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The Unbearable Rightness of *Bush v. Gore*

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INTRODUCTION

Bush v. Gore[1] was a straightforward and legally correct decision. If one were familiar only with the commentary that ensued in the decision's wake, this claim might sound almost lunatic. This article will explain why the Supreme Court acted properly, indeed admirably, and why the ubiquitous criticisms that have been leveled at the Justices from both the left and the right are at best misguided.[2]

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

[2] The Court's legal analysis hardly has a friend in the world. Attacks from the left have been particularly vituperative. *See, e.g.*, Akhil Reed Amar, *Should We Trust Judges?*, L.A. Times, Dec. 17, 2000, at M1; Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose our President* (Nation Books, 2001); Bruce Ackerman, *Anatomy of a Constitutional Coup*, London Rev. of Books, Feb. 8, 2001, at 3.; Jeffrey Rosen, *The Supreme Court Commits Suicide*, The New Republic, Dec. 25, 2000, at 18; Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford U., 2001); Sanford Levinson, *Return of Legal Realism*, The Nation, Jan. 8, 2001, at 8; Randall Kennedy, *Contempt of Court*, Amer. Prospect Jan. 15, 2001, at 15; Richard Briles Moriarty, *Law Avoiding Reality: Journey Through the Void to the Real*, 50 DePaul L. Rev. 1103, 1104 (2001); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001); Neal Kumar Katyal, *Politics over Principle*,

For almost forty years, the Supreme Court has treated the stuffing of ballot boxes as a paradigmatic violation of the Equal Protection Clause. Much more subtle and indirect forms of vote dilution have also been outlawed. Like some of those practices, the selective and partial recount ordered by the Florida Supreme Court may have been an inadvertent form of vote dilution. But that recount had effects that were virtually indistinguishable from those in the paradigmatic case. There is no meaningful difference between adding illegal votes to the count and *selectively* adding legal votes, which is what the Florida court was doing. The Supreme Court rightly concluded that the vote dilution in this case violated well-established equal protection principles.

Nor did the Supreme Court err in its response to this constitutional violation.

Wash. Post, Dec. 14, 2000, at A35; Michael J. Klarman, *Bush v. Gore through the Lens of Constitutional History* – Cal. L. Rev. – (2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, Florida St. L. Rev. (forthcoming); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407 (2001); David Abel, *Bush v. Gore Case Compels Scholars to Alter Courses at US Law Schools*, Boston Globe, Feb. 3, 2001, at A1 (quoting Margaret Jane Radin); Law Professors for the Rule of Law, *554 Law Professors Say: By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law* (advertisement) N.Y. Times, Jan. 13, 2001, at A7.

Conservatives have frequently defended the result and certain aspects of the decision, but have generally been unwilling to endorse the legal reasoning offered by the Court as the basis for its decision. *See, e.g.*, Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, The New Criterion, March, 2001, at 4; Charles Fried, *'A Badly Flawed Election': An Exchange*, New York Review of Books, Feb. 22, 2001; Richard A. Epstein, *Constitutional Crash Landing: No One Said It Would Be Pretty*, National Review Online (Dec. 13, 2000); Michael W. McConnell, *A Muddled Ruling*, Wall St. J., Dec. 14, 2000, at A26; Ronald A. Cass, *The Rule of Law in America* (forthcoming 2001); Harvey Mansfield, *What We'll Remember in 2050*, Chronicles of Higher Education, Jan. 5, 200, at B16; James W. Ceaser & Andrew E. Busch, *The Perfect Tie: The True Story of the 2000 Presidential Election* 209-10 (Rowman & Littlefield, 2001).

Very rare early defenders of the Court's legal reasoning included Marci Hamilton, *A Well-Reasoned "Right to Vote" Ruling in the Eye of the Storm*, FindLaw, Dec. 14, 2000 [http://writ.news.findlaw.com/hamilton/20001214.html]; Nelson Lund, *An Act of Courage*, The Weekly Standard, December 25, 2000, at 19; Alan J. Meese, *The Majority Decision Vindicated the Rule of Law and Upheld the U.S. Constitution*, Insight Magazine, Jan. 15, 2001, at 41.

Although the Court acted with unprecedented dispatch after the Florida court's December 8, 2000 decision, it was highly improbable that a legally proper recount could be conducted by the December 18 deadline set by federal law. And it was quite impossible for such a recount to meet the December 12 deadline that the Florida court itself had found in Florida law. Contrary to a widespread misconception, the U.S. Supreme properly accepted the Florida court's interpretation of state law *and* provided that court with an opportunity to reconsider its own interpretation of state law. When the clock ran out, it was entirely due to mistakes and delays attributable to the Florida court.

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The least known passages in *Bush v. Gore* are those in which the dissenters explain why the majority's legal analysis was erroneous. These passages are not well known because they do not exist. The best known passage, which comes from Justice Stevens' dissent, consists of a rhetorical flourish rather than analysis:

> What must underlie [George W. Bush's and the other defendants'] entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[3]

[3] 531 U.S. at 128-29.

This passage became famous because it has been read to mean that Stevens was impugning the integrity of the five Justices who joined the majority opinion.[4] But if Stevens was slyly encouraging this interpretation, he was careful not to say or imply any such thing. Indeed, if we take his statement at face value, Stevens' point is almost the opposite: cynical appraisals of the work of judges—any judges—are a threat to the rule of law.

Justice Stevens may have been correct that the real loser in the 2000 election was "the Nation's confidence in the judge as an impartial guardian of the rule of law." Partisans on both sides accused judges of manipulating the law in order to assist the candidate they favored, and aspersions were cast on the integrity of some judges even before they ruled.[5] For the vast majority of observers who lacked the time or expertise to form an independent judgment, it must have seemed unlikely that *all* the judges involved had behaved impartially. And many Americans may well have quietly concluded that they're all just a bunch of political hacks in robes.

That conclusion would be a mistake, if for no other reason than the impossibility of proving or disproving such charges.[6] Justice Stevens, however, offered a very different

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[4] The *per curiam* majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. For a penetrating study of the history of *per curiam* opinions, which explains why the device was properly used in this case and why Justices Souter and Breyer should not have styled their disagreement as a dissent, see Arthur J. Jacobson, *The Ghostwriters*, in Arthur Jacobson & Michel Rosenfeld, eds., The Longest Night: Polemics and Perspectives on Election 2000 (University of California Press, forthcoming)

[5] The nastiest examples of this involved Judge Nikki Clark, who was assigned to hear one of the innumerable lawsuits that were filed during the fight over Florida's electoral votes. Frequently, and sometimes not too subtly, it was insinuated that the assignment of Clark was good for Gore and bad for Bush because of her race. *See, e.g.*, Margery Eagan, *ELECTION 2000; Florida Judge Adds Color to Election Fiasco*, Boston Herald, Dec. 7, 2000 ("'A three-fer,' as somebody put it yesterday, 'a GOP nightmare.' A woman, black and left-leaning—possibly a borderline socialist, surely no friend to the Nasdaq."); Jonathan Tilove, *Judge Hearing Ballot Case Caught in Quandary: No Matter How She Rules, Critics Will Cite Her Race*, Times-Picayune, Dec. 7, 2000.

[6] The most elaborate of the many indictments for corruption that have issued from various pundits is Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford U., 2001). Much of the book consists of speculation about the motives of those in the *Bush*

reason for worrying about the reputations of the Florida judges: "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law." A thoughtful citizen unschooled in legal folkways might regard this as a very odd notion. This citizen might suppose that the true backbone of the rule of law is *actual adherence*

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v. Gore majority and about the outcome of a hypothetical case in which the roles of Bush and Gore were reversed. Whatever slight value such speculation might have as evidence, one could produce at least as much of the same kind of evidence to frame an indictment of the *Bush v. Gore* dissenters and the four judges who joined the Florida Supreme Court's majority opinion, as Dershowitz himself occasionally seems to recognize. *See, e.g., id.* at 119-20, 171-72, 183. And, after all that is done, what is to be done with the three Democrats who dissented on the Florida court, in part for reasons very similar to those adopted by the *Bush v. Gore* majority? *See* Gore v. Harris, 772 So.2d 1243, 1273 (Harding, J., dissenting); *id.* at 1267 (Wells, C.J., dissenting).

Apart from unverifiable psychologizing, the core of Dershowitz's argument is that the *Bush v. Gore* majority "were willing not just to *ignore* their own long-held judicial philosophies but to *contradict* them in order to elect the presidential candidate they preferred." *Id.* at 93 (emphasis in original). His offer of proof, however, is fatally flawed in at least three major respects:

- He misstates the holding in *Bush v. Gore*, which rather seriously undermines his effort to compare this case with previous decisions. Compare *id.* at 56 with 531 U.S. at 105-10.

- He persistently claims that the equal protection holding is inconsistent with prior precedents and with interpretations of the Equal Protection Clause advanced by various members of the majority. But none of the quotations he pulls from prior cases actually contradicts anything in the *Bush v. Gore* majority opinion.

- He falsely claims that the majority announced that "it decided this case not on general principles applicable to all cases, but on a principle that has never before been recognized by any court and that will never again be recognized by this court." Dershowitz, *Supreme Injustice* at 81. For a discussion of the actual scope of the holding in *Bush v. Gore*, see *infra* notes — - — and accompanying text.

Unlike Professor Dershowitz, the *Bush v. Gore* dissenters did not pretend that the majority opinion contradicted the "long-held judicial philosophies" of those who joined it. And for good reason. Such a charge can be supported only through the use of debaters' tricks, irresponsible innuendo, and wilful misinterpretation. This book does contain a great deal of evidence to support a charge of "dishonesty, of trying to hide [one's] bias behind plausible legal arguments that [one] never would have put forward had the shoe been on the other foot." Dershowitz, *Supreme Injustice* at 110. But it is the prosecutor, not the defendants, who stands convicted by that evidence.

to the law by the men and women who administer the judicial system. And the citizen might then suppose that refusals by judges to adhere to the law should be exposed and corrected. In fact, that's all that Bush's lawyers asked for, and it's all that the Supreme Court gave them.[7]

Odd as Stevens' statement might seem to an ordinary citizen, it is quite consistent with a theory deeply imbedded among sophisticated legal elites, but seldom advocated in popular discourse.[8] That theory essentially holds that the law is what the judges say it is, so that an aura of impartiality around judges would serve mainly to help them impose better laws on the nation than the people are willing to enact through their legislatures.[9] This theory was rejected by the *Bush v. Gore* majority, which took an approach much more closely aligned with the ordinary citizen's view. That rejection provides the most important reason for defending the Court's decision, and this article will take up that defense.

A thoughtful citizen's attitude is a useful tool when thinking about this case, but it won't be enough. Judges are expected to apply the law set out in the Constitution and statutes. For two main reasons, however, that law often cannot be applied with the same certainty offered, say, by the laws of algebra. First, many provisions of the law are ambiguous, which means that judgment has to be used in choosing among a range of possible interpretations. Second, our legal system has adopted a practice in which courts

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[7] At oral argument in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) ("*Bush I*"), Bush's lawyer specifically said that he was not imputing any lack of integrity or dishonesty to the Florida Supreme Court. Transcript of oral argument in *Bush v. Palm Beach Cty. Canvassing Bd.*, No. 00-836, at 18 (Dec. 1, 2000) [available at http://election2000.stanford.edu/].

[8] *See, e.g.*, John O. McGinnis, *Impeachable Defenses*, 95 Pol'y Rev. 27 (1999) (showing that sophisticated theories of legal interpretation were abandoned in favor of "naïve" notions of original meaning by academics intent on persuading the public that Bill Clinton had not committed impeachable offenses).

[9] For a small sample of the more sophisticated variations on this theme, see Alexander Bickel, *The Least Dangerous Branch* (1962); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); Mark Tushnet, The *Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411 (1981); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in David Kairys, ed., The Politics of Law: A Progressive Critique 40 (1982).

ordinarily adhere to their past decisions even when they have reason to believe that the prior decision was wrong.[10] This rule of *stare decisis*, however, is not completely inflexible, and courts must therefore also exercise judgment in applying it.

Although this means that colorable arguments can often be made on both sides of the legal questions with which courts are confronted, it does *not* mean that the distinction between legally right and legally wrong answers is a chimera. Nor does it mean, as the fashionable academic theories would have it, that judicial decisions should be judged on the basis of their political effects rather than their fidelity to the law. If there are some close legal questions, as there are, there are also such things as stronger and weaker legal arguments. And if there are some legal questions with no indubitably clear answers, as there are, there are also some questions that do have right and wrong legal answers.

Simply stated, my claim is that *Bush v. Gore* should be evaluated as a *legal* decision, and that it stands up very well when judged by appropriate legal standards. Conversely, whatever motivated the Florida judges who were reversed, their ruling was indefensible as a legal decision. The criticisms that can most plausibly be leveled against the Supreme Court majority are essentially *political* criticisms of a kind that might more fittingly be directed against a Senate Majority Leader or an Ambassador to China. Justice Stevens' rhetorical flight, in which the rule of law becomes conflated with confidence in its supposed guardians, is one example. I say that the Florida Supreme Court grossly violated the law and that the U.S. Supreme Court properly acted to stop the travesty. That decision was the legally correct decision, and political criticisms of the Court are based on the corrosively sophisticated assumption that the Justices cannot be anything except politicians in robes.

I. OVERVIEW OF THE FACTUAL SETTING

An extraordinary confluence of events presented the American judicial system with

[10] I leave aside the interesting question whether this hoary and almost unquestioned practice is consistent with the Constitution.

a genuinely difficult challenge in the aftermath of the voting that took place on November 7, 2000.

First, the decisive election in Florida was so excruciatingly close that certainty about the outcome could not have been achieved under the best of conditions.[11] In the final official counts of Florida's ballots, the difference between Bush and Gore was only 537 votes out of some 6,000,000, which is less than one one-hundredth of one per cent. Even if there were some unerring and unambiguously correct way to tabulate the ballots, which there probably is not,[12] certainty would still have eluded us because we would not know how many ballots were cast by ineligible or nonexistent voters. In an election that was this close, with such a large number of ballots cast, only God can know who "really" won.[13]

As a practical and legal matter, this would not have mattered very much if there

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[11] One must note in passing that Florida's election *was* decisive, notwithstanding the claim by some law professors, including Bruce Ackerman, Ronald Dworkin, and Cass Sunstein, that "there is good reason to believe that Vice President Gore has been elected President by a clear constitutional majority of the popular vote and the Electoral College." New York Times Advertisement, Friday, November 10, 2000. Gore came out ahead by about one-half of one percent in the official totals of the popular vote. Whatever the accuracy of these totals may be (and we have no way of knowing the number or distribution of ballots cast by ineligible or nonexistent persons), they have no legal significance because there is simply no such thing as a "constitutional majority of the popular vote."

[12] *See, e.g.*, Lawrence M. Krauss, *Analyze This: A Physicist on Applied Politics*, N.Y. Times, Nov. 21, 2000, at F4 (estimating that if 6 million votes were repeatedly recounted using the same method, the variation in results would be as large as 2,000 votes approximately 68% of the time).

[13] For a detailed exploration of the "statistical tie" in Florida, see Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton U., 2001). A subsequent effort to reexamine all of the disqualified ballots failed to diminish the uncertainty about the "real winner" of the election. *See, e.g.*, Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. Times, Nov. 12, 2001 ("The race was so close that it is possible to get different results simply by applying different hypothetical vote-counting methods to the thousands of uncounted ballots."); Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush*, Wash. Post, Nov. 12, 2001, at A1 ("[T]here are too many variables in any effort to reexamine the ballots—from varying standards in judging ballots in the counties to problems in getting an exact replication of the overvote and undervote ballots—to be able to say with absolute certainty what might have happened in Florida.").

had been some clear and agreed-upon rules for determining which ballots to count for which candidates, and how to tabulate the results. But there were not. First, the Florida statutes governing election disputes had apparently been drafted with local rather than statewide elections primarily in mind, and without considering the unique time constraints that federal law imposes on the resolution of disputes about the electoral college. This shouldn't be too surprising. Statewide elections in a jurisdiction as populous as Florida have rarely, if ever, been close enough to have their outcome turn on an interpretation of the rules for counting ballots. And who would have thought that this unlikely contingency would ever be compounded into freakishness by coming to pass in a state whose electoral votes were going to make the difference in a presidential election? When the freak event did occur, it turned out that the statutes drafted with local elections in mind did not fit a statewide election dispute very easily.[14]

On top of everything else, federal law had its own share of problems and uncertainties. In the wake of the notorious Hayes-Tilden contest in 1876, Congress had enacted a number of provisions aimed at avoiding another such disorderly mess.[15] But the meaning of these provisions, and their relationship with even older statutes, was not entirely clear.[16] On the books for more than a century, they had never been tested in practice or in the courts. Meanwhile, the twentieth century had witnessed the independent development of a complex and evolving body of *constitutional* election law in the federal courts.

Thus, when George Bush and Al Gore entered what looked at times like mortal legal combat, there were lots of weapons scattered around the arena. Because Bush had

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[14] One important statute, Fla. Stat. § 102.168, had been substantially amended in 1999, so it had not been applied even to the local elections for which it seems to have been primarily designed. Thus, the state judiciary was short on experience and precedents to guide its resolution of the disputes that arose in 2000.

[15] Electoral Count Act, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5-18).

[16] For a thoughtful analysis of the infirmities in these provisions, see Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should be Changed*, – Cardozo Law Review – (forthcoming 2001).

more votes tallied in the initial count, and in the automatic recount that Florida law provided for close elections, Gore could only win by attacking the official vote counts. Correlatively, Bush's self-interest dictated that he defend those same counts. Whether from pure self-interest or not, both candidates skillfully and relentlessly deployed all their legal weapons in a fight for victory.[17]

Without blaming either candidate for his litigation strategy,[18] one can note that this created an unusual problem for the courts. A great many novel legal issues were raised in a large number of lawsuits filed by the candidates and their supporters. Furthermore, unlike most other election disputes, those involving the electoral college must be resolved very quickly. *Bush v. Gore* itself was probably decided faster than any comparably important decision in history,[19] and it came at the end of a series of judgments that had themselves been made in unusual haste. What is perhaps most remarkable about the Supreme Court's opinion is how easily defensible it is.

II. OVERVIEW OF THE LEGAL SETTING

A full analysis, or even an adequate summary, of the legal disputes that set the stage for the decision in *Bush v. Gore* is beyond the scope of this article. I therefore offer only the barest essentials here.

The Constitution requires each state to appoint, "in such Manner as the Legislature thereof may direct," a number of presidential electors equal to the size of the state's

[17] For an analysis of the performance of both legal teams, which avoids the cheap Monday morning quarter backing to which Gore's lawyers in particular have been unfairly subjected by some pundits, see Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* 190-98 (Princeton U., 2001).

[18] One could, and perhaps should, ask whether individuals who were entirely devoted to the good of the country would have behaved differently than Gore and Bush did. I leave that interesting question aside in this paper.

[19] Only four days elapsed between the Florida Supreme Court's decision on December 8, 2000 and the U.S. Supreme Court's reversal of that decision on December 12.

congressional delegation.[20] The Constitution also requires these electors to meet in their states to cast their ballots, and then to send a certified list of the votes to the president of the Senate (who in this case was Al Gore).[21] He is required to open them in the presence of the Senate and House of Representatives, where they are then counted.[22] An absolute majority of the "Electors appointed" is needed to win the election.[23] Absent such a majority, the House of Representatives chooses the president under a rule that gives each state's delegation one vote.[24] If no president is chosen by January 20, an acting president takes office "until a President shall have qualified."[25]

Congress has attempted to fill in some of the details that are left unspecified by the Constitution. Two of those statutes are especially relevant. First, federal law required that presidential electors meet and give their votes on December 18, 2000.[26] Second, federal law provided that if a state had enacted laws for resolving disputes before November 7, 2000, and used those laws to resolve election disputes by December 12, 2000, such resolution would be treated as conclusive when the votes were counted in Congress."[27]

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[20] U.S. Const. art. I, § 1 cl. 2.

[21] *Id*. amend. XII.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Id*. amend. XX, § 3.

[26] 3 U.S.C. § 7: "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."

[27] 3 U.S.C. § 5: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least

Florida election law is much more complex and detailed. The procedure for dealing with disputes has four main elements. First, an automatic statewide recount is conducted in close elections.[28] Second, a "protest" period occurs, during which certain kinds of challenges can be brought before county canvassing boards (which comprise two local elected officials and one local judge).[29] Third, state officials accept election results from these county officials and "certify" a winner.[30] Fourth, that certification can be challenged in court through an election "contest."[31]

A. *The Litigation Begins*

Bush won the initial count by 1,784 votes, and he was still ahead by 327 votes after the automatic statewide machine recount.[32] Gore then filed "protests,"[33] demanding a hand recount of the ballots in four heavily Democratic counties, only three of which are relevant to the following discussion: Broward, Palm Beach, and Miami-Dade.[34] Gore

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six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

[28] Fla. Stat. § 102.141(4). Such a recount need not be conducted if the losing candidate concedes the election. *Id.*

[29] Fla. Stat. §§ 102.141, 102.166.

[30] Fla. Stat. § 102.111.

[31] Fla. Stat. § 102.168.

[32] These figures were tentative because the absentee ballots had not all been counted yet. In retrospect, we know that the remaining absentee ballots were going to widen Bush's lead.

[33] Gore acted through the Democratic Party, as he was permitted to do under Florida law. For simplicity of exposition, my discussion will refer to Gore as the initiator of the "protests."

[34] One of the four counties (Volusia) apparently had real tabulation problems, caused by malfunctioning machines and the like, which almost everyone agreed is a legitimate reason for

apparently chose these counties for one or both of two reasons.[35] First, to the extent that errors by the counting machines were randomly distributed, Gore could expect to be a net gainer in these most heavily Democratic jurisdictions.[36] Second, the hand recounts would be supervised by local elected officials, and the chances that such officials would be biased in Gore's favor (or at least not biased in Bush's favor) would be highest in the most heavily Democratic counties.[37]

Gore's strategy was consistent with the letter of Florida law, at least in the sense that it permitted Gore to *request* recounts in selected counties, but it raised serious constitutional questions that had lurked unnoticed so long as the law had been applied only to local elections. If the law actually allowed one candidate to obtain a geographically biased recount in a statewide election, the Florida statute may have unconstitutionally (albeit inadvertently) run afoul of established principles requiring the fair and equal treatment of similarly situated voters. Accordingly, Bush promptly filed a lawsuit in federal court, in which he sought to stop the recounts that Gore had demanded.

The courts never addressed the merits of Bush's arguments, concluding instead

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performing a manual recount. *See* Siegel v. LePore, 234 F.3d 1163, 1194 n.2 (11th Cir. 2000) (Carnes, J., dissenting).

[35] The notion that these counties were chosen because they were the ones in which voters were most likely to have cast a vote that was missed by the machines is untenable. Gore never made such a claim in court, and there were at least seven counties using punch cards that had a higher percentage of "no vote" ballots than Palm Beach, none of which was selected for a manual recount. *See id.* at 1203.

[36] The counties chosen by Gore were the three most populous in Florida, and they were counties where Gore won by the widest margins. (Jefferson County gave Gore a slightly higher margin of victory than Miami-Dade, but Jefferson is a small county in which very few ballots were cast, thus making it a poor prospect for Gore's recount strategy.) *See id.* at 1213-14 (Chart A).

[37] Two of the three members of each canvassing board are elected in local, partisan elections. See Fla. Stat. §§ 102.141; 124.01(2); Fla. Const. art. 8, § 1(d).

that the relief he sought was premature.[38] What proved to be the decisive litigation resulted instead from lawsuits brought by Gore in an attempt to overcome a series of obstacles in state law that threatened to frustrate his chosen strategy.

The first obstacle was a statutory provision requiring that the local officials provide a final tally to the Secretary of State within seven days after the election, whereupon the statewide result would be "certified." None of the three counties had finished their hand recounts by that deadline, and Secretary of State Katherine Harris concluded that they had not offered legally sufficient reasons for any further delay.[39] In response to a lawsuit filed by Gore and others, a Florida court rejected Gore's claim that Harris had behaved illegally by refusing to accept tardy recounts. Gore then appealed to the Florida Supreme Court, which took the first of many highly questionable actions. Without even being asked to do so by any litigant, the court issued an unexplained order forbidding state officials from "certifying" the results of the election.[40]

This order, to which Gore raised no objection, had the practical effect of artificially extending the "protest" phase (where preliminary decisions are made by local elected officials), and therefore necessarily shortening the "contest" phase of the legal process

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[38] See Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000) (upholding the district court's denial of a preliminary injunction requested by Bush), *cert. denied*, 121 S. Ct. 749 (2001). *See also* Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000) (declining to grant certiorari on equal protection and due process claims). Assuming that Florida law allowed Gore to obtain a geographically biased recount premised on voter error, rather than machine error, the arguments in Bush's favor on the merits were very strong. *See, e.g.*, *Siegel v. LePore*, 234 F.3d at 1194-1213 (Carnes, J., dissenting).

[39] The Secretary of State is an elected official, and Harris is a Republican who was active in Bush's presidential campaign.

[40] The order, which is available at http://election2000.stanford.edu/stay.pdf, read as follows:

> In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission from certifying the results of the November 7, 2000, presidential election, until further order of this Court. It is NOT the intent of this order to stop the counting and conveying to the Secretary of State the results of absentee ballots or any other ballots.

(where final decisions are made by courts). As we shall see, the shortening of the "contest" period had fateful consequences.

B. *Bush v. Palm Beach County Canvassing Board* ("*Bush I*")

This unprompted decision by the Florida Supreme Court was the first in a series that culminated in the U.S. Supreme Court's decision that the Florida recount was being conducted in an unconstitutional manner. The next step was the Florida Supreme Court's decision, four days later, to reverse the trial court, thereby overturning two decisions made by the Secretary of State, who had concluded 1) that manual recounts were legally available only to correct errors made by the voting or counting machines, not errors by voters; and 2) that conducting recounts based on voters' errors did not justify relaxing the statutory deadline for the counties to report their election returns.

The Florida court sought to justify its decision by resolving what it identified as three troublesome or ambiguous features of the state election statute. First, the statute allowed full manual recounts only to correct an "error in the vote tabulation," without specifying whether this would include a failure by the voter to mark or punch a ballot in the manner required to render the ballot machine-readable. Second, one statutory provision said that the Secretary of State "shall" ignore late returns from the counties, while another provision said that she "may" ignore late returns. Third, one statute allowed a candidate to request a recount at any time before the county returns are certified, while another required the county officials to certify the returns within seven days; thus, cases might arise where a candidate requested a recount just before the seventh day, leaving no time to conduct the recount.

The Florida court believed that it should resolve these issues so as to facilitate the right of the voters to express their will, without abiding by "[t]echnical statutory requirements."[41] The court rejected Secretary of State Harris' argument that an "error in vote tabulation" could only refer to malfunctioning machines, concluding instead that the statutory language also referred to cases in which a ballot was punched or marked in such

[41] Palm Beach Cty. Canvassing Bd. v. Harris, 772 So.2d 1220, 1237 (2000).

a way that a human, but not a machine, could detect an intent to vote for a particular candidate.

For two reasons, this was the court's most important decision. First, the disputes about the deadline only became relevant on the assumption that there was a legal basis for the recounts in the first place. Second, and most important, it was this interpretation of the statutes that made Gore's cherry-picking strategy feasible, thus raising serious constitutional questions about those statutes.

The decision was also more far-fetched than it may at first appear. According to the court's interpretation, machine tabulations will *always* be erroneous if any voter failed to follow the instructions for marking the ballot, which always happens.[42] Why then would the statutes provide for an automatic *machine* recount in close elections? Such a procedure would almost always be pointless because a hand recount to correct these inherently erroneous machine recounts would always be justified. It should therefore come as no surprise that recounts had never before been conducted to correct *voters'* errors.[43]

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[42] It could hardly be contended that the voters' "intent" should always be honored because a failure to follow the instructions for voting is excusable. On that reasoning, one might almost as easily say that an "error in vote tabulation" occurs when there is evidence that a voter intended to vote for a particular candidate, but didn't show up at the polls to cast a ballot. This is more than a hypothetical possibility. One of the least known stories about the 2000 election involves the role of the television networks in suppressing voter turnout in the heavily Republican panhandle of Florida. Secretary of State Harris specifically asked the networks to refrain from predicting the outcome of Florida's election until the polls had closed in the western part of the state, which is in the central time zone. Despite this request, or perhaps because of it, *all five national networks* "called" Florida for Gore before the polls closed in the panhandle. Worse, *all* of these networks falsely and repeatedly announced that the polls had closed in Florida beginning an hour before they had actually closed in the western counties. *Asides: Driving Voters Away*, Wall Street Journal, May 7, 2001, at A22. Subsequent analysis has indicated that these actions by the networks cost Bush many thousands of votes. *See, e.g.*, Bill Sammon, *Networks' Early Call Kept Many from Polls: Florida Section Affected by TV*, Wash. Times, May 7, 2001, at A1. Those who were tricked by the television networks into staying home had at least as good an excuse for their failure to cast a valid ballot as those who failed to follow the instructions at the polling places.

[43] At oral argument before the U.S. Supreme Court in *Bush I*, the lawyer for Florida's Attorney General (who was aligned with Gore) conceded that he was unaware of any previous election

The court's conclusions with respect to the other two issues were similarly implausible. The Florida court resolved the apparent conflict between the "shall ignore" and "may ignore" provisions by inventing a new meaning inconsistent with them *both*, namely that the Secretary *may not ignore* late returns. The court then went on to give the counties an entirely new deadline of nineteen days after the election. This deadline had no basis anywhere in the statutes, and it was adopted without any explanation except a vague allusion to "the equitable powers of this Court."[44] The justification given for these

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"in which recounts were conducted, manual recounts, because of an allegation that some voters did not punch the cards the way they should have through their fault."

The Florida court attempted to support its counterintuitive conclusion by citing a statutory provision that said: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." See 772 So.2d at 1229 (citing Fla. Stat. § 101.5614(5)). But that provision applies only to cases where the ballot *itself* is damaged or defective, which simply reinforces the conclusion that the Florida laws did not contemplate manual recounts designed to correct errors by *voters*. The court also pointed to the next subsection, Fla. Stat. § 101.5614(6), which provides: "If an elector marks more names than there are persons to be elected to an office or if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office, but the ballot shall not be invalidated as to those names which are properly marked."). 772 So.2d at 1229. This rule does not support the court because it says only that 1) improperly marked "overvote" ballots shall *not* be counted; 2) ballots shall *not* be counted when the elector's choice is (for whatever reason) impossible to determine; and 3) a ballot *properly* marked for one candidate shall not be invalidated *as to that candidate* because of improper marks elsewhere on the ballot. This three-part rule covers a number of situations, but it does not purport to cover all situations. And it emphatically does not say or imply that ballots must always be counted when a reviewer believes he can discern the intent of the voter.

[44] 772 So.2d at 1240. In a later opinion, which was issued after the U.S. Supreme Court reviewed the case, the Florida court contended that the recounts had been "thwarted" by an advisory opinion from the Florida Division of Elections that interpreted the law differently than the Florida court interpreted it. The court then explained that it had tried to create as much time for the recounts as would have existed had the counties not complied with this advisory opinion. Palm Beach County Canvassing Board v. Harris, 772 So.2d 1273, 1290 (2000). This is nonsense. The advisory opinion from the Division of Elections did not prevent the county canvassing boards from continuing the recounts. Indeed, Florida's Attorney General had immediately responded to the Division by issuing his own advisory opinion, which directly repudiated the conclusions reached by the Division of Elections. See Fla. Att. Gen. Advisory Opinion No. AGO 2000-65 (Nov. 14, 2000). Furthermore, those boards were well aware that the Division of Elections might be overruled by the courts, for a lawsuit challenging the

conclusions was that "the will of the electors supersedes any technical statutory requirements."[45]

Bush sought review in the U.S. Supreme Court, arguing that the Florida court had simply disregarded the statutes, thus violating the Constitution's command in Article II that electors be chosen "in such Manner as the Legislature [of the State] may direct." What the Florida court had done, Bush argued, was not to interpret the statutes but to rewrite them, in contravention of the U.S. Constitution.[46]

Bush's argument presented the U.S. Supreme Court with a genuinely difficult question. The Constitution plainly says that the directions of the state legislature must be followed, and the Florida court was pretty plainly not following the legislature's directions. On the other hand, the decisions of state supreme courts are almost always treated as authoritative interpretations of state law, no matter how implausible they may seem. It would thus not have been altogether unthinkable to assume that the Florida legislature had implicitly "directed" that electors be chosen in accordance with Florida law as interpreted by the Florida courts.

A unanimous Supreme Court avoided this difficult Article II question, and rightly so. In resolving what it saw as the troublesome features of the statutory scheme, the Florida court had appeared to rely in part on the notion that statutes should be interpreted so as to render them consistent with its own prior interpretation of the Florida Constitution, according to which "[u]nreasonable or unnecessary restraints on the elective process are

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opinion of the Division of Elections had been filed the very day that opinion was issued. *See* 772 So.2d at 1226. The Division's advisory opinion "thwarted" nothing.

[45] 772 So.2d at 1239 (relying on language in State *ex rel.* Chappell v. Martinez, 536 So.2d 1007, 1008-1009 (Fla.1988)).

[46] Throughout the article, I will focus on the arguments and parties that in retrospect turned out to be most significant. Here, for example, Secretary of State Harris presented somewhat different arguments from Bush's, and Bush himself presented some arguments that I have not summarized.

prohibited."[47] This would have seemed a normal approach to resolving a state law question because a state Constitution has greater authority than state statutes.[48] In this case, however, that seemingly normal approach may have been misplaced. *McPherson v. Blacker*, an 1892 Supreme Court case apparently overlooked by the Florida Supreme Court, had suggested (without deciding) that state constitutions are *not* authorized to constrain state legislatures in the special context of choosing presidential electors.[49]

Thus, the Supreme Court was confronted with a double uncertainty. First, it had previously said, but had not actually decided, that a very unusual relationship exists between state constitutions and state statutes in the context of selecting presidential electors. Second, the Florida Supreme Court had not made it clear that its construction of the state statutes was *crucially* dependent on the Florida constitution. If the Florida court

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[47] See Palm Beach Cty. Canvassing Bd. v. Harris, 772 So.2d 1220, 1236-37 (Fla. 2000) (quoting Treiman v. Malmquist, 342 So.2d 972, 975 (Fla. 1977), which was in turn construing the Florida Constitution's statement that "[a]ll political power is inherent in the people").

[48] The United States Supreme Court frequently follows the closely analogous practice of resolving statutory ambiguities in a manner that avoids raising serious constitutional questions. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 203 (1991); Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Hooper v. California, 155 U.S. 648, 657 (1895).

[49] 146 U.S. 1, 25 (1892):

> The clause under consideration [i.e. U.S. Const. art. II, §l cl. 2] does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words, 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

In addition, the Court quoted with apparent approval the following statement from a Senate committee report: "This power [to appoint presidential electors] is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *Id.* at 35 (quoting Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

were given a chance to construe the state statutes without reference to the state constitution, then the U.S. Supreme Court might not have to decide whether to adopt the suggestion made in *McPherson*. Accordingly, the Supreme Court vacated the decision and remanded the case so that the Florida court could clarify or reconsider its ruling.[50]

In the course of its opinion, the Supreme Court also cautioned the Florida court to give attention to a federal statute that it had previously ignored. That statute, 3 U.S.C. § 5, provided that if a state resolved any election disputes by December 12, 2000, using laws in place before November 7, 2000, such resolution would be treated as conclusive when the votes were counted in Congress. The Supreme Court noted that "a legislative wish to take advantage of the 'safe harbor' [offered by this federal statute] would counsel against any construction of the [Florida] Election Code that Congress might deem to be a change in the law."[51]

This was an arresting statement. It certainly seems reasonable to suppose that Florida's legislature would want to take advantage of this safe harbor. And it might make sense to resolve statutory ambiguities so as to bring the state within the safe harbor, though there is no evidence that anyone in the Florida legislature had ever heard of 3 U.S.C. § 5 before the 2000 election. But what did any of this have to do with the case before the Court? The fact is that it had no relevance at all *unless* the U.S. Constitution *required* the Florida court to give effect to such a "legislative wish." As we've seen, however, the Supreme Court had never decided that the Constitution does impose this requirement, and

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[50] Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000). By vacating the decision below, the Court implicitly concluded that the case was justiciable, notwithstanding the "political question" doctrine. This conclusion was compelled by *McPherson*, which had expressly and emphatically held that questions arising under Art. II, § 1, cl. 2 are justiciable. With respect to the justiciability issue, the only difference between the two cases is that *McPherson* involved review of a state statute, whereas *Bush I* involved review of a state court judgment. The Supreme Court has never suggested that this difference has any bearing on justiciability. *McPherson*'s interpretation of the Constitution may well be questionable, but that does not necessarily imply that it is so clearly wrong as to be a plausible candidate for overruling under the Court's usual application of *stare decisis*.

[51] *Id*. at 78.

the Court had taken pains to avoid deciding the question in this case.

Thus, the message that the unanimous Court was sending to the Florida judges should have been quite clear: We are not anxious to decide difficult questions of federal constitutional law without giving you an opportunity to address those questions first. But you had better take federal law much more seriously than you did in your first opinion.

C. *The Florida Court Careens out of Control*

Clear as it was, the Supreme Court's message either did not reach a majority of the Florida judges, or they decided they could safely ignore it. Whatever the cause, those judges soon embarked on an extraordinary journey outside the bounds of federal law. In order to appreciate the necessity and the restraint of the Supreme Court's controversial decision in *Bush v. Gore*, one must first understand the sheer outlandishness of the Florida decision that provoked it.

Before coming to that, however, we need to summarize a few more facts. Florida, like many other states, has a decentralized system for conducting elections. Each of Florida's 67 counties conducts elections under the supervision of local officials. These officials are bound by a number of rules established by state law, but many details are left to their discretion. Different counties, for example, have used different kinds of voting machines, and the counties have not been told by state law exactly what rules to use when conducting hand recounts.

As the whole nation learned in 2000, there is room for considerable debate about the proper way to classify punch-card ballots during a manual review. Without reviewing the intricacies of the controversies over matters such as hanging and dimpled chad, it should be enough to note that the three counties chosen by Gore for his "protests" used different standards of review, and that one county actually changed its standard repeatedly during the recount. Although Democratic officials controlled all of the recounts, and despite the extra twelve days that the Florida Supreme Court had created for the recount process, Bush remained ahead when the new deadline arrived.

Accordingly, state officials "certified" Bush as the winner of the election, by a margin of 537 votes. Gore then invoked the "contest" provisions of state law, filing a lawsuit challenging this certification. In order to prevail in this suit, the statute required Gore to begin by proving the "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[52] Gore claimed that he could do this, primarily on the basis of the following claims: 1) even though Palm Beach County had not completed its recount by the extended deadline, and even though Miami-Dade had not completed its recount at all, Gore should be credited with the net gains he had thus far made in those counties (215 and 168 votes, respectively), and 2) more importantly, some 9,000 Miami-Dade "undervote" ballots—those on which the machine did not detect a choice for any candidate for the office of president—would change the result of the election if reexamined by hand.[53]

After a trial at which Gore had the opportunity to establish his claims, Judge N. Sanders Sauls found that he had failed to do so. The most important element in Sauls' reasoning was that Gore had offered "no credible statistical evidence and no other competent substantial evidence" to establish that the certified result of the statewide election would be changed if further scrutiny of the Miami-Dade ballots were undertaken.[54]

The fundamental difficulty confronting Gore was this: He had demanded a manual recount only in selected counties, and that demand was manifestly calculated to produce a shift in the statewide totals *on the basis of chance alone*. But even after the Florida Supreme Court had created an extra twelve days for Gore to pursue this constitutionally dubious strategy, the result of the election had remained the same. Thus, Gore appeared to be locked in to a losing game, even assuming that his strategy was permissible under federal law.

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[52] Fla. Stat. § 102.168(3)(c).

[53] Gore made a number of other claims as well, all of which were rejected both by the trial court and by the Florida Supreme Court.

[54] Transcript of oral ruling, Dec. 3, 2000, at 9 [available at http://election2000.stanford.edu/].

On December 8, 2000, however, the Florida Supreme Court created a whole new theory under which Gore might be able to get the outcome of the election changed. Reversing the trial court's decision by a vote of 4-3, the majority ordered the trial court to take the following actions:

- Add a net of 215 votes (or perhaps 176, depending on a factual issue that the judges did not resolve) to Gore's total, based on the Palm Beach recount, whose results were not reported to state officials within the judicially extended "protest" period.

- Add a net of 168 votes for Gore to the officially certified vote totals, based on the incomplete recount conducted by local election officials in Miami-Dade County.

- Conduct a manual recount of the 9,000 Miami-Dade ballots that Gore claimed might shift the statewide totals in his favor.

- Conduct a statewide recount of some kind, which the Florida Supreme Court strongly suggested should be limited to a recount of the "undervote" ballots in each county.[55]

This was a truly bizarre ruling.

First, it ignored the legal effect of the U.S. Supreme Court's decision in *Bush I*. On December 4, the Supreme Court had vacated the Florida court's November 21 decision in that case, thus rendering it a legal nullity. The Florida court's December 8 decision, however, appeared to assume the validity of the nullified decision because it ordered additions to Gore's vote total that had been made possible only by the November 21

[55] Technically, the Florida Supreme Court only required the trial court to *consider* conducting a statewide recount, perhaps because of doubts about the supreme court's jurisdiction to order the recount. Because the trial court did order the recount, this technical distinction had no subsequent significance.

decision's extension of the statutory "protest" period.[56]

Second, the statutory interpretation underlying the December 8 decision was even more questionable than that on which the November 21 decision rested. Florida's "contest" statute required Gore to prove the existence of errors sufficient to change or place in doubt the outcome of the election.[57] The only evidence he had was the existence of some 9,000 "undervote" ballots that the Miami-Dade officials had found it impracticable to examine during the "protest" period.[58] The court held that the mere existence of these ballots was sufficient to place the outcome of the statewide election in doubt, even though Gore had not proved that a recount of these ballots would even favor him.[59] The

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[56] It might be possible to devise some legal theory under which recounts conducted pursuant to a subsequently nullified judicial decision should be treated as valid, but no such theory was articulated by the Florida court.

[57] Fla. Stat. § 102.168(3):

> The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:
>
> . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

[58] Gore's attempt to construct a statistical argument for calling the election results into doubt foundered when his expert witnesses, a consultant named Kimball Brace and a Yale professor named Nicolas Hengartner, were both demolished under cross-examination. Those who missed seeing this embarrassing spectacle when the trial was televised can consult the transcript, which is available at http://election2000.stanford.edu/.

[59] 772 So.2d at 1256:

> Here, there has been an undisputed showing of the existence of some 9,000 "under votes" in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt,

assumption here seemed to be that in a very close election, almost *anything* could put the outcome in doubt.[60] That has a certain plausibility, but the court also held, in a bizarre reversal of logic, that the statute did not require a recount of all Miami-Dade ballots (let alone all ballots statewide) because Gore had only put these 9,000 at issue.[61] The absurdity of putting these two conclusions together was apparently obvious to the court itself, for it then spun off in a different direction, concluding without explanation that a recount could *not* be confined to Miami-Dade, though it *could* be confined to "undervote" ballots.[62] How the court got this conglomeration of conclusions out of the statute is

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> warranting a manual count of all undervotes or "no vote registered" ballots, has been made.

Gore had picked up 168 votes in the partial recount in Miami-Dade, but that recount had been limited to a set of disproportionately Democratic precincts.

[60] This assumption is the apparent explanation for the court's claim that the statute did not place the burden of proof on the plaintiff, as is universally done in civil litigation, but rather imposed on the *trial judge* the burden of *disproving* the plaintiff's allegations. *See* Gore v. Harris, 772 So.2d 1243, 1259 (Fla. 2000) ("[B]y failing to examine the specifically identified group of uncounted ballots that is claimed to contain the rejected legal votes, the trial court has refused to address the issue presented.").

[61] 772 So.2d at 1253:

> As explained above, section 102.168(3)(c) explicitly contemplates contests based upon a "rejection of a number of legal votes sufficient to change the outcome of an election." Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under section 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under section 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected.

[62] *Id.*:

> [A] consideration of "legal votes" contained in the category of "undervotes" identified statewide may be properly considered as evidence in the contest

anyone's guess.

Thus, the effect of this ruling by the Florida court was to raise exactly the same difficult constitutional question that the U.S. Supreme Court had carefully avoided in the *Bush I* case, namely whether a state court's interpretation of state statutes can be so clearly untenable that it constitutes an impermissible departure from the legislative directions referenced in Article II of the U.S. Constitution.

Third, the court ordered the addition of 168 votes to Gore's certified totals, based on the *partial* recount in Miami-Dade. This order is worth pausing over because it is truly shocking. Whatever rationale one might use to justify conducting recounts in some jurisdictions but not others, stopping in the *middle* of a recount and *definitively* awarding one candidate the number of new votes he had picked up by that point simply defies explanation in terms of an effort to produce a more accurate count of the votes. What's worse, there was unrebutted evidence at trial that Miami-Dade had begun its recount with the most heavily Democratic precincts, which means that the partial recount was obviously biased in Gore's favor.[63]

Fourth, the statewide remedy of reexamining "undervote" ballots had not been requested by any of the parties,[64] it had no source in the Florida statutes, and the court

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proceedings and, more importantly, in fashioning any relief.

> We do agree, however, that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted.

[63] *See* Trial Transcript, *Gore v. Harris*, No. 00-2808 (Leon Cty. Jud. Cir. Dec. 2, 2000), at 461-83 (testimony of Thomas Spencer) [transcript available at http://election2000.stanford.edu/].

[64] From the beginning, Gore and Bush had maintained clear and consistent positions. Bush defended the machine recounts in which he had gotten more votes, and objected to hand recounts. Gore, in turn, consistently defended his demand that recounts be limited to the ballots in the heavily Democratic counties he had chosen for his "protests." Two groups of voters from other counties agreed with Bush, but argued that if there was to be a recount, equal protection required that similarly

provided no meaningful instructions for conducting it.[65] The court's decision, moreover, came only four days before the federal "safe harbor" deadline that was pointedly discussed in the U.S. Supreme Court's *Bush I* opinion. It was perfectly obvious, as the three Florida Supreme Court dissenters insisted, that the majority was "departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos."[66] And, as Chief Justice Wells pointed out in his dissent, the lawlessness was so obvious that it seemed likely to "eventually cause the election results in Florida to be stricken by the federal courts or Congress."[67]

What could have caused the majority to take this reckless action? Leaving cynical hypotheses aside, and looking only at the justification offered by the Florida judges themselves, it turns out that their reasoning actually contradicted their actions. The majority purported to adopt what it called a "common sense" approach to the statute, summed up in the notion that the outcome of elections should be determined by "the will of the voters" rather than by "strategies extraneous to the voting process."[68] The actual ruling, however, was based on a very different theory, which was never stated in the opinion, and which was pretty much the opposite of the stated theory.

The real theory went something like this. Once the ballots have been counted by machine, we will allow the loser to choose which ballots to reexamine by hand. Any changes in the vote totals resulting from this selective and partial recount, such as the 168 votes in Miami-Dade, will be adopted. But because this would so manifestly allow the

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situated voters throughout the state must be treated similarly. *See* Brief of Intervenors Glenda Carr, et al., *Gore v. Harris*, No. SC00-2431 (Fla. 2000); Brief of Intervenors Stephen Cruce, et al., *Gore v. Harris*, No. SC00-2431 (Fla. 2000).

[65] For a brief discussion of the problems created by the majority's standardless remand, see Gore v. Harris, 772 So.2d 1243, 1269 (Fla. 2000) (Wells, C.J., dissenting).

[66] *Id.* at 1273 (Harding, J., dissenting).

[67] *Id.* at 1267 (Wells, C.J., dissenting). Justice Harding's dissent made a similar point. *Id.* at 1272.

[68] 772 So.2d at 1249, 1253.

outcome to turn on "strategies extraneous to the voting process," we will try to create what we regard as a tolerable approximation of evenhandedness by directing the trial court to make an *effort* to perform a *somewhat less* selective and *somewhat less* partial recount than the loser had at first demanded.

If the Florida Supreme Court had actually been seeking to ascertain the "will of the voters" of Florida, it would have designed a statewide recount that could believably be called more accurate or more reliable than the initial machine counts.[69] At an absolute minimum, that would have required reexamining all the "overvotes" (where the machines detected a vote for more than one candidate, and therefore recorded no vote) as well as the "undervotes" (where the machines detected no vote for any candidate). Once one assumes that the "intent of the voter" should be honored even when the voter failed to comply with the instructions on how to vote, these two categories of ballots become logically indistinguishable.[70]

Furthermore, the need to treat "undervotes" and "overvotes" the same way is only the most obvious requirement of a recount aimed at determining the will of the voters. If one were actually serious about designing a recount that was more accurate than the machine counts, one would also have to recount all of the ballots identified by the machines as "legal votes." Whatever criterion is adopted for changing "undervotes" to "legal votes" (the presence of hanging chad, or the presence of dimpled chad, for example), that same criterion should be applied to ballots containing both a machine readable hole and a

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[69] This is exactly the point that Judge Sauls (whom the Florida Supreme Court was reversing) had made when he said:

> [U]nder Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount [of] all ballots, and all of the counties within this state with respect to the alleged irregularities in the balloting or counting processes alleged to have occurred.

Transcript of oral ruling, Dec. 3, 2000, at 12-13 [available at http://election2000.stanford.edu/].

[70] The majority was certainly aware of this completely obvious point because Chief Justice Wells insisted on it in his dissent. *See* 772 So.2d at 1264 n.26.

hanging or dimpled chad. That means that some "legal votes" would have to be changed to "overvotes," and thus deducted from the vote totals. This could be quite significant, for ballots containing both a clean hole for one candidate and a dimpled or indented chad for another candidate were quite common.[71] Alternatively, the court might have been justified in restricting a recount to "undervote" ballots *if* it had employed a standard designed to count the ballots of those voters whose efforts were frustrated by faulty machines, without counting the ballots of voters who failed to follow the instructions. But the Florida court insisted upon the proposition that "a legal vote is one in which there is a 'clear indication of the intent of the voter,'" with or without evidence of a faulty machine.[72]

Thus, the Florida Supreme Court could not have been seeking to ascertain the will of the voters of Florida. Instead, it was seeking to ascertain the will of a peculiar subset of Florida voters, namely those who had cast "undervote" ballots and those other voters who both happened to reside in the counties Gore had selected for full recounts and happened to reside in precincts where such recounts had actually been conducted. The court gave no explanation for this extraordinarily capricious choice.[73]

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[71] *See* Trial Transcript, *Gore v. Harris*, No. 00-2808 (Leon Cty. Jud. Cir. Dec. 2, 2000), at 262-64 (testimony of Judge Charles Burton) [transcript available at http://election2000.stanford.edu/].

[72] 772 So.2d at 1257 (apparently quoting Fla. Stat. § 101.5614(5) (which applies only to damaged or defective ballots), but clearly adopting the quoted standard as a general principle applicable to all ballots subject to manual recounts).

[73] Justice Breyer later tried to supply an explanation by pointing out that Bush and the other defendants in the case "presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes." 531 U.S. at 145. This is patently untenable. First, the only "evidence" cited by the Florida Supreme Court for the proposition that the undervote ballots included some additional "legal votes" was the mere existence of the 9,000 undervote ballots from Miami-Dade. *See* 772 So.2d at 1256. Second, there was not even that much "evidence" of undervotes in counties other than those selected by Gore for his "protests," yet the Florida courts were conducting a manual recount of undervotes in *all* Florida counties. Third, the *defendants* in the lawsuit had no occasion to present "evidence" to support a legal theory that they were not advancing, and in fact they had no reason even to think of such a theory until after the Florida Supreme Court ordered, quite out of the blue, a statewide recount of "undervote" ballots. Fourth, Gore's own lawyer acknowledged to the U.S. Supreme Court that there were approximately 110,000 "overvote" ballots in Florida. Transcript of oral argument in *Bush v. Gore*, 2000 WL 1804429, at 62.

Not only did the Florida Supreme Court focus the statewide recount on a manifestly inappropriate subset of the ballots, the court did not even indicate that the statewide recount of "undervotes" would actually have to be *completed* in order for Gore to prevail in his challenge. What the majority apparently contemplated was that it would stop the recount at some point (December 12? December 18? January 6? January 20?), and declare a winner on the basis of whatever new vote totals existed at that time. Although the court did not announce this, it is the logical inference from the majority's decision definitively to award Gore the 168 votes he had already picked up in the uncompleted recount in Miami-Dade. If that uncompleted recount was enough to justify changing the official vote count, why couldn't a similarly uncompleted statewide recount be used to justify changing the outcome of the election? And why wasn't the world told in advance when the recounting would stop?

III. THE SUPREME COURT'S DECISION IN *BUSH V. GORE*

The day after this amazing decision by the Florida court, the U.S. Supreme Court voted to halt the statewide partial recount that the Florida judges had initiated, and to schedule a full hearing two days later.[74] On December 12, only four days after the Florida court's decision, the Supreme Court held that the recount violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, with only two Justices dissenting from this conclusion.[75]

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[74] Contrary to a lot of heated commentary, this order had no adverse effects on Gore's legal rights. Seven members of the Supreme Court subsequently agreed that the suspended recount was inconsistent with constitutional standards, and nobody can have a right to something that is itself illegal. The counting that would have been done after the stay order and before the Court's decision on the merits would have been legally void, and Gore could have had no legal right to the results of an illegal recount.

It is true that if the Supreme Court had affirmed the Florida court, instead of reversing it, it would have been proper for the Court to look for a way to prevent the interruption of the counting from injuring Gore. There is no reason to assume that the Court would have been unable to accomplish this.

[75] The 7-2 alignment on the merits decision in *Bush v. Gore* has been widely ignored or downplayed by those inclined to see the decision as an exercise in partisan politics. One of the more

The majority's equal protection analysis was quite straightforward, and firmly grounded in precedent. After a brief summary of the Court's vote-dilution jurisprudence, the majority described several ways in which the Florida recount entailed the uneven treatment of different voters: 1) varying standards for determining a voter's intent had been employed; 2) the statewide recount had been limited to "undervotes," while the recounts in the Gore-selected counties had included all ballots; 3) the partial recount in Miami-Dade had been used for certification, and the Florida court evidently contemplated the future use of partial recounts; and 4) the statewide recount was being conducted by untrained personnel, without an opportunity for observers to make contemporaneous objections. Without saying that any one of these features of the recount process would by itself have been legally fatal, the majority concluded that the process as a whole failed to satisfy "the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to vote.[76]

Not a single one of the Court's dissenters made any effort to show that the Florida recount did satisfy the minimum requirements of equal protection. This should be no surprise, for reasons that will become clear when we take a closer look at the Court's precedents.

Under well-known and long-established case law, the right to vote has been

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charming efforts to deal with the embarrassingly lopsided vote occurs in Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407 (2001), where we find the following droll distinction:

- "[T]he five conservatives seemed to adopt whatever legal arguments would further the election of the Republican candidate, George W. Bush." *Id.* at 1409.

- "Justices Souter and Breyer appear to have been engaging in a statesmanlike form of compromise." *Id.* at 1429 n.77.

[76] 531 U.S. at 105. I will spare the reader the tedium of reading a collection of citations to the law professors who have misstated the holding in the case.

treated as a fundamental right that must be extended equally to all citizens.[77] This means that state governments cannot deny the vote to any citizen without an extremely powerful justification. The Court has also held that "the right of suffrage can be denied by a *debasement* or *dilution* of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[78]

The Court has held, for example, that the seats in state legislatures must be equally apportioned on a population basis;[79] that statewide elections may not be conducted under a "county unit" system resembling the federal electoral college;[80] and that a state may not require that a nominating petition for presidential elector include the signatures of at least 200 qualified voters from each of at least 50 counties.[81] Faced with such rules, which effectively gave more "weight" to the votes of those living in rural or sparsely populated areas of a state than to those living in more densely populated areas, the Court declared:

> [T]he weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.'[82]

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[77] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[78] Reynolds v. Sims , 377 U.S. 533, 555 (1964) (emphasis added).

[79] *Id*.

[80] Gray v. Sanders, 372 U.S. 368 (1963).

[81] Moore v. Olgivie, 394 U.S. 814 (1969).

[82] *Reynolds*, 377 U.S. at 567-68 (footnote omitted).

The application of the vote-dilution principle is not confined to any particular class of voting rules: "Weighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simpleminded modes of discrimination."[83] And "sophisticated" modes of discrimination include those that are *unintentionally* discriminatory.[84]

In this case, the Florida court devised an extremely complex system of weighting, in which certain kinds of ballots were more likely to be counted as legal votes in some places than in others, thus discriminating for and against different groups of voters based on where they happened to reside. Most obviously, voters who cast "overvote" ballots in Broward, Palm Beach, and Miami-Dade Counties were treated more favorably than those who cast similar ballots elsewhere.[85] Similarly, voters who cast "dimpled chad" ballots in

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[83] *Id.* at 563 (citations and internal quotation marks omitted) (emphasis added).

[84] *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524 (1974). In this case, state law permitted absentee voting only by those who were absent from their county of residence on election day. When applied to persons in jail, it had the odd and unforeseen effect of discriminating between those who were jailed in their county of residence and those who were jailed elsewhere. Without even suggesting that the legislature's intent was relevant, the Court held that this application of the statute violated equal protection. More generally, neither *Reynolds v. Sims* nor any of its progeny have indicated that discriminatory intent is a necessary element of an equal protection claim in geographic vote-dilution cases that do not involve claims of racial discrimination. Commentators who assume that the "discriminatory purpose" requirement of Washington v. Davis, 426 U.S. 229 (1976) is applicable in this area are mistaken. *See, e.g.*, Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, Florida St. L. Rev. (forthcoming).

[85] Even Florida's Attorney General, a Democrat who had been active in Gore's presidential campaign, recognized that serious constitutional problems would be created by "treating voters differently, depending upon what county they voted in":

> If hand recounts have already occurred in Seminole County and an unknown number of other counties without the restraint of a legal opinion while similar hand counts are blocked in other counties due to a newly issued standard, a two-tier system for reporting votes results.
>
> A two-tier system would have the effect of treating voters differently,

Broward were treated more favorably than those who cast similar ballots in Palm Beach. Voters living in the unrecounted (and more Republican) precincts of Miami-Dade were disadvantaged in comparison with those living in the recounted (and more Democratic) precincts. The complexity of the vote dilution involved did not convert it into something other than vote dilution.

Prior to *Bush v. Gore*, geographic vote-denial and vote-dilution controversies had arisen primarily in two kinds of cases: 1) where imbalances arose because legislatures had failed to reapportion in response to population shifts;[86] and 2) where discriminatory arrangements had been adopted deliberately in order to serve what legislatures thought were overriding purposes, such as to protect the influence of certain constituencies or to create districts whose boundaries would coincide with preexisting political or geographic borders.[87] In these cases, the Court applied what is often called "strict scrutiny," which requires that any inequality or discrimination be justified by legitimate and compelling

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> depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.
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> As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.

Letter from Robert A. Butterworth, Attorney General, to Hon. Charles E. Burton, Chair, Palm Beach Canvassing Board, Nov. 14, 2000, *reprinted in* Appendix to Brief of Intervenors Glenda Carr, et al., *Bush v. Gore*, No. 00-949 (00A504) (U.S. Sup. Ct. 2000).

[86] *E.g.*, *Reynolds*, 377 U.S. at 569-70.

[87] *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965) (invalidating a prohibition against voting by members of the Armed Services who became state residents after they joined the military); Board of Estimate v. Morris, 489 U.S. 688 (1989) (invalidating a New York City governing body on which each of the city's five (unequally sized) boroughs had equal representation).

government purposes and that the inequality not extend farther than those purposes require.[88]

Bush v. Gore did not involve the application of a *preexisting* rule that systematically discriminated against an identifiable class of voters, such as those residing in more sparsely populated jurisdictions. But nothing in the rationale underlying the vote dilution cases limits it to such cases. Unconstitutional vote dilution has been found, for example, where there is no systematic discrimination against a class of voters with shared political interests.[89] Furthermore, the rationale of the decisions implies, if anything, that the application of new and discriminatory rules *after* an election has been held should receive an especially skeptical review by the courts because after-the-fact manipulation of voting rules is especially prone to abuse.[90]

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[88] The Court has declined to apply strict scrutiny to cases involving elections to certain offices that do not exercise general governmental powers. *See, e.g.*, Ball v. James, 451 U.S. 355 (1981) (compliance with *Reynolds v. Sims* not required for certain special-purpose units of government that are assigned the performance of limited functions overwhelmingly affecting definable groups of constituents); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (same). These precedents are manifestly inapplicable to an election for President of the United States.

[89] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725 (1983) (invalidating a congressional apportionment plan in which the average deviation from perfect mathematical equality was 0.1384%, which was within the margin of error of the census data).

[90] *See, e.g.*, Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995). In this case, Alabama's election code on its face required that absentee ballots be enclosed in envelopes signed by a notary public or two witnesses. All counties in the state except one had uniformly applied this requirement for many years. After a narrow, statewide election, the Alabama courts suddenly and retroactively held that Alabama law did not require such signatures, and that absentee ballots lacking such signatures must be counted. Relying in part on the Supreme Court's vote dilution decisions, *id.* at 580 (citing *Reynolds v. Sims*), the court held that the fundamental unfairness inherent in this retroactive change of law unconstitutionally diluted the votes of those who had actually complied with the preexisting voting rules, and unconstitutionally disenfranchised those who would have cast absentee ballots but for the inconvenience imposed by the notarization/witness requirement. *Id.* at 581. (The *Roe* court appeared to rule under the rubric of due process rather than equal protection. As Justice Souter noted in *Bush v. Gore*, 531 U.S. at 134, however, an identical claim may often by brought under either label. Indeed, the Court's equal protection jurisprudence of voting rights may be best understood as substantive due process by another name.)

Indeed, the Court has frequently used the stuffing of ballot boxes as a paradigmatic example of an obvious constitutional violation.[91] But any distinction between adding *illegal* ballots to the count and *selectively* adding legal ballots in a way that favors one candidate over another would be entirely sophistical. The Court long ago ruled out such sophistry when it declared that the Fourteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination."[92]

Vote dilution obviously occurs when illegal ballots are counted along with legal ballots. It also occurs when legal ballots are counted for one candidate but not the other. It occurs when ballots are counted only from precincts with a history of favoring one party over the other. And it occurs when a special effort is made to find previously overlooked legal ballots in arbitrarily chosen subcategories. Nor does it make any difference whether such vote dilution proceeds from partisan motives. Thus, for example, if a vote count were inadvertently inflated with illegal ballots, and a court arbitrarily refused to correct the count, it wouldn't matter whether the judge was dishonest or just mistaken about his obligations. Similarly, it makes no difference whether the Florida judges were trying to help Gore or were simply the victims of confused thinking.

The discrimination in the Florida recount was novel, complex, and subtle, which helps explain why it was unprecedented. No legislature would ever adopt a recount process like the one adopted by the Florida court, and no court had ever done so either. Whether this uniquely bizarre procedure resulted from bad faith (which I do not assert) or

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The preexisting Florida election laws may not have been quite so clear and unambiguous as the Alabama statute had been, but the novelty of the recount process ordered by the Florida court was unmistakable. And that process was pervaded with arbitrary, disparate treatment. *See Bush v. Gore*, 531 U.S. at 105-10 (2000).

[91] *See, e.g.*, Anderson v. United States, 417 U.S. 211, 227 (1974); *Reynolds v. Sims*, 377 U.S. at 554-55; Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Baker v. Carr, 369 U.S. 186, 208 (1962). Because the stuffing of ballot boxes has been prohibited by statute for a very long time, the Court has apparently not had the opportunity formally to decide that this practice would violate the Constitution even in the absence of a statutory prohibition.

[92] Lane v. Wilson, 307 U.S. 268, 275 (1939).

from a misunderstanding of the law, it should not even survive rational-basis scrutiny, let alone the strict scrutiny that the Supreme Court has previously employed in vote-dilution cases.

To see why this simply was not a close or debatable case, it is important to remember that the recount process designed by the Florida court was a substitute for the standardized, machine counts upon which the Secretary of State had sought to rely. Although the machine counts were undoubtedly imperfect, there could be no legitimate, let alone compelling, interest in substituting hand recounts unless those recounts could reasonably have been expected to be *more accurate as a whole* than the machine recounts. The Florida Supreme Court never made any attempt to show that its recount procedure would likely be more accurate, and any such effort would have been laughable.

The only justification the Florida Supreme Court ever offered for its orders was that *some* new "legal votes," (*i.e.* ballots containing evidence of an "intent to vote" undetected by the counting machines) would turn up in the various partial manual recounts. The underlying theory was apparently that any "legal votes" that happened to turn up in any of these selective recounts should be added to the totals generated by the machine counts.

But this completely misses the point of the equal protection cases: that substantially the same rules, whatever those rules are, must be applied to all voters and all ballots. Suppose, for example, that "undervote" ballots containing evidence of an intent to vote for Gore were changed to legal votes, but similar ballots showing an intent to vote for Bush were not changed to legal votes. Such a recount would be "better" than the machine counts under the criterion employed by the Florida court because it would result in more "legal votes" being tabulated. But it would not be better in any constitutionally relevant sense,[93] or indeed under any sane criterion. The difference between this hypothetical and the actual order of the Florida court is only one of degree, and a very slight degree at that.

It is true, as the U.S. Supreme Court has always recognized, that the law cannot

[93] *Cf.* Gray v. Sanders, 372 U.S. 368, 379 (1963) ("If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable." (citation omitted)).

and does not require *perfect* equality in the treatment of all voters. All laws affect some people differently than others, but that doesn't mean that all laws are unconstitutional. Similarly, all voting procedures affect some people differently than others, but that doesn't mean that all voting procedures are unconstitutional.

Rural voters, for example, must on average travel farther to their polling places than urban voters, but the Court has not required that election officials somehow correct this inequality. Nor would the Court permit a "correction" that entailed a more pronouncedly unequal effect, such as the creation of malapportioned districts that gave greater weight to the ballots of rural voters. Similarly, there may be latent forms of inequality associated with particular kinds of voting machines, or in the use of different kinds of machines in different counties. But it does not follow that such relatively minor and speculative inequality can permissibly be "corrected" with the kind of gross and palpable inequality that pervaded the Florida court's recount process.

It should therefore come as no surprise that *not a single member* of the U.S. Supreme Court actually defended the Florida court's recount process against the charge that it violated equal protection. Two of the dissenters (Souter and Breyer) acknowledged that the recount process could not be defended against equal protection objections.[94] Justice Stevens, who refused to find the Florida recount unconstitutional, offered nothing more than an utterly anodyne allusion to the need for "a little play in the joints" of the machinery of government.[95] That maxim could be used to defend any vote-dilution scheme,

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[94] *See* 531 U.S. at 111 (per curiam) ("Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy."); *id.* at 134 (Souter J., joined by Breyer, J., dissenting) (reviewing several examples of disparate treatment of ballots in the Florida recount, and concluding: "I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."); *id.* at 145 (Breyer, J, joined by Souter, J., dissenting) ("absence of a uniform, specific standard to guide the recounts. . . . does implicate principles of fundamental fairness").

[95] 531 U.S. at 126 (footnote omitted):

> Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns.

including all of those that have been invalidated by the Supreme Court in the past. Justice Ginsburg, for her part, merely offered an unsupported and unreasoned refusal to recognize the constitutional violation.[96]

> Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection. So, too, might 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.

This reasoning has no natural limit: one might, for example, use it to say that local officials should be allowed to stuff the ballot boxes because forbidding them to do so might create constitutional doubts about the common practice of delegating determinations of voter eligibility to local authorities. But the truismabout allowing some play in the joints obviously cannot mean that the states are free to do anything they want. Stevens offered no reason whatsoever for treating the kind of discrimination dictated by the Florida court as constitutionally distinguishable from the kinds of discrimination that had previously been struck down by the Supreme Court.

> [96] 531 U.S. at 143:
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> I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g., McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (even in the context of the right to vote, the state is permitted to reform "'one step at a time'") (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

Justice Ginsburg's citation to *McDonald* is almost comically inapposite. *McDonald* was a vote-*denial* case in which the Court declined to apply strict scrutiny because the plaintiffs had failed to prove that they were actually prohibited from voting. *See* Goosby v. Osser, 409 U.S. 512, 520-21 (1973). It therefore has nothing at all to do with a vote-*dilution* case like *Bush v. Gore*. If it did, the apparent implication would be that all vote-dilution cases should be judged by the *Lee Optical* rational-basis test, which means that the Court's controlling precedents in this area, beginning with *Reynolds v. Sims*, would all have to be overruled.

There is a good reason for the failure of the *Bush v. Gore* dissenters to offer any legal defense of what the Florida court did. It was simply indefensible under the principles established in the Supreme Court's equal protection jurisprudence.

IV. WERE THERE LEGALLY PREFERABLE ALTERNATIVES TO THE COURT'S APPLICATION OF EQUAL PROTECTION ANALYSIS?

Although the dissenters did not provide any legal criticism of the majority's equal protection analysis, they did dissent. It is therefore worth considering whether their opinions contained or suggested any legally appropriate objections to the majority's disposition of the case.

A. *Refusing to Review the Case*

The most plausible objection offered by any of the *Bush v. Gore* dissenters was Justice Breyer's suggestion that the Twelfth Amendment assigns to Congress, and not to the federal courts, the responsibility for correcting constitutional violations like those the Florida Supreme Court committed. The Twelfth Amendment does assign to Congress the authority and responsibility for counting electoral votes.[97] And it seems undeniable that Congress must also have the authority to make decisions about the legal validity of votes that are submitted to Congress, most obviously in cases where more than one slate of votes is received from the same state.[98] And it may well be that Congress is authorized to ignore judicial decisions that conflict with its own judgments about the legality of the

[97] "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates [from the presidential electors] and the votes shall then be counted." U.S. Const. amend. XII. Although the Constitution uses the passive voice, it appears to give responsibility for the vote count to Congress, not to the President of the Senate (who often has a conflict of interest because he is one of the candidates).

[98] The most notorious examples of this occurred in connection with the disputed election of 1876, but it has happened as recently as the 1960 election.

electoral votes it receives.[99]

For Justice Breyer's suggestion to have any merit in the context of this case, however, one would have to go even farther, and argue that the Constitution gives Congress the *exclusive* authority to rule on the legality of electoral votes, thereby depriving federal courts of the jurisdiction they would otherwise have to adjudicate claims arising under federal law. The constitutional text, however, does not by its terms provide such exclusive jurisdiction to Congress. An argument supporting such exclusivity would therefore have to rely on inferences from the structure and history of the Constitution and/or on the judicially-developed "political questions" doctrine.[100]

Breyer made no attempt to develop an argument along these lines in his *Bush v. Gore* dissent, probably because of one simple and powerful legal fact: the Supreme Court

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[99] Congress' authority to substitute its own interpretation of the legality of electoral votes for the interpretation of a state court, at least when an interpretation of federal law is involved, can easily be defended. The proposition that Congress is authorized by the Constitution to ignore the judgments of federal courts, including the Supreme Court, is more debatable, but is certainly not out of the question.

[100] The "political question" doctrine has a somewhat complicated history, and its contours are not perfectly clear. According to the standard formulation, the Court will not decide constitutional questions when it finds:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). The Florida legislature made a nonjusticiability argument to the U.S. Supreme Court in *Bush I*. *See* Brief of the Florida Senate and House of Representatives as *Amici Curiae* in support of Neither Party, *Bush v. Palm Beach Cty. Canvassing Bd.*, No. 00-836. The Court ignored the argument. It is worth noting that *Baker v. Carr* held that a vote-dilution claim, i.e. a claim of the same general kind at issue in *Bush v. Gore*, was justiciable.

had previously held, in *McPherson v. Blacker*, that Congress does *not* have such exclusive authority.[101] Breyer was obviously aware of this holding, since the Court had unanimously relied on dicta in the same case just a few days earlier in *Bush I*. It would have been quite a challenge to explain why the Court should overrule the holding in a case upon whose dicta the Justices had so recently and unanimously relied.[102]

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[101] 146 U.S. 1, 23-24 (1892):

> It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its deeision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.
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> But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. Boyd v. State, 143 U. S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U. S. 672.
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> As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The Court then went on to review several questions under Art. I, § 1, cl. 2, the Fourteenth and Fifteenth Amendments, and the Electoral Count Act. To hold that the issues in *Bush v. Gore* were nonjusticiable political questions would have required overruling the justiciability decision in *McPherson*.

[102] Accordingly, I will not address the interesting and important questions that would arise if one were to undertake an evaluation of the correctness of *McPherson* itself. Nor will I consider whether *McPherson* should have been overruled if it was wrong.

If *McPherson* were overruled, the claim in *Bush I* might have been held nonjusticiable. In order to find *Bush v. Gore* nonjusticiable, however, one would also need to show that such a conclusion is compatible with the Fourteenth Amendment and, perhaps, the Court's Fourteenth

Accordingly, Breyer never quite asserted that the Court was legally forbidden to review the Florida court's judgment. Instead, he merely contended that the Twelfth Amendment, and various federal statutes that had been enacted to guide the counting of electoral votes, somehow conveyed a counsel of "restraint."[103] In the end, Breyer did not and could not contend that the majority committed a legal error in agreeing to review the Florida court's decision. Instead, he offered a nakedly political critique of the majority: "*[A]bove all*, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."[104]

This political approach to the exercise of jurisdiction deserves some attention, for it goes to the core of the most commonly articulated criticism of the *Bush v. Gore* majority. The Justices, we are often told, have a duty to preserve the institutional capital of the Court by avoiding entanglements in the "political thicket," where their reputation for impartiality might be sullied, fairly or not. As Breyer so eloquently put it:

> [T]he public's confidence in the Court itself. . . . is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of

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Amendment precedents.

[103] 531 U.S. at 153-58 (Breyer, J., dissenting). The following passage, for example, may leave the impression that the majority ran afoul of the Constitution, but it doesn't quite say so:

> The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by *state* courts. See 3 U.S.C. § 5 (providing that, where a "State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . electors . . . by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

Id. at 153 (emphasis in original).

[104] *Id.* at 157 (emphasis added).

> any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" Loth, *Chief Justice John Marshall and The Growth of the American Republic* 365 (1948). But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.[105]

Breyer forgot to mention that this argument about avoiding the "political thicket" was exactly the argument that the Court had *rejected* in the vote-dilution cases on which the majority relied.[106] Moreover, the notion of a general duty to avoid decisions that might undermine the public's confidence in the Court is not one that anybody actually believes. In fact, many of the Court's most intensely admired decisions are exactly those that were *most* controversial when decided. *Brown v. Board of Education*, which forbade racially segregated schools. *Engel v. Vitale*, which forbade prayer in the schools. *Miranda v. Arizona*, which forbade the use of voluntary confessions at trial unless preceded by a series of judicially created warnings. *Reynolds v. Sims*, which required equality of population in state legislative districts. *Roe v. Wade*, which established a right to abortion. *Texas v. Johnson*, which protected a right to desecrate the American flag.

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[105] *Id*. at 157-58.

[106] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."); Reynolds v. Sims, 377 U.S. 533, 566 (1964) (majority opinion) ("We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."); Karcher v. Daggett, 462 U.S. 725, 751 (1983) (Stevens, J., concurring) ("Until two decades ago, constrained by its fear of entering a standardless political thicket, the Court simply abstained from any attempt to judge the constitutionality of legislative apportionment plans . . . In *Baker v. Carr* and *Reynolds v. Sims*, the Court abandoned that extreme form of judicial restraint and enunciated the "one person one vote" principle.").

Notwithstanding the sound of Breyer's rhetoric, the theory underlying his call for judicial restraint is actually not one that would preclude any of the decisions in this list. On the contrary, it is a theory meant to *foster* just such controversial decisions, along with their frequently profound political effects, even or perhaps especially when those effects are so profound as to shake the public's confidence in the Court. The real theory, well known to sophisticated students of law and political science, is that the Supreme Court should refuse to decide *certain* politically sensitive cases, especially those involving the constitutional allocation of power between the federal and state governments, in order to conserve the Court's political resources for more important tasks, especially those involving the protection of "individual liberties."[107] In practice, what this means is that the Court should sometimes allow the Constitution to be violated when Congress infringes on the rights of the states, while protecting judicially selected "individual liberties" that often have no basis in the Constitution.

This calculated, asymmetrical, and ultimately lawless concern with the maintenance and deployment of judicial political capital has been a hallmark of modern liberal jurisprudence. It is, in fact, a corollary of the political theory reflected in Justice Stevens' dissent, where the rule of law and the rule of judges become conflated. And it is very plainly the basis for Breyer's dissent. Even though he acknowledged that the Florida court's recount process was inconsistent with constitutional standards, Breyer contended

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[107] The classic statement is presented in Jesse Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980, which revised and extended an earlier proposal in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). In a 5-4 decision in 1985, five Justices endorsed something very close to this theory. *See* Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985) (suggesting that the Constitution's limits on federal regulation of the states are not judicially enforceable). Two members of the *Bush v. Gore* majority (Rehnquist and O'Connor) were on the Court in 1985, and both of them strongly objected to what they thought was an abdication of the Court's responsibilities. *See, e.g., id.* at 581 (O'Connor, J., dissenting) ("If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."). While *Garcia* has not been overruled, the "political safeguards" theory has subsequently been rejected in closely analogous contexts. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

that "the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty."[108]

Breyer attempted to justify his position by arguing that the Court could have waited to see whether the unconstitutional recount process would actually alter the election's outcome, thus giving the Florida courts an opportunity to address the constitutional issue "if and when it was discovered to have mattered."[109] For reasons to be explored below, Breyer was wrong to assume that there was time left for the state court to correct the problem it had created. Even apart from that mistake, however, it is simply not the case that Justice Breyer believes that the Supreme Court should generally stay its hand until the very last moment before a constitutional violation becomes unquestionably irremediable.

Just a few months before *Bush v. Gore*, for example, Breyer himself had written the majority opinion in a case that had the following interesting features: 1) the Court was reviewing a state statute that had been deliberately drafted to be consistent with the Supreme Court's case law; 2) the Court rejected an interpretation of the statute that would have made it consistent with that case law, instead adopting a far-fetched interpretation that allowed the Court to invalidate the statute; 3) the state itself had argued in the Supreme Court in favor of the interpretation that the Court rejected; 4) the state courts had never been allowed to review the statute at all because the Supreme Court struck it down before it was ever applied to anyone; and 5) the Court's 5-4 decision exposed divisions within the Court whose bitterness easily exceeded what was expressed in *Bush v. Gore*.[110]

And what was the "fundamental constitutional principle" at stake in this case, the

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[108] *Bush v. Gore*, 531 U.S. at 157 (Breyer, J., dissenting).

[109] *Id.* at 153 (Breyer, J., dissenting). There is no legal basis for this "wait and see" idea, notwithstanding Breyer's effort to insinuate that some kind of ripeness problem existed. The Court has decided many vote denial and vote dilution cases without suggesting that it made the slightest difference whether the outcome of an election actually had been or would be affected by the constitutional violation.

[110] Stenberg v. Carhart, 120 S. Ct. 2597 (2000). I leave others to speculate about any bitterness about *Bush v. Gore* that may have been left unexpressed in the published opinions.

likes of which were supposedly absent in *Bush v. Gore*? The right to so-called partial birth abortion, a procedure that is deeply repugnant to many millions of American citizens, that had been outlawed by at least 30 states,[111] and that Congress had twice voted by wide margins to forbid.[112] Compared with preserving this truly important right, what's a little matter like conducting a presidential election in a constitutional manner and protecting the constitutional rights of those who voted in it? According to Justice Breyer, not much.

Perhaps it should come as no surprise that the left wing of the current court would object to deciding a controversial, high profile case involving partisan politics that would not contribute to the protection of the left's favored individual liberties. Somewhat more surprisingly, however, the theory of judicial politics underlying Breyer's dissent in *Bush v. Gore* is one to which more conservative members of the Court have sometimes been attracted.

In 1992, for example, the Court reaffirmed the judicially created right to abortion, even while strongly hinting that some Justices who voted to do so had serious misgivings about the decision's consistency with the Constitution.[113] And just last year, the Court reaffirmed a constitutional right to so-called *Miranda* warnings,[114] notwithstanding the fact that some members of the majority had previously said that such warnings are *not* required by the Constitution.[115] In both cases, *stare decisis* was offered as the principal rationale

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[111] *Stenberg*, 120 S. Ct. at 2634 (Kennedy, J., dissenting).

[112] See 141 Cong. Rec. 35892 (1995); 142 Cong. Rec. 31169 (1996); 143 Cong. Rec. H1230 (1997); *id.*, at S715. In both cases, the House voted to override President Clinton's veto, but the Senate did not. See 142 Cong. Rec. 23851; *id.* at 25829 (1996); 144 Cong. Rec. H6213 (1998); *id.*, at S10564.

[113] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 853 (1992).

[114] Dickerson v. United States, 530 U.S. 428 (2000).

[115] As Justice Scalia pointed out, these statements include the following: Davis v. United States, 512 U.S. 452, 457-58 (1994) (opinion of the Court, in which Kennedy, J., joined); Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (opinion of the Court, in which Kennedy, J., joined); Oregon v. Elstad, 470 U.S. 298 (1985) (opinion of the Court by O'Connor, J.); New York v. Quarles, 467 U.S. 649 (1984) (opinion of the Court by Rehnquist, J.).

for the decision, but neither decision can be explained on that ground, for they both reaffirmed some precedents while overruling other and more recent precedents.[116]

Far more important in both cases than any supposed respect for precedent was an easily discernable concern with the Court's own public image and a fear of diminishing its own political capital. In the abortion case, for example, a majority of the Justices issued one of the most grandiose expressions of the judicial self-importance on record:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.[117]

The *Miranda*-warning opinion, which was mercifully free of such rhetoric, confined itself to observing that *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture."[118] But the implications of this bland statement are no less troubling. Indeed, I would translate the Court's remark to mean something like this: We'd look pretty silly if the one rule of constitutional law that

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[116] Throughout its opinion in *Casey*, the Court refers to its decision to reaffirm the "essential holding" or the "central holding" in *Roe v. Wade*, thereby conceding that it was overruling that decision in part. *See also Casey*, 505 U.S. at 870 (plurality opinion) ("we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn").

In *Dickerson*, the Court reaffirmed *Miranda*. But, as Justice Scalia pointed out in his dissent, the proposition that failure to comply with *Miranda*'s rules does *not* establish a constitutional violation was central to the holdings in at least four post-*Miranda* cases. 530 U.S. at 450-54.

[117] *Casey*, 505 U.S. at 868.

[118] *Dickerson*, 530 U.S. at 443.

every American is familiar with, from watching untold numbers of cops and robbers shows on television, were suddenly declared by the Supreme Court to be a figment of the Court's own imagination. The masses might even start to wonder where all the other rules of constitutional law are coming from. And who knows what would happen to our national culture then?

Three members of the *Bush v. Gore* majority had joined one or both of these opinions.[119] It is therefore striking that all three rejected the temptation to conserve the Court's political capital by avoiding any involvement in *Bush v. Gore*. They could easily have avoided such involvement, simply by voting not to review any of the Florida election cases.[120] Such refusals require no explanation and are without precedential effect. Indeed, it had been widely anticipated that this is exactly what would happen before the Court surprised the world by granting review in *Bush I*.

The *Bush v. Gore* majority had to know that a decision in Bush's favor would trigger an avalanche of scurrilous accusations and politically motivated attacks, and endless insinuations about their personal integrity. They were thus faced with a very unpleasant choice: if they enforced the law, they ran the risk of acquiring a reputation for having done the opposite, but if they refused to enforce the law, they would preserve their reputation for judiciousness. In deciding to hear the case, and then resolving it in accordance with the law, the majority demonstrated genuine integrity and impartiality in exactly those circumstances where it is most difficult to practice.

In contrast to Justice Stevens' remarkable assault on George W. Bush for having had the temerity to defend himself against Vice President Gore's lawsuit, and in contrast to Stevens' emotional attack on his colleagues for agreeing to hear Bush's appeal, the

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[119] Justices O'Connor and Kennedy were co-authors (with Justice Souter) of the Court's opinion in *Casey*. They both joined Chief Justice Rehnquist's majority opinion in *Dickerson*.

[120] For arguments that seem to favor taking this approach, see Elizabeth Garrett, *Leaving the Decision to Congress, in* The Vote: Bush, Gore, and the Supreme Court (C. Sunstein & R. Epstein, eds., 2001); Jesse Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000* (UC Berkeley School of Law Public Law and Legal Theory Working Paper No. 65, 2001).

majority treated this as a legal case that deserved to be treated as such by judges, even if others chose to use it as a political football:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[121]

One might think that fulfilling their unsought responsibilities is just about the minimum that we ought to expect from Supreme Court Justices, who are given life tenure for just this purpose. But when one reflects on the concept of judicial integrity that infuses the dissenting opinions in *Bush v. Gore*, a simple willingness to enforce the law begins to look like a kind of heroism.

B. *The Article II Argument*

The majority's decision in *Bush v. Gore* relied entirely on an equal protection analysis. One line of criticism, particularly appealing to the conservative legal mind, is that the decision should have rested instead on the analysis set forth in Chief Justice Rehnquist's concurring opinion.[122] That opinion resolved the question that the Court had avoided in *Bush I*.

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[121] 531 U.S. at 111.

[122] *See, e.g.*, Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2001 Sup. Ct. Rev. (forthcoming); John Yoo, In Defense of the Court's Legitimacy, *in* The Vote: Bush, Gore, and the Supreme Court (C. Sunstein & R. Epstein, eds., 2001); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended, in* The Vote: Bush, Gore, and the Supreme Court (C. Sunstein & R. Epstein, eds., 2001).

Article II of the Constitution provides: "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of [presidential] Electors . . ."[123] Along with Justices Scalia and Thomas, Rehnquist argued that the Florida Supreme Court had violated the Constitution by discarding the election statutes written by Florida's legislature, and writing a new election code that was inconsistent with the legislature's directions.

One can make a powerful argument for this conclusion. Even apart from its many strange "interpretations" of statutory language, the Florida court's crucial decisions—especially the order for a partial and selective statewide recount—were simply disconnected from anything in the statutes. Taken as a whole, moreover, the court's exposition of Florida law had results that were so absurd and inequitable that they could not possibly have been intended by the legislature. Whatever authority there might be for a state court to ignore the legislature's directions in other contexts, Article II of the Constitution appears on its face to forbid such judicial reshaping of the law in connection with the appointment of presidential electors. This straightforward textual argument has a kind of intellectual power that no equal protection analysis can match. A more detailed comparison of the majority's equal protection approach with the Article II approach, however, will show that the one is not so clearly preferable to the other as may first appear.

Consider first the weaknesses of the majority's analysis. The Supreme Court's entire equal protection jurisprudence is notoriously ill-rooted in either the text of the Fourteenth Amendment or in the expectations of those who enacted it. The vote-dilution strand of the fundamental interests branch of equal protection case law, moreover, is particularly vulnerable to criticism based on the text and history of the Constitution, as Justice Harlan demonstrated in his devastating and unanswered dissent in *Reynolds v. Sims*.[124] The evolution of the law of equal protection, moreover, has been something less than a model of logical consistency. New doctrinal pathways have sometimes been opened

[123] U.S. Const. art. I, § 1 cl. 2 (emphasis added).

[124] 377 U.S. at 616-32.

up with scarcely a legal reason offered,[125] while equally plausible lines of development have been foreclosed or suddenly stopped in their tracks without much more than a wave of the hand.[126]

Over the decades, the Court has developed a complex scheme under which it requires varying degrees of justification for the inequalities associated with different kinds of laws. Both critics and proponents of the aggressive use of equal protection analysis have contended that this scheme does not constitute a set of preexisting rules that are applied to new factual situations as they arise, but rather reflects a series of judgments made independently of the theoretical apparatus that is used to explain the results.[127] Notwithstanding the very real difficulty of identifying a coherent set of principles that are applied in a principled manner throughout the Court's equal protection cases, however, it does not follow that every equal protection decision is an unprincipled exercise of political judgment.

For example, given that the Court has required states to apportion their legislatures on the basis of equal population in order to avoid diluting the votes of some citizens, consistency requires that this rule be applied to all states. Creating an arbitrary exception—such as one for states with two Republican Senators, or one for states through which the Mississippi River passes—would clearly be unacceptable. Conversely, refusing to create such exceptions is appropriately principled. At the other extreme, the creation of

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[125] *See, e.g.*, U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (holding that it is "irrational" for a legislature to take action solely to harm a politically unpopular group); Romer v. Evans, 116 S. Ct. 1620 (1996) (apparently concluding that a state may not forbid its subordinate governmental units to grant special legal protections to certain politically unpopular groups).

[126] *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (refusing to apply heightened scrutiny to age-based classifications); San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to examine wealth-based classifications under heightened scrutiny or under fundamental-interests analysis).

[127] *See, e.g.*, San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 176-77 n.10 (1980) (opinion for the Court by Rehnquist, J.); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451-54 (1985) (Stevens, J., concurring).

some exceptions is clearly proper, and therefore does not manifest an arbitrary or unprincipled approach to the law. The Court, for example, has recognized that perfect equality of population in state legislative districts would create enormous and possibly insurmountable practical difficulties, and has therefore never demanded it.

Between these two extremes is a middle range, where more or less reasonable differences of opinion might arise. As the failure of the *Bush v. Gore* dissenters to mount any meaningful criticism of the majority's equal protection analysis suggests, this case is much closer to one extreme than the other. The Florida court's recount procedure was rife with differences in the treatment of various categories of ballots that were at best arbitrary, and there was no compelling or even legitimate reason to create an equal protection exception that would permit such capricious forms of inequality. Indeed, the truly unprincipled course of action would have been to create an exception on the basis of the legally flimsy or irrelevant grounds advanced by the *Bush v. Gore* dissenters.

Thus, the application of equal protection analysis by the *Bush v. Gore* majority did not exhibit the sort of unprincipled, essentially political judgments that have rightly made legal conservatives uncomfortable with some of the Court's equal protection decisions.

A related, but slightly different objection to the majority's analysis is that it will lead to a flood of socially undesirable litigation challenging a vast number of traditional election practices.[128] Must every voter now use exactly the same kind of ballot, which will be counted by exactly the same kind of machine? If some ballots are counted or recounted by hand, must the same treatment be given to all ballots in that election? Must voters who ask questions of officials at their local polling place receive exactly the same answer in precisely the same words? Must those who count the ballots and tabulate the results receive exactly the same training, and conduct themselves according to exactly the same procedures? Is it even permissible for election officials to be chosen in partisan elections, as Florida's Secretary of State and many of its local canvassing officials were?

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[128] Justice Stevens expressed concern about this supposedly slippery slope. 531 U.S. at 126. Commentators, including some conservatives, have criticized the Court's decision for the same reason. *E.g.*, Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, The New Criterion, March, 2001, at 4; Robert F. Nagel, *From U.S. v. Nixon to Bush v. Gore*, Weekly Standard, Dec. 25, 2000, at 20.

These and a host of similar questions are now thought to be the inevitable subject of litigation in the wake of future elections, where they will inevitably produce new suspicions about judicial bias. That danger certainly does exist, even though the Court expressly limited its holding to cases involving a court-ordered statewide recount lacking even the rudimentary requirements of equal treatment and fundamental fairness.[129] Defendants in future cases will cite the narrow statement of the Court's holding in order to show that *Bush v. Gore* does not compel radical and unwarranted changes in traditional election practices. But plaintiffs will nonetheless be able to argue that a great many of those practices have in one way or another crossed an ill-defined boundary between what is impermissibly unequal and what is tolerably unequal.

It is too soon to know how many benefits will come at what cost as future courts wrestle with the questions that are certainly going to arise in an area that the majority freely acknowledged is fraught with "many complexities."[130] But it is not too soon to recognize that this is nothing new in the jurisprudence of equal protection. Indeed, virtually every major equal protection decision has created the potential for similar consequences. When the Court held that segregated public schools are unconstitutional, it inevitably opened up a host of questions about the permissibility of other forms of official segregation and discrimination. Some of those questions continue to be litigated almost a half century later.[131] Similarly, when the Court ruled that legislative districts must be apportioned equally on the basis of population, it opened the way for a great deal of ensuing litigation about the exact degree of equality that is required, about the possibility of special circumstances in which there might be good reason to relax the general rule, and about the application of the underlying principle of equal weighting for all votes to arguably analogous situations like that presented by politically gerrymandered districts.[132]

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[129] 531 U.S. at 109.

[130] *Id*.

[131] *E.g.*, Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 1598 (2001).

[132] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725 (1983); Brown v. Thompson, 462 U.S. 835 (1983); Davis v. Bandemer, 478 U.S. 109 (1986).

If *Bush v. Gore* does lead to litigation that results in significant alterations of American election practices, that might merely indicate that there is a real problem that needs to be addressed, as was clearly the case with *Brown v. Board of Education*. But that hardly seems the most likely outcome. For all their impressive industry and creativity, the lawyers in *Bush v. Gore* failed to produce examples of the existence of election practices that even approached the level of arbitrary and unnecessary unfairness that pervaded the court-ordered recount in Florida. There may be some existing practices that will come into serious question as a result of *Bush v. Gore*, such as the availability of recounts in selectively chosen jurisdictions under Florida's "protest" mechanism.[133] But there is little reason to believe, and nothing in the Court's opinion to suggest, that any massive or inappropriate reconsideration of America's traditional, decentralized electoral system is about to be undertaken by the federal courts.

Thus, the majority's equal protection analysis is not quite so problematic as legal conservatives may be inclined to suppose, either with respect to its roots in prior case law or with respect to its implications for future case law. On the other side of the scale, Chief Justice Rehnquist's Article II analysis is not without significant difficulties of its own.

First, although Rehnquist's analysis is anchored in the text of the Constitution, its textual anchor is an ambiguous one. It is certainly quite plausible to read Article II to outlaw election procedures that are devised by courts in contravention of a state legislature's directions. But it is not inconceivable that the Constitution's reference to the legislature's directions could refer to state statutes *as interpreted* by state courts. The framers were well aware that statutes often do require judicial interpretation in order to be applied, and federal courts ordinarily assume that state statutes mean what state courts say they mean. It would not be outlandish to interpret Article II as incorporating the same background assumption.

Second, using Rehnquist's Article II theory would have been unprecedented. In one sense, that is unproblematic. An Article II objection to a state's election procedures had apparently never come before the Court, and every issue has to be a new issue once.

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[133] *See, e.g.*, Siegel v. LePore, 234. F.3d 1163, 1194-1218 (Carnes, J., dissenting).

In another sense, however, using the Article II argument would have created some tension with existing precedent. Let us assume that the Florida Supreme Court's application of the Florida election statutes was so far-fetched and untenable that it constituted an act of legislating, rather than an interpretation of existing law. The same can be said of a significant number of decisions by the U.S. Supreme Court itself.[134] Indeed, the dissenters in some of these cases have plausibly suggested that the Court was violating the Constitution by legislating from the bench.[135] Although some of us would have been well pleased if *Bush v. Gore* had signaled the beginning of a new era of judicial respect for the text of the statutes that the Supreme Court is charged with interpreting, a decision relying on Article II would have exposed the Court to a colorable objection that it was holding the Florida court to standards of fidelity in statutory interpretation that it has not imposed upon itself.

Third, an opinion based solely on Article II grounds might have suggested that the Florida statutes themselves were constitutionally unproblematic. In fact, however, substantial equal protection objections can be raised against a statutory scheme under which the losing candidate can demand recounts in counties selectively chosen so as to tilt the incidence of random errors in his own favor. Although the majority did not need to reach this issue, its application of equal protection analysis suggests, more strongly than an Article II analysis would have, that such objections should be taken quite seriously.

Fourth, the precedential basis for treating equal protection claims (including vote-dilution claims) as justiciable is somewhat more well settled than for it is treating Article II issues as justiciable. Although the *McPherson* decision is quite clear on this point, there does not seem to be anything approaching the large body of Fourteenth Amendment precedent that is based on *Baker v. Carr*. Accordingly, in terms of the Court's usual approach to *stare decisis*, it is somewhat easier is justify passing over the justiciability question in an equal protection decision than it would be in an Article II decision.

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[134] *E.g.*, Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rector of Holy Trinity Church v. United States, 143 U.S. 457 (1892).

[135] *Catholic Bishop of Chicago*, 440 U.S. at 508-18 (Brennan, J., dissenting); *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting).

Thus, the equal protection and Article II rationales for reversing the Florida Supreme Court have somewhat different legal strengths, and corresponding weaknesses. In important ways, the equal protection rationale is less bold, and in that respect perhaps more judicious. Even if one is inclined to prefer an argument based on Article II, as I am, it is not preferable across all the relevant dimensions.[136] And it is not on the whole so clearly preferable as to provide a good reason for criticizing the majority's use of equal protection. It should therefore come as no surprise that those members of the Court who joined Chief Justice Rehnquist's opinion also joined the majority opinion.

C. *The Suspiciously Narrow Holding*

Courts, and especially appellate courts, are supposed to apply general rules and standards to particular cases. When an appellate court cannot or will not articulate its reasons at an appropriate level of generality, one is entitled to wonder whether it is being driven by something other than principle. For that reason, there is something immediately troubling about the *Bush v. Gore* majority's narrow statement of its holding:

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.
>
> 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. When a court orders a statewide remedy,

[136] I believe both that the analysis developed in Chief Justice Rehnquist's concurrence has some significant problems and that the conclusion he reaches can be defended. Space precludes my presenting an alternative to his analysis here, but my doubts about certain aspects of his argument reinforce my disinclination to criticize Justices O'Connor and Kennedy for declining to embrace it.

> there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.[137]

At least at first, this could sound rather like the statement of people who know what result they want, but can't quite say what their reasons are. Before jumping to that conclusion, though, it's important to remember that overly broad holdings can be worse than those that are too narrow. Broad holdings may effectively decide future cases that are factually dissimilar in ways that should be legally distinguished. That danger is particularly acute in an area of the law, like equal protection, in which the Court is necessarily drawing lines between "too much" and "not enough" without the benefit of guidance from the Constitution itself.

Closer consideration of the *Bush v. Gore* holding reveals good reasons for a narrow holding. First, it was appropriate to limit the decision to *recounts*. Procedures employed after the decisionmakers know they are dealing with a close election, in which one candidate is provisionally the loser, present opportunities for abuse that are at the very least much less pronounced in other circumstances. This case provides an example, for nobody would ever have dreamed of proposing that an *initial* count of the ballots be conducted in the way that the court-ordered recount was proceeding in Florida. Without accusing or exonerating anyone in Florida of misconduct, it is obvious that the incentives to adopt inappropriately discriminatory procedures increase dramatically once the responsible officials know which candidate is more likely to be adversely affected by them.

It was also appropriate to limit the decision to cases involving *judicial* recounts because these enjoy a finality that is not present when executive officials make decisions that are subject to judicial review. Similarly, it was probably appropriate to limit the decision to cases involving a recount by a *single* judge because a) those are the cases in which there is least likely to be any good practical reason for tolerating significant differences in the way similar ballots are treated; and b) those are the cases in which there is the least chance that arbitrary differences in the treatment of ballots will cancel each other out, and thus leave the result of the election unaffected.

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[137] 531 U.S. at 109.

That leaves one limitation on the holding for which I cannot see a plausible justification: the restriction to *statewide* recounts. Although the inclusion of this limitation seems mistaken to me, it is a relatively small point that cannot justify the conclusion that the majority was result-oriented or unprincipled. If this is the only error in the majority opinion, it is almost miraculous that an opinion written under such enormous time pressures would be so slightly blemished.

Finally, it is worth emphasizing that the Court did not *preclude* the application of vote-dilution principles to other election procedures, such as statewide recounts or counts conducted by executive officials. The majority decided only that they lacked sufficient time and information to evaluate such procedures responsibly in the context of this case. If there's one thing about this extraordinary case that should be undeniable, this would seem to be it.

D. *Fidelity to Federalism*

Another common criticism of the *Bush v. Gore* majority is that they behaved hypocritically by interfering in Florida's resolution of its own state election. These are the same five Justices who have been moving in what many consider an aggressive fashion to protect the states from federal interference in a variety of other contexts. What happened to their solicitude for states' rights in this case?[138]

One might simply turn the question around, and ask: What happened to the dissenters' solicitude for federal authority and the fundamental equal protection rights of voters? This kind of "so's your Mother" response, however, is both inadequate and inappropriate. It is inadequate because it's perfectly possible for everyone on the Court to be guilty of hypocrisy. It's not much of a defense to a charge of hypocrisy to show that someone else is hypocritical as well. And it is inappropriate because it distracts attention from the real question, which is whether the case was correctly decided or not.

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[138] *See, e.g.*, E.J. Dionne, Jr., *So Much for States' Rights*, Wash. Post, Dec. 14, 2000, at A35; John J. DiIulio, *Equal Protection Run Amok: Conservatives Will Come to Regret the Court's Rationale in* Bush v. Gore, Weekly Standard, Dec. 25, 2000, at 25.

The hypocrisy objection is never framed in precise legal terms, nor could it be by any honest and knowledgeable commentator, for there is no legal tension between the holding in *Bush v. Gore* and the holdings in any of the Court's other recent decisions. In terms of precedent, moreover, a "federalism objection" to *Bush v. Gore* would be ludicrous.[139] States are required to conform their conduct with the U.S. Constitution, and the Supreme Court has jurisdiction to correct state court judgments that are inconsistent with the Constitution. No member of the *Bush v. Gore* majority has ever questioned these propositions, and none has ever suggested that the Supreme Court should stop enforcing either the Fourteenth Amendment or the Court's vote-dilution precedents.

The federalism objection thus turns out to be yet another criticism based on the unproven premise that the *Bush v. Gore* majority were politically, rather than legally, misguided. But unless one can show that the majority in fact were politically rather than legally motivated, which I think has not and cannot be done, this objection is simply another regrettable manifestation of the fashionably decadent view that judges cannot and should not be anything except robed politicians.

E. *The Controversial Remedy*

Among the more interesting criticisms of the *Bush v. Gore* majority is that they erred by declining to remand the case to the state court with instructions to conduct a recount under constitutionally permissible procedures. Justices Souter and Breyer, who thought the Court should have refused to hear the case at all, advocated this approach as the best way of dealing with the constitutional violation whose existence they could not deny.

In order to understand this criticism, it is important to recall that *Bush v. Gore* was decided on December 12, the deadline for Florida to take advantage of the "safe harbor"

[139] Accordingly, the dissenters made no objections based on federalism, and did not suggest that the majority opinion was in any sense out of line with the Court's recent federalism decisions. Justice Ginsburg did raise federalismobjections to Chief Justice Rehnquist's concurrence, but not to the majority opinion.

offered by federal law.[140] Whether this non-binding deadline was met or not, however, federal law required that all presidential electors meet and cast their votes on December 18.[141] As a practical matter, it is almost inconceivable that the Florida courts could have established constitutionally adequate procedures, and then used them to conduct a statewide, hand recount during this six-day period. And even if one supposes that this could somehow have been done, how could the loser have been given any meaningful right of appellate review within that time frame?[142]

These difficulties are exactly what made the Souter/Breyer approach look so politically attractive. Writing immediately after the Court's decision, Michael W. McConnell put it this way:

> Such a disposition would have maintained the 7-2 majority for the entire holding, which the American public would find vastly more reassuring. To be sure, it is probably impossible to conduct a proper recount by [the statutory deadline of December 18], but by cutting off the possibility, the court encouraged critics to blame the court majority—rather than the passage of time—for the outcome.[143]

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[140] This statute, 3 U.S.C. § 5, purports to bind Congress in exercising its constitutional duty to count electoral votes. I doubt that this can constitutionally be accomplished by a statute. Each house of Congress has the authority to determine its own rules of proceeding, U.S. Const. art. I, § 5, cl. 2, and it is far from clear that a statute can override that authority. But even if 3 U.S.C. § 5 is unconstitutional in this sense, that has no bearing on the legal issues that arose in *Bush v. Gore.*

[141] 3 U.S.C. § 7. Unlike 3 U.S.C. § 5, this statute is clearly binding because it is directed at the states and the presidential electors, rather than at Congress.

[142] It is this problem that probably caused the Court, appropriately enough, to mention due process in its opinion even though the decision itself rested on equal protection. *See* 531 U.S. at 532. Some commentators have mistakenly thought that the Court was confused. *See, e.g.*, Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, Florida St. L. Rev. [at n.59] (forthcoming).

[143] Michael W. McConnell, *A Muddled Ruling*, Wall St. J., Dec. 14, 2000, at A26.

Assuming, *arguendo*, that such political analysis could appropriately inform the Court's decision, I agree with Professor McConnell that this disposition would have spared the Supreme Court *some* of the criticism that it has received, and that the institutional political interests of the Court *might* have been served by a nearly unanimous ruling that encouraged the Florida court to make yet another effort to find a "better" way to count the ballots than the initial machine counts had provided. It would then have become more clear to more people that the Florida court's project had been frustrated by simple reality, as well as by its own mistake in extending the "protest" period beyond the statutory deadline.

Although it's easy to see how this approach might have prevented some of the political criticism that the Court has received, it is also easy to see how such a stratagem could have blown up in the Court's face.

First, the Florida court had already proved to be highly aggressive and irresponsible in dealing with federal law and with the U.S. Supreme Court. It is therefore quite possible that the next stab at a statewide recount would have been infected with new constitutional problems, which the U.S. Supreme Court would then have had to deal with under time pressures even greater than those it faced in *Bush v. Gore* itself.

Second, the passing of the December 12 "safe harbor" deadline would virtually have assured intervention by the Florida legislature. With the election results themselves still tied up in litigation, and the legal deadline of December 18 for the meeting of the electoral college fast approaching, Florida would have been in real danger of having made no clear choice of electors in time for the electoral college to meet. Accordingly, the legislature was already gearing up to appoint a slate of electors directly.[144] Given the makeup of the Florida legislature, and the fact that Bush was the certified winner of the election, it is safe to predict that a slate of electors pledged to Bush would have been selected.

That would have created a whole new swarm of legal and political controversies.

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[144] *See, e.g.*, David Firestone, *Legislators Move on Electors, Court Set to Hear Appeal*, New York Times, Dec. 7, 2000.

Good arguments can be made, on the basis of both the Constitution and a specific federal statute, that the legislature would have had a right, or even a constitutional duty, to step in and appoint electors.[145] But this had never happened before, and the legal basis for it was anything but crystal clear. More litigation, probably beginning in the Florida courts, would therefore have ensued, and it is entirely possible that the U.S. Supreme Court would have been faced with a new set of difficult legal questions, which would have been posed in an atmosphere even more politically charged than before. And if the ongoing recount of Florida ballots had at some point along the way tipped just once in Gore's favor, the political histrionics on both sides would probably have reached levels well beyond the very impressive exchanges of venom that we had already observed. Intervention by the Florida legislature also would have heightened the chances that Congress would have received votes from multiple slates of putative electors, as had happened in 1876. This would have generated yet more litigation, with all the added potential for the U.S. Supreme Court to be accused of politically motivated decisions, no matter how it ruled.

We have no way of knowing whether the *Bush v. Gore* majority had considerations like these in mind when they decided the case, let alone whether or not it

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[145] Article II of the Constitution specifies that each state "shall" appoint electors. Consistent with the duty suggested by that language, the Supreme Court long ago quoted with apparent approval the following statement from a Senate committee report: "Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." McPherson v. Blacker, 146 U.S. 1, 35 (1892) (quoting Senate Rep. 1st Sess. 43d Cong. No. 395)). This, however, was dicta, and the passage from the Senate Report hardly constitutes a unchallengeable interpretation of the Constitution.

In addition, a statute first enacted in 1845 provides: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." 3 U.S.C. § 2. Among the most obvious examples of an election that failed to result in a choice of electors would seem to be one that remained tied up in litigation after the "safe harbor" period designated in 3 U.S.C. § 5 had expired. Here again, however, such an interpretation is not indisputably correct. And, in any event, it is possible that, as Richard D. Friedman has contended, the law would have allowed different slates of electors to meet on December 18, with decisions as to which slate was legitimate to be decided later. Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, Fla. St. L. Rev. (forthcoming 2001).

would have been shrewder to accept the Souter/Breyer invitation. Judging from the opinions that actually issued, however, it is doubtful that Professor McConnell is right to suppose that there could have been seven votes for a remand along the lines that Souter and Breyer suggested. Breyer and Souter clearly thought that it was constitutionally permissible to confine a recount to "undervote" ballots,[146] while the five Justices who joined the majority opinion treated this aspect of the Florida court's decision as a serious problem.[147] A remand order that submerged this disagreement would have been irresponsible because it would have left the Florida judges without clear instructions as to how they could ensure that any further recount they attempted would comply with constitutional standards.

More important, there is no reason to criticize the majority for rejecting the Souter/Breyer approach.[148] Apart from the questionable propriety of employing such calculations,[149] they were entirely unnecessary.

My reason for offering this conclusion is quite simple: the Souter/Breyer approach was *legally untenable*, and for exactly the reasons given by the majority. On December

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[146] 531 U.S. at 145 (Breyer, J., joined by Souter J., dissenting).

[147] *Id*. at 107-08 (per curiam).

[148] Neither is there any good reason to *assume* that the majority was politically motivated. For that reason, I cannot embrace the otherwise interesting approach taken in Michael Abramowicz and Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, (George Mason University Law School Working Paper No. 01-09, 2001). In this paper, the authors conjecture on the basis of their intuitions that the *Bush v. Gore* Justices did not express their honest views of what the law required, and the authors seek to explain this behavior as a product of implicit intracourt logrolling.

[149] Some commentators have suggested, with varying degrees of enthusiasm, that the Court's decision may have been justified by its practical effects even if it was legally wrong. *See, e.g.*, Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* 190-98 (Princeton U., 2001); Cass Sunstein, *Order without Law*, *in* The Vote: Bush, Gore, and the Supreme Court (C. Sunstein & R. Epstein, eds., 2001). For a critique of such arguments, see Ward Farnsworth, "*To Do a Great Right, Do a Little Wrong: A User's Guide to Judicial Lawlessness*, Minn. L. Rev. (forthcoming).

11, just one day before the decision in *Bush v. Gore*, the Florida Supreme Court had finally issued its decision in response to the remand in *Bush I*. In that opinion, the Florida court had interpreted state law to allow the late filing of amended election returns by county officials in only two circumstances: where a late filing would preclude someone from exercising his rights under the statutory "contest" provisions, and where the late filing would "result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5 [the 'safe harbor' provision of federal law]."[150] Perhaps even more emphatically, the Florida Court said in the same opinion: "Although the [Florida Election] Code sets no specific deadline by which a manual recount must be completed, the time required to complete a manual recount must be reasonable,"[151] to which it added the following footnote:

> What is a reasonable time required for completion will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.[152]

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[150] Palm Beach Cty. Canvassing Bd. v. Harris, 772 So.2d 1273, 1289 (2000). The Florida court had repeatedly made the same point in its initial opinion in the case. See 772 So. 2d 1220, 1237,1239, 1239-40 (2000).

The cited statement from *Palm Beach Cty. Canvassing Bd.* was cited by the *Bush v. Gore* majority in the Court's slip opinion. Unfortunately, the West Publishing Company inserted an incorrect citation in its Supreme Court Reporter. Because of West's error, some commentators have mistakenly believed that the Supreme Court offered a nonsensical citation for a crucial proposition in its opinion. *See, e.g.*, Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, *in* The Vote: Bush, Gore, and the Supreme Court, at 118 (C. Sunstein & R. Epstein, eds., 2001)); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407, 1429-30 & n.79 (2001).

[151] 772 So.2d at 1285-86.

[152] *Id*. at 1286 n17.

And again, in the same opinion:

> As always, it is necessary to read all provisions of the [Florida] elections code in pari materia. In this case, that comprehensive reading *required* that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate *the outside deadline* set forth in 3 U.S.C. § 5 of December 12, 2000.[153]

Thus, the Florida Supreme Court had already concluded, *as a matter of state law*, that recounts had to be concluded by December 12.[154] If the U.S. Supreme Court had remanded the case on December 12 with instructions or encouragement to conduct a recount under constitutionally adequate procedures, it would have been ordering or inviting the Florida court to violate Florida law *as construed by the Florida Supreme Court*. The U.S. Supreme Court simply had no grounds for doing that because the ensuing violation of state law would not have been dictated by any requirement of federal law.

One might argue that the Florida court's discussion of the binding nature of the December 12 deadline came in the context of a discussion of the "protest" provisions of

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[153] *Id.* at 1290 n.22 (emphasis added). In the concluding section of the opinion, the court reiterated the point yet again:

> [B]ased upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential election. This statutory construction reflects our view that the Legislature would not wish to endanger Florida's vote being counted in a presidential election. This ruling is not only consistent with our prior interpretation of the entire statutory election scheme, but also with our identification of the important legislative policies underlying that scheme.

Id. at 1291.

[154] Whether or not 3 U.S.C. § 5 is legally binding on Congress, Florida law could safely presume that Congress would be virtually certain to comply with it, for political reasons if for no other.

the Florida election code, whereas the issues in *Bush v. Gore* arose under the "contest" provisions. Nothing in the Florida court's December 11 opinion, however, suggested that this should make any difference at all. The Florida court's decision in the "contest" case, moreover, referenced the federal "safe harbor" statute, without mentioning any alternative possible deadlines.[155] The U.S. Supreme Court simply had no basis at all for inferring that some deadline other than December 12 would be applicable under state law to the "contest" at issue in this case.

Still, one might say, the Supreme Court should at least have remanded the case to the Florida court so that it could reexamine the state law question itself. Perhaps that court would have concluded that state law ultimately subordinated the December 12 deadline to the goal of obtaining a constitutionally acceptable hand recount.

Fair enough. *But that is exactly what the Supreme Court did*. Contrary to a widespread misperception, the Supreme Court did *not* forbid the Florida court from attempting to conduct a statewide recount under constitutionally permissible standards.[156] That would have been the effect of a judgment that reversed the Florida court and remanded with instructions to dismiss the case.[157] But the Court did *not* order the case dismissed. Instead, it reversed and remanded with instructions "for further proceedings not inconsistent with this opinion." And the Florida court could indeed have ordered a new recount without acting inconsistently with the Supreme Court's opinion.

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[155] *See* 772 So.2d at 1248.

[156] The myth that the Supreme Court forbade the Florida court from conducting a recount under constitutionally permissible standards began with statements in the dissenting opinions. *See* 531 U.S. at 126 (Stevens, J., dissenting) ("the majority nonetheless orders the termination of the contest proceeding"); *id.* at 551 (Breyer, J., dissenting) ("there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely"). Stevens's claim is simply wrong. Breyer's statement is not so clearly wrong as a technical matter, but it is misleading. The majority did halt the particular (unconstitutional) recount ordered by the Florida court, but that is all that it did.

[157] When the Court decides to order a case dismissed, it knows how to say so. *See, e.g.*, Calderon v. Ashmus, 523 U.S. 740 (1998); Growe v. Emison, 507 U.S. 25 (1993); Mississippi v. Louisiana, 506 U.S. 73 (1992).

The only statement in the Supreme Court's opinion that could conceivably be considered "inconsistent" with a new recount is the following:

> Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2000).[158]

It is true that this statement assumes that Florida law hadn't changed between December 11 and December 12, and it assumes that the December 11 opinion meant what it appeared to say. But this statement does not purport to *forbid* the Florida court from concluding on remand that the U.S. Supreme Court had misinterpreted the statements it made on December 11. The Supreme Court's statement, for that matter, does not purport to forbid the Florida court from overruling its own December 11 interpretation of Florida law.[159] Thus, as a legal matter, the Florida court was indeed left free to order the sort of recount that Justices Souter and Breyer suggested.[160]

Gore's lawyers reportedly recognized that the Florida Supreme Court had been

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[158] 531 U.S. at 111.

[159] That interpretation, it is worth noting, was hardly compelled by the Florida statutes. Those statutes make no mention of 3 U.S.C. § 5, and there appears to be no reason to suppose that anyone in the enacting legislatures had ever heard of this once-obscure federal law.

[160] It is no doubt true that the Supreme Court's failure to make this fact explicit left many readers with the impression that the Court did not "want" to see another attempt at a recount. And it may even be true that the Justices anticipated this effect. But the Court had no legal duty to remind the Florida judges of their power to interpret Florida law, especially after those judges had complied a very sorry record of abusing that power.

left free to order a new recount, but decided on political grounds not to request one.[161] There is not much to be gained by speculating about what the Florida court might have done in response to such a request,[162] but it is important to recognize that the U.S. Supreme Court did *not* prevent Gore from continuing to litigate his case, and that the U.S. Supreme Court did *not* dictate the interpretation of Florida law to the Florida courts.

Here again, as in every other aspect of this case, the majority simply applied the

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[161] Washington Post Political Staff, *Deadlock: The Inside Story of America's Closest Election* 234-35 (2001). Unlike the law professors who have stubbornly refused to recognize that the Supreme Court said exactly what it said, and not something else, Gore's lead lawyers have publicly acknowledged that the Court's opinion did not foreclose the Florida court from ordering a new recount. David Boies acknowledged this in response to a question from the audience at the Cardozo Law School symposium where this article was first presented. Ronald Klain made a similar acknowledgment in response to a question from the audience at the Federalist Society's National Lawyers Convention in Washington, D.C. on November 17, 2001. Both of them also indicated that they believed (what I think it entirely reasonable to believe) that the Florida court would have been unlikely to take advantage of its power to order a new recount, but that is very different from claiming that the Supreme Court had taken this power away.

[162] Gore's lawsuit was dismissed by the Florida Supreme Court two days after the U.S. Supreme Court's decision. On December 22, after the electoral college had met, the Florida court issued an opinion in which it mistakenly, though conveniently, interpreted the U.S. Supreme Court's opinion as having "mandated that any manual recount be concluded by December 12, 2000." Gore v. Harris, 773 So.2d 524, 526 (2000). But the court added:

> Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

Id. If taken at face value, this suggests that the Florida court might not have been willing to torture the state's election laws any further in order to provide Gore with a few more days of recounting, even if he had asked the court to do so.

It is also worth noting that Gore's decision to concede the election also had the effect of obscuring an ironic and widely overlooked effect of the Florida court's decision to wait two days before dismissing his lawsuit: that delay prevented Florida from complying with the December 12 deadline.

law. If that turned out to be bad politics, which is a pretty dubious proposition anyway, it at least had the merit of being the right thing for judges to do.

Conclusion

For several decades, constitutional law has held that states may not weight the votes of people according to where they reside without a legitimate and compelling public purpose. Such vote dilution permeated the recount process designed by the Florida Supreme Court, and that court offered no coherent, let alone compelling, justification for the discrimination it was imposing on the election process. Nor was any justification offered by either of the two dissenting U.S. Supreme Justices who claimed that they could not perceive the completely obvious constitutional problem identified by the other seven.

The *Bush v. Gore* majority opinion has been harshly criticized—by the dissenters and by a wide range of commentators—for a variety of supposed sins. The Court should have refused to hear the case for fear of creating an "appearance" of political partiality. The Court should have refused to apply its Fourteenth Amendment precedents for fear of having them taken seriously in future cases. The Court should have ignored the Florida court's one-day old decision about the meaning of Florida law, thereby inviting that court to commit further violations of federal law. The Court should have refused to apply well-established federal law in this case because of a supposed commitment by the Court's conservatives to some notion of federalism imputed to them by people who have apparently never read their opinions.

None of these criticisms has the slightest legal merit. Every one of them is a political criticism, offered by people who have forgotten the distinction between law and politics, or who do not want the distinction to exist, or who do not want to be snickered at for defending the distinction. Once one surrenders that distinction, however, all of law becomes at best a decadent exercise in sophistry.

Faced with a gross violation of law by a subordinate court, the *Bush v. Gore* majority did exactly what an appellate court is supposed to do. It reversed the erroneous decision, and upheld the law. That this action has provoked so much outrage, and so little reasoned approval, suggests that the history of our contemporary legal culture may have

to be written by a Tacitus, or perhaps a Juvenal.