SUPREME COURT OF THE UNITED STATES

No. 00–949

GEORGE W. BUSH, ET AL., PETITIONERS *v.*
ALBERT GORE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE BREYER join as to Part I, dissenting.

I

The CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante*, at 3. But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore* v. *Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 45–55) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd.* v. *Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 34) (on remand) (confirming, 6–1, the construction of Florida law advanced in *Gore*). I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the

members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner* v. *Mata*, 449 U. S. 539, 549 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.'" *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 509 (1963)); see *O'Dell* v. *Netherland*, 521 U. S. 151, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990)); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary

L. Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp.* v. *Romein*, 503 U. S. 181 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court." *Id.*, at 187 (citation omitted). And in *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.*, at 195.[1]

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[1] See also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1032, n. 18 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude . . . beneficial uses in the circumstances in which the land is presently found"); *Bishop* v. *Wood*, 426 U. S. 341, 344–345 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley* v. *Rhoden*, 421 U. S. 200 (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification devise to afford state high courts an opportunity to inform us on matters of their own State's law because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers*, 416 U. S., at 391.

Just last Term, in *Fiore* v. *White*, 528 U. S. 23 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.*, at 25–26. Instead of resolving the state-law question on which the federal claim de-

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grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of the meaning of state statutes," we said that "[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.*, at 208.

pended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.*, at 29; *id.*, at 28 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans*, 520 U. S., at 77, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers*, 416 U. S., at 391, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603 (1813), *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), and *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), cited by THE CHIEF JUSTICE, are three such rare instances. See *ante*, at 4, 5, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61–62 (13th ed. 1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). *Patterson*, a case decided three months after *Cooper* v. *Aaron*,

358 U. S. 1 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is without any fair or substantial support." 357 U. S., at 455. *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws– criminalizing conduct not covered by the text of an otherwise clear statute– was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U. S., at 350, 354.

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. As JUSTICE BREYER convincingly explains, see *post*, at 5–9 (dissenting opinion), this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state court interpretations of state law. *Ante*, at 5 ("To

attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U. S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U. S. Const., Art. IV, §4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").[2] Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the

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[2] Even in the rare case in which a State's "manner" of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint. See U. S. CONST., amend. XII; 3 U. S. C. §§1–15; cf. *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 569 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, §4); *Luther* v. *Borden*, 7 How. 1, 42 (1849).

ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz* v. *Roe*, 526 U. S. 489, 504, n. 17 (1999) (citing *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U. S. Const., Art. II, §1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President) (emphasis added); *ante*, at 1–2 (STEVENS, J., dissenting).[3] Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with JUSTICE STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in

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[3] "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution . . . grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, §4, cl. 1 . . . , and allows States to appoint electors for the President, Art. II, §1, cl. 2." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 841–842 (1995) (KENNEDY, J., concurring).

which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (even in the context of the right to vote, the state is permitted to reform "'one step at a time'") (quoting *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

Even if there were an equal protection violation, I would agree with JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER that the Court's concern about "the December 12 deadline," *ante*, at 12, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward— despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante*, at 8— ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as JUSTICE BREYER explains, *post*, at 12 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U. S. C. §5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha[d] not been . . . regularly given." 3 U. S. C. §15. The statute identifies other significant dates. See, *e.g.*, §7 (specifying December 18 as the date electors "shall meet and give their votes"); §12 (specifying "the fourth Wednesday in December"— this year, December 27— as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of

state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. §15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante,* at 12. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.