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## Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government

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## ESSAY

### **Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government**

RICHARD C. SCHRAGGER†

#### INTRODUCTION

For many, the most enduring images from the presidential election debacle of 2000 were the individual members of county canvassing boards seated at tables set up in gymnasiums, school auditoriums, and wherever else there was room, peering quizzically up at disputed punch-card ballots, looking for a glimmer of light behind those pieces of cardboard. The hanging chad became a running joke, a symbol of everything that was wrong with a process that had been badly bungled and was now running amok, and which was irretrievably corrupt. The skepticism that met the canvassing boards was ferocious. Indeed, to many around the country—whether in favor of or against recounting, whether Democrat or Republican—the pictures of individuals sitting at card tables in gymnasiums trying to

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decipher punch-card ballots were simply not consistent with their vision of American democracy at work. The canvassing boards' seemingly Sisyphean undertaking made a mockery of the franchise and a laughingstock, some said, of the United States.<sup>1</sup>

The heroic counter-image barely made it to the surface. This image, of canvassing board members and their staffs taking an oath to uphold the constitutions of Florida and the United States before sitting down next to their neighbors to do the work of democracy, was not widely embraced. Even supporters of Vice President Al Gore held their noses, begging America's indulgence and patience for the "messy" but "necessary" work of hand counting thousands of disputed ballots.<sup>2</sup> Very few viewed the canvassing boards as a glorious example of local governance at work, as—in fact—the very ideal of local participatory democracy. And fewer still expressed any confidence in the competence of the individual members of the boards. These individuals were not experts, national or state political leaders, or television personalities, but rather "everyday" folks who were involved in politics at what is arguably the most local and least glamorous level possible—the county canvassing board.

There is an irony here, in a country that so often takes pride in local self-governance, and whose politicians regularly deploy the rhetoric of local control. That rhetoric masks a deep ambivalence, a romantic vision of participatory democracy in small-scale settings accompanied by a mistrust of local officials and a suspicion that local power is often abused. This Essay examines how we arrived at a

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1. See, e.g., Hoda Elemary, *Appeal to Democrats: Gore Must Concede for the Country's Sake*, WASH. TIMES, Dec. 6, 2000, at A21, available at 2000 WL 4171364; *Places Where a Ballot Means Something*, GLOBE & MAIL, Jan. 1, 2001, at A10; Roger Simon, *Eye on the Prize: A Historic Fight to Decide Who's Got the Votes and Which Ones Count*, U.S. NEWS & WORLD REP., Nov. 27, 2000, at 27-28, available at 2000 WL 29541926; *Broward Officials Want Students to Try Hacking Mock Election*, Aug. 16, 2001, <http://www.newsjournalonline.com/2001/Aug/17/POL002.htm> (last visited Feb. 22, 2002).

2. See Dan Balz, *Bush Authorizes Seeking Court Order to Stop Fla. Counties' Hand Recounts*, WASH. POST, Nov. 11, 2000, at A1, available at 2000 WL 25427645; Ron Fournier, *Presidential Election Tumbles into Courts*, Nov. 13, 2000, available at <http://www.nctimes.com/news/111400/s.html> (last visited Feb. 22, 2002).

state of affairs where local governance is everywhere acclaimed and nowhere trusted.

More specifically, this Essay uses *Bush v. Gore*<sup>3</sup>—the U.S. Supreme Court decision that effectively resolved the 2000 presidential election—as an opportunity to focus attention on the role of local institutions in our constitutional democracy, a discussion that few have undertaken in the aftermath of that case though it was centrally concerned with the powers of local entities.<sup>4</sup> The 2000 presidential election—with county canvassing boards at the center—gives us an opportunity to examine local government as both a formal political institution and as a site for democratic practice. I offer the canvassing board as an archetype (if not an ideal) of localism: first, as representative of a local political community, be it a town, city, school district or, as in this case, a county; and second, as an exemplar of a local institution staffed by “ordinary people”—be it the planning board, the school board, the town council or, as here, the canvassing board.

I am interested in how these local institutions are treated as a formal doctrinal matter and what that says about the current state of our democratic practice. My initial claim is that *Bush v. Gore* is a vivid example of what Joan Williams has called the “constitutional vulnerability” of local government.<sup>5</sup> Local political entities like counties are “vulnerable” to the extent that their constitutional status is ambiguous.<sup>6</sup> Because local governments have no clearly defined role in the constitutional scheme, courts have few constraints (and little guidance) when faced with questions concerning the distribution of power between local and state or federal institutions. The result has been a constitutional “doctrine” that treats localities as mere creatures of the state with no independent federal

3. 531 U.S. 98 (2000) (per curiam).

4. There has been an understandable avalanche of commentary on *Bush v. Gore*. A small sampling includes: THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); SAMUEL ISSACHAROFF ET. AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001); THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001).

5. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83.

6. See *id.* at 152.

constitutional role, and an alternative “shadow doctrine” that treats localities as sovereign political entities entitled to constitutional protection. The emergent local government jurisprudence oscillates between distrust and trust of local governments depending on whether the exercise of local power is consistent with some substantive (political) end.

This doctrinal uncertainty points toward a deeper vulnerability—however, a political culture that is increasingly alienated from governance generally, and from local government in particular. I wonder why the counties and the county canvassing boards were not considered appropriate sites for resolving the 2000 presidential election, and what that says about current conceptions of democratic government. I am thinking here again of how images of the Florida county canvassing boards at work in their gymnasiums reflect both elite and popular conceptions of self-government—how they map the “cultural terrain” of democratic practice.<sup>7</sup> Local governance is not only doctrinally untethered; I suggest that it is politically and culturally untethered as well. If *Bush v. Gore* indicates some deficiency in the institutions of American democracy, as many have suggested, the defect may not be in our national institutions, but rather in the marginalization of our local ones.

In critiquing the majority decision in *Bush v. Gore*, this Essay does not retell a suitably exasperated story about how a Supreme Court that has made federalism its central value suddenly discovered the Equal Protection Clause. The “Federalist Five,”<sup>8</sup> I argue, are no more responsive to localism than are those on the Court with a more expansive

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7. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 697 (2001). Pildes defines democratic practice as “the institutional structures of democracy with which we live, the legal framework of national democratic practices, and the dispositions of judges and many others toward novel or received forms of democratic practice.” *Id.* at 717.

8. The Supreme Court Justices who vote heavily in favor of states rights “when state interests conflict with an individual citizen’s claim of a federal right” have been called the “Federalist Five.” Ann Althouse, *The Federalist Five*, A.B.A. J., Jan. 1990, at 46 (naming Chief Justice Rehnquist, Justices White, O’Connor, Scalia, and Kennedy as comprising the five-member “federalist” majority prior to White’s retirement); see also Betsy McCaughey Ross, *New Support for States Rights: The Conflict Between Federalism and Equal Protection Is the Defining Issue of Important Cases Now Before the Supreme Court*, AM. OUTLOOK, Winter 2000, at 44, 45 (listing Justice Thomas as a member of the “Federalist Five”).

understanding of the Commerce Clause. In fact, federalism often works at cross purposes with a substantive localism, and the Equal Protection Clause can be employed to defend local governance as much as to override it. This Essay seeks to rehabilitate the county canvassing boards in a different way, by suggesting where localism fits within a federal scheme that has been mostly inattentive to the status of local government. The effort may not make heroes of the county canvassing boards of Florida or anywhere else, but it raises new questions about the role of local institutions in a constitutional democracy.

Part I of this Essay observes how *Bush v. Gore* reflects a legal culture that is ambivalent about local government, how that ambivalence has been translated into constitutional doctrine, and how that doctrine is deployed toward the Court's desired result. By claiming that the decision was "results oriented," I do not mean to express an opinion about the motivations of the Justices. I will leave it to others to determine whether the majority of Justices on the Supreme Court were motivated by partisan political desires, an institutional concern to avoid a constitutional crisis, or a genuine belief that particular constitutional norms mandated intervention. The thesis of constitutional vulnerability *presumes* that local government status is deployed in the service of larger political values or goals.<sup>9</sup> What I am interested in is how the Court treated counties and their canvassing boards and to what end.

Part II challenges the assertion that the Rehnquist Court's federalism jurisprudence is protective of local government. In fact, localism and federalism are often incompatible. In *Bush v. Gore*, they are on opposite sides.

Part III concludes with some observations about the current thinness of our conceptions of self-government. I suggest several reasons why local institutions are not

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9. Whether these goals are characterized as "high politics," which "involves struggles over competing values and ideologies," or as "low politics," which "involves struggles over which group or party will hold power," Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062-64 (2001), is not my concern. In any case, the thesis of local government vulnerability shows how difficult it is to disentangle "high" from "low" politics. As Joan Williams has shown, local government status has historically been manipulated in the interests of specific political forces (for example, property owners) in the name of larger ideologies (for example, the market). See Williams, *supra* note 5, at 87-138; *infra* Part I.C.

considered relevant institutional checks on the “rule by nine,” drawing connections between the Court’s treatment of the county canvassing boards and scholars’ recent concerns about the state of civil society. The conclusion to be drawn from *Bush v. Gore* is not that the Court manipulated local government status toward a desired end—that is far from unusual. Rather, the real lesson may be that we allowed the Court to do so.

### I. TRUST AND DISTRUST

I begin with the obvious but overlooked observation that the Supreme Court was bound by the institutional geography of voting in Florida. Counties and county canvassing boards—the most local of local institutions—were the origins of the presidential election dispute. Florida is divided into over sixty counties, independent political entities that govern through elected county commissioners. Under Florida law at the time of the 2000 presidential election, county canvassing boards were composed of three officials: the county Supervisor of Elections, a county court judge, and the chair of the board of county commissioners.<sup>10</sup> The canvassing boards oversaw the work of county election boards, composed of inspectors and clerks, who were required to be residents of the county.<sup>11</sup> The canvassing boards were charged with transmitting the countywide returns to the Florida Department of State.<sup>12</sup>

It is easy to forget that an election dispute that was eventually reduced to the two candidates’ names—George W. Bush and Al Gore—began with a lawsuit pitting county canvassing boards against the Florida Secretary of State. The Palm Beach and Volusia County canvassing boards sought injunctive and declaratory relief requiring that the

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10. FLA. STAT. ANN. § 102.141(1) (West 1982). *But see* Florida Election Reform Act of 2001, 2001 Fla. Sess. Law. Serv. 2001-40 (West) (amending FLA. STAT. § 102.141).

11. FLA. STAT. ANN. § 102.012(1) (West 1982) (making the county supervisor of elections of the county canvassing board “responsible for the attendance and diligent performance” of each clerk and inspector); *id.* § 102.012 (2) (West Supp. 2001) (mandating that inspectors and clerks of the election board “be a registered qualified elector of the county in which the member is appointed”). *But see* Florida Election Reform Act of 2001, 2001 Fla. Sess. Law. Serv. 2001-40 (West) (amending FLA. STAT. § 102.012).

12. FLA. STAT. ANN. § 102.141(6) (West Supp. 2001). *But see* 2001 Fla. Sess. Law. Serv. 2001-40 (West) (amending FLA. STAT. § 102.141).

Florida Secretary of State certify their recounted election returns even if those returns were submitted beyond the statutory deadline.<sup>13</sup> The initial issue then was the distribution of authority between a state official acting through a state office, and local officials acting through local offices. A state circuit court judge ruled that the Secretary was not required to accept late returns.<sup>14</sup> That decision was overruled by the Florida Supreme Court, which held that the Secretary of State was required to accept amended election returns even after the statutory deadline unless doing so would undermine the integrity of the electoral system.<sup>15</sup>

The U.S. Supreme Court, however, remanded the case to the Florida Supreme Court, requesting that the Florida court clarify its ruling in light of the fact that federal power plays a role in presidential elections pursuant to Article II of the U.S. Constitution.<sup>16</sup> In essence, the Supreme Court was introducing another level of government, reminding the Florida Supreme Court that it had to consider the appropriate distribution of authority among state, local, and federal institutions and warning that it—the U.S. Supreme Court—would do so as well on appeal.<sup>17</sup>

It is against this backdrop of the institutional distribution of powers that the debate over the standards for counting disputed ballots in Florida took place. The role of local institutions was therefore squarely at issue in *Bush v. Gore*. The Court's treatment of those institutions says a great deal about the uneasy constitutional status of local government. Indeed, the equal protection argument at the heart of the majority opinion is emblematic of this status.

13. *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713 (Fla. Cir. Ct. Nov. 14, 2000), *rev'd sub nom.* *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

14. *McDermott*, 2000 WL 1693713, at \*1.

15. *Palm Beach*, 772 So. 2d at 1239-40.

16. *Bush*, 531 U.S. at 78. The Court also noted the possible application of 3 U.S.C. § 5 (1994), the federal statute that provides a "safe harbor" for a state "insofar as consideration of its electoral votes is concerned." *Id.*

17. *See id.* ("[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.") (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).



A. *Equal Protection and Local Discretion*

The equal protection claim that pitted the Florida Supreme Court against the U.S. Supreme Court was fundamentally about the exercise of local power. Recall that the majority in *Bush v. Gore* held that the recounts ordered by the Florida Supreme Court violated the Equal Protection Clause because the Florida court failed to provide a specific standard for counting disputed ballots.<sup>18</sup> The core of the U.S. Supreme Court's decision was that the Florida Supreme Court's instruction to the canvassing boards to determine "the intent of the voter" did not "satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right."<sup>19</sup> At oral argument,<sup>20</sup> and in the subsequent opinion, the Justices repeatedly expressed their concern that the Florida Supreme Court had failed to provide sufficient guidance to local boards in deciding whether disputed ballots could be counted and for whom: "The problem inheres in the absence of specific standards to ensure its equal application."<sup>21</sup> As the Court stated with some exasperation: "[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."<sup>22</sup>

The overriding concern of the *Bush v. Gore* majority was the exercise of standardless discretion by county canvassing boards. Of course, the Florida Supreme Court's "intent of the voter" standard did not come out of thin air: it had ample precedent in state case law and statutory provisions, and it embodied a state constitutional value that encouraged the counting of all possible votes.<sup>23</sup> For the

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18. *Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (per curiam).

19. *Id.* at 105.

20. Transcript of Oral Argument, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), at 2000 WL 1804429.

21. *Bush v. Gore*, 531 U.S. at 106.

22. *Id.*

23. See FLA. STAT. ANN. § 101.011(2) (West 1982) (indicating that paper ballots not properly marked with an "X" may nevertheless be valid "so long as there is a clear indication . . . that the person marking such ballot has made a definite choice"); *id.* § 101.5614(5) (damaged ballots that cannot be counted by tabulating machines shall be counted manually, and may not be voided if the canvassing board is able to determine the intent of the voters); see also Fla. *ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) (ruling that a nonconforming marking on the ballot should have been counted because it was clear whom the

majority of U.S. Supreme Court Justices, however, the lack of a uniform standard for counting disputed ballots was an obvious equal protection problem. Counting ballots with hanging or indented chads in one county while throwing them out in another was per se unequal treatment.

Partisan tendencies alone do not seem to account for these radically different understandings of the most fundamental requirements of equal protection. Two of the more vociferous dissenters from the majority opinion in the U.S. Supreme Court—Justices Breyer and Souter—joined the majority in condemning the lack of guidance provided by the Florida Supreme Court to the counters (though they rejected the majority’s remedy).<sup>24</sup> And it seems unlikely that the Florida Supreme Court would simply adopt a vague standard knowing full well that it could not possibly comport with equal protection, or that the two Justices who did not find an equal protection violation—Ginsburg and Stevens—could possibly be so outside the mainstream and so cavalier about the standard for counting votes.<sup>25</sup>

Differing conceptions of local institutional role provide a better explanation. Had the Florida Supreme Court declared that, for example, indented Broward County ballots should be counted but indented Miami-Dade County ballots should not be, the equal protection problem would be obvious. But the Florida Supreme Court never adopted a non-uniform standard. Instead of dictating the specifics of the “intent of the voter” standard—which would have been tantamount to counting the disputed ballots themselves—the Florida Supreme Court simply shifted decision-making to the canvassing boards.<sup>26</sup> In contrast, the U.S. Supreme Court required that canvassing boards be provided with

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voter intended to vote for). *But see* Florida Election Reform Act of 2001, 2001 Fla. Sess. Law. Serv. 2001-40 (West) (repealing FLA. STAT. § 101.011 and amending § 101.5614).

24. *Bush v. Gore*, 531 U.S. at 145 (Breyer, J., dissenting); *id.* at 134 (Souter, J., dissenting).

25. *See id.* at 124 (Stevens, J., dissenting) (finding that Florida Supreme Court’s ruling did not violate the Constitution for want of providing a more precise standard for counting contested ballots); *id.* at 143 (Ginsburg, J., dissenting) (arguing that total accuracy in a recount is not always possible and that flawed methods may still yield fair results).

26. *See Gore v. Harris*, 772 So. 2d 1243, 1253-55 (Fla. 2000) (per curiam) (holding that final results of the statewide election should not be issued, when properly contested, until all legal votes have been considered), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

fairly specific instructions on how to count disputed ballots—equal treatment requires uniformity throughout the state. The Florida court's "intent of the voter" standard was at the opposite extreme: a general instruction effectively to "do the right thing" when exercising one's discretion.

This "do the right thing" standard only makes sense if one views counties and their canvassing boards as active and important players in the electoral regime, instead of as passive mechanisms for instituting the state's will. If counties are trustworthy repositories of power, the decision to leave substantial discretion to county representatives seems quite reasonable, and even required. The county canvassing boards should make determinations about disputed ballots *because that is their job*. Localities manage elections and can manage the details of counting, especially the details of counting the small percentage of ballots that fall into the "disputed" category.

Justice Stevens, writing in dissent, made an argument along these lines. As Stevens pointed out, the canvassing board is akin to another local deliberative institution populated by "ordinary citizens" that we also trust to implement broad standards under difficult factual circumstances—the jury.<sup>27</sup> Justice Stevens wrote,

[T]here is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.<sup>28</sup>

Justice Stevens evoked the jury to counter the suggestion that "intent of the voter" is too vague a standard for a canvassing board to apply. The stronger claim implicit in Stevens's analogy is one about the proper role of the canvassing board. On this argument, the adoption of a more rigorous standard by the Florida Supreme Court would have been inconsistent with the local management of elections, the proper division of labor. In other words, it would be just as improper to tell a canvassing board that it *must* find the intent of a voter under a particular set of

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27. See *Bush v. Gore*, 531 U.S. at 125 (Stevens, J., dissenting).

28. *Id.*

facts as it would be to tell a jury that it *must* find the intent of a criminal defendant under a particular set of facts. We seek to preserve the jury's role as factfinder (despite our ambivalence about it) because there are affirmative substantive values to that form of decision-making. Canvassing boards, like juries, are the appropriate sites for investing the kind of judgment required to make hard decisions under conditions of uncertainty, because the reasoning that ordinary citizens bring to the table is valuable, and because such local decision-making is more consistent with, and protective of, our democratic values.

Of course, Stevens's analogy to the jury begs two kinds of questions concerning the relative trustworthiness of local entities. The first is a question of institutional competence—*can* local governments do a good job? The second is a question of institutional power—*will* local governments do a good job? These two questions are often conflated; local entities are often distrusted as possible sites for a substantive institutional role because their competence is suspect. I examine each in turn.

### B. *Local Virtue and Vice*

The first question—of institutional competence—is one that dogs all institutions staffed with “ordinary citizens.” The analogy between juries and local governments is an instructive one. A long history and an extensive literature—popular and legal—reflects the myth and sometime reality that juries act stupidly or incompetently. Jury reformers suggest that complex cases are beyond the reach of the ordinary citizen, that juries often do not follow the law, that juries make decisions on prejudice or whim, that juries tend to be populated by less intelligent people, or that juries cannot properly make difficult decisions about causation or damages.<sup>29</sup>

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29. See Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998) (“Juries have been said, variously, to be incompetent, capricious, unreliable, biased, sympathy-prone, confused, hostile to corporate defendants and doctors, gullible, excessively generous in awarding compensatory damages, and out of control when awarding punitive damages.”). Reviews of these criticisms are contained in Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306 (Robert Litan ed., 1993); STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); NEIL VIDMAR,

Local government institutions are susceptible to similar charges of incompetence. As Alexis de Tocqueville—the champion of local government—admitted, people acting through local institutions will sometimes conduct public business very poorly.<sup>30</sup> Local officials, according to John Stuart Mill, often bring “inferior qualifications” to their tasks and answer to “inferior public opinion.”<sup>31</sup> The reality—as Mill recognized in the nineteenth century—is that local government is not normally an attractive career choice for professionals and those with expertise who can opt for positions at the state or federal level. The pay is less, the rewards fewer, the impact less significant and often marginal. Local governments are often staffed by part-time employees, or by non-professionals. The “best and the brightest” may be too busy and too focused on more national issues to bother themselves with the parochial concerns of the town planning board or sewer authority or library committee. The standard refrain is that municipal institutions are not managed by those “*best fitted* by their intelligence, business experience, capacity, and moral character,” and their management is “too often both *unwise* and *extravagant*.”<sup>32</sup>

Of course, there are counter-arguments. For example, local officials may be more responsive to local concerns, more accountable, and more aware of local circumstances, and therefore better able to serve the interests of local citizens. Like the jury, local entities may bring much needed commonsense and local knowledge to particular kinds of decision-making, and decisions may be viewed as more legitimate when arrived at through local processes.

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MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109-15 (1996); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Stephen L. Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building (Is the Jury Competent?)*, 52 LAW & CONTEMP. PROBS. 269 (1989).

30. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 74-75 (Henry Reeve trans., Shoken Books 2d ed. 1961) (1835).

31. JOHN STUART MILL, *UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT* 387 (H.B. Acton ed., 1987) (1910).

32. 1 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 85-86 (2d ed., rev. New York, James Cockcroft & Co. 1873).

Indeed, localities may be better positioned to achieve local ends than centralized, distant governments.

This brings us to the second question of institutional role—whether local governments are appropriate sites for the exercise of political power. The issue of power is more problematic because it evokes far deeper concerns. Local governments may act incompetently sometimes, but our real concern is whether local governments will act venally or corruptly.

Whether one believes that local institutions will act venally is inextricable from one's theory of democratic government. Political theory is interested in questions about the relationship between democracy and scale. One tradition posits small-scale localities as repositories of republican virtue. Various versions of this account link localism with citizenship—from Jefferson's yeoman farmers governing themselves in wards to New Englanders governing themselves through the traditional town meeting. These accounts share with de Tocqueville the view that the strength of a free nation resides in the local community. Local institutions are "to liberty what primary schools are to science; they bring it within people's reach, they teach people how to use and enjoy it."<sup>33</sup> Without local institutions, "a nation may establish free government, . . . but it cannot have the spirit of liberty."<sup>34</sup> On this account, self-government in localized, participatory settings serves as an antidote to corruption and despotism. Large-scale government threatens the values of independence, judgment, self-rule, and citizenship.

Those suspicious of local power can invoke an equally powerful counter-tradition, citing James Madison's familiar discussion of factions in *Federalist No. 10*.<sup>35</sup> Madison's argument to "extend the sphere" is the basis for the expansive American republic. Madison theorized that tyrannous majorities can more easily gain power in a polity consisting of a small number of citizens. His is an argument about territorial and political scale. To control the problem of faction, you enlarge the territory and persons

33. 1 DE TOCQUEVILLE, *supra* note 30, at 55.

34. *Id.*

35. THE FEDERALIST NO. 10, at 62-64 (James Madison) (Jacob E. Cooke ed., 1961).

encompassed by the political unit—by “extending the sphere,” a republic can counter the danger of faction.<sup>36</sup>

The Federalists and the Anti-Federalists did battle over these questions of scale in the early days of the republic.<sup>37</sup> The current debate tends to revolve around competing accounts of the constraints on local government behavior. Devotees of Madison claim that local governments will often be susceptible to dominance by stable local majority factions or to capture by vocal and well-organized minority factions, and that local government will be characterized by “majoritarian excess” on the one hand or by interest group domination on the other.<sup>38</sup> Taking the opposite view, proponents of local government trustworthiness argue that localities are actually less likely than large-scale polities to suffer the vices of majoritarian excess or interest group factionalism. That is because power is more accessible and less costly to obtain in a small-scale republic. Therefore, minority residents and firms are more likely to get themselves heard by local governors than by state or national ones. More important, unsatisfied local residents or firms can easily leave a small-scale jurisdiction for a more amenable one if they do not like how things are being run. These constraints of “voice” and “exit” discipline small-scale jurisdictions to be attentive both to stable inattentive majorities and to minority concerns.<sup>39</sup> Those constraints are greatly weakened at the state or federal level.

The counties and county canvassing boards of Florida look very different depending on which side of local virtue or vice one is on. If one views the local canvassing boards as Jeffersonian repositories of republican virtue, or as institutions properly scaled to avoid the problems of faction, then it would be inappropriate to impose on them standards for counting their own votes—first, because we can trust them more than a centralized government to act virtuously

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36. *See id.*

37. *See* Carol Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 85 NW. U. L. REV. 74, 99 (1990).

38. *See, e.g.*, WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 7, 284, 298-99, 322-24 (1995).

39. *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1032-39 (1996) (book review). *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

(or at least not venally); and second, because self-government in localized settings benefits democracy as a whole. Alternatively, if one sees counties and county canvassing boards as sites of Madisonian faction (or as scaled to be captured by them easily), then it is correct to limit their discretion; otherwise, they will likely use it to oppress a minority.

### C. *The Constitutional Status of Local Government*

The doctrine and “shadow doctrine” of local government status parallels these two accounts of the nature of small-scaled political institutions. To the extent that local governments are distrusted, they are treated as non-entities—administrative units of the state in which they happen to be found. This is the formal doctrine of local government status. To the extent that local governments are trusted, they are treated as sovereigns, political communities with independent and valued constitutional roles. This is the “shadow doctrine” of local government status.

Distrust of local entities is consistent with the formal doctrine that local governments have no constitutional status. Counties and their canvassing boards are all creatures of the state—they can be created, modified, and eliminated at the will of the state legislature. Justice Moody put the point quite forcefully in *Hunter v. City of Pittsburgh*:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. . . . [T]he State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.<sup>40</sup>

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40. 207 U.S. 161, 164 (1907); see also *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).



The doctrine of state legislative supremacy has remained the conventional wisdom.<sup>41</sup> A corollary to the constitutional doctrine of legislative supremacy is the rule that state enabling statutes—the laws that confer powers on local governments—should be strictly construed.<sup>42</sup> At the time he articulated the rule in 1872, John Dillon—the “most famous nineteenth-century scholar of municipal governance”<sup>43</sup>—sought to limit municipal power, particularly municipal authority to regulate private property.<sup>44</sup> Dillon’s fear of municipal corporations stemmed from his distrust of the use of public funds to underwrite public works projects, like railroads, “which are better left to private capital.”<sup>45</sup> Municipalities had to be limited in their authority to purely public matters to prevent them from interfering with private property and the “natural functioning of the market system.”<sup>46</sup> “Dillon’s Rule” limits municipal power to the explicit terms of the legislative grant.

The formal doctrine of distrust and Dillon’s Rule does not exhaust the constitutional treatment of local government status, however. A competing “shadow doctrine” of local government status treats localities as having some of the characteristics of sovereignty. On this account, local entities—in this case, counties—are more than convenient jurisdictional units, but actually represent independent and robust political communities, worthy of constitutional recognition. Local political units are not mere instrumentalities of the state, they are autonomous actors with broad powers to set local policy.

This quasi-constitutional doctrine of local sovereignty finds expression in a number of cases involving the primary powers of local governments to regulate land use, control local finances, and administer local public schools. Thus, as Carol Rose observes, *Village of Euclid v. Ambler Realty Co.*,

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41. See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter* and noting that state legislatures can decide the political reach of local governments).

42. See 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911).

43. David Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506 (1999).

44. See *id.* at 506-08; Williams, *supra* note 5, at 95-100.

45. Williams, *supra* note 5, at 94-95 (discussing Dillon’s view of local power).

46. *Id.* at 97 (noting that Dillon’s view of local power stemmed from his conception of “the requirements of laissez-faire economics”).

which upheld the power of local governments to deploy restrictive zoning ordinances, “gave back, under land use auspices, the local authority supposedly taken away by Dillon’s [Rule].”<sup>47</sup> Other commentators have also recognized a local “quasi constitutional principle of self rule.”<sup>48</sup> In a series of land use cases after *Euclid*, the Court has shown a pattern of deference to local government decision-making and has widened the scope of local police powers.<sup>49</sup>

These decisions do not merely reflect deference to state choices to organize their local jurisdictional boundaries as they see fit, but rather embody an independent value of local control—an assertion that communities should be empowered to choose policies consonant with local values—that can be deployed to counter federal interference. Thus, in cases like *Village of Belle Terre v. Boraas*,<sup>50</sup> *Arlington Heights v. Metro Housing Development Corp.*,<sup>51</sup> and *Warth v.*

47. Rose, *supra* note 37, at 99 (discussing *Euclid*, 272 U.S. 365 (1926)). In addition, the home rule movement resulted in states adopting constitutional protections for localities beginning as early as 1875. See generally Michael E. Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51 (1989).

48. Williams, *supra* note 5, at 83 n.2; see also M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980s*, 21 B.C. L. REV. 763, 837, 847 (1980); see also WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 216 (2001) (“With the Court’s approval of zoning, Dillon’s view of municipalities was implicitly ousted in favor of Cooley’s [inherent right of local self-government].”).

49. See, e.g., *James v. Valtierra*, 402 U.S. 137, 139-43 (1971) (holding that absent showing of racial discrimination, requirement that all low-rent public housing projects must be approved by a majority of voters does not violate the Fourteenth Amendment); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8-9 (1974) (holding that zoning ordinance excluding student households withstands “rational basis” test); *Warth v. Seldin*, 422 U.S. 490, 508-18 (1975) (holding that residents, nonresidents, and organizations do not have standing to sue for remedy of exclusionary zoning); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 670-80 (1976) (holding that provision in city charter providing that any changes in land use agreed to by City Council must be approved by majority vote in a referendum does not violate due process); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 72-73 (1976) (upholding a zoning ordinance restricting the location of new theaters showing sexually explicit movies); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (holding that plaintiff with standing to sue had no remedy for exclusionary zoning under the Fourteenth Amendment because village’s discriminatory “purpose” not adequately proven).

50. 416 U.S. at 8-9.

51. 429 U.S. at 270.

*Seldin*<sup>52</sup> the Court adopted expansive language limiting the ability of (usually poor and minority) outsiders to employ federal constitutional guarantees to challenge local exclusionary land use policies. Instead of treating residents and non-residents as citizens of the same state who happened to be divided into local administrative units, the Court treated residents as insiders of an identifiable political community, one that could exclude outsiders on the basis of self-governance. The question, as the Court saw it, was not whether states were entitled to set up administrative subunits that could use state-granted powers to prevent other members of the political community from moving there, but rather whether local communities could make independent choices to adopt particular versions of the "decent life"<sup>53</sup> when those decisions happened to have "incidental" effects on outsiders.<sup>54</sup> The answer for the Court—once local political autonomy was assumed—was obvious.

Local autonomy limits federal scrutiny of local values, in particular, scrutiny under the Fourteenth Amendment's Equal Protection Clause. The Court's busing and school finance cases provide an even more robust version of this principle of self-rule. For example, in *San Antonio Indep. School Dist. v. Rodriguez*, the Court rejected a challenge to a Texas school financing regime based on local property taxes.<sup>55</sup> Despite the fact that the financing scheme was imposed by the state, the Court rejected an equal protection claim challenging the significant disparities in school funding between local districts on the basis that fiscal differentials among counties were not susceptible to equal protection analysis.<sup>56</sup> The Court stated that it lacked the ability to make "wise decisions with respect to the raising

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52. 422 U.S. at 508-18.

53. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 87 (1981) (Burger, C.J., dissenting); see also *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 389 (1926) ("[T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed with definitely fixed lines.").

54. See *Warth*, 422 U.S. at 506.

55. 411 U.S. 1 (1973).

56. See *id.* at 41.

and disposition of public revenues,” concluding that “[i]n such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.”<sup>57</sup>

Similarly in *Milliken v. Bradley*, the Court struck down a federal district court’s school desegregation order that mandated busing across county lines.<sup>58</sup> In invalidating the metropolitan area-wide remedy, Chief Justice Burger described a constitutionally recognizable place for local autonomy: “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.”<sup>59</sup> The district court’s remedy viewed the practice of educating Michigan school children in separate school districts as an administrative convenience, and one that should fall to the requirements of integration.<sup>60</sup> For the district court, it was as if the state established an agency that employed arbitrary geographic criteria in allotting students to schools (and distributed resources according to those criteria). School district boundaries had no independent significance, except as jurisdictional markers, and therefore had little relevance when equal protection norms were at stake. The Supreme Court disagreed, finding that local jurisdictional lines had an independent value in protecting local prerogatives—prerogatives with a long and significant pedigree of functioning independently of national power.<sup>61</sup> Local power thus emerges as a means of limiting federal judicial interference.

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57. *Id.* *But cf.* *Papasan v. Allain*, 478 U.S. 265 (1986) (holding that the state’s unequal allocation of federal grant lands to local school districts might raise an equal protection problem).

58. 418 U.S. 717 (1974).

59. *Id.* at 741-42.

60. *See id.* at 741.

61. *Id.* at 741-42; *see also* *Missouri v. Jenkins*, 515 U.S. 70, 98-100 (1995) (invalidating a district court’s school desegregation remedy that required the state to continue funding remedial education programs and stating that the court should seek to restore local control of schools); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (“[L]ocal autonomy of school districts is a vital national tradition.”).

*D. The Demise and Resurrection of Local Control*

Both the formal doctrine of constitutional distrust and the shadow doctrine of constitutional trust are at work in *Bush v. Gore*. If counties are instrumentalities of the state with no independent sovereign status, it is perfectly correct to hold Florida accountable for the arbitrariness of local vote-counting.<sup>62</sup> If counties are instrumentalities of the state, then the relevant question for equal protection analysis is whether the state can create territorial designations that employ widely divergent standards for counting votes in a state-wide election. It is as if the state created a vote counting agency that determined that disputed votes would be treated differently according to arbitrary jurisdictional lines. The state and its adopted standard are the focus of constitutional inquiry—what matters is the state acting through its counties and canvassing boards, not the counties and canvassing boards themselves.

Indeed, whether canvassing boards behave competently and virtuously does not matter if they have adopted different standards; the state would nonetheless have to provide some rational basis for allowing its convenient administrative agencies to behave differently from one another. Even so, the *Bush v. Gore* majority did appear to mistrust the vote counters, noting that “county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots.”<sup>63</sup> The opinion also cited record evidence that within some counties, the applicable standards for counting disputed ballots shifted from day to day and even from counting table to counting table, indicating either a problem of competence or corruption or both.<sup>64</sup> Moreover, though never explicitly mentioned, venality is certainly implied by Chief Justice Rehnquist’s citation in his concurrence to civil rights era cases in which the Supreme Court had to reign in the excesses of southern institutions bent on oppressing

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62. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (holding that state statute that redefined the boundaries of the City of Tuskegee, Alabama, to exclude most black voters, was a violation of the Fifteenth Amendment).

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

64. *See id.* at 106.

blacks.<sup>65</sup> The implication was that localities cannot be trusted because of some invidious motive—the most invidious in our history being racism.<sup>66</sup> Fear of corruption is the subtext of the arguments about standards: in the absence of standards, county canvassing boards dominated by Democrats—an example of a Madisonian faction—could “throw” the election to Al Gore, the Democratic candidate.

And yet, the majority was not wholly comfortable with the implications of treating the Florida counties as mere instrumentalities. In fact, the majority’s equal protection analysis is indefensible if localities are simply administrative units of the state. If the lack of a uniform standard for counting votes is an equal protection violation, then the use by counties of different voting mechanisms—be they paper ballot, voting machine, or computer—should also constitute an equal protection violation. It is uncontroverted that different balloting mechanisms result in serious differences in the number of votes that are thrown out as irregular across counties. As Justice Stevens pointed out, the logic of the equal protection claim should extend to “Florida’s decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy,”<sup>67</sup> as it should to “the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.”<sup>68</sup> In short, if local standards are

65. *See id.* at 114-15 (Rehnquist, C.J., concurring).

66. Justice Ginsburg criticized the Chief Justice for this almost cynical use of Civil Rights era precedents, rejecting the implicit linkage of Florida’s electoral systems with the electoral system of the Jim Crow South. *See id.* at 140-41 (Ginsburg, J., dissenting).

67. *Id.* at 126 (Stevens, J., dissenting). *But cf. id.* at 134 (Souter, J., dissenting) (arguing that local variation in voting mechanisms can be justified by concerns about cost, innovation, “and so on”). Souter’s primary equal protection concern seemed to be intra-county differential treatment, not inter-county differential treatment. *See id.*

68. *Id.* at 126 (Stevens, J. dissenting). These designs led to significant discrepancies in the percentage of votes rejected as irregular across counties. Those counties using computer balloting procedures had a small percentage of ballots thrown out for irregularities, while those counties employing paper ballots saw a significant percentage of ballots thrown out as irregular or unreadable. *See id.* at 126 n.4. These discrepancies were correlated with race. *See U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), available at <http://www.usccr.gov/vote2000/stdraft1/main.htm>* (finding that African Americans made up only 11% of the voting population but cast 54% of the ballots rejected in automatic

inadequate for equal protection purposes on a recount, then local mechanisms should be even more inadequate when the state makes affirmative choices to delegate electoral regimes to local entities from the start.

The “shadow doctrine” of local government status, however, emerges to preserve a core of local control. Just as the *Rodriguez* Court was not prepared to say that all “local fiscal schemes”—i.e., all cross county differences in school funding—are suspect,<sup>69</sup> the *Bush v. Gore* majority was not prepared to say that all local counting regimes—i.e., all cross county differences in vote counting—are suspect. Local control of voting is a long-standing tradition; like local control of education, it has an independent constitutional value. Thus, according to the majority,

The question before the Court *is not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.<sup>70</sup>

With these two sentences, counties (and their canvassing boards), “local entities,” are quickly put to the side with their baseline powers intact. Suddenly local entities *do* have a role in the system; they are not merely instruments of the state.

This appears to be something of a turnabout: whereas the Court was quite skeptical of the ability of localities to implement the intent of the voter standard, local entities now have “expertise” that they may “exercise.” This may account for the Court’s resistance to a no-holds-barred portrayal of local institutions as untrustworthy, as hotbeds of Madisonian tyranny and all the rest. The Court was quite careful not to attribute specific venal motives to the county canvassing boards, and indeed, there was no finding of corruption or fraud in the record. Instead, the Court’s skepticism was reserved for the Florida Supreme Court,

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machine counts). *But cf.* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 308 (2d ed. 2001) (noting that punch-card systems did not dominate in Democratic counties and that 60.4% of white voters and 63.1% of black voters lived in punch-card balloting counties).

69. *See supra* text accompanying notes 55-57.

70. *Bush v. Gore*, 531 U.S. at 109 (emphasis added).

and its rhetoric was sometimes protective of the canvassing boards.

It was not that the canvassing boards could not be trusted, but that “[w]hen a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”<sup>71</sup> The thrust of the majority opinion was clearly directed to the state court, not to counties or canvassing boards per se. In other words, the Court treated as obvious that local entities can develop different systems for implementing elections. Thus, the Court left intact balloting systems that led to vast disparities across counties in the number of irregular or unreadable ballots thrown out. Yet, it compelled the state to adopt rigorous standards when it required a locality to perform a recount. The Court assumed some *a priori* local sovereignty over elections; it is only after a recount is ordered that the state gains the “power to assure uniformity.” The phrase “power to assure uniformity,” however, makes no sense at all if localities are instrumentalities of the state. If the local entity is an instrumentality of the state, the state *has always had* the power to assure uniformity; it does not “gain” that power after a recount is ordered.

Is the locality a sovereign or an instrumentality when it comes to implementing elections? For the majority, the answer is both. Local government is both relevant and not at issue in the case; the obvious sphere of local autonomy to regulate elections remains untouched. For purposes of implementing elections, counties are sovereign—local entities can exercise their expertise in designing voting mechanisms, whether they use paper ballots or computers, whether the ballots are counted by machine or by hand. Indeed, on the sovereign conception, localities should be permitted to experiment with various voting regimes, as long as their internal mechanisms comport with equal protection. Counties are also instrumentalities, however—when ordered by a state to engage in a recount, the state must articulate rigorous standards to ensure uniformity across counties. Counties are agencies of the state, and the state cannot treat the ballots of one agency differently than it treats the ballots of another agency.

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71. *Id.*



If counties retain a core of sovereignty, then *no difference* in counting procedures (as between counties) is arbitrary or irrational. Sovereign political units can decide how to count "their own" citizens' votes, as do states, and any variance between counties is a result of substantive political will, not simply arbitrary jurisdictional division. If counties are instrumentalities, than *any difference* in counting procedures appears arbitrary. The votes being counted are those of the citizens of the state, and differences based upon random territorial divisions have no rational basis. By treating counties as both sovereign and instrumentality, the Court finessed these two extremes.

Moreover, by treating the counties and their canvassing boards as instrumentalities when ordered by the state's highest court to engage in a recount, and as sovereigns for purposes of implementing election regimes, the Court's opinion protects a limited sphere of local authority. A locality "acting on its own" has some discretion to exercise its expertise in implementing elections. A locality acting, however, on the instructions of the state is subject to federal oversight. The Court's skepticism—its distrust—is reserved for the institutions of the state, namely the Florida Supreme Court.

In this way, the Court resurrected local control over elections while seeming to reject it altogether. It shifted the blame for the equal protection violation from the counties to the state by treating the counties as instrumentalities, and then rehabilitated the counties by assuming that they were sovereign within their sphere.

## II. FEDERALISM AND LOCALISM

Thus, the real magic in *Bush v. Gore* is a disappearing trick: local entities seem to disappear and reappear at will. The counties and their canvassing boards are "vulnerable" to this manipulation because they have no set institutional role in the constitutional scheme. Unlike states, local political entities have no formal constitutional status. The malleability of local government status is convenient; it means that local institutions are readily deployed in the service of political ends, most often by being treated as invisible until called in to serve as a check on some uncongenial exercise of centralized power, sometimes

directly as in *Milliken* or *Rodriguez*, and sometimes as an afterthought as in *Bush v. Gore*.<sup>72</sup>

Some might argue that local status is already adequately addressed in the constitutional scheme through the vertical separation of powers, and that principles of federalism are attentive to the requirements of local power. Often, battles over the proper distribution of powers between the federal and state sovereigns invoke the rhetoric of local control and the counter-rhetoric of local parochialism. On numerous accounts, federalism is the bulwark of limited government. The vertical separation of powers is the chief structural component of a constitution that is meant to check the federal government. States' rights ensure that the centralized authorities will be constrained, leaving room for the exercise of "local" power, which is more accountable and more responsive to the concerns of the people.<sup>73</sup> A contrary account views federalism as synonymous with "local" tyranny. Historically, "states' rights" have been invoked to justify slavery and Jim Crow; more recently, states' rights have been used to deny federal protection to victims of sexual

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72. While the "shadow doctrine" of local government "visibility" is the most direct means for limiting federal interference into local matters, the formal doctrine of local government "invisibility" can also be employed to prevent federal intervention. For example, Chief Justice Rehnquist's opposition to municipal liability for constitutional torts relies, in part, on the *Hunter* doctrine that municipal corporations are creatures of the state. *Cf. Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Rehnquist, J., dissenting) (arguing that the Court's decision holding that municipalities do not enjoy qualified immunity from damages liability flowing from their constitutional violations "impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 714-24 (1978) (Rehnquist, J., dissenting) (dissenting from Court's decision holding that municipalities may be held liable for federal constitutional deprivations because they are "persons" under 42 U.S.C. §1983 and do not share the state's Eleventh Amendment sovereign immunity).

73. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."). *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

violence, to prevent federal intervention to control gun violence, or to remedy violations of federal law by state actors.<sup>74</sup>

These are the competing claims, at least. What is lost in these arguments is the distinction between state and local government.<sup>75</sup> The reality is that, though the themes sounded by those who favor broader state immunities and rights are often articulated as a general suspicion of centralized power, a robust states' rights jurisprudence is actually quite hostile to a substantive localism. Indeed, state supremacy within its sphere dictates that localities should only have the status that states decide they should have. Thus we should not cry hypocrisy when the Federalist Five run roughshod over local institutions like county canvassing boards. Nor should we be surprised when a significant number of Justices embrace a vigorous version of state legislative supremacy—a strong version of Dillon's Rule—that they zealously guard from federal interference from above and from local interference from below. A federal constitutional value of state autonomy is simply not

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74. See, e.g., *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (striking down federal Violence Against Women Act); *Printz v. United States*, 521 U.S. 898, 933-35 (1997) (striking down portion of federal handgun registration scheme); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down federal "gun free school zones" legislation); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-374 (2001) (holding that by virtue of the Eleventh Amendment, Congress, in enacting the Americans with Disabilities Act, lacked power to authorize persons subjected to discrimination by state agencies on the basis of disability to sue in federal court); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645-48 (1999) (holding that Congress is powerless to authorize a federal court suit for patent infringement brought by a private entity against a state instrumentality under the Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that Congress is powerless to authorize a federal court suit for misleading advertising brought by a private entity against a state instrumentality under the Lanham Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66 (2000) (holding that Congress is powerless to authorize federal court suits for age discrimination brought by private individuals against state instrumentalities under the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 711 (1999) (holding that Congress is powerless to authorize a Fair Labor Standards Act suit for overtime brought in a Maine state court by private individuals against their employer, the state of Maine).

75. This is a distinction that a less federalist-minded Court has recognized. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (holding that municipalities do not share the state's immunity from lawsuits under the Eleventh Amendment).

synonymous with local autonomy; these values are, in fact, in tension.

### A. *State Legislative Supremacy in Bush v. Gore*

State legislative supremacy is the crux of Chief Justice Rehnquist's concurrence in *Bush v. Gore*.<sup>76</sup> Recall that the Chief Justice joined the majority in its holding that the intent of the voter standard violated equal protection. His chief complaint, however, was that the Florida Supreme Court's interpretation of the state statutory scheme departed from the state legislature's intentions, and therefore violated the U.S. Constitution's provisions for the election of the President and Vice President.<sup>77</sup> At first blush, this appears to be a radical departure from federalist principles, which require that federal courts defer to state courts on disputed matters of state statutory interpretation.<sup>78</sup> In fact, Rehnquist's Article II argument (joined by Justices Scalia and Thomas) can be read as a defense of state power against all comers, including, most emphatically, local power. This reading is actually quite consistent with the federalist principle of state supremacy within its sphere.

Rehnquist's argument turned on the fact that the U.S. Constitution, Article II, section 1 provides that "each State shall appoint, in such Manner as the *Legislature* thereof may direct" electors for the President and Vice President.<sup>79</sup> Had the Florida Supreme Court interpreted the Florida legislature's instructions—the election statutes—properly, asserted Rehnquist, there would be no violation of Article II. The Florida Supreme Court, however, got it wrong. By extending the certification deadline and by forcing the Secretary of State to accept late vote counts that included totals from "improperly marked ballots," the court "step[ped] away from . . . established practice, prescribed by the Secretary, the state official charged by the legislature with 'responsibility to . . . obtain and maintain uniformity in the application, operation, and interpretation of the

76. See *Bush v. Gore*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring).

77. *Id.* at 114-20.

78. See *id.* at 136-41 (Ginsburg, J., dissenting).

79. *Id.* at 112 (Rehnquist, C.J., concurring) (alteration in original) (quoting U.S. CONST. art II, §1).

election laws.’”<sup>80</sup> The court’s interpretation of “legal vote,” and hence its decision to order a contest-period recount, was a “depart[ure] from the legislative scheme.”<sup>81</sup>

The problem with the Florida Supreme Court’s decision, according to Rehnquist, was that by forcing the Secretary of State to accept all late vote tallies, the Florida court “virtually eliminated” the certification deadline and the Secretary of State’s “discretion to disregard recounts that violate it.”<sup>82</sup> At stake was the Secretary’s power to make final decisions concerning disputed ballots. By adopting the “intent of the voter” standard and extending the deadline for certification, the Florida Supreme Court had shifted power from the Secretary of State to the counties and to county canvassing boards—from the state to its localities. This is certainly a radical departure from a state legislative scheme if local governments are instrumentalities of the state and the county canvassing boards are simply agents of the Florida Secretary of State and through her, the Florida legislature.

The Florida Supreme Court, in contrast, had adopted something of a localist position, by reading the state legislative scheme to carve out a sphere of authority for county canvassing boards to determine disputed ballots for themselves. The Florida Supreme Court based this reading on prior cases, and on a state constitutional mandate to credit as many ballots as possible,<sup>83</sup> but it could also have invoked the Florida Constitution’s “home rule” provisions. Florida is a home rule state rather than a Dillon’s Rule state: Under Article VIII, Section 1 of the Florida Constitution, Florida grants to its counties all powers of government not specifically excepted by law.<sup>84</sup> Exercise of the government’s police power on behalf of the health, safety, and welfare of the citizenry is included in the “broad home rule powers” granted to counties.<sup>85</sup>

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80. *Id.* at 118, 120 (quoting FLA. STAT. ANN. § 97.01 (1) (West Supp. 2001)).

81. *Id.* at 120.

82. *Id.*

83. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1230-38 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

84. FLA. CONST., art VIII, § 1; *see also City of Boca Raton v. Florida*, 595 So. 2d 25, 26-28 (Fla. 1992); *Home Builders & Contractors Ass’n of Palm Beach County v. Bd. of County Comm’rs of Palm Beach County*, 446 So. 2d 140, 142-43 (Fla. Dist. Ct. App. 1983).

85. *See Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 608 (Fla. 1983);

Rehnquist's Article II argument, however, appears to trump any grant of local authority—protected by state constitutions or otherwise. For Rehnquist, it was sufficient that the Secretary disagreed with the canvassing boards and that the State was pitted against the counties. On the Chief Justice's interpretation of Florida law, the Secretary of State was the only official in the system permitted to exercise significant discretion. In light of the obvious subordinate position of local boards, the Court was required to affirm this clear statutory grant of authority to the state official.

In other words, Article II embodies a federalism principle as against power asserted from above *or from below*. As Rehnquist observed: "This inquiry does not imply disrespect for state *courts*"—or, by extension, county canvassing boards—"but rather a respect for the constitutionally proscribed role of state *legislatures*."<sup>86</sup> This is state legislative supremacy taken to the extreme. Under a statutory scheme that appeared to make a state official the final arbiter of vote tallies, Article II was essentially read as a Dillon's Rule for federal elections: the state legislature's grant of power to county canvassing boards was to be strictly and narrowly construed. The Florida Supreme Court's decision in favor of the county canvassing boards as against state officials contravened this requirement.

Indeed, plenary state control of its own localities is the *essence* of federalism. Attention to states' rights does not translate into protection of local power; it translates into whatever the state wants local power to be. Thus, Rehnquist's Article II argument is entirely consistent with, and indeed emblematic of, the Court's federalism jurisprudence, which has been deployed to defend traditional state prerogatives, one of the most central being state plenary authority over its own political units.

In this way, the federalism of the Rehnquist Court is a defensive program animated by fear of the federal government, as opposed to a positive program animated by an affirmative belief in the good of small-scale decentralized government. States are simply not small-scale decen-

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see also *Florida v. City of Port Orange*, 650 So. 2d 1, 3-5 (Fla. 1994); *Speer v. Olson*, 367 So. 2d 207, 210-11 (Fla. 1978).

86. *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

tralized governments. No one can seriously contend that California, with a population of over thirty million, or even Rhode Island, with a population of over one million, are appropriately scaled to obtain the benefits of truly local governance. And certainly Florida, with its sixty-seven counties, and a population of over fifteen million over a territory of 53,927 square miles, cannot be considered a small-scale government. Alexander Hamilton made this point in responding to the Anti-Federalist's argument that the nation would be too vast to foster the civic virtue necessary to maintain a republic, observing that the states were already too large for that kind of civic engagement.<sup>87</sup> Though advocates of "states' rights" often invoke the advantages of diversity, local knowledge, accountability, and participation when defending state power,<sup>88</sup> the cry of local control as an affirmative justification for limiting federal power is misplaced.<sup>89</sup>

Again, the confusion stems from a failure to distinguish state from local government, to separate out the constitutionally-embedded principle of federalism with the constitutionally-malleable principle of localism. This confusion is evident when advocates of federalism extol the benefits of inter-state competition by pointing out—for instance—that "[i]nhabitants of San Francisco simply have different preferences and needs from those in Dubuque."<sup>90</sup> The sentence would be much less convincing if San Francisco were replaced by "California" and Dubuque were replaced by "Iowa," because—though arguably California and Iowa have different characteristics—there are likely

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87. See THE FEDERALIST NO. 9 (Alexander Hamilton).

88. See, e.g., John O. McGinnis, *Reviving Tocqueville's America: The Supreme Court's New Jurisprudence of Social Discovery*, 90 CAL. L. REV. (forthcoming 2002); see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402-04 (1997) (collecting arguments); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998) (same).

89. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes of a National Neurosis*, 41 UCLA L. REV. 903, 915-21 (1994).

90. McGinnis, *supra* note 88. The rest of that sentence reads: "and uniform rules that fail to take account of this diversity will leave them alienated from their government." *Id.* McGinnis, in particular, conflates localism and federalism, lumping them together in an overarching "Tocquevillian" jurisprudence of decentralization, which he attributes to the Rehnquist Court. It turns out that the Chief Justice is not all that enamored of local government independence. See *supra* text accompanying notes 85-88.

substate communities in both states that share affinities with San Francisco *and* Dubuque.<sup>91</sup> As Richard Briffault observes, “[c]ontemporary federalism discourse often sweeps local autonomy in its ambit, vindicating the states in terms more applicable to local governments.”<sup>92</sup> Federalism often appears to be a short-hand for “state and local governments,”<sup>93</sup> “states and their substate local governments,”<sup>94</sup> the “autonomy of the political processes of local governments”<sup>95</sup> or “federalism and the more encompassing principle of subsidiarity.”<sup>96</sup> Take away substate local governments, or the principle of subsidiarity, and what you have left are large polities known as states. Adopt *only* the principle of subsidiarity and most states look as inhospitable to the alleged benefits of small-scale governance as does the federal government.<sup>97</sup>

Certainly, maintaining some form of state power as against federal interference might be valuable for reasons that are not directly related to the benefits of small-scale governance. For example, states—however vast—may still be valuable sites for experiment and innovation.<sup>98</sup> It may be that the mere existence of two levels of government enhances citizens’ ability to access government by providing more than one “layer of government to which [they] may appeal,”<sup>99</sup> or that the fact of independent state government

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91. Arguably, these characteristics have more to do with *regional* differences in geography, climate, and population density than with the particular values or policy-preferences of “Californians” and “Iowans.” If the 2000 presidential election is any indication, the significant divides in this country seem to be regional—between the interior and the coasts—and between urban, rural, and suburban communities. See *The Count and the Map*, N.Y. TIMES, Nov. 20, 2000, at A26.

92. Richard Briffault, “What About the ‘Ism?’ Normative and Formal Concerns in Contemporary Federalism,” 47 VAND. L. REV. 1303, 1305 (1994).

93. Friedman, *supra* note 88, at 400.

94. *Id.* at 389.

95. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 404; see *id.* at 402-08.

96. McGinnis, *supra* note 88. Cf. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (arguing that the Court has a role in policing the line “between what is truly national and what is truly local”).

97. See Briffault, *supra* note 92, at 1303-35. Cf. FISCHER, *supra* note 48, at 52-54 (describing why states are not appropriately scaled for effective inter-jurisdictional competition).

98. See, e.g., Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J. L. & PUB. POL’Y 1, 2-3 (1982); McConnell, *supra* note 73, at 1498.

99. Jackson, *supra* note 88, at 2214.



serves as a "structural" check on the national government's aggrandizing tendencies.<sup>100</sup> It has also been suggested that state political communities can promote intermediate civic identities that may help transcend more parochial attachments to one's ethnic, racial, or religious community.<sup>101</sup> And finally, it may be that our fear of the federal government is justified, and that one of the more effective ways to protect individual rights is by diffusing power through a federalist regime.<sup>102</sup>

Significantly, these alleged benefits of federalism could easily lead one to embrace localism as well (even putting aside the advantages of small scale), on the argument that if two layers of government is good, three or more layers of government is better.<sup>103</sup> This is not a step, however, that a Court seeking to limit federal power in the name of state authority would be willing to take.<sup>104</sup> A constitutional value of localism is certainly inconsistent with state plenary authority over its political subdivisions.<sup>105</sup> Moreover, it is often inconsistent with limitations on federal power.<sup>106</sup> In other words—for all their affinities—localism and federalism are ultimately irreconcilable.

### B. *Federal Power and Local Autonomy*

The error in equating local independence with limited federal power is that there is no necessary relationship between the exercise of federal or state power and the fostering of local autonomy. Federal power is not necessarily more hostile to local autonomy than state

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100. See *id.* at 2219 (collecting arguments).

101. See *id.* at 2220-24; cf. Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329 (1996) (arguing that federalism may serve to retard a polity, providing the time required for a Rawlsian overlapping consensus to develop).

102. See Friedman, *supra* note 88, at 402-04.

103. Indeed, at least one of the supposed benefits of federalism—inter-jurisdictional competition for citizens and firms—is one of the central justifications for municipal autonomy. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

104. As Richard Briffault states, "the ultimate irony could be that normative federalism will provide a weapon for national attacks on state autonomy in the name of local democracy, rather than constitute a shield for the states' defense against federal intrusions." Briffault, *supra* note 92, at 1317.

105. See Rubin & Feeley, *supra* note 89, at 919-21.

106. See Briffault, *supra* note 92, at 1304; *infra* Part II.C.

power, nor is state power necessarily more attentive to local authority.<sup>107</sup> For example, the federal government can empower local entities directly, and the Supremacy Clause permits this type of congressional activity even in the face of contrary state commands. Take for instance a case such as *City of Davenport v. Three-Fifths of an Acre of Land*.<sup>108</sup> In *Davenport*, Congress had, through a specific act, conferred the power of eminent domain on a city for purposes of constructing a bridge.<sup>109</sup> The City of Moline challenged the condemnation, asserting that Davenport did not have the power to condemn state land under Illinois law and that the Eleventh Amendment prevented Congress from authorizing one city to condemn the land of the state or another political subdivision of the state.<sup>110</sup> The Seventh Circuit Court of Appeals rejected those contentions, noting that Congress was well within its authority to grant local governments power to carry out the legitimate purpose of building a bridge, regardless of state law.<sup>111</sup>

Federal preemption of state laws can also be a source of municipal autonomy. In *Lawrence County v. Lead-Deadwood School District*, the Supreme Court also interpreted federal commands as bypassing state wishes to the contrary.<sup>112</sup> In *Lawrence County*, the Court held that the Payment in Lieu of Taxes Act, which compensated local governments for the loss of tax revenues from the tax-immune status of federal land and permitted the locality to “use the payment for any governmental purpose,” preempted a South Dakota statute that required that localities distribute federal payments in the same way they distribute general tax revenues.<sup>113</sup> Lawrence County had allocated 60% of its general tax revenues to its school districts, and the school districts therefore sought 60% of

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107. Cf. *id.* at 1316 (“[F]ederalism and localism are not inevitable allies, and states and local governments frequently come into conflict.”)

108. 252 F.2d 354 (7th Cir. 1958).

109. *Id.* at 356.

110. *Id.* at 355.

111. *Id.* at 356; see also *Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391, 396 (9th Cir. 1953) (holding that the City of Tacoma’s federal license to build a dam pursuant to the authority of the Federal Power Commission preempted Washington state law barring construction of the dam), *aff’d sub nom.* *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).

112. 469 U.S. 256 (1985).

113. *Id.* at 258.

the federal payment pursuant to South Dakota law.<sup>114</sup> The Court struck down the state law as invalid under the Supremacy Clause, upholding the county's discretion as authorized by federal law.<sup>115</sup> Consistent with his view of state legislative supremacy, Justice Rehnquist dissented, citing the *Hunter* doctrine of local subordination.<sup>116</sup>

Nothing prevents the federal government from affirmatively conferring specific powers on local governments and insulating them from state interference.<sup>117</sup> Common examples are direct federal grants-in-aid to cities, a funding scheme that bypasses states altogether.<sup>118</sup> General federal statutes may also benefit localities and allow them to better coordinate their independent activities. Federalism decisions that override such laws in deference to state sovereignty do not necessarily enhance local authority, control, or power.

Consider the federal gun registration provision struck down in *Printz v. United States* on the grounds that it "commandeered" state officials in the service of federal ends in violation of the Tenth Amendment.<sup>119</sup> While considered a victory for "local" autonomy, it is not clear as a practical or conceptual matter that localities benefited from the decision. For example, the Conference of Mayors supported the federal legislation because it complemented city efforts to combat crime; as a practical matter city power to control gun violence was enhanced by federal coordination.<sup>120</sup> More important, as a conceptual matter, *Printz* fully embraced the *Hunter* doctrine of local invisibility: counties and county

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114. *Id.* at 259.

115. *Id.* at 270; see also *Wash. Dep't of Game*, 207 F.2d at 396.

116. *Lawrence County*, 469 U.S. at 273 (Rehnquist, J. dissenting); see also *supra* Part II.A.

117. See *Wash. Dep't of Game*, 207 F.2d at 396; see also Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999).

118. See also Rubin & Feeley, *supra* note 89, at 916 ("As an empirical matter, support for urban planning generally, or for specific city functions such as schools or police, has often come from the federal government, not from the states."). Professor Hills argues that courts should adopt a presumption of institutional autonomy that maximizes the ability of local governmental institutions to spend federal revenue free from state legislative supervision. See Hills, *supra* note 117, at 1284-85.

119. 521 U.S. 898, 933-35 (1997).

120. See Brief of Amici Curiae Handgun Control, Inc., Center to Prevent Handgun Violence, U.S. Conference of Mayors, et al., *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

officials are treated solely as instrumentalities of the state. Though *county* officials—local sheriffs—were the petitioners in *Printz*, the Court considered them agents of the state for purposes of the Tenth Amendment. The provisions of the Brady Bill that required local action were objectionable because they amounted to an unconstitutional “commandeering” of *state* officials.<sup>121</sup> The Court was not concerned with local power or autonomy except as it followed from state power and autonomy. The Tenth Amendment was thus read—just like Rehnquist’s Article II—as carving out a sphere of state autonomy immune from challenge from above or from below. *Printz* is a good example of the double-edged nature of state supremacy. Local “autonomy” is whatever the state wants it to be regardless of the wishes or desires of local political units.

Simply put, protecting states from federal interference does not necessarily translate into “local” power. Indeed, the application of federal constitutional norms may sometimes be used to immunize local decisions from contrary state commands. For example, the Equal Protection Clause may be a potent source of “local authority” where the state seeks to override local anti-discrimination or anti-integration efforts.<sup>122</sup> In *Seattle School District No. 1 v. Washington*, several school districts challenged a statewide measure that prevented them from implementing race-based school assignment plans in an effort to remedy segregation.<sup>123</sup> The Supreme Court struck down the state-wide initiative on grounds that it violated the Equal Protection Clause, thus vindicating local power to pursue particular desegregation remedies.<sup>124</sup>

*Romer v. Evans*, in which the Supreme Court struck down a Colorado state constitutional referendum that voided local attempts to enact measures protecting gays

121. See *Printz*, 521 U.S. at 935 (referring to the county officials as “State’s officers”); see also Hills, *supra* note 117, at 1212-14 (discussing *Printz* and its version of state legislative supremacy).

122. Local African-American communities certainly benefited from federal intervention when recalcitrant states resisted integration during the Civil Rights era.

123. 458 U.S. 457, 461-64 (1982).

124. *Id.* at 470-71, 487; see also *Missouri v. Jenkins*, 495 U.S. 33 (1990) (holding that state constitutional limit on local tax rates could not be imposed on school district that was required to raise taxes to comply with federal desegregation remedies).

and lesbians from discrimination,<sup>125</sup> has also been read as vindicating local autonomy in the face of state objections.<sup>126</sup> It is telling that Justice Scalia's dissent in *Romer*—joined by the Chief Justice and Justice Thomas—invoked the Madisonian argument for local distrust.<sup>127</sup> Scalia argued that the local governments in which pro-homosexual policies had been adopted (Aspen, Boulder, and Denver) had been captured by a well-organized minority faction—gays and lesbians. Because gays and lesbians “tend to reside in disproportionate numbers in certain communities, have high disposable income, and . . . care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.”<sup>128</sup> The antidote is both classically Madisonian and consistent with federalist (but certainly not localist) principles: move decision-making up to the state level, the implicit claim being that state legislative or constitutional processes are more democratic, representative, and fair than are local ones.

These cases do not illustrate that federal power is always a source of local autonomy, but only that the federal government *can* be a source of local power rather than a threat to it. Of course, federal constitutional values can often be used to override local norms as well. The *Bush v. Gore* majority's use of the Equal Protection Clause is an example. And yet, Chief Justice Rehnquist's concurrence shows that federalism and overriding local norms often go hand in hand. By elevating the Florida Legislature above the Florida Supreme Court and by giving the Florida Secretary of State the final word over the county canvassing boards, the Court effectively pitted state power against local power, federalism against localism. It is no surprise that federalism won.<sup>129</sup>

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125. 517 U.S. 620 (1996).

126. See Barron, *supra* note 43, at 599. *But cf.* Richard Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 922-27 (1999) (arguing that local autonomy can also be a prison for minority groups, who may only gain protections if they can control local political processes in often insular enclaves). *Romer* is, of course, a notoriously opaque decision.

127. See *Romer*, 517 U.S. at 645-56 (Scalia, J., dissenting); text accompanying notes 33-38.

128. *Id.* (citations omitted).

129. *Cf.* *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 273 (1985) (Rehnquist, J. dissenting) (arguing that the Court's reasoning is “simply

All of which is to say that the equation of federalism with either local tyranny or local autonomy is misplaced. A substantive localism would require that states defer to local norms, and further, that federal courts can and should enforce local "immunity" from state interference under certain circumstances. In *Bush v Gore*, that would mean that the Florida Supreme Court's opinion carving out a sphere of authority for county canvassing boards as against contrary state instructions would not just be entitled to federal deference as a matter of comity or general federalism principles, but would instead have an affirmative constitutional basis.

### III. SELF-GOVERNMENT

The argument that local governments are constitutional actors with affirmative and formal roles to play in the constitutional scheme is not without pedigree. Carol Rose has traced the tradition of modern localism back through the Anti-Federalists to what J.G.A. Pocock has called the "ancient constitution"<sup>130</sup>—the spiritual forebear of current forms of civic republicanism. David Barron has more recently advocated a version of "local constitutionalism," derived in part from the thought of Thomas Cooley, a prominent nineteenth century constitutional theorist, who advocated judicial protection of local government independence from state interference.<sup>131</sup> Other commentators have also recently suggested that localism take on a more prominent place in constitutional doctrine. Thus, Dan Kahan and Tracey Meares have argued that certain constitutional provisions (particularly those dealing with street law) be read in light of local circumstances, and that levels of constitutional scrutiny be adjusted to accommodate neighborhood norms or laws that are crucial to the survival

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not convincing in the light of the long history of treatment of counties as being by law totally subordinate to the States which have created them").

130. See Rose, *supra* note 37, at 75.

131. See Barron, *supra* note 43, at 488-96. Barron understands localities as important institutions in "checking the arbitrary tendencies of public power." *Id.* at 520. According to Barron, "local communities are peculiarly positioned to determine the scope of their positive constitutional obligations," and therefore should be enabled to enforce under-enforced constitutional norms—those constitutional norms that are not susceptible of direct judicial enforcement. *Id.* at 598.

of unique substate communities.<sup>132</sup> Mark Rosen has suggested that the Constitution be interpreted to allow for wider variations in local norms, arguing that liberalism requires that the wider society accommodate the law-making of discrete, territorially-defined local communities.<sup>133</sup> Localism, on these accounts, is protective of particular—often insular—communities of common interest whose values are worthy of constitutional protection.<sup>134</sup>

These versions of local power present tremendous difficulties in application. The line drawing problems inherent in defining the appropriate self-governing community and delineating limiting principles that a court can apply in deciding the ultimate contours of local authority have always stymied judicial efforts to carve out “spheres” of local competence.<sup>135</sup> But even putting those difficulties aside, these various “local constitutionalisms” are somewhat limited in application. Local power can be defined and cabined when it is exercised in separatist enclaves, but what happens when it is exercised as it most often is, by municipal corporations operating the machinery of government on a day-to-day basis? The test of local constitutionalism is not whether insular or unique minority communities’ differing norms can be accommodated.

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132. See Dan Kahan & Tracey Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173 (1998); Dan Kahan & Tracey Meares, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (1998) [hereinafter *Critique of Morales*]. I have criticized these efforts elsewhere. See Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001).

133. See Mark Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

134. For example, Kahan and Meares argue that courts should defer to the law-making of minority residents of inner-city Chicago, who share a “linked fate.” *Critique of Morales*, *supra* note 132, at 209-10. Abner Greene makes a related argument in the context of the Establishment Clause. See Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996).

135. See, e.g., *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (noting that “municipal affair” and “statewide concern” are legal conclusions rather than factual descriptions); cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that the attempt to draw the boundaries of state regulatory immunity in terms of traditional governmental function is unworkable, and that the limits on Congress’s Commerce Clause powers is a question to be resolved by the political process). I am skeptical of efforts to ground local autonomy in territorial and sociological conceptions of community. See Schragger, *supra* note 132.

Rather, the real test is whether the existing institutions of local government to which we all belong (towns, counties, townships, cities) can be taken seriously as components of our national democratic practice. Should local institutions like counties and county canvassing boards be part of the *national* constitutional conversation when the stakes are quite high?

### A. *Democratic Legitimacy*

Remember that the Florida counties and their canvassing boards were relatively powerless institutions—almost ministerial in function—until what they did *mattered*. *Bush v. Gore* underscores how powerful a “powerless” entity can become when the spillover effects of local decisions are significant. In this instance, the spillover effect of a local decision either to count or not to count ballots with hanging or dimpled chads might have been the election of the President of the United States.<sup>136</sup> It is here that the local norm has national implications; an insignificant authority to count ballots becomes a significant power potentially to alter the outcome of a presidential election. One may not be prepared to allow local communities that much power, and it is not clear that one should. The difficulty is determining which powers are appropriately “local” and which are appropriately “general” when that choice will have clearly defined winners and losers.

The issue is not the size of government—“big” versus “small” government is a shibboleth—but rather its legitimacy. How can an unavoidably and necessarily large-scale and diverse society made up of hundreds of millions of “citizens” make democratically acceptable decisions about how to govern itself? Consider recent concerns among political and legal theorists about the current state of civil

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136. Of course, no one can know what the outcome would have been had the recounts been allowed to continue. Recent reviews of the Florida ballots by independent media indicate, however, that the outcome of the election would not have changed had the canvassing boards been permitted to count the specific ballots challenged by the Gore campaign, though the study also found that the outcome may have been different had *all* undercounted ballots throughout the state been recounted. Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1.



society.<sup>137</sup> Scholars are increasingly attentive to participatory and/or deliberative values, animated by a fear that democratic institutions cannot long survive if citizens are not speaking to one another or if the quality of their discourse is debased.<sup>138</sup> Indeed, constitutional theory has become somewhat preoccupied with deliberative values.<sup>139</sup> Theorists find in communicative practices a mechanism for justifying the exercise of collective political power, for grounding the legitimacy of constitutional norms and government action.<sup>140</sup> "Discourse" has become a popular

137. See, e.g., COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA (E.J. Dionne, Jr., ed., 1998); CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL (Robert K. Fullinwider ed., 1999); JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL 16 (1995); NAT'L COMM'N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT (1998), at [http://www.puaf.umd.edu/Affiliates/CivicRenewal/finalreport/table\\_of\\_contentsfinal\\_report.htm](http://www.puaf.umd.edu/Affiliates/CivicRenewal/finalreport/table_of_contentsfinal_report.htm). A number of law reviews have recently hosted symposia addressing issues surrounding civil society. See Symposium, *The Constitution and the Good Society*, 69 FORDHAM L. REV. 1569 (2001); Symposium on *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 1 (2000); Symposium, *Trust Relationships*, 81 B.U. L. REV. 1 (2001). For a critique of "civil society revivalism," see Linda McClain & James Fleming, *Some Questions for Civil Society Revivalists*, 75 CHI.-KENT L. REV. 301 (2000).

138. This diverse group is unified by the belief that self-government must be restored by "facilitating people's active participation in the governmental process." Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 731-32 (2001) (collecting sources). Works that arguably fall within this category include CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JAMES BOHMAN, *DELIBERATION AND DEMOCRACY* (1996).

139. As Miriam Galston points out, legal scholars as diverse as Bruce Ackerman, Mark Tushnet, Robin West, Frank Michelman, Suzanna Sherry, and Cass Sunstein all share an interest in deliberative accounts of public constitutional decision-making. Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 331, 334-35 (1994).

140. See, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 4-10 (2000). Young argues:

On the deliberative model, democracy is a form of practical reason. Democratic process is primarily a discussion of problems, conflicts, claims of need or interest. Through dialogue others test and challenge these proposals and arguments. Because they have not stood up to dialogic examination, the deliberating public rejects or refines some proposals. Participants arrive at a decision not by determining which preferences have greatest numerical support, but by determining

proceduralist solution to the problem of conflicting fundamental values, a way of domesticating and guiding democracy when it is faced with fundamental moral disagreements about public policy.<sup>141</sup>

Yet, scholars of deliberation rarely mention local institutions as sites of legitimation. Perhaps this is because when theorists talk about deliberation or participation they are often referring to deliberation in a national institution (other than the Supreme Court) or to the mobilization of the undifferentiated mass known as “the People.”<sup>142</sup> Participatory accounts often refer to popular political energy in the abstract without pausing to consider how self-government already happens in local institutions.<sup>143</sup> Again, much of this abstraction is a result of the emphasis on a nationalized constitutional dialogue.<sup>144</sup> Perhaps the local planning or school boards, the sewer committee, and the canvassing boards are, by themselves, inadequate to the distinctly national task of formulating constitutional values, and may even be theoretically incapable of doing so, not being representative of “the People” except in the most symbolic sense.

I suggest the opposite. What about the institutional, political, and moral weight of county canvassing boards? Consider the argument that the ultimate conclusion of the contest for the presidency in 2000 would have been *most* legitimate if it had been resolved by “local citizens” engaged in the ordinary institutional practices of local governance. This argument sounds appealing, and yet it is likely that when asked to choose among all the possible institutions that could have resolved the 2000 election—the county canvassing boards, the U.S. Congress, the Florida state

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which proposals the collective agrees are supported by the best reasons.

*Id.* at 10.

141. See, e.g., HABERMAS, *supra* note 138; GUTMANN & THOMPSON, *supra* note 138, at 1-9, 11-51.

142. Claims that “the People” can mobilize to create constitutional meaning—usually through some kind of national institution—are in the mainstream of legal academia. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991).

143. See, e.g., RICHARD PARKER, *HERE THE PEOPLE RULE* (1994).

144. See Robert F. Nagel, *Nationalized Political Discourse*, 69 *FORDHAM L. REV.* 2057, 2058-59 (2001); cf. SUNSTEIN, *supra* note 138 (adopting a deliberative account of American constitutionalism that discusses how national institutions like the Supreme Court should do their work).

legislature, the Florida state courts, and the U.S. Supreme Court—most commentators and citizens would put the county canvassing boards last.

Granted, one might come to this conclusion not because of one's general distrust of local government, but rather because of one's doubts about the particular institutional composition of the canvassing boards. The Florida canvassing boards were made up of local government officials—a judge, a county commissioner, and the local supervisor of elections—and one could argue that these officials were not competent to speak on *our* behalf or would have acted venally if permitted to do so. Perhaps the respect we might have for the jury (recall Stevens's analogy)—an institution arguably staffed by “ordinary people”—does not extend to the canvassing boards—an institution staffed by politicians and government officials.

But one could also make the opposite claim—that these local officials were particularly well suited to count *our* ballots, particularly when it was their job to do so and particularly when compared to the alternatives—some collection of unelected judges, the Florida state legislature, or Congress. Certainly county-level officials are more likely to be our neighbors (and look more like our neighbors) than members of Congress, federal judges, U.S. and State Supreme Court Justices, or even state representatives. And County Election Boards—composed of inspectors and clerks who were required to be residents of the county—are certainly more akin to “ordinary people” than federal or state elected or appointed officials.<sup>145</sup> Consider again the images of the numerous part-time counters—county employees and volunteers—who came in over the weekend to participate in the *Bush v. Gore* recount under the supervision of county canvassing boards.

Indeed, one could argue that canvassing boards, rather than state or national entities, should determine the “intent of the voter” because that decision should be made by the

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145. It is not clear which way the “ordinary people” argument cuts. Among the political and cultural elite, of which the Supreme Court Justices are undoubtedly members, the image of “ordinary people” doing such important work might have been terrifying. On the Court's disdain for the vast majority of Americans who do not share the Justices' particular class interests, see Paul D. Carrington and H. Jefferson Powell, *The Right to Self-Government after Bush v. Gore* (Duke Univ. Sch. of Law, Public Law & Legal Theory Working Paper Series No. 26, 2001).

very people who voted in the community, used the same ballot, and attended the same polling stations. The alternative—some kind of centralized counting process—might actually result in less transparency and more potential political manipulation or bureaucratic abuse. Even if fair, such a process might be viewed as less legitimate. Certainly for many of Florida's African-American citizens (a community that is rightfully suspicious of voter manipulation by those outside the community), the 2000 election would have been more legitimate had local communities been permitted to count their own votes.

In any case, the discussion was and is worth having. Yet, the canvassing boards never made it into the conversation. What does it say about American democracy when the institutions that look most like the people (or at least that are closest to them) are not trusted with even the most mundane tasks of democratic self-rule?

### B. *The Marginalization of Local Government*

The notion that a particular local institution can occasionally speak for all of us seems quite foreign. However, that may only be because "the People" do not see themselves reflected in those institutions. I am pointing here towards a cultural disposition, a way of engaging the institutions of government and politics.<sup>146</sup> Perhaps *Bush v. Gore* is a lagging indicator of a cultural and political reality—a fact of social life in the United States that local government institutions are simply not robust sites of civic engagement.

Surely, an argument can be made along these lines. As a start, one could point to a significant historical trend toward centralization and globalization in the twentieth century. The "local" has less and less relevance to Americans living in an age of rapid communications and transportation, where the mobility of information, persons,

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146. In a related vein, Richard Pildes argues that a "cultural conservatism toward democracy" underlies *Bush v. Gore*. See Pildes, *supra* note 7, at 716-17 (citing a series of Supreme Court opinions that indicate a judicial culture that fears democratic tumult and favors order and structure). Pildes indicates that this cultural disposition is "more pervasive than one confined to the current [Supreme] Court," *id.* at 716, though it is not clear how pervasive he believes it to be.

goods, and capital makes specific jurisdictional locales increasingly irrelevant. Over fifteen million Americans moved across county lines in 2000, with almost seven million crossing state lines as well.<sup>147</sup> The average American often commutes over significant distances and through numerous jurisdictions, residing in one locality, working in another, and spending leisure time in a third.<sup>148</sup> Communities are not defined predominantly by geographical space, but more often by those cultural spaces carved out by demographics, mass markets, and cultural production and consumption.<sup>149</sup> That can mean that we have less in common with the residents of the neighborhoods on the other side of town than with the residents of the neighborhoods on the other side of the world.

This fact of global information and markets means that local institutions have less control over local conditions. National and international markets have more sustained effects on our lives than do local ones; the price of gasoline at the neighborhood gas station, the cost of goods at the local Wal-Mart, or the availability of oranges in the local grocery are mostly unrelated to local conditions and beyond local regulatory control. The distance between the consumer and the supplier has become international, and government is increasingly scaled to grapple with an outsized economic sector that can only be understood in global terms. The town council can do a lot about local trash pick-up, but little about the layoffs occurring at the GM plant, and less about OPEC's current production quotas.

These larger-scale trends assert a profound, though not inevitable, pull toward greater scale and away from the local.<sup>150</sup> One could also argue that a more particular and

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147. U.S. CENSUS BUREAU, CENSUS 2000 SUPPLEMENTARY SURVEY SUMMARY TABLES tbl. P041, *Residence 1 Year Ago for the Population 1 Year & Over—State & County Level*, [http://factfinder.census.gov/servlet/DTTable?\\_ts=34451845210](http://factfinder.census.gov/servlet/DTTable?_ts=34451845210) (last visited March 17, 2002).

148. See Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 320 (1993) (noting that individuals cross local government jurisdictional lines numerous times a day).

149. See, e.g., Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791 (1995).

150. The trend toward larger scale institutions cannot be ignored, though I do not want to overstate it. Globalism and localism can happen simultaneously, with government both devolving downward and migrating upward. See Alan Ehrenhalt, *Demanding the Right Size Government*, N.Y. TIMES, Oct. 4, 1999, at

home-grown reason for the cultural vulnerability of local government is a pervasive consumerism that characterizes conceptions of local governance—call it “consumerist localism.” Government services are increasingly viewed as goods that consumer-voters purchase in market transactions.<sup>151</sup> For vast numbers of Americans, the market now provides what traditional municipal governments once had. Private security guards outnumber public police by three to one.<sup>152</sup> In many cities, quasi-private agencies like business improvement districts manage public streets, provide security, and sanitation services.<sup>153</sup> The public spaces of the town square have been replaced by the privately managed spaces of the shopping mall.<sup>154</sup> Private homeowners’ associations are the most popular new forms of suburban development.<sup>155</sup> As of 1998, approximately forty-two million Americans were living in privately managed neighborhoods, and up to eight million lived in gated communities.<sup>156</sup> And private schooling has become the default option in many neighborhoods for those who can afford it.<sup>157</sup>

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A27; see also Michael Geyer & Charles Bright, *World History in a Global Age*, 100 AM. HIST. REV. 1034, 1034-60 (1995).

151. See, e.g., Jerry Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998). In the legal literature this view is associated with Charles Tiebout’s *A Pure Theory of Local Expenditures*, *supra* note 103, which first developed the framework for understanding local finance as a rivalry among local governments for residents analogous to the rivalry among firms.

152. *Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21.

153. See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366-67 & n.1 (1999). Briffault estimates that there are between 1000 and 2000 business improvement districts operating in the United States. *Id.*

154. See Margaret Crawford, *The World in a Shopping Mall*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE (Michael Sorkin ed., 1992). There are over 44,000 shopping centers in the United States. See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, tbls. 1293 & 1294. (120th ed. 2000).

155. See Sheryll D. Cashin, *Privatized Communities and the “Secession of the Successful”: Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1676 (2001) (collecting data).

156. See CLIFFORD TREESE, COMMUNITY ASSOCIATIONS FACTBOOK 3 (1999); EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 180 n.1 (1997).

157. As of 1998, approximately 13% of all school-age students attended private schools. See U.S. DEP’T OF COMMERCE, *supra* note 154, at tbls. 239 & 240.

The result is the privatization of traditional municipal services, a management model of the provision of public goods.<sup>158</sup> The governing ethos of the market is exit:<sup>159</sup> if citizens desire a service and cannot obtain it, they take their business elsewhere, either to a more congenial locality or to a private provider of public services. This ability to "opt-out" eliminates the necessity for politics—the public formation of shared priorities and values. Exit displaces voice as the mechanism for accommodating conflicting preferences or dissatisfaction with a current regime.<sup>160</sup> As numerous commentators have noted with some alarm, the wealthy can and are seceding from American society into "privatopias"<sup>161</sup>—homogeneous communities in which politics is barely required because all interactions are managed and larger societal problems can be "zoned" out. Deliberation, negotiation—the give-and-take of the political process—are time-consuming, expensive, and unnecessary.

The sorting of Americans into communities of like minds through the mechanism of exit may contribute to political lethargy at the local level. Americans tend to live in increasingly segregated neighborhoods that are easy to describe—as "Republican" or "black" or "working class" or "wealthy." Studies have shown that homogeneous communities have lower rates of local political involvement and participation in voting than do communities with more integrated populations;<sup>162</sup> studies of homeowner associations indicate a similar lack of civic engagement.<sup>163</sup> As Constance

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158. This follows the professionalization of municipal government that began in the first part of the twentieth century. Currently, most municipalities are governed by professional managers, who are accountable to elected municipal boards in the way CEO's are accountable to corporate boards of directors. See FISCHER, *supra* note 48, at 23.

159. See HIRSCHMAN, *supra* note 39.

160. See GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 3 (1981).

161. Robert Reich was the first to sound the alarm about the secession of the successful. See Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, §6 (Magazine), at 16. Evan McKenzie coined the term "privatopia" in *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994). See also BLAKELY & SNYDER, *supra* note 156. For an argument that "civic secession" exacerbates inequality see Cashin, *supra* note 155, at 1675-78.

162. See Eric J. Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 AM. J. POL. SCI. 186 (1999).

163. See ROBERT J. DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 140 (1992).

Perrin observed in her study of suburban land use regimes in the 1970s, the pervasive management of social spaces unavoidably results in the atrophying of the social competencies of the neighbor.<sup>164</sup>

The rise of the management model of public goods (with its emphasis on exit) has been accompanied by what political theorists who study civic engagement have noted is a serious decline in citizen participation in local institutions over the past thirty-five years.<sup>165</sup> Robert D. Putnam, in his oft-cited book *Bowling Alone: The Collapse and Revival of American Community*, records Americans' declining participation in politics, civic organizations and clubs, and activities with neighbors.<sup>166</sup> It is difficult to assess these claims, and there are certainly debates about what normative conclusions should be drawn from Putnam's data.<sup>167</sup> Undoubtedly, however, less space is available in which "ordinary citizens" can come together to engage in

164. See CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 105-06 (1977); see also Frug, *supra* note 151, at 32 (discussing the consumerist model of local government services which devalues "values commonly associated with democracy— notions of equality, of the importance of collective deliberation and compromise, of the existence of a public interest not reducible to personal economic concerns"). This lack of interest in the democratic aspects of governance on the part of local residents does not mean that local government and local government policies are not important to them. Consumerist local government is characterized by its defensive posture; local government's primary function is to control the flow of people and firms into and out of the community. See Schragger, *supra* note 132, at 374-75, 405-15. This is a very important task because people are quite concerned (for a host of reasons) about who moves-in next door to them. Participation in the decisions of the day increases dramatically when there is a perceived threat that such in-migrants will not add to the value of the community. This is most often thought to be the case when those in-migrants do not "look like" or are "different" from current residents.

165. As Lawrence Lessig notes, "Like the ozone layer, a hole in social capital has opened up in social space, and the question is why." Lawrence Lessig, *Preface to a Conference on Trust*, 81 B.U. L. REV. 329, 332 (2001); see also Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1574-77 (2001).

166. ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48-64 (2000). Putnam has wondered recently whether the attacks on the World Trade Center and the Pentagon on September 11, 2001, will have the effect of increasing civic engagement to the levels seen after the attack on Pearl Harbor. See Robert Putnam, *A Better Society in a Time of War*, N.Y. TIMES, Oct. 19, 2001, at A19.

167. See, e.g., Paul Rich, *American Voluntarism, Social Capital, and Political Culture*, 565 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1999) (collecting arguments).



participatory and deliberative “governing” activities, and less time is being spent in the spaces that do exist. Americans appear to be spending more time in front of the television or at the mall and less time at the planning board meeting. Whether or not the “social capital” generated by interactions with neighbors and fellow citizens in pursuit of common ends is, as Benjamin Barber writes, a “necessary basis for democratic citizenship,”<sup>168</sup> the social reality is that local government is not an important civic commitment for a large percentage of Americans.<sup>169</sup>

This reality is reflected in a political culture that identifies much more with national officeholders than with the county freeholder. Ambitious and talented persons seek the national stage where the audience is larger and the issues are arguably more significant. A televised political culture focuses on the politics of Congress and the Presidency, and little on the politics of the local school board. And that nationalized political culture has come to be dominated by professionalized, “top-down” interest groups, what Theda Skocpol calls “advocates without members.”<sup>170</sup> In Mark Tushnet’s words, this is a constitutional regime characterized by a “public that does not participate in politics.”<sup>171</sup> The legal culture—the culture of law students, lawyers, and legal professionals—is also directed to a national audience. Law schools, at least some of whose students will end up practicing in local contexts or advising local institutions, rarely emphasize the theory or practice of local government law. Law students strive to enter practice in global law firms based in global cities, and legal academics (of which I am one) rarely bother studying the operations of local governments and local entities, but

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168. BENJAMIN BARBER, *CREATING MALL TOWN SQUARE: WHAT CAN BE DONE TO RECREATE PUBLIC SPACE IN AMERICA’S SUBURBS* 1 (1997); see generally BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

169. One notable exception appears to be the state of New Hampshire. In a recent study of forty geographic areas across the nation, New Hampshire scored highest in the measures of civic equality. See Tamar Lewin, *One State Finds Secret to Strong Civic Bonds*, N.Y. TIMES, Aug. 26, 2001, at A1. According to Lewin, in one town, 8% of the population serves in some civic position.

170. Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 461 (Theda Skocpol & Morris P. Fiorina eds., 1999).

171. Mark Tushnet, *The New Constitutional Order* (unpublished manuscript on file with author).

spend much more of their time parsing the words of the Supreme Court.

### C. *Localism and Constitutionalism*

Thus, it may be that localism is a historical fact that we have moved beyond, instead of a viable normative account of politics. Perhaps the larger difficulty is that localism and constitutionalism are conceptually at odds. Both rights and democracy must transcend the parochialism of place if such a thing as a national polity is to be possible. Indeed, it could be argued that constitutional norms *are* properly the province of a national (and not local) People. If an institution is going to articulate those values, this argument asserts, it has to do so for all of us.

Whether one agrees with the outcome or not, that is what the Supreme Court arguably thought it was doing in *Bush v. Gore*. In fact, many believed that the Court was the only institution with the requisite political capital to resolve the 2000 election,<sup>172</sup> though others think that any remaining political capital the Court possessed is now irretrievably squandered.<sup>173</sup> Some ask why Congress was not a more legitimate institution for solving the dispute.<sup>174</sup> I wonder why the county canvassing boards, sitting in their gymnasiums actually counting ballots, were not.

The assertion that national democratic governance must be grounded in local practice is commonplace, but one that is often accompanied by—and confused with—claims

172. See, e.g., Nelson Lund, *An Act of Courage; Under Rehnquist's Leadership, the Court Did the Right Thing*, WEEKLY STANDARD, Dec. 25, 2000, at 19.

173. See, e.g., Jonathan Groner, *Will Election Case Do Damage to the Judiciary?*, LEGAL TIMES, Dec. 18, 2000, at 15. *But see* Linda Greenhouse, *The Vote Count Omits a Verdict on the Court*, N.Y. TIMES, Nov. 18, 2001, at § 4, 4. (noting that recent polling data has shown that *Bush v. Gore* had “little effect on the public’s assessment of the Court”).

174. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1432 (2001); Balkin & Levinson, *supra* note 9, at 1062. Arguments that Congress should have resolved the 2000 election assume that after the counting in Florida there would have been competing slates of electors. Obviously, had the county canvassing boards completed their task of counting ballots and had they submitted a set of electors to Congress that differed from the slate submitted by the Florida state legislature, Congress would have had to resolve the dispute. Counts of disputed ballots undertaken by media organizations after the fact indicate that it is unlikely that such a dispute would have arisen. See Fessenden & Broder, *supra* note 136, at A1.

for territorial sovereignty.<sup>175</sup> The structure of constitutional democracy with its ongoing negotiation between liberalism and democracy is not consistent with territorial or group exceptionalism except at the margins. One need not embrace a localism of territorial exceptionalism, however, to consider local governments relevant national political actors. All that is required is a localism of recognition. This is the notion that the legitimacy of democratic self-rule depends on our ability to recognize ourselves in the particular quotidian exercises of local governance that take place a hundred times a day throughout the country—for example, in the mundane act of counting undertaken by the canvassing boards of South Florida.

Recall that for de Tocqueville, local government's primary function was educative—local institutions were the “primary schools” of liberty.<sup>176</sup> It is no surprise that de Tocqueville described the jury's role in the same terms, as “the most efficacious means of teaching [the people] how to rule well.”<sup>177</sup> We decry the illegitimacy of a jury that seems to have adopted and pronounced widely divergent views from the “mainstream.”<sup>178</sup> Such departures challenge the core idea of a collective community, the imagined belief that we are one people, refracted through our civic institutions. As with the jury, if we come to distrust local government, we have in some sense come to distrust ourselves.

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175. For example, the “shadow doctrine” of local government law emphasizes the territorializing aspects of local power. See *supra* text accompanying notes 47-61. Jerry Frug has offered an account of local government that seeks to promote local democracy while rejecting the concept of local territorial sovereignty. See Frug, *supra* note 148, at 254-55.

176. See DE TOCQUEVILLE, *supra* note 30, at 55.

177. See *id.* at 339 (stating that the jury “is the most energetic means of making the people rule”); cf. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 250 (1994) (“the direct and raw character of jury democracy makes it our most honest mirror”).

178. The O.J. Simpson and Rodney King verdicts are two recent examples. See, e.g., George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 1018-19 (1997) (“Many of those who watched the first Rodney King trial, the first Menendez brothers trial, and the O.J. Simpson trial concluded that the jury was wrong. Perhaps they lost some of their former faith in jury verdicts.”); Lisa Kern Griffin, *The Image We See Is Our Own: Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 333 (1996) (book review) (“Sensational stories, like the Simpson, King, and Menendez trials, undermine the legitimacy of jury verdicts and call into question the compatibility of the institution with the ideal of the rule of law.”).

If *Bush v. Gore* is understood as a failure then, it may represent a failure of political and cultural will—the increasing irrelevance of civic and participatory local government as a social fact on the ground. This failure cannot easily be remedied with changes to legal doctrine or constitutional design. Though individual constitutional doctrines have a significant impact on the distribution of local power and resources, the defense of local government has to come from a revised legal/political culture that sees local entities as central actors in a constitutional democracy. Indeed, *Bush v. Gore* illustrates that attempts to formulate a substantive constitutional role for local governments are destined to fail when addressed to the Constitution and the courts. Such local constitutionalisms are accommodationist in the strongest sense: the Court establishes the terms for the exercise of local status and the locality serves at the Court's sufferance. These accounts do not solve the vulnerability of local government status, they introduce new vulnerabilities by making the Court—a highly centralized and hierarchical institution—the central arbiter of local role. This is localism in name only.

Indeed, it is difficult to imagine that any *doctrine* of local constitutionalism would have affected the outcome in *Bush v. Gore*. One might suspect—not unfairly—that the Court would have decided the way it did regardless. I do not mean this merely as the realist objection that *Bush v. Gore* is politics and not law. The vulnerability of local government status runs far deeper. This vulnerability is a function not only of the Court's inherent role as a centralizing institution (even if it uses that role to distribute powers), but also of a political culture that has little patience for, or engagement in, the exercise of local government. If *Bush v. Gore* teaches anything, it is that national institutions—and the Supreme Court in particular—are where we are governed.<sup>179</sup> The vulnerability

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179. This may explain why *Bush v. Gore* does not seem to have significantly affected Americans' respect for the Court despite many commentators' claims that the Court acted illegally. See Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 33, 37 (2001); Greenhouse, *supra* note 173; cf. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. (forthcoming 2002). Tushnet argues that the U.S. Supreme Court is free to make bold political decisions in part because of "the acceptance in our political and legal

of local government status is, in other words, the vulnerability of political power. If we trust local institutions, if we participate and invest in them, they may be a viable alternative to "rule by nine."<sup>180</sup> The fact that we may not trust them is not the fault of the Supreme Court.<sup>181</sup>

#### CONCLUSION

When Joan Williams wrote sixteen years ago that the history of local governments' legal status is "a startling pure example of politics as black letter law,"<sup>182</sup> she meant that because localities have no "set place in the American constitutional structure"<sup>183</sup> the status of local government can easily be manipulated in order to constrain exercises of power—local, state, or federal—in the furtherance of political goals. *Bush v. Gore* illustrates this particular constitutional vulnerability of local government status quite effectively; no other recent decision by the Court has been so soundly decried as "politics as black letter law."

But *Bush v. Gore* also illustrates what may be a larger truth about democratic life in America: Local government is simply not a political force that can counter the tendency to let others do our governing for us. The county canvassing boards were not our heroes, but maybe they should have been. At least they should have had a place at the constitutional table.

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culture of a strong form of judicial supremacy," which is currently reinforced by the politics of divided government.

180. Cf. LEARNED HAND, *THE SPIRIT OF LIBERTY* 189-90 (1952) ("I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law can save it.")

181. *But cf.* Larry D. Kramer, Forward, *We the Court*, 115 HARV. L. REV. 4, 13-15, 128-69 (2001) (arguing that the Rehnquist court has aggressively embraced a jurisprudence of "judicial sovereignty" in the service of conservative political ends).

182. Williams, *supra* note 5, at 86.

183. *Id.*