community. The affidavit of Mr. Ways clearly indicates that he has been in multiple states and has viewed multiple strip bars and the activity the [sic] he is encouraging and the business that he is running it [sic] typical of those business [sic] run throughout several states. There is absolutely no reason why Mr. Ways should not be allowed under *Bush v. Gore* to the same right to engage in this activity as a citizen from Indiana, Illinois, Minnesota, Kansa [sic], Iowa, South Dakota or any other establishment.

Id. at *24 (quoting Pl.'s Br. at 10-11 (citation omitted)). For the court, *Bush* "does not suggest that a city's properly enacted an ordinance—one that has survived the plaintiff's constitutional challenges—is rendered unconstitutional by the mere fact that other cities have not chosen to exercise their authority to enact similar ordinances." *Id.*

238. *See, e.g.*, LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY (1998) (tracing the way in which literary sentimentality shaped the law of adultery).

legal stance[239] suggests an advancement of the enterprise of law and offers an ease of decision alluring to courts from time to time.[240]

The well known history of the rise and demise of the "separate but equal" doctrine of constitutional law provides an often imitated case in point.[241] Traditionalists attempting to reverse constitutional interpretation of abortion rights[242] and prayer in school,[243] and

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239. This is to suggest the entropy of law described by Duncan Kennedy years ago. *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing the decline of confusing distinctions).

240. This, perhaps, explains the appeal of the jurisprudence of someone like Robert Bork, whose emphasis on original understanding can be seen as an elegant response to the longing for certainty and simplicity based on rules outside of the person, longings or political philosophy of the judge. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143-60 (1990).

241. For a history of the litigation strategy of the NAACP, which initially focused on litigating the enforcement of the separate but equal doctrine, and then attacked the doctrine as unworkable in light of the endless litigation seeking to enforce it, see KLUGER, *supra* note 55; TUSHNET, *supra* note 55.

242. The initial decision in *Roe*, 410 U.S. at 113, has been subject to a steady stream of legislative actions and judicial challenges to its basic decision, which has achieved only partial success. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Simultaneously, opponents of *Roe* have engaged in litigation meant to test the outer boundaries of the doctrine in an attempt to first limit, and then make unworkable, the right to abortion as a prelude to a successful frontal attack. *See e.g.*, Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989); Daniel A. Farber & John E. Novack, *Beyond the Roe Debate: Judicial Experience With the 1980s "Reasonableness" Test*, 76 VA. L. REV. 519 (1990).

243. The decisions in *Engle v. Vitale*, 370 U.S. 421 (1962) (holding N.Y. law requiring recitation of prayer at start of school day unconstitutional), and *School District of Abbington Township v. Schempp*, 374 U.S. 203 (1963) (holding a Pennsylvania requirement of recitation of the Lord's Prayer and Bible reading unconstitutional), have generated tremendous responses in support and opposition. *See, e.g.*, JOHN HERBERT LAUBACH, SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC (1969). Most sessions of Congress since 1963 have seen the introduction of bills seeking to amend the federal Constitution to overturn those decisions and their progeny. *Id.* at 47-97; Michael R. Belknap, *Go and the Warren Court: The Quest for "A Wholesome Neutrality,"* 9 SETON HALL CONST. L.J. 401, 444-50 (1999). The borders of the constitutional limitations of governmental 'involvement' in religion are constantly tested in the courts, and from the perspective of the 'traditionalist' there seems to be no end in sight. Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19 (2003) ("The future course of the Establishment Clause will provide an interesting case study of the Court's willingness to correct a line of decisions that is now incontestably a major perversion of the Constitution." (citation omitted)). Those who do not find judicial pronouncements illegitimate still find them less than models of clarity. "Indeed, [the Supreme Court's] Establishment Clause cases sometimes 'more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles.'" Newdow v. United States Cong., 328 F.3d 446, 481 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (quoting Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 282 (5th Cir. 1996) (Jones, J., dissenting from denial of rehearing *en banc*)); *see generally* Larry Catá Backer, *Reading Entrails*

progressives attempting to constitutionalize protection for sexual minorities[244] have been the most energetic in attempting to mimic the successful African-American legal strategy.

The litigants in the *Bush* cases effectively exploited uncertainty.[245] Uncertainty was at the heart of the equal protection arguments.[246] Uncertainty in the cases touched on matters of fact, law and remedies.[247] In addition, uncertainty remained after the Supreme Court's mandate was issued. Even the Florida Supreme Court accepted the judgment in *Bush* rather grudgingly.[248]

Sentimentality, like uncertainty, works subliminally. To construct images of sentimentality is to tap into cultural patterns that make the form of decision irresistible as a cultural, and thus as a legal, matter. Again, the history of the legal battles over the constitutionality of state sodomy laws is instructive.[249] Iconic images work far more effectively than legal discourse to chart a certain course to decision. Though this truth is usually well masked by the discourse that shrouds it, sometimes it can be glimpsed. Much of the work of public interest litigants, the masterstrokes of cases over the last fifty years over the spectrum of political belief, has rested on the construction of the "right" parties. With the eye of movie casting directors, hypothetical cases are made pointedly concrete through

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Romer, VMI and the Art of Divining Equal Protection, 32 TULSA L. J. 361 (1997) (discussing the confusion created by the Supreme Court's decisions in two equal protection cases).

244. The reaction of sexual minorities to the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was intense. Substantial litigation was focused on state constitutional protection after *Bowers* and the decision has come before the Supreme Court again indirectly in *Romer v. Evans*, 517 U.S. 620 (1996) and now directly in *Lawrence v. Texas*, 123 S. Ct.. 2472 (2003). The result appears to be a willingness by the Supreme Court to revisit the issue. *See Lawrence*, 123 S. Ct. at 2472 (discussing the constitutionality of a state statute regarding homosexual conduct).

245. *See Bush I*, 531 U.S. at 70; *see also Bush II*, U.S. at 1040.

246. *See Bush I*, 531 U.S. at 70; *see also Bush II*, U.S. at 1040.

247. *See Bush I*, 531 U.S. at 70; *see also Bush II*, U.S. at 1040.

248. The separate opinion of Justice Shaw, concurring in the judgment on remand from *Bush* provides clues to the level of uncertainty cultivated by *Bush*. Gore v. Harris, 773 So. 2d 524 (2000) (on remand from *Bush*). "This case has torn the nation and the judiciary. It is quintessentially divisive and confounding. The problem, I believe, lies not in the partisan nature of the issues but rather in the deeply rooted, and conflicting, legal principles that are involved." *Id.* at 527 (Shaw, J., concurring). In addition, the authority of the decision itself remains uncertain. Judge Shaw noted that "although the rule of law is supreme, the key legal text in this case—i.e., the Florida Election Code-is fraught with contradictions and ambiguities, and the key legal ruling—i.e., the United States Supreme Court's final decision in *Bush v. Gore* was denigrated and rejected by nearly half the members of that Court." *Id.* at 530 (citation omitted).

249. *See, e.g.*, Backer, *supra* note 40; Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

judicious choices for the starring role of litigants. That judicious choice depends on those cultural strings the parties wish to jerk. Sentimentality, thus, serves as shorthand for the sort of cultural undertone that sets a case to a culturally mandated conclusion.

The *Bush* cases exploited sentimentality masterfully. The Norman Rockwell voter,[250] whose vote is to be effectively recast by petty functionaries counting votes and surmising intent, became the poster child of the briefs and arguments of the Bush teams.[251] In the

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250. The reference here is to the pictures Norman Rockwell created to illustrate the four freedoms made famous by President Roosevelt and incorporated in the Atlantic Charter. Holsinger writes:

> In his January 6, 1941, State of the Union message to Congress, President Franklin Roosevelt called on Americans to become leaders in a new world focusing on four essential human freedoms: freedom of speech, freedom of worship, freedom from want, and freedom from fear. Seven months later, he reaffirmed America's determination to work toward these vital goals in the momentous Atlantic Charter, which he and British Prime Minister Winston Churchill signed on August 14.... It was Norman Rockwell, one of America's most popular artists, who best made Roosevelt's abstractions real to the average American. For many months after Pearl Harbor, Rockwell tried to find a way to put the Four Freedoms in terms everybody could understand. Then, one evening in July 1942, he decided that if he could paint everyday Americans enjoying those freedoms, the effect would be dramatic. He immediately began to put his ideas on canvas. The *Saturday Evening Post*, which had earlier published dozens of his paintings and illustrations, enthusiastically hired him to create four covers, one for each of the four freedoms.... Using many of his Vermont neighbors as his models, Rockwell completed the four canvases in the fall of 1942. "Freedom of Speech" showed a man expressing his views at a New England town meeting; "Freedom of Worship" featured different Americans at prayer; "Freedom from Want" depicted a large family gathered around a Thanksgiving table; and "Freedom from Fear" portrayed parents peacefully tucking their two sons in bed at night.... The United States government quickly saw how effective the paintings could be, and with the *Post*'s permission, the U.S. Office of War Information printed more than 4 million copies to help sell War Savings Stamps and bonds.

M. Paul Holsinger, *Four Freedoms (paintings - symphony), in* WAR AND AMERICAN POPULAR CULTURE: A HISTORICAL ENCYCLOPEDIA 261-262 (1999). For a discussion of the four freedoms, see FRANK ROBERT DONOVAN, MR. ROOSEVELT'S FOUR FREEDOMS: THE STORY BEHIND THE UNITED NATION'S CHARTER (1966); HENRY S. DRINKER, SOME OBSERVATIONS ON THE FOUR FREEDOMS OF THE FIRST AMENDMENT: FREEDOM OF SPEECH, FREEDOM OF THE PRESS, FREEDOM OF ASSEMBLY AND PETITION, FREEDOM OF RELIGION (1957). *But see* PAUL FUSSEL, WARTIME: UNDERSTANDING AND BEHAVIOR IN THE SECOND WORLD WAR 138 (1989) ("What were the troops to be told they were fighting for, as opposed to their clear understanding of what, in the Pacific at least, they were fighting against? The often-repeated Four Freedoms was one official answer, but even sentimentally set forth on the Norman Rockwell poster 'Ours To Fight For,' they didn't seem to grab the heart, let alone the mind.").

251. "The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective, and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This

press, the opposition was also masterfully recast as foreign and ignorant.[252] This depiction, essentially uncontested, struck a very different cultural chord—that of a group altogether manipulable by demagogues or as merely corrupt. The images of the big city machines of the late Nineteenth and early Twentieth centuries[253] that eventually gave rise to the Progressive Era reforms[254] never strayed far from the Democratic Party's image throughout the litigation. No attempt was made to paint the Republican litigants with the colors of a certain understanding of Mugwumpery—an elite "reacting against the conditions of urbanizing, industrializing America, with its vast immigrant population, [hoping] to weaken political parties and

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unfair, new process cannot be squared with the Constitution." Brief for Petitioners at 40, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

252. *See, e.g.*, Deborah Hastings, *State of Confusion: Welcome to Florida*, THE CANADIAN PRESS, Nov. 11, 2000, *available at* 2000 WL 29227684 (discussing depictions of voters who complained about ballot irregularities or difficulty with the voting system as non-English speaking or old enough to be senile or otherwise stupid). The briefs alluded to this as well: "By properly executing their ballots, voters can ensure that their vote will be counted by the tabulation machinery. Otherwise, these same voters risk having their vote disregarded. No other definition for 'legal votes' fits the legislature's scheme." Brief on the Merits of Katherine Harris et al. at 10, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

253. *See* ROBERT C. BROOKS, CORRUPTION IN AMERICAN POLITICS AND LIFE 14-17 (1910) (explaining that political corruption saves society from mob rule). Of course, it was not merely the imagery of corruption that attached to political machines. *See id.* Machines, especially in large urban areas, were also associated with immigrants and other marginalized groups excluded from the mainstream. *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 71-82 (1957) (discussing the functions of the machine); *see also* Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age*, 100 POL. SCI. Q. 669 (1985-86). Thus, political corruption, immigrants, and the progeny of former slaves—all elements foreign to American self-conceptions—were bundled together in the imagery deployed against the Democratic party. *Id.* These images, used so successfully by the Republican party at the end of the Nineteenth century, found effective modern expression at the end of the Twentieth century as well. *Id.*

254. "Thus, his sense of lost status, his contempt and fear of the masses, his nativism, his reaction to the city boss as a rogue and professional politician—all indicate that the reformer's response to the Tweed Ring was more than simple moralizing about political sin." ALEXANDER B. CALLOW, JR., THE TWEED RING 260 (1966). For a general discussion of Progressive Era reforms, see JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA 1890-1920 (2d ed. 1992); LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA, 1890-1914 (2002); RHETORIC AND REFORM IN THE PROGRESSIVE ERA (J. Michael Hogan ed., 2003). For analysis of progressive era arguments, see DAVID W. NOBLE, THE PARADOX OF PROGRESSIVE THOUGHT (1958). Those reforms did not stray far from a desire to limit the ability of undesirables, immigrants and minorities for the most part, to access many of the greatest social and economic fruits of American society. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 100-01 (1983) (providing an example of legal education reform).

universal suffrage."[255] Thus, it is true enough that, as commentators now understand, "[w]hile the Gore camp's cry was 'count the votes,' the Bush camp's was 'follow the rules.' Both of their messages reflected appeals to common sense, albeit appeals pointing in opposite directions."[256] What this understanding fails to sufficiently reflect are the long cultural pedigrees of these respective positions. The Republicans were able to exploit the cultural underpinnings of theirs more effectively than were the Democrats.

This same divergence of imagery, and its utility in the management of the cases, has already been evidenced in the reparations lawsuits filed in 2002.[257] Rather than focus on slaves who are long dead or their owners, also dead, the suits have sought to target, in part those "persons" who slave holders or slave profiteers before 1865—corporations primarily.[258] Brilliant! In an age in which media and political elites have deployed the imagery of amorality and avarice against the managerial elites of large corporations,[259] there could hardly be a better set of defendants against whom to deploy the arguments for reparations than similar entities. No longer just a case of descendants seeking a substantially vast income and wealth transfer from descendants and newcomers, individual to individual, reparations might be more successfully maintained as the continuing victims of systemic oppression by the network of economic entities that control (and oppress) not just African-American, but all poor and

255. Argersinger, *supra* note 253, at 671; *see also* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955); GERALD W. MCFARLAND, MUGWUMPS, MORALS & POLITICS 1884-1920 1 (1975) (identifying a number of definitions for Mugwumpery).

256. Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1872 (2001) (citations omitted).

257. *See, e.g.*, Evan P. Schultz, *The Case After Slavery: Reparations Suits Redress Real Suffering of Racial Bias*, LEGAL TIMES, Nov. 26, 2001, at 34.

258. *See* Brent Staples, *How Slavery Fueled Business in the North*, N.Y. TIMES, July 24, 2000, at A18; *see also* Robin Finn, *Public Lives: Pressing the Cause of the Forgotten Slaves*, N.Y. TIMES, Aug. 8, 2000, at B2 (discussing litigation against corporations that benefited from slavery).

259. The scandals that rocked some of the nation's largest corporations eventually resulted in the passage of significant new federal legislation regulating corporations, their lawyers and accountants. Daniel Fisher, *Shell Game*, FORBES, Jan. 7, 2002, at 52 (explaining how Enron used a network of external partnerships to hide the declining value of its assets); *see, e.g.*, Christopher Stern, *Members of Rigas Family Indicted; 3 Ex-Adelphia Officials Accused of Conspiracy*, WASH. POST, Sept. 24, 2002, at E1 (noting that the Rigases allegedly "used Adelphia funds to cover more than $250 million in personal stock losses."); Shawn Young et al., *WorldCom Files for Bankruptcy*, WALL ST. J., July 22, 2002, at A3 (discussing how WorldCom filed for bankruptcy protection after accumulating $41 billion of debt due to, in part, misstating $3.8 billion in expenses for five quarters).

working class people. The imagery may not win the lawsuits, but it might make political accommodation more likely.[260]

The courts have picked up on the connection between the imagery of the honest voter and the forces of corruption within the institutions of state and local governance. The linkage made in *Bush*, for example, is echoed in *Harrison County Board of Supervisors v. Carlo Corp.*[261] The imagery used to paint the Democratic party in the *Bush* case—a manipulative, morally dishonest and pharisaic elite that hijacked the machinery of state governance for their own purposes—was deployed in a slightly different guise in *Carlo Corp.*—the rapacious government seeking to take advantage of citizens.[262] It is even echoed indirectly, by reference to the *Bush* defendant's acquiescence in a decision they plainly thought wrong.[263]

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260. *Cf.* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims,* 40 B.C. L. REV. 477 (1998) (discussing the redress and reparations movements by those who suffered because of racial injustice, particularly Japanese Americans and African Americans).

261. 833 So. 2d 582 (Miss. 2002) (holding that taxpayer assessment of the statutory maximum fee for collection of delinquent taxes was arbitrary).

262. Thus, in rejecting the county's argument that it was entitled to assess the statutorily permissible maximum fee of twenty-five percent of the amount collected, the court referred to the *Bush* case for support:

> As the United States Supreme Court noted in the recent controversy regarding chads and the intent of the voter, "the problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable . . . ." In the case at bar, standards are necessary to avoid such ridiculous charges; a fee of $79,912.11 is excessive for the task of writing one letter. Common sense, practicality and appropriateness, in accordance with our Rules of Professional Conduct, so dictate.

Id. at 584 (citation omitted).

263. This element sometimes attains the heights of bathos. Consider the epic mixing of the highest and lowest sentiments in *Karedes v. Colella*, 722 N.Y.S.2d 714 (N.Y. 2001), a case involving a dispute between the manager of a municipal golf course and the municipality over the extension of the management agreement. In the course of that opinion, the court found it necessary to expound on the necessity and nature of the "rule of law." In that context, *Bush* and its aftermath played a substantial role:

> [A] contender for that same Presidency—and the winner of the popular vote—was told that the recounting which he sought of one state's votes would cease, and he must thereby be the loser of the election. His response was a paradigm of statesmanship, and a model for citizenship: "Let there be no doubt, while I strongly disagree with the court's decision, I accept it." Earlier in his text he, too, had paid homage to the rule of law: "Not under man, but under . . . law. That's the ruling principal of American freedom, the source of our democratic liberties." Well said.

Id. at 717.

G. *Recruit Legitimacy*

The intelligentsia and other elites must be recruited to give a greater aura of legitimacy to arguments put forward to courts. Speech, as a symbolic act, requires signs for the listener to assign appropriate weight to the speech act. The greater the legitimacy—or the signs of legitimacy—of the speaker, the more legitimate the speech will appear.[264] There are abundant examples of this. Gerald Torres's brief description of the unionization of a K-Mart Distribution Center in North Carolina provides an example on the political plane.[265] But consider also, in that respect, the receptivity of the local court to the arguments of labor where the judge is aware of the sympathy of the small town elite to the aspirations of labor in that particular case. There is a long history, especially within the labor movement, of strong synergy between the views of the local elite and the attitudes of the local courts to labor disputes before them.[266]

Authority is always, to some extent, defined by socio-political position. Legitimacy is as much a function of status as it is of the value of position taken. Even the most egregious acts might be condoned, or at least tolerated, if made by a critical authoritative institution. Thus, for example, one of the difficulties of freeing Dreyfus from Devil's Island, even after it became clear that his conviction had been rendered in error, was the fact that the authority and legitimacy of the condemning forces—the military and the judiciary of France—were involved.[267] The same forces operate to make freeing people clearly erroneously imprisoned a difficult task—not because of any doubt of innocence, but because of the authority and legitimacy with which the erroneous decisions were invested.[268]

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264. For examples with reference to the normalization of the legal regime in Germany after 1932, see Curran, *supra* note 10, at 151-75.

265. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 131-38 (2002).

266. *See, e.g., id.* at 101-03.

267. For a discussion of the Dreyfuss Affair, which tarnished the reputation of the French judiciary and its military, both ready to sacrifice the individual to preserve the "honor" of the system and a pretended finality and infallibility, see MICHAEL BURNS, DREYFUS: A FAMILY AFFAIR 1789-1945 (1991); ROBERT L. HOFFMAN, MORE THAN A TRIAL: THE STRUGGLE OVER CAPTAIN DREYFUSS (1980).

268. Thus, for example, the furor over DNA testing of convicted defendants sprang, in part, from a sense that the determination that people might have been erroneously convicted might bring the legitimacy of the entire system into disrepute. The recent discoveries of laboratory carelessness and error have contributed to this threat to the legitimacy of the criminal justice system. *See, e.g., Audit of DNA Lab in Houston Leads to Re-examination of 525 Cases it Handled; Houston Facility's Staff Was Overworked and Undertrained*, ST. LOUIS POST-DISPATCH, Mar. 24, 2003, at A4. And, indeed, those fears might well have been borne out when former Governor Ryan of Illinois, as his nearly last act in office pardoned or commuted the death sentences of state prisoners.

Thus, legitimacy and authority rise to paramount importance, and for that purpose, the American courts serve very well, indeed.

The *Bush* cases demonstrate the use of this tactic for legitimizing ends. The case was brought before the federal courts, not necessarily because there were no other remedies available. Clearly, a political solution could have been invoked.[269] However, by invoking the authority and legitimacy of the federal Supreme Court, the parties were able to invest any outcome with the legitimacy and authority of the institution rendering the decision. Indeed, the Chief Justice was well aware of the way in which the institutional authority of the Supreme Court was being used to this effect—and he was happy enough to lend that institutional authority for the purpose of minimizing the political scandal of the resolution of the election contest.[270] As a consequence, any post-facto revisiting of the result—through efforts to recount the ballots for example—could be resisted in order to protect the legitimacy and authority of the courts, rather than that of the political contest itself.

Bush has provided curious, if indirect, fodder for the power of legitimacy of sorts. The Indiana Supreme Court affirmed a sanction of thirty-days suspension for intemperate language.[271] A dissenting opinion argued that the offending footnote ought not to be found "within the broad range of protected fair commentary on a matter of public interest."[272] For the author of that opinion, the language was "no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as *Bush v. Gore*. . . . [or] from the charges occasionally leveled by

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See, e.g., Kate McCann and Christi Parsons, *Death Penalty Debate Gets Forum; In House in a Surprise, State Panel OKs Abolition*, CHI. TRIB., Mar. 7, 2003 at 1.

269. Justice Breyer, dissenting in *Bush II*, was quick to remind his colleagues that, indeed, "the selection of the President is of fundamental importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so tends to determine the outcome of the election." *Bush II*, 531 U.S. at 153 (Breyer, J., dissenting). For an interesting study of the death of the political question doctrine and its effect on the trend to the juridification of American political life, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

270. *See Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (recognizing that rendering this decision may impinge on federalism).

271. *In re* Wilkins, 777 N.E.2d 714, 719 (Ind. 2002). The lawyer subject to discipline had suggested, in a footnote included in a brief, that the decision of certain court of appeals judges was motivated by something other than the proper administration of justice. *Id.* at 715-16. This was deemed to violate Indiana Rule of Professional Conduct Rule 8.2(a). *Id.* at 716.

272. *Id.* at 720 (Boehm, J., dissenting).

judges at other judges."[273] The Supreme Court itself, it seems, has legitimized what could be characterized as tasteless and disrespectful forms of argument.

H. *If All Else Fails, Overwhelm Law Through Its Own Devices*

Every normative legal system provides the tools for its own overcoming. Those tools will be different across systems but in every case are dependant, for their utility, on their connection to the normative core of the system to be overcome. In systems heavily invested in fairness as a core substantive value, like the American system,[274] procedure provides a tool which can both legitimize and overcome the system.[275] In the case of the American system, a hyper-exercise of procedural rights, of rights to demand the time and efforts of the process institutions, primarily the courts, can have perverse effects. Process geared to a certain rhythm will break down when overwhelmed.[276] That breakdown itself will constitute an act of arbitrariness going to the heart of the legitimacy—and thus the authority—of the institution. Where the legitimacy, authority or effectiveness of the courts is sought, taking advantage of systemic opportunities can be as effective as direct attacks.

Clogging the system provides a means of expressing political sentiment. It provides a necessary pause in the other business of the state. It may also precipitate the crisis through which one may be heard.[277] The *Bush* cases used this strategy, and its threat—brilliantly. The Republican Party combined the suit with the threat of filing a number of claims based on voting irregularities in national and local elections in which Democratic Party candidates had won.[278]

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273. *Id.* To buttress his argument, Justice Boehm cited language from recent constitutional law opinions of Justice Scalia accusing Justice O'Connor of irrationality or impugning the motives of the members of a majority opinion. *Id.*

274. *See generally* Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*, 33 TULSA L.J. 135 (1997) (discussing the principle of fairness in American Constitutional Law).

275. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-103 (1980) (recognizing that American academic constitutional theory is heavily invested in this notion of process as basis of legitimacy).

276. This was a fear expressed by elite judges in the 1980s, especially with respect to the work of the federal courts. *See generally* POSNER, *supra* note 166 (discussing the effects of the federal courts' system).

277. In the EU context, see, for example, Tridimas, *supra* note 167, at 122.

278. The popular press reported that:

> James A. Baker III, strategist for Bush, called on Gore and his Democratic allies to drop threatened legal challenges in Florida and accept the outcome of the statewide recount expected Tuesday and the tally of absentee ballots expected next Friday.

Others not connected with the political parties or Florida also sought to intervene in the vote counting in Florida as well.[279] The litigation that eventually became *Bush v. Gore* proceeded on many simultaneous tracks. Or maybe a better image is a giant checkerboard, with pieces moving in all directions and jumping over one another through the state and federal systems. It would take a full-length book (and there are plenty already) to reconstruct the roughly two-dozen separate pieces of litigation. The field-marshal skill involved on both sides in simply keeping on top of all the cases was impressive.[280]

Litigants have begun to use the *Bush* case, especially its equal protection components, for a variety of purposes. Sifting through what are sometimes difficult to understand arguments,[281] litigants are creating the sort of clogging of the courts that can significantly hamper system efficiency. The utility of *Bush* for clogging the courts both to express a political sentiment and to seek change, has been its use by criminal defendants in California attacking, on equal protection grounds, the standard California jury instruction on reasonable doubt.[282] After repeated, and unsuccessful, attempts to

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> Baker—said to be considering injunctions against hand-counting ballots—warned that unless Gore abided by Bush's expected popular vote victory in Florida and dropped threatened legal action, Republicans may challenge Gore's narrow leads in Iowa, Wisconsin and New Mexico.

Stewart M. Powell, *Tensions Rise as Nation Waits,* TIMES UNION (Albany, NY), Nov. 11, 2000, at 1, *available at* 2000 WL 23871538.

279. *See, e.g.,* Wells v. Florida, 17 Fed.Appx. 272 (6th Cir. 2001) (discussing a section 1983 action by a Kentucky litigant against recount proceedings in Florida mooted after the Supreme Court rendered its decision in *Bush*).

280. Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2D 381, 384 (2001).

281. *See, e.g.,* Hecht v. Barnhart, 217 F. Supp. 2d 356 (E.D.N.Y. 2002) (appeal seeking re-determination of SSI benefits).

> Finally, Plaintiff alleges as a cause of action in his complaint that Defendant violated "the Equal Protection Clause of the Constitution by denying the mentally incapacitated plaintiff SSI benefits which are provided to competent SSI recipients because the SSA Commissioner presumes the availability of resources under the jurisdiction of the State Court for which there has *not* been an order to distribute the funds for 'support and maintenance' which results in the denial of SSI benefits because a different standard is applied to incompetent SSI recipients than applied to competent SSI recipients." First, Plaintiff does not argue this point in his briefs and thus it is waived since this Court can only guess at its meaning.

Id. at 362.

282. That instruction provides:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the

make this argument before the California appellate courts,[283] at least one court had enough: "There are only so many ways to beat a dead horse, and this court has concluded the due process challenge to CALJIC No. 2.90 has been beaten enough."[284] On the other hand, the court also determined that the "equal protection challenge requires slightly more discussion."[285] Though the court could not resist dismissing *Bush* as inapplicable under California law,[286] it went out of its way to demonstrate that *Bush* could not have meant indirectly to overrule prior Supreme Court holdings on the constitutional validity of the reasonable doubt standard.[287]

Despite the rejections of the arguments against the use of *Bush* to challenge California's jury instructions, the cases keep coming up

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> jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

The Comm. on Standard Jury Instructions of the Super. Ct. of L.A. County, Cal., California Jury Instructions-Criminal § 2.90 (7th ed. 2003).

283. *See Ferrel*, 2002 WL 31781158, at *11-13; *Lee*, 2002 WL 31431509, at *3-4; People v. Patlan, No. F037794, 2002 WL 1897963, at *5-6 (Cal. Ct. App. Aug. 19, 2002); *Chhoeun*, 2002 WL 502523, at *8-9; *Denton*, 2002 WL 453733, at *4; People v. Warren, No. C039112, 2002 WL 307579, at *1-2 (Cal. Ct. App. Feb. 27, 2002).

284. *Williams*, 2003 WL 245716, at *11. This opinion, like the others before it raising similar issues, was not officially published, and under California's Rules of Court, it may not be cited or relied on by courts or parties. CAL. CT. R. 977(a). But the decisions *are* read. *Williams* was not the first California appellate court to more carefully consider the equal protection claims raised with respect to the burden of proof instruction. The analysis, and even the language of the opinion follows closely that of an earlier unpublished appellate court opinion. *Denton*, 2002 WL 453733, at *4-5; *see also Ferrel*, 2002 WL 31781158, at *11-13 (outlining a similar analysis); *Lee*, 2002 WL 31431509, at *6 (reasoning that the *Bush* opinion is unpersuasive because similarly situated groups are treated the same).

285. *Williams*, 2003 WL 245716, at *11.

286. "It is fundamental that a case is not authority for an issue neither raised nor considered." *Id.* (citation omitted).

287. *Id.* (citing Victor v. Nebraska, 511 U.S. 1, 5 (1994)). The court noted that "in *Bush*, the court majority carefully distinguished the election contest before it from the ordinary case in which a jury evaluates evidence at a criminal trial." *Id.* The *Williams* court concluded that the Supreme Court's *Bush* holding "that the 'intent of the voter' standard is insufficient does not disclose any belief that the beyond-a-reasonable-doubt standard is similarly inadequate." *Id.* at n.3; *accord Hunter*, 2003 WL 21666817, at *48-50; *Arconti*, 2003 WL 21279674, at *6-7.

In *Ferrel*, 2002 WL 31781158, at *12, the court also relied on *Victor* to support the validity of CALJIC 2.90 and to reject defendant's contention that *Bush* "implements a new and important legal principle for protecting our constitutional rights." *Id.* The court explained that *Bush* was limited to its unique factual context, and that the equal protection problem in *Bush* was fundamentally different than that presented under the jury instruction, and that the prior and still valid Supreme Court precedent did not require a definition of reasonable doubt that could be more systematically and uniformly applied. *Id.*

for appeal.[288] Deploying people with sincerely held beliefs to file individual motions testing even the most apparently settled notions of substantive law and procedure can have similar effects. It is not that difficult to motivate people with sincerely held beliefs to litigate.[289]

Still, the ultimate deployment may still remain essentially political. Judges, especially elected state judges, are always subject to judgment themselves. Recalls of judges, and campaigns against the retention of judges, have become increasingly popular since the 1980s when the political process was used to remove a number of "liberal" judges form the California Supreme Court.[290] Where politics becomes the bread and butter of the judiciary, judicial selection becomes as important as the elections affecting the legislative and executive branches, if not more.[291] For this, both liberals and conservatives can look to the *Bush* cases as well.[292]

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288. *See, e .g., Hunter*, 2003 WL 21666817, at *54-56; People v. Nguyen, No. H023622, 2003 WL 21470360, at *7-8 (Cal. Ct. App. Jun 25, 2003); *Ryden*, 2003 WL 21404697, at *1-2; *Arconti*, 2003 WL 21279674, at *6-7; *Kemp*, 2003 WL 1827295, at *13.

289. For an example of the sort of litigation stances evoked by *Bush*, see *Strunk v. United States House of Representatives*, 24 Fed.Appx. 21, 2001 WL 1412533, at *1 (2d Cir. Nov. 8, 2001) (relying, in part, on teaching of Bush to reject the request for an injunction preventing New York from seating its electors for the 2000 presidential elections); *Armstead v. Brewer*, No. 3-03-CV-0318-H, 2003 WL 21509158, at *1 (N.D. Tex. Apr 10, 2003) (dismissing as frivolous plaintiff's *pro se* complaint about the result of the 2000 presidential elections and the then imminent war with Iraq); *Perkel v. United States*, No. C 00-4288 SI, 2001 WL 58964, at *1 (N.D. Cal. Jan. 9, 2001) (dismissing a *pro se* complaint without prejudice against the United States to forestall constitutional crisis evidenced in part by *Bush* decision for lack of standing).

290. *See, e.g.,* PHILLIP JOHNSON, THE COURT ON TRIAL (1985) (explaining opposition based on the court's stance on capital punishment and rulings in favor of consumers and employees); *see generally* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997).

291. *See* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges,* 36 U.C. DAVIS L. REV. 619 (2003).

292. Professor Chemerinsky has it right when he suggests an explanation for the increased sense of the importance of ideology to judges:

> There is a widespread sense that the focus on ideology has increased in recent years. . . . There are several explanations for why there is intense focus on ideology at this point in American history. . . . People increasingly have come to recognize that law is not mechanical, that judges often have great discretion in deciding cases. People realize that how judges rule on questions like abortion and affirmative action and the death penalty . . . is a reflection of the individual jurist's views. *Bush v. Gore* simply reinforced the widespread belief that the political views of judges often determine how they vote in important cases.

Id. at 625-26.

IV. CONCLUSION: A PEEK AT THE TOOLS OF THE TRADE, OR EQUAL PROTECTION AS THE LUBRICANT FOR CONSTITUTIONAL TRANSFORMATION

The cases considered in this article all rely to some extent on the unique and limited holding and dicta of *Bush II*, for what appears to be an expanding range of issues. More time is needed to better understand the ultimate effect, if any, of the case on American jurisprudence. I believe the effects of the case are only now beginning to be felt. In one area, in particular, *Bush II* adds significant weight to one jurisprudential trend that is worth sketching out a little further the jurisprudential cluster of equal protection.

The application of the judicial methodologies inherent in *Bush* provides us with a sense of the jurisdictional space within which the judiciary will view its authority. And, of course, it is to the judiciary itself, and the federal judiciary in particular, that recourse must be made for the determination of the limits of judicial authority.[293] The methodologies exposed in *Bush*, taken together, suggest the reinforcement of a progress toward a rigid hierarchy. This hierarchy could not have been envisioned at the time of the Founding. The move towards hierarchy, however, will no doubt be affirmed by an appropriate reinterpretation of the writings of the founders.[294]

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293. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Some modern commentators excuse the assertion of the judicial authority, at least in the context of election laws, as a necessary remedy for political (or legislative) failure. *See, e.g.*, Martin D. Carcieri, Bush v. Gore *and Equal Protection*, 53 S.C. L. REV. 63, 76-77 (2001). The judicial role in the voting cases can be defended as:

> necessary to safeguard the equal access of every American to elected officials and institutions of governance. Even if the institutional limitations of the adjudicatory process decrease the possibility that courts can provide comprehensive solutions, on balance the good done by the judiciary in these cases of political process failure outweighs the harm.

Id. (quoting Elizabeth Garett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 44 (Cass R. Sunstein & Richard A. Epstan eds., 2001)).

294. This pattern is particularly the favorite of the twentieth century judiciary. Law students are taught to marvel, and imitate, the dexterity with precedents evident in many of the opinions of Justice Cardozo, for example. *Compare* Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922) (finding buyer of beans might have a cause of action against weigher of beans who had been engaged for that purpose by seller) *with* Ultramares Corp. v. Touche, 255 N.Y. 170 (1931) (holding accountant would not have liability to an indeterminate class of persons who might have relied on the accountants reports). More recently, the opinions of the Chief Justice evidence a pride of imitation of this form of reworking of the past, at least within the judicial sphere. For examples of the way prior cases can be seamlessly reconstituted to effect significant change, see the Chief Justice's opinions in *Lopez*, 514 U.S. at 549 (reconstructing prior commerce clause cases to restate the standard for application of that provision), and *Morrison v. Olson*, 487 U.S. 654 (1988) (reconstituting separation of powers doctrine in "administrative law" field).

The lubricant of that power in this century, I suspect, will be equal protection jurisprudence. It will function like the lottery, giving a false or exaggerated hope that changes in relative treatment is possible.[295] It will also serve as a basis for consolidating power in the courts—for who but the courts will ultimately be capable of determining, finally, what is or is not equal treatment within the parameters of the federal (and in its little corner, state) constitutions. In this respect, *Bush II's* use of the judiciary to settle political disputes in states on the basis of a more aggressive reading of the judiciary's power to order people and institutions about in the name of equal protection is merely a tendency already visible in the 1990s. In its own way, *Romer v. Evans*[296] involved the judiciary in a matter of significant political concern resolved on the basis of a more aggressively applied equal protection clause, administered, of course, by the federal courts. For those who tend to view judicial opinions as political, the Supreme Court seems to have split the baby—enraging conservatives by *Romer*, enraging liberals by *Bush II*. *Romer* and *Bush II*, taken together, then, suggest that the ultimate winner of the race to the courts for the resolution of political disputes has been—the courts.[297]

Consider the focus of litigation based on the equal protection clause hope of *Bush II* in the very short time since the publication of the decision. The equal protection inquiry was central to attacks on the electoral process of states from a number of angles.[298] But not just the conduct of elections—the hope of equal protection has reached voter initiative elections,[299] the constitution and rights of counties and county governance,[300] apportionment,[301] labor union elections,[302] and even the election of representatives to university student government.[303] Equal protection analysis also played a role the

295. This hope is extended to academics no less than litigants. For a glimpse of the mountain of works, written in standard form (and thus more "formally" authoritative), in which various aspects of this lust for equal protection are exposed after *Bush II*, see Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281 (2002).

296. 517 U.S. 620 (1996) (holding Colorado constitutional revision denying certain political rights to gay men and lesbians violates federal equal protection clauses limitations on state actions).

297. For a theory of the sociology of this phenomena, see *Backer*, *supra* note 81.

298. *See supra* notes 113-14, 117-18, 199-200 and accompanying text.

299. *See* Save Palisade Fruitlands v. Todd, 279 F.3d 1204 (10th Cir. 2002); *see also supra* notes 193-98, 201-02 and accompanying text.

300. *See Save Palisade Fruitlands*, 279 F.3d at 1204; *see also supra* text accompanying notes 201-02.

301. *See supra* notes 115-16 and accompanying text.

302. *See supra* note 207 and accompanying text.

303. *See supra* note 208 and accompanying text.

attempt to overturn residency requirements for qualification to serve as mayor of New Haven.[304] The manipulation of equal protection in *Bush II* has inspired criminal defendants seeking to rewrite state standard jury instructions on reasonable doubt.[305] It has been used to challenge the fee structures of state government.[306] It has formed part of a challenge to the extension of a golf course management agreement.[307] In each of these cases equal protection has provided greater opportunity for litigants, and more work for the courts. Here an interesting use of law, indeed. And judges are bracing for what is coming:[308] challenges to the use of money in political campaigns;[309] the structure of and process of state elections;[310] the right of American citizens resident in United States territories to participate in Presidential elections;[311] the methods of prosecutorial discretion and charging decisions;[312] caps on awards against states[313] and even the operation of strip bars;[314] the intrusion of federal courts into matters of state law interpretation;[315] and the use of intemperate language in judicial proceedings.[316]

Many of the lessons extracted from the *Bush* cases are old. There is precedent for all of the lessons applied. I make no claim of discovery. However, to see all the lessons applied simultaneously in one singularly important case is unusual. To see the judiciary embrace a role in the process suggests culpability based, at the least, on careless indifference to the potential for wrong inherent in their participation. To see the judiciary embrace some of the less obvious teachings, the embedded lessons of *Bush*, so quickly and so completely, illustrates nicely LatCrit's "critical and self critical application of the theory we profess and articulate to a key site of

304. *See supra* note 134 and accompanying text.

305. *See* cases cited in *supra* note 283.

306. *See supra* notes 261-62 and accompanying text.

307. *See supra* note 263 and accompanying text.

308. *See supra* note 148 and accompanying text.

309. *See supra* notes 210-15 and accompanying text.

310. *See supra* note 217 and accompanying text.

311. *See supra* note 119-24 and accompanying text.

312. *See Pena*, 2002 WL 118650, at *10; *Cunningham*, 62 P.3d at 823; *see supra* text accompanying notes 174-75, 181.

313. *See supra* notes 138-40 and accompanying text.

314. *See* Ways v. City of Lincoln, 2002 WL 1742644, at *1; *see also supra* notes 234-35 and accompanying text.

315. *See Filson*, 2002 WL 31528616, at *1; *see also supra* text accompanying notes 176.

316. *See Wilkins*, 777 N.E.2d at 714; *see also supra* text accompanying notes 269-71.

contestation: the legal academy and imagination of the United States—a highly legalistic society if ever there was one."[317]

I have attempted an amoral romp through the *Bush* cases. But the reader should by now be ready to accept that the amorality is in the cases and not in my romp. And that conclusion should worry us. All systems must rely on the good faith of those charged with its maintenance. Good faith requires a strong belief in the fundamental worth of the substantive norms the system is geared to implement. Where elites contest the core meaning of that substance, where competing or emerging elites seek to wrest control of that meaning from others, good faith falters. And then, all that is left are the tools—and the contest. However, when those contests are obfuscated through the niceties of the behavior and linguistic facades of academic, judicial or institutional discourse, the entire system may fail us.

317. Elizabeth M. Iglesias and Francisco Valdes, *LatCrit at Five: Institutionalizing a Post-Subordination Future*, 78 DENV. U. L. REV. 1249, 1277 (2001).