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THE PRESIDENTIAL ELECTION CASE: REMEMBERING SAFE HARBOR DAY

Gary C. Leedes*

*"The circumstances of [the 2000 presidential] election call to mind a quote from football coaching legend Vince Lombardi: 'We didn't lose the game, we just ran out of time.'"*¹

I. BEYOND THE POINT OF NO RETURN

A. *Focal Points of this Article*

The 2000 presidential election transported the nation down a long and winding road without a map and headed in an uncertain direction. While it might be an exaggeration to say that the system of constitutional law was self-destructing, it is undoubtedly true that the events surrounding the election were spinning out of control, and that irreparable harm to the electoral process and thereby the nation was imminent.²

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1. *Gore v. Harris*, 772 So. 2d 1243, 1273 (Fla. 2000) (Harding, J., dissenting) [hereinafter *Harris II*], *rev'd and remanded sub nom.* *Bush v. Gore*, 121 S. Ct. 525 (2000) (per curiam) [hereinafter *Bush II*].

2. Contingency plans were made to have Florida Governor Jeb Bush avoid any process that might have been issued by the Florida Supreme Court that would have interfered with the slate of electors that the court was going to appoint. E-mail from Donald Rubot-

The presidential race was dubbed "the loony election."³ It certainly was unpredictable, bizarre, and flawed. Many of the mishaps were due to complications caused by the electoral college,⁴ which was designed to lend legitimacy to a President who won or lost the popular election indecisively.⁵ The college's imprimatur usually produces an aura of legitimacy because most elections produce "a clear cut majority of electoral votes."⁶ If no presidential candidate obtains a majority of electoral college votes, Congress selects the President and Vice President of the United States.⁷ The Framers chose Congress as the tiebreaker because Congress represents the will of the people. In 2000, the voting public was divided almost evenly, and the popular vote in the decisive state, Florida, was a statistical tie.⁸ Under these circumstances, at some point finality rather than a 100% accurate vote count becomes a necessity.

An impartial umpire applying the rule of law is desirable, if not indispensable, in an election in which the margin of error in counting votes is greater than the margin of victory. The Supreme Court accepted the challenge to serve as umpire, and the crisis that was simmering subsided soon after the Court rendered its decision.⁹ The Court could be given credit for making a wise decision in an unusually stressful situation; however, a large

tom, Aide & Legal Advisor to Tom Feeney, Speaker of the Florida House of Representatives, to Gary C. Leedes, Professor of Law, Emeritus, University of Richmond School of Law (Mar. 3, 2001, 11:16:44 EST) (on file with the author). The Florida legislature was planning to convene throughout the day and night on the day that electors met in order to protect the electors from arrest. *Id.* An adjutant who lived in Georgia and who was not subject to service of process by the Florida courts would be instructed to deliver personally the electoral votes (and requisite certificates) to appropriate officials in Washington, D.C. See E-mail from Donald Rubottom, Aide & Legal Advisor to Tom Feeney, Speaker of the Florida House of Representatives, to Gary C. Leedes, Professor of Law, Emeritus, University of Richmond School of Law (Feb. 7, 2001, 19:11:37 EST) (on file with the author). To my knowledge, this information was not reported to the media resulting in many law professors taking a "What Me Worry" approach to the imminent, irreparable harm on December 12, 2000.

3. *The Loony Election*, N.Y. REV. OF BOOKS, Dec. 21, 2000, at 96.

4. For a discussion of some of the potential problems, see *infra* notes 98–124 and accompanying text.

5. See ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION* 127–28 (1994) (discussing "close" elections and the effect of the electoral college).

6. *Id.* at 21.

7. See U.S. CONST. amend. XII. The electoral college vote is indecisive when no candidate in the presidential race has a majority of the electors appointed to vote.

8. See *Bush II*, 121 S. Ct. at 527–28.

9. See *id.* at 533 (ending the manual recount in Florida).

number of learned observers have criticized it as biased.¹⁰ Undoubtedly, historians will reconstruct the events, the psychology, and the dangers that would have been encountered had the Court not acted as it did. The extent of the danger to the nation that was prevented by the Court's decision will then be assessed from a longer range and, perhaps, more objective perspective. Nonetheless, it is not too early to begin to put events into place.

When the polls closed on November 7, 2000, no one knew who would become the President-elect. George W. Bush ("Bush") had fewer popular votes nation-wide than Albert Gore, Jr. ("Gore"), but the winner of the nation's presidential election hinged upon the contested outcome in Florida.¹¹ Even after the recount was completed, which candidate was entitled to Florida's twenty-five electors remained uncertain.¹² One question was whether the votes of Florida's electors would be accepted by both Houses of Congress, and that question depended, in part, on whether the issues in *Gore v. Harris*¹³ (*Harris II*) were determined before midnight on December 12, 2000, which is referred to in this article as "Safe Harbor Day." If the Florida recount had continued after midnight on Safe Harbor Day, then Congress would have had an active role to play on January 6, 2001. Congress may either count or reject the votes of a state's electors.¹⁴ This is especially important when there is a controversy between a state's supreme court and the other branches of its government regarding the lawfulness of the electors' votes.¹⁵

In Florida, there was intractable disagreement between the State's supreme court and the State's legislative and executive

10. *E.g.*, *The Election Mess*, N.Y. REV. OF BOOKS, Feb. 8, 2001, at 48.

11. The first major decision in the disputed election came when the Florida Supreme Court extended the deadline for counties submitting late and amended election returns from November 14, to November 26. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000) (per curiam) [hereinafter *Harris I*], *vacated and remanded sub. nom. Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471 (2000) (per curiam) [hereinafter *Bush I*], *on remand at* 772 So. 2d 1273 (Fla. 2000) (per curiam) [hereinafter *Harris III*] (clarifying the holding in *Harris I*).

12. Many voters think they vote for the presidential candidates identified on the ballot, but voters actually cast ballots for electors. In Florida, the electors' names were not listed on the presidential ballot in the 2000 election. See CNN.com-Electors, *Frequently Asked Questions*, at <http://www.cnn.com/interactive/allpolitics/0012/electors/print.html> (last visited Mar. 13, 2001).

13. 772 So. 2d 1243 (Fla. 2000) (per curiam).

14. See 3 U.S.C. § 15 (1994).

15. See *id.*

branches.¹⁶ Thus, had the Supreme Court not stepped in and preserved the safe harbor, thereby conclusively protecting the slate of Republican-appointed electors certified by the Governor on November 26,¹⁷ Congress would have had the duty on January 6 of determining whether the Florida legislature could validly appoint a second set of Bush electors.¹⁸

Congress undertook this very task in 1877.¹⁹ In that debacle, the Twelfth Amendment failed to operate in accordance with the Framers' intent, resulting in Congress's choice for President, Rutherford B. Hayes, being regarded as an illegitimate President.²⁰ In 1877, Democrats took up the cry, "Tilden or War," and threatened to march on the Capitol.²¹ It was feared that a similar, or at least analogous, situation would disrupt the orderly transition of administrations on Inauguration Day, January 20.

In 2000, the recount did not continue after midnight on Safe Harbor Day; thus, Congress had no active role to play. Instead, Congress routinely counted Florida's twenty-five electoral votes and verified that the outcome was in Bush's favor.²² These twenty-five votes gave Bush one vote more than the majority required by the Twelfth Amendment.²³ No objections were debated

16. See *infra* Part II.B.1.

17. R.W. Apple, Jr., *A Mantle of Legitimacy*, N.Y. TIMES, Nov. 27, 2000, at A1 (discussing the November 26 certification).

18. Compare 3 U.S.C. § 2 (1994) (providing state legislators with the power to appoint electors if a state "has failed to make a choice on the day prescribed by law"), with 3 U.S.C. § 15 (1994) (outlining the responsibilities of Congress when a state presents more than one slate of electors).

19. See SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 734 (1965).

20. See *id.*; HARDAWAY, *supra* note 5, at 135–36.

21. See ERIC FONER, *RECONSTRUCTION: 1863–1877*, at 576 (1988).

22. Edward Walsh & Juliet Eilperin, *Gore Presides As Congress Tallies Votes Electing Bush; Black Caucus Members Object As Fla. Numbers Are Accepted*, WASH. POST, Jan. 7, 2001, at A1.

23. U.S. CONST. amend. XII ("The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed . . .").

The commands of the Twelfth Amendment, however, are not as clear as they might appear. For example, Robert M. Hardaway has stated:

With regard to actual procedures, the Twelfth Amendment leaves many questions unanswered. For example, it fails to indicate whether the president is to be chosen by legislators sitting in the House of Representatives at the time of the presidential election, or the incoming members of the House to be sworn in the following January.

HARDAWAY, *supra* note 5, at 2. Others have stated:

[The Twelfth Amendment], which supersedes clause 3 of § 1 of Article II,

on January 6 in the Joint Session of Congress due to the conclusive presumption set forth in the counting rule, 3 U.S.C. § 5, established by Congress in 1887.²⁴ Section 5 denied Congress the power to reject Florida's electoral votes, but only because the Supreme Court made sure that the controversy over the appointment of Florida's electors was determined before the midnight deadline. Therefore, pursuant to 3 U.S.C. § 5, which explains that a state's electoral votes "shall be conclusive, and shall govern in the counting of electoral votes,"²⁵ Florida's twenty-five votes were counted.

The procedures for counting electoral votes in Congress would have been quite different on January 6 if the recount had been resumed on December 13, as 3 U.S.C. § 5 would no longer have required Congress to count the votes of Florida's electors.²⁶ This odd system of counting electoral votes endures because of the tension between Article II of the Constitution and the Twelfth Amendment.

was adopted so as to make impossible the situation occurring after the election of 1800 in which Jefferson and Burr received tie votes in the electoral college, thus throwing the selection of a President into the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice-President.

THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1286 (1973) (internal citations omitted).

24. See Walsh & Eilperin, *supra* note 22, at A1.

25. 3 U.S.C. § 5 (1994). This section entitled "Determination of controversy as to appointment of electors" provides:

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 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.

Id.

In other words, Congress was required to count the votes of Florida's electors because the State complied with the following conditions: Its applicable election laws (1) were enacted prior to the day fixed for the popular election (November 7), (2) provided for the State's "final determination" of any controversy by the judiciary or another branch of government, and (3) the final determination of the election controversy occurred no later than December 12. See *id.*

26. *Id.* If 3 U.S.C. § 5 no longer applied, then 3 U.S.C. § 15 would have been applicable when Congress counted the votes. See 3 U.S.C. § 15 (1994).

On the one hand, Article II grants to state legislatures the power to appoint electors.²⁷ All state legislatures currently delegate to the people the legislative power to appoint electors.²⁸ The people's selection is then made in the popular election. The legislature's delegation to the people to appoint electors, however, is revocable, even after the citizens have voted.²⁹ On the other hand, the Twelfth Amendment grants Congress the power to count the votes of the electors appointed by the state legislature or its delegate.³⁰

The power to count votes is the power to reject them. Therefore, the body (that is, Congress) that counts votes cast by a state's electors has the final say concerning their legality, unless the Supreme Court intervenes before Congress has the opportunity to debate the issue. In *Bush v. Gore*³¹ (*Bush II*), the Court did intervene, and its decision safeguarded the conclusive presumption described in 3 U.S.C. § 5. Had the Court not acted when it did, the Florida legislature would have appointed a new slate of electors in a desperate, last minute attempt to overcome the loss of the safe harbor benefit.³² The state legislature's entry would have complicated enormously the process of counting electoral votes on January 6, particularly if Gore had managed to squeak ahead of Bush in the manual recount. If Florida's electors (certified previously by the Governor on November 26) lost their safe harbor guarantee, it is unknown what weight, if any, Congress would have given to the Governor's certification.³³

27. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

28. HARDAWAY, *supra* note 5, at 46.

29. U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 2 (1994).

30. U.S. CONST. amend. XII.

31. 121 S. Ct. 525 (2000) (*per curiam*).

32. See Dexter Filkins & Dana Canedy, *Committees Approve Resolutions Allowing Florida Lawmakers to Name Electors*, N.Y. TIMES, Dec. 12, 2000, at A17.

33. Laurence Tribe's brief filed on Gore's behalf in the Supreme Court argued that "SECTION 5 IS A SAFE HARBOR OPTION, NOT A MANDATE." Brief of Respondents Al Gore, Jr. and Florida Democratic Party at 22, *Bush I*, 121 S. Ct. 471 (2000) (No. 00-836). Tribe was trying to assure the Court that 3 U.S.C. § 15 would give the electors adequate protection. *Id.* According to Bush's attorneys, the problem with Tribe's statement was that the Florida legislature intended to take advantage of the conclusive presumption provided by Congress, and their intent was frustrated twice by the Florida Supreme Court. Brief for Petitioners at 35, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949). Theodore Olsen, counsel of

The Court's decision, of course, avoided delay, confusion, and a potentially disorderly joint session on January 6. Indeed, if the Court had not intervened, and if Congress had rejected Florida's electors, Congress might have been required to select the President and Vice President, thereby disenfranchising all voters who cast their ballots on Election Day.³⁴

The Supreme Court's decision eliminated that contingency. First, in a seven-to-two decision, the Court concluded that the manual recount procedures authorized by *Harris II* violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.³⁵ Second, in a five-to-four decision, the Court prevented the resumption of manual recounts that had been previously interrupted by its stay issued on December 9.³⁶

In *Bush II*, the Court held that a continuation of the recount improperly interfered with "the Florida Legislature[']s inten[tion] to obtain the safe harbor benefits of 3 U.S.C. § 5."³⁷ "That statute," stated the Court, "requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us"³⁸

The Court's definitive decision surprised many people. Many Court watchers predicted that if the Chief Justice could not achieve a consensus, then the Court would not make a move that rendered it vulnerable to attacks on its impartiality and credibility.³⁹ The Court's holding was attacked viciously by observers who were more than just muckrakers and iconoclasts. Four-hundred-fifty preeminent historians and Ronald Dworkin, a widely respected professor of law, published letters in the *New York Review of Books* claiming that the five Justice majority acted to pro-

record for Bush, argued successfully in *Bush II* that "[s]ection 5 . . . creates a compact between States and Congress. By enacting laws prior to election day that seek to resolve . . . contests concerning presidential electors . . . the Florida Legislature sought to obtain for the State of Florida and its voters the protections that § 5 affords." *Id.* at 34.

34. U.S. CONST. amend. XII; see also *supra* note 7 and accompanying text; *infra* text accompanying notes 107–26.

35. *Bush II*, 121 S. Ct. at 532.

36. *Id.* at 533.

37. *Id.*

38. *Id.*

39. Cf. Charles Krauthammer, *The Winner in Bush v. Gore?*, TIME, Dec. 18, 2000, at 104 ("Rehnquist does not like 5-4 in questions of this magnitude.").

tect its "political position" from future erosion by eliminating the possibility that more liberal Justices might be appointed by Gore.⁴⁰

There is, however, a qualitative difference between the historians' indictment and the frequently heard inanity that a judge's decision is sometimes ideologically driven. Nonetheless, this tired platitude does contain some semblance of truth. Judges do have (or should have) firmly held values and convictions (pejoratively called ideology) that help them make decisions.⁴¹ Among an undogmatic judge's values may be the desire to depart from foolish consistency in a hard case, and he may "adopt an approach that is practical and instrumental"⁴² if it is necessary to render a useful decision that prevents an acute Constitutional crisis. The historians' denunciation of the Justice's motivation, however, speaks of something more stigmatizing than a promotion of values or utility. If taken seriously, the historians' assertions justify a congressional investigation because the ascription of nefarious motives

40. *The Election Mess*, *supra* note 10, at 48. The historians stated:

[I]n an act no less reprehensible than the partisan resolution of the election of 1876, a narrow majority of the Supreme Court has pulled the nation backward. Its decision to halt the full and accurate counting of Florida's legal votes prevents the American people from selecting the next President of the United States.

The narrow majority has simultaneously cast doubt upon its own motives and undermined the legitimacy of the next chief executive. There is, justifiably, a widespread impression that this narrow majority acted as it did in order to install a Republican president and to expand its political position on the Court.

Id.

Professor Ronald Dworkin's innuendoes, also published in the *New York Review of Books*, planted the idea that the agenda of Chief Justice Rehnquist and Justices Scalia and Thomas "includes finally abolishing abortion rights . . ." Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. OF BOOKS, Jan. 11, 2001, at 53. Dworkin asserts that "[t]he prospects of future success for the conservatives' radical program crucially depend on the Court appointments that the new president will almost certainly make." *Id.* He adds, "the troubling question . . . being asked among scholars and commentators [is] whether the Court's decision would have been different if it was Bush, not Gore, who needed the recount to win . . ." *Id.* A sizable number of law professors agree with Dworkin's views. *See, e.g.*, Adam Cohen, *Can the Court Recover?*, TIME, Jan. 1, 2001, at 76.

41. As Justice Holmes once wrote, a judge without principles and firm convictions regarding the constraints of the Constitution will "quite agree that a law should be called good if it reflects the will of the dominant forces in the community, even if it will take us to hell." HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 19 (Robert M. Mennel & Christine L. Compston eds., 1996).

42. RICHARD A. POSNER, OVERCOMING LAW 4 (1995).

and unscrupulous behavior is an impeachable offense.⁴³

Notwithstanding their impressive credentials, the historians presumably lack expertise in mind reading. Their competence, both as individuals and collectively, to discern an ulterior motive is no better or worse than any other group of 450 people. Moreover, the historians' instant analysis of Article II and a complicated set of federal statutes designed to work in coordination with a complicated set of state statutes suggests that they did not do their homework. This article argues, in part, that the historians failed to grasp or remember the legal, political, and historical significance of Safe Harbor Day.

The Court's opinion in *Bush II* is not a masterpiece; however, a flawless and more comprehensive disquisition on the intricate relationship between state, federal, and constitutional law was not practicable given the expedited proceedings and time constraints surrounding the election. Nevertheless, and despite its flaws, the per curiam opinion is a fair and balanced assessment of the applicable law. Moreover, Chief Justice Rehnquist's concurrence, although more far-reaching,⁴⁴ is also a fair reading of Article II and in line with precedent.⁴⁵

No credible evidence suggests that any Justice's preference for a particular candidate motivated his or her decision to prevent the resumption of the recount under a revised set of procedures. There are, however, sufficient grounds to believe that a resump-

43. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

44. Chief Justice Rehnquist's concurrence is more far-reaching because it concludes that the Florida Supreme Court impermissibly changed state law in violation of Article II of the Constitution. See *Bush II*, 121 S. Ct. 525, 537–38 (2000) (Rehnquist, C.J., concurring). Nonetheless, Chief Justice Rehnquist's concurrence actually narrows the scope and future applicability of the per curiam holding, since the Chief Justice went out of his way to indicate that presidential elections are special. *Id.* at 533. Thus, it can be argued that in future cases a majority of the Justices do not intend to apply the equal protection principles identified in *Bush II* to every instance of disparate treatment of voters by a state.

45. A unanimous Court held more than a century ago that Article II, Section 1, Clause 2, the provision in the Constitution relied upon by the concurring opinion, "operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power" to appoint electors. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). In *McPherson*, the Court referred to the legislature's power to appoint electors as "plenary." *Id.* It went on to say that the "whole subject is committed" to the state legislature. *Id.* at 26. The Court added that "[t]his power 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 . . ." *Id.* at 35. Arguably, no other branch of the state government may interfere with the legislature's power to appoint electors.

tion of the recount risked irreparable harm to voters, the State of Florida, and the congressional/state legislative balance struck by the Constitution's provisions relating to presidential elections.⁴⁶ Given these circumstances, the Court's motivation to act promptly and definitively was based on necessity, rather than on Machiavellian calculations concerning future appointees that may or may not replace the individual Justices on the bench.

The Court made its motivation, the prevention of irreparable harm, plain when it issued a stay on December 9.⁴⁷ Evidence of irreparable harm is presented throughout this article. By contrast, the historians present no evidence or analysis of applicable statutes and cases, instead offering only foot-stomping assertions.⁴⁸ Under the unique circumstances created by the 2000 election, it is scandal mongering to assert that the Court's opinions in *Bush II* camouflage dishonorable motives. This article analyzes

46. Bruce Ackerman referred to "pessimists" who worried about "hordes of right and left-wing extremists marching on Washington, congressional elites deadlocked, and the situation spinning out of control." Bruce Ackerman, *Anatomy of a Coup*, LONDON REV. OF BOOKS, Feb. 8, 2001, at 5-6. His proposed solution was for the Court to "take[] care of all the serious difficulties by enjoining Jeb Bush not to send this slate [appointed by the legislature] to Congress." *Id.* at 6. Just how the Court would manage to obtain jurisdiction, however, is not made clear.

47. *Cf. Bush v. Gore*, 121 S. Ct. 512, 512 (2000) (Scalia, J., concurring) ("The counting of votes that are of questionable legality does . . . threaten irreparable harm to the petitioner, and to the country . . .").

The Emergency Application for a Stay alleged that the decisions in *Harris I* and *Harris II* threw the results of the presidential election into intense turmoil and controversy, and that a stay was necessary in order to "protect the integrity of the electoral process for President and Vice President of the United States and in order to correct the serious constitutional errors made by the Florida Supreme Court." Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Supreme Court of Florida at 2-3, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949) (stating that a Stay was necessary "to prevent the irreparable harm" that would be caused to Bush, Richard Cheney, the electoral process, and the Nation if the Court did not protect the safe harbor that the Florida legislature intended to have for its certified slate of electors). The Petitioners averred:

The Florida Supreme Court's decision raises a reasonable possibility that the November 26 certification of Governor Bush as the winner of Florida's electoral votes will be called in doubt—or purport to be withdrawn—at a time when the December 12 deadline for naming Florida's electors could preclude Applicants' ability to seek meaningful review by this Court.

Failure to resolve a controversy or contest concerning the appointment of presidential electors pursuant to the law as enacted prior to election day will jeopardize the 'conclusive' effect of any such determination for Congress counting purposes.

Id. at 39-40 (internal citation omitted).

48. See *The Election Mess*, *supra* note 10, at 48.

the opinions of the U.S. Supreme Court and the Florida Supreme Court in considerable detail.⁴⁹ After due deliberation, this author contends that the Court acted responsibly, under stressful conditions, in deciding a difficult case.

This article has two focal points. It presents evidence and analysis of applicable statutes and cases to support its argument that the decision in *Bush II* is defensible. The per curiam opinion is a terse but straightforward march to the bottom line: "It's too late to retool the system. Stop counting!" This article also argues that attacks on the motives of the Justices are scurrilous. Prevention of clear and present dangers to our system of constitutional law is the only credible extralegal reason for the mandate that stopped the clock from running beyond the safe harbor deadline.

B. *Approaching the Brink of a Crisis*

Republicans wanted finality, as quickly as possible. "Don't change the rules of the game after you have lost" was the Republican Party's mantra, but the questions begged were: what are the rules in the applicable state statutes, and do they prohibit the methods and timing of the court-ordered manual recount? Democrats were geared to battle for an indefinite period of time. Party regulars chanted: "We want accuracy in counting," neglecting to mention that the inaccurately punched ballots were cast by voters who failed to follow instructions.

A recurring issue involved the counting of "undervotes" and "overvotes."⁵⁰ Democrats argued that counting teams should at-

49. See *infra* Part II.

50. E.g., *Bush II*, 121 S. Ct. at 531; *Harris II*, 772 So. 2d 1243, 1264 n.26 (2000) (per curiam).

An undervote, in counties using punch card voting machines, is a ballot that is incompletely perforated by the stylus used to punch a clean hole in a card. See Brooks Jackson, *Factcheck: Examining Florida's 'undervote'*, at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/30/jackson.undervote/index.html> (last visited Apr. 20, 2001). In order to make a voter's intent detectable by a machine based on punch card technology, the voter must not leave bits of paper ("chads") hanging in the place where there should be complete penetration. If a hole is not cleanly punched in the card, then there is a substantial likelihood that the machine will not tabulate the vote. See David Whitman, *Chadology 101: Divining a Dimple*, U.S. NEWS & WORLD REP., Nov. 27, 2001, at 34; see also *Harris II*, 772 So. 2d at 1258-59.

An overvote is one in which the ballot indicates that more than one vote has been cast. See Jurist: The Legal Education Network, *Presidential Election Law: The Recount*, available at <http://www.jurist.law.pitt.edu/election/election2000-0a.htm> (last visited Apr. 20, 2001). The Florida Supreme Court was not concerned with counting overvotes for reasons

tempt to discern the intent of the voter from hanging, dimpled, and pregnant chads or from some other mark or hole.⁵¹ Republicans claimed, inter alia, that counting teams *lacked the competence* to divine the clear intent of the voter from such circumstantial evidence, and that the Florida Election Code did not even authorize the attempt.⁵²

The proper technique for visually examining chads is ordinarily a mundane matter that does not agitate the entire country.⁵³ In local and statewide elections, a chad fight is not usually a major news story; however, in this extremely close presidential election, the world watched to see how the United States would resolve an election dispute between two leading presidential candidates who both claimed victory.

it never explained, and the court's lack of concern presented Equal Protection Clause problems. See *Harris II*, 772 So. 2d at 1264 n.26 (Wells, C.J., dissenting); see also Dan Keating, *Fla. 'Overvotes' Hit Democrats the Hardest*, WASH. POST., Jan. 27, 2001, at A1.

51. Cf. Brief of Respondent Albert Gore, Jr. at 46, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949) ("[W]ith respect to the counting of punch card ballots, most states do not attempt specifically to define what particular appearance of the ballot is required before a vote is counted.").

"Bruce Rogow, an attorney for Florida's election supervisors, [and a professor of law at Nova University] explained with a straight face, 'Pregnancy does not count in Palm Beach County, only penetration.'" William Safire, *The Way We Live Now: 12-10-00: On Language; Chad*, N.Y. TIMES, Dec. 10, 2000, at 68.

52. Brief for Petitioners at 49, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949) ("The [Florida Supreme Court] returns the case to the circuit court for this partial recount of undervotes on the basis of unknown, or at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown") (quoting *Harris II*, 772 So. 2d at 1263 (Wells, C.J., dissenting)); *id.* at 36 ("Nothing in the Florida Election Code provides for the procedure and results mandated by the Florida Supreme Court . . .").

53. A chad is a tiny piece of paper that pops off a voting card after a voter has punched through it before inserting it into a punch card voting machine. See Deborah Zabarenko, *A Chad Is Born: Debuting in 1890, It Stuck Around*, WASH. POST, Nov. 24, 2000, at A41. The chad is supposed to separate completely from the card; however, in some Florida counties, the inspectors who examined the erroneously cast ballots considered the imperfectly (and often improperly) punched card to be a legal vote if two or more corners of the chad were broken or separated from the voting card. Cf. *Bush II*, 121 S. Ct. at 531. Some counting teams considered the separation of one corner a vote, and still others considered a depression or an indentation (so-called dimple) or any other mark as an indication of a voter's intent. *Id.*

The marks (evidence of voter intent) on a punch card include dimpled chads (bulging but not pierced), pregnant chads (attached by all four corners to a ballot that is either bulging or pierced), hanging chads (attached by a single corner), swinging chads (attached by two corners) and tri-chads (attached by three corners). Jurist: The Legal Education Network, *supra* note 50.

Because there were no specific standards in Florida that prevented different counties from using different methods of counting, the Supreme Court, given the need to have an immediate final determination of the dispute, found that the equal protection and due process problems of the counting procedures were insurmountable, *Bush II*, 121 S. Ct.

The Florida Supreme Court left it up to each county to choose its own method for discerning the clear intent of the voter,⁵⁴ presenting the question of whether this was a violation of the Equal Protection and Due Process Clauses of the Constitution.⁵⁵ Was this a question for Congress? On December 12, many observers answered this question in the affirmative;⁵⁶ however, the world would have to wait three-and-a-half more weeks for Congress's answer.

If Congress, rather than the Court, had decided whether Florida's system of counting undervotes was lawful, the resultant partisan wrangling would not have been based on the rule of law. There are feisty members in Congress who would have used any means necessary to obtain the presidency for their party's candidate. Irrational exuberance by such a band of zealots could have set in motion a chain of events that would have destabilized the government, as occurred in 1877.⁵⁷ At that time, when Congressional Democrats compromised and allowed a Republican to move into the White House, the Democratic Speaker of the House claimed that the Democrats yielded "to save the nation from civil commotion."⁵⁸ The "commotion," however, began after Congress bollixed the counting process and had already irrevocably harmed the electoral process.

There is no doubt that the Justices had the 1877 imbroglio on their minds when they considered the issues presented in *Bush II*. Justice Breyer devoted substantial space in his dissent to that melee.⁵⁹ Relying on the Twelfth Amendment, Justice Breyer would have left the decision on the merits to Congress.⁶⁰ Justice Breyer's reliance on the Twelfth Amendment, and his comfort

54. *Harris II*, 772 So. 2d at 1262 ("[I]n making a determination of what is a 'legal' vote, the standards to be employed . . . [are] that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" (quoting FLA. STAT. ANN. § 101.5614(5) (West Cum. Supp. 2000))).

55. See *Bush II*, 121 S. Ct. at 531 (discussing examples of varying standards applied by Florida counties).

56. See, e.g., N.Y. TIMES, Jan. 13, 2001, at A7. Over 650 law professors signed a document protesting the Court's December 12 decision in *Bush II*, and claiming that the five Justices who decided to end the recount in Florida "were acting as political proponents for candidate Bush, not as Judges." *Id.* The list of law professors has swelled to 673. 673 *Law Professors Say*, at <http://www.the-rule-of-law.com> (last visited Apr. 1, 2001).

57. See *infra* notes 93–102 and accompanying text.

58. HARDAWAY, *supra* note 5, at 135.

59. See *Bush II*, 121 S. Ct. at 555–57 (Breyer, J., dissenting).

60. *Id.* at 555.

level with Congress's ability to handle the vote counting problem, is remarkable. When Congress debates whether or not to count disputed electoral votes, the enigmatic provisions of the Twelfth Amendment are the problem—not the solution. The Twelfth Amendment was drafted by men who did not believe in universal suffrage.⁶¹ Moreover, the Twelfth Amendment carried forward the classical republican ideal that all government officials, including electors voting in the electoral college, should be specially qualified gentlemen with a disinterested political perspective.⁶² This ideal was already undermined by the time the Twelfth Amendment was ratified in 1804.⁶³ By 1836, when Martin Van Buren was elected President, the political parties function was to win elections for candidates running for public office.⁶⁴ Loyalty to one's political party became the preeminent qualification for presidential candidates.⁶⁵ The Twelfth Amendment by then was already an anachronism. As a result, the electoral college's duties and functions, originally outlined in Article II, Section 1, Clause 3 and superseded by the Twelfth Amendment, are the Constitution's Achilles' heel. The electoral college's very existence was the source of the postelection uncertainty in 2000, and the post-election contest Gore initiated did not concern the winner of the popular vote in the United States. It was about the legal status of Florida's twenty-five electors.

A set of ambiguous and little-known federal laws was enacted in the nineteenth century to clarify and particularize provisions of the Twelfth Amendment. One of these remedial laws is 3 U.S.C. § 5.⁶⁶ Another section, 3 U.S.C. § 2,⁶⁷ instructs state legislatures how to overcome the loss of the § 5 safe harbor.⁶⁸ This sec-

61. See MICHAEL J. GLENNON, WHEN NO MAJORITY RULES 7–9 (1992).

62. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 294 (1991).

63. See *id.* at 293.

64. See *id.* at 299.

65. See *id.* Wood describes the transition between the classical republican paradigm based on civic virtue and the subsequent paradigm of liberal democracy that condones the tendency of elected public officials to represent special interest groups. See *id.* at 293–300. This includes the party loyalists who are appointed to vote in the electoral college and the members of Congress who have the power to reject them as lawful electors. See *id.* at 299–300. In short, the function of electors today is entirely different than what it was in 1804 when the Twelfth Amendment was ratified.

66. 3 U.S.C. § 5 (1994).

67. 3 U.S.C. § 2 (1994).

68. See *id.* ("Whenever any State has held an election for the purpose of choosing elec-

tion, however, also has latent ambiguities that made the Florida legislature's plan to appoint its own slate of electors vulnerable to objections by Democrats.⁶⁹

Harris II was decided four days before the expiration of the safe harbor.⁷⁰ The court knowingly risked the loss of the safe harbor, presumably hoping that the recount would be completed by December 12.⁷¹ This hope was unrealistic. The media noticed what would happen once the race to the White House took the nation beyond that brink, even if the Florida Supreme Court did not. Beyond the point of no return were the furies of civil commotion, chaos, and grave dangers that were no longer imminent but real. Reputable magazines, newspapers, and TV pundits identified many scenarios that were no longer pure fantasy.

Weekly newsmagazines sported covers with "CHAOS" written in unusually large, bold type.⁷² "Confusion Reigns" was the title of an article published in *U.S. News & World Report*,⁷³ and several disturbing "what if" questions also began to surface: What if the litigation in Florida continues beyond December 18 when the electoral college meets?⁷⁴ What if Congress receives votes from two or three competing slates of electors? What if Congress decides to reject the votes of Florida's electors when it convenes in joint session to count votes on January 6? What if the election re-

tors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct.").

69. *See id.*

70. *See Harris II*, 772 So. 2d 1243, 1243 (Fla. 2000) (per curiam).

71. *Cf. id.* at 1261 (stating that while the court recognized "that time [was] desparately short," it could not ignore the claims made in this case).

72. *See, e.g.*, U.S. NEWS & WORLD REP., Dec. 18, 2000; NEWSWEEK, Dec. 18, 2000.

73. Kenneth T. Walsh, *Confusion Reigns*, U.S. NEWS & WORLD REP., Dec. 18, 2000, at 21.

74. In addition to the cases discussed in this article, there were two other major cases pending in federal court seeking to enjoin the manual recounts. *See Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 510 (2000) (mem.); *Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 749 (2000) (mem.). There were also several "butterfly ballot" cases. *See, e.g.*, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000). There was also a case dealing with overseas ballots. *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000). Finally, there were the Seminole and Martin County cases, where, as a result of irregularities engaged in by Republican officials and supporters of Bush, the plaintiffs sought to throw out 25,000 votes in counties where Bush received substantially more votes than Gore. *See Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517 (Fla. 2000) (per curiam); *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000) (per curiam).

sults are not known on Inauguration Day? What if the election of the President is thrown to the House of Representatives?⁷⁵ According to several experts, this scene was "too horrible to contemplate,"⁷⁶ especially since the standing rules in the House that structure contingency elections have not been updated since 1825.⁷⁷

The media was fully aware that the Florida legislature, pursuant to 3 U.S.C. § 2,⁷⁸ was committed irrevocably to the idea of appointing its own slate of electors immediately after the safe harbor benefit of 3 U.S.C. § 5 was lost.⁷⁹ This unusual development

75. The colloquial phrase "thrown to the House," is technically called a contingency election.

76. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, J. LEGIS. 145, 148 n.21 (1996) (commenting that the prospect of the House of Representatives promulgating new standing rules "in the context of choosing a president is too horrible to contemplate").

77. For example, Robert M. Hardaway, writing in 1994, described why a contingency election would be a horrible idea:

An election thrown into the House of Representatives . . . would indeed have posed considerable challenges and created deep strains within the American electoral system. There would have been powerful incentives to support or oppose a particular House procedure, not on a principled basis but on which candidate it would favor.

HARDAWAY, *supra* note 5, at 3.

One can assume that contributions to the next political campaign would flow into the coffers of members of Congress who made commitments to vote for the candidate preferred by the person, union, or corporation sending in the money.

78. For a discussion of 3 U.S.C. § 2, see *supra* notes 67–69 and accompanying text.

79. *E.g.*, Filkins & Canedy, *supra* note 32, at A17.

This obscure provision in 3 U.S.C. § 2 was originally enacted in 1845, see Law of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1845) (current version at 3 U.S.C. § 2 (1994)), and there does not appear to be any judicial interpretation of the provision's current meaning. Counsel to the Florida legislature advised a joint committee that 3 U.S.C. § 2 gives "the state legislature . . . absolute power to determine the state's electors." SELECT JOINT COMMITTEE ON THE MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS, REPORT AND RECOMMENDATIONS, at 7 (Dec. 4, 2000). Counsel further asserted that Congress would be bound to count the votes of Florida's electors appointed by the Florida legislature as long as the electors voted on December 18. *Id.* at 8. Bruce Ackerman and David Strauss disagreed, and so testified during the hearing. *Id.* According to Ackerman, since the Florida returns were already certified on November 26, a second replacement certification would be unlawful and rejected by Congress. *Id.* Ackerman warned the legislature that its appointment of electors would cause a "constitutional trainwreck." Filkins & Canedy, *supra* note 32, at A17. "If the Legislature took action," he warned, "it could unleash a process that would end in a constitutional deadlock" and throw the election to the House of Representatives. *Id.* It was further argued that other states would emulate Florida's example in the future, thereby causing irreparable harm to the existing system of constitutional law. *Id.* Nevertheless, on December 13, the Florida House of Representatives voted in favor of the concurrent resolution to appoint a new slate of electors nominated by the Republican Party. Dana Canedy, *House Adopts Bush Electors, But Act May Be Moot*, N.Y. TIMES, Dec. 13, 2000, at A26. On December 14, the day after Gore conceded defeat, the Senate allowed

inspired further questions. What if the Florida Supreme Court prohibits the legislature from transmitting its new slate of electors to the Governor and to Congress? What if the court orders Florida Governor Jeb Bush not to certify the slate or to certify a competing Gore slate?⁸⁰ What if Jeb Bush avoids, evades, or defies the court order?⁸¹ What if he is held in contempt of court? What if Bush appeals the court order? What will Congress do on January 6 under this set of circumstances?

Republican leaders in the Florida legislature were nonplussed by these questions. They were preparing for any and all possibilities, and were willing to appoint the electors regardless of what the Florida court did or said.⁸² Their strategy would have completely destroyed any remaining amity between the supreme court and Florida's legislative and executive branches. Confusion would have indeed reigned if Congress had been presented voting returns from the state legislature (after having already received an identical slate from Governor Jeb Bush on November 26) and a competing set of returns from electors voting for Gore. In this situation, the magazine covers referring to "chaos" would not have been mere hyperbole, and the projected nightmare scenarios would no longer have been pure speculation. Given the "no-holds-barred" temperament of many members of Congress, common sense and a sophisticated sense of realpolitik suggest that power politics would have decided which slate of electors, if any, was lawfully appointed. The disorder that would have arisen had Congress debated the issues resolved by the Supreme Court on December 12, would make the partisan politics seen during the ill-tempered Clinton impeachment hearings seem genial. Who would have controlled the showboats? Those members who appealed to the passions of the people in strident and sarcastic speeches.

An unusually imaginative author might have created a plot

it to die on its calendar. See Dana Canedy, *Oh, That Appointed Slate? Lawmakers Are Glad to Forget It*, N.Y. TIMES, Dec. 14, 2000, at A30.

80. The executive of the state is required to sign the state's certification of electors, to place the State seal upon the certification, and to transmit a designated number of original-duplicates to the Archivist of the United States, who, in turn, forwards it to the Capitol so the electoral votes can be counted in a joint session of Congress on the day specified by law. 3 U.S.C. § 6 (1994).

81. This option was viewed favorably by many Florida Republicans in the legislature. See *supra* note 2 and accompanying text.

82. See *supra* note 2 and accompanying text.

that has one of two presidential candidates in charge of maintaining order and decorum in the joint session in which objections to electors are debated, yet Gore's position as the President of the Senate made this imaginative plot a reality.⁸³ How would he have reacted to the certification of the legislatively appointed slate by Florida Governor Jeb Bush? Undoubtedly, the then Vice President would have been on his best behavior, but his surrogates would have agitated the American people in a way that would not bode well for the nation. Justice Breyer, dissenting in *Bush II*, did not seem perturbed by this prospect.⁸⁴

Justice Breyer observed that "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court."⁸⁵ Justice Breyer was willing to give the Florida courts and county canvassing boards six more days to finish the recount.⁸⁶ The Court, however, decided not to delay the election until the first week of January to find out which slate of electors, if any, Congress would accept.⁸⁷ If Justice Breyer's proposal to extend the counting until December 18 had been adopted by the Court, the issue that Congress would have resolved was whether the Florida legislature's appointment of electors was permitted by 3 U.S.C. § 2. Without the safe harbor immunity, the Florida legislature's slate of electors would have been subjected to formidable objections in Congress by Democrats, arguing that "the Republican Party was making a brazen effort to seize the Presidency by assaulting the state courts and wresting power from the voters"⁸⁸

The foregoing problem is created by the need to reconcile the Twelfth Amendment, which gives Congress the power to count, with Article II, Section 1, Clause 2, which delegates to the state legislatures the power to appoint electors.⁸⁹ Does Congress's

83. The President of the Senate (Gore on Jan. 6) is assigned the duty of preserving order during the joint meeting of the two Houses of Congress. 3 U.S.C. § 18 (1994).

84. *Cf. Bush II*, 121 S. Ct. 525, 555–56 (2000) (Breyer, J., dissenting) (commenting that "the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes" and outlining the procedure in Congress when a state submits more than one slate of electors).

85. *Id.* at 556.

86. *Id.* at 551–52. In that way the recount could have been completed by December 18 when the electoral college met and voted.

87. *Id.* at 533 (per curiam).

88. Ackerman, *supra* note 46, at 5.

89. Compare U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner

power to count electoral votes trump the state legislatures' power to appoint? According to Justice Breyer, this question is committed to Congress,⁹⁰ but the tension between Article II and the Twelfth Amendment presents a pure question of constitutional law. If Congress had rejected the Florida legislature's electoral votes sometime near the middle of January, a suit could still have been filed in federal court before Inauguration Day. Even if the question presented was deemed a nonjusticiable, political question, it would have taken time, perhaps weeks, to find out that the Court was not going to reach the merits.⁹¹ If neither candidate was qualified to become President on January 20, then J. Dennis Hastert, the Speaker of the House of Representatives, could have become acting President, if he wanted the job of governing a nation that might not only be evenly divided, but also polarized, angry, and confused.⁹²

C. Counting the Electoral College Votes in Congress

The electoral college is not only the Achilles heel of the Constitution, but is also a Pandora's Box that would have been opened by Congress if Justice Breyer's proposal had been adopted.⁹³ The last time Congress had two sets of competing returns from Florida, the partisan debate nearly caused an outbreak of violence.⁹⁴ In 1877, "Democrats demanded that the election be thrown into the House, as provided in another clause of the Twelfth Amend-

as the Legislature thereof may direct, a Number of Electors . . ."), with U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted . . .").

90. *Bush II*, 121 S. Ct. at 555–56 (Breyer, J., dissenting).

91. The political question issue would be a formidable roadblock if, after Congress selected the President in a contingency election, a suit was filed—an outcome that would not be surprising. A plaintiff with standing to sue, such as Bush, the Speaker of the Florida House of Representatives, a Florida elector, or a Florida voter, could allege that Congress did not stay within the powers committed to it by Article I, Section 2, Clause 1 of the Constitution when it rejected the electors appointed by the State legislature and certified by the Governor.

92. See 3 U.S.C. § 19(a)(1) (1994) (providing for the Speaker of the House of Representatives to become President if a vacancy occurs in the offices of both President and Vice President).

93. For a discussion of Justice Breyer's dissent in *Bush II*, see *supra* notes 84–90 and accompanying text; *infra* notes 100, 125–27, 133–35, 137–39, 152, 336, 343–45, 394, 481 and accompanying text.

94. C. VANN WOODWARD, *THE ORIGINS OF THE NEW SOUTH: 1877–1913*, at 25 (1st Paperback ed. 1966).

ment.”⁹⁵ Republicans rejected that proposal because the Democrats controlled the House.⁹⁶ Members of the House began to carry arms as “debates in the House became more rancorous.”⁹⁷

The Electoral Count Act of 1887⁹⁸ was designed to alleviate the problems that plagued the country in 1877.⁹⁹ The Act has eliminated many of the problems, but the procedures¹⁰⁰ established by the Act are “in reality a constitutional minefield.”¹⁰¹ The following list of problems is just a sampling of the ticking time bombs in the interstices of the Twelfth Amendment.¹⁰²

Problem #1: Completion of the process of counting electoral votes could be delayed for long periods of time, especially if numerous frivolous objections to a state’s electors were filed by members of Congress who wanted delays for tactical reasons. Even if the objections were not frivolous, there might still be delays since debates are time-consuming. In the present case, such delays could have been particularly problematic. If Congress was unable to complete the counting of electoral votes within five days after its first meeting on January 6, 3 U.S.C. § 16 provides that “no further or other recess shall be taken by either House.”¹⁰³ Sec-

95. C. VANN WOODWARD, REUNION AND REACTION 21 (3d ed. 1966).

96. *Id.*

97. *Id.*

98. ch. 90, 24 Stat. 373 (1887).

99. In 1877, Justice Joseph Bradley voted with the other seven Republicans on the fifteen member Electoral Commission appointed by Congress to break the deadlock over the counting of electoral votes, resulting in Rutherford B. Hayes being declared President-elect. See WOODWARD, *supra* note 95, at 159. Justice Bradley was accused of yielding to pressures exerted by lobbyists. See *id.* at 159–64. Democratic hotheads asked whether “honest men [should] feel obliged by the decisions of the Commission and carry the work of conspirators into law?” *Id.* at 264. Despite allegations that the Justices voted their political preferences, Bruce Ackerman proposes this solution to the impasse that would have developed if Congress had to choose “between a Gore slate picked by Florida’s voters and the Bush slate picked by its legislature.” Ackerman, *supra* note 46, at 5.

Aside from separation of powers problems, we should learn from history, not repeat the mistakes we have learned from the historical record.

100. Sections 5, 6, and 7 of Title 3 of the U.S. Code all derive from the Electoral Count Act. *Bush II*, 121 S. Ct. 525, 555 (2000) (Breyer, J., dissenting).

101. GLENNON, *supra* note 61, at 36.

102. Although both Houses of Congress meet separately after objections are made in writing, they must concurrently agree before electoral votes from a state are rejected. See U.S. CONST. amend. XII; 3 U.S.C. § 15 (1994).

103. 3 U.S.C. § 16 (1994).

When objections to a state’s electoral votes are received and read aloud, “the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter . . .” *Id.*

tion 16, in other words, would have permitted debates over objections to continue until January 12, which was only eight days before the incoming President took the oath of office.¹⁰⁴ Even if recesses are prohibited,¹⁰⁵ debates over numerous objections could still have continued beyond Inauguration Day, which, as stated, would have enabled the Speaker of the House to become acting President.¹⁰⁶

Problem #2: Election of the President can be thrown to the House of Representatives if, after the electoral votes are counted, "no person [has a] majority."¹⁰⁷ A "majority" is "[t]he person having the greatest number of [electoral] votes for President . . . if such number be a majority of the whole number of Electors appointed"¹⁰⁸ The ambiguity of this definition could have been a stumbling block,¹⁰⁹ particularly if the safe harbor protection of

§ 17. There are time limits established for debates on specific objections. *See id.* These time limits, however, do not expedite the counting process if numerous objections are duly made in writing in accordance with 3 U.S.C. § 15. That section simply requires that every objection be signed by at least one member of the Senate and one member of the House and "state clearly and concisely, and without argument, the ground thereof." *Id.* § 15. Section 15 further provides:

When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw [from the House chamber], and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision

Id.

104. *See id.* § 16; *see also* U.S. CONST. amend. XX, § 1.

105. Quorum problems could occur if no official recesses are permitted. For example, to advance a political party's decision to delay the counting process, many or all of its adherents could walk out and prevent a quorum.

106. *See* 3 U.S.C. § 19(a)(1) (1994).

107. U.S. CONST. amend. XII. The Twelfth Amendment provides that if no one has a majority, "then from the persons having the highest numbers [of votes] not exceeding three . . . the House of Representatives shall choose immediately, by ballot, the President, the votes shall be taken by states, the representation from each state having one vote" *Id.*

108. *Id.*

109. The Twelfth Amendment contains ambiguous provisions with regard to the requisite quorum in a contingency election. *See* GLENNON, *supra* note 61, at 52–53. There are unanswered questions concerning the public's right to observe the proceedings, whether a majority or a plurality of a State's delegation in the House is required before a State may cast its one vote, and whether the representatives' ballots, when each state votes, are secret or open. *See id.* at 48–52. There are also limits on the length of time the House may devote to the selection process, but those limits are not specific. *Id.* at 53. The most obvious problem is the absence of standing rules in the House, which leaves many procedural questions unanswered, and which, therefore, have to be debated. *See id.* at 53–54. It is also still plausible to argue that the lame duck Congress can seize the power to select the

Florida's electors was nonexistent, as would have been the situation had the Court ducked the tough questions presented in *Bush II*.

According to the most common view, a candidate must have at least 270 electoral votes out of the 535 electors appointed by the fifty states and the District of Columbia to have a majority.¹¹⁰ Neither Bush nor Gore had 270 electoral votes on December 12. Therefore, if both Houses of Congress had rejected Florida's twenty-five electoral votes, selection of the President would have been thrown to the House of Representatives and the Senate would have chosen the Vice President.¹¹¹ Since Bush was more likely to win such a contingency election,¹¹² a plaintiff could have filed a lawsuit claiming that Congress did not adhere to the Twelfth Amendment's definition of a majority.

The political question doctrine could, perhaps, be avoided by the following argument: The word "majority" in the Twelfth Amendment is a pure question of law for the Court. There would be no problem with judicially manageable standards if the Court ruled that a majority is a majority of electoral votes counted rather than a majority of electors appointed. The plaintiff could cite *Powell v. McCormack*,¹¹³ a case in which the House of Representatives excluded Adam Clayton Powell from his seat in the House after he won an election for the seat.¹¹⁴ Powell sued the Speaker, John McCormack.¹¹⁵ The Court held that Congress violated Article I, Section 2, Clause 2 (the age, citizenship, and resi-

President in January before the incoming Congress replaces it. *Id.* at 46–48. Finally, there is the concern about shady, "back-room" deals. *See id.* at 54.

110. *See id.* at 19. The Twenty-Third Amendment authorizes the District of Columbia to appoint

[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . . and they shall meet in the District and perform such duties as provided by the twelfth article of amendment."

U.S. CONST. amend. XXIII, § 1.

111. *See* U.S. CONST. amend. XII.

112. Twenty-eight state delegations had more Republicans than Democrats. *What if Florida Ends Up with Two Slates of Electors?*, N.Y. TIMES, Dec. 9, 2000, at A1 (providing a flow-chart mapping out the possible outcomes if there were two slates of Florida electors).

113. 395 U.S. 486 (1969).

114. *Id.* at 489.

115. *Id.* at 493.

dence requirements) and specifically rejected the applicability of the political question doctrine.¹¹⁶ The Court stated: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."¹¹⁷ Furthermore, the Court asserted its authority "to act as the ultimate interpreter of the Constitution."¹¹⁸

Even if the Court chose not to decide whether Gore needed at least 270 votes, the election might still have been delayed beyond January 20. By the time the Court decided to abstain, Congress would have been unable to have a contingency election since the joint session would have adjourned.¹¹⁹ On the other hand, if there had been a contingency election based on a party-line vote and Bush had won, the imprimatur of a Republican dominated House of Representatives would not have carried the prestige of a Supreme Court decision. Bush's presidency would have been tainted and his honeymoon nonexistent. Indeed, a contingency election could have caused a civil commotion that would have weakened both the office of the President and the nation.

A President who is compelled by circumstances to make commitments to members of Congress in exchange for their votes cannot be a strong President. Moreover, Pandora's Box would be opened and foreign and domestic enemies of the United States, who after biding their time until they could take advantage of social unrest and disarray in the nation's government, would suddenly appear.

Problem #3: As indicated in the foregoing discussion of *Problem #2*, Congress could have considered a more flexible interpretation

116. *Id.* at 522.

117. *Id.* at 549.

118. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting the supremacy of the Court).

119. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 14–15 (1999). Longley and Peirce state that after the Speaker orders the cessation of fruitless House efforts to elect a President within the time limits referred to in the Twelfth Amendment, which optimistically requires an immediate decision, the Speaker is entitled to resign and assume the office of Acting President. *Id.* Thus, in this case, the Speaker could have remained in office "subject to the possibility that renewed House balloting . . . following the congressional elections of 2002" would replace him. *Id.* at 15. Obviously, such a bizarre turn of events would traumatize the nation for months or years during this political and constitutional crisis. *Id.* at 15–16.

of the meaning of the word "majority" in the Twelfth Amendment. In our hypothetical situation, Gore could have been declared President under this alternative since he already had the majority he needed. Undoubtedly, Democrats would have argued in favor of such a flexible interpretation; however, as stated previously, this kind of partisan debate in Congress would make the members' invectives during the Clinton impeachment seem mild. The Court would again be involved, but this time, Bush would argue that by adopting this interpretation Congress exceeded the powers committed to it by the Twelfth Amendment.¹²⁰

Problem #4: The Twelfth Amendment states: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted"¹²¹ This language does not specify, however, what the rules for counting are. As stated previously, the Electoral Count Act was designed to alleviate the problems caused by the lack of rules that plagued the country in 1877.¹²² While the Act eliminated many problems, many remain. For example, a provision now codified as 3 U.S.C. § 15 permits Congress to reject electoral votes not "regularly given" by lawfully certified electors, not appointed by a lawful tribunal, and not authorized by state law.¹²³ These ambiguous grounds would have given members of Congress ammunition to reject Florida's electoral votes, and debates over their objections could have precipitated a Donnybrook Fair.¹²⁴ For example, are electors appointed by the Florida legislature lawful electors? Are their votes regularly given? These ambiguous grounds would also have enabled Republicans to challenge votes returned by a Gore slate, and many of the legal issues such as due process, equal protection, and Article II violations by the Florida Supreme Court would have been the same as those resolved in *Bush II*.

120. The political question doctrine again might influence the Court to abstain from this "hot potato" of an issue. However, Bush would have precedent to evade the doctrine. See *supra* notes 113–18 and accompanying text.

121. U.S. CONST. amend. XII.

122. See *supra* notes 88–102 and accompanying text.

123. 3 U.S.C. § 15 (1994).

124. Four years before the 2000 presidential election, Congress was advised to "clarify sections 5 and 15 to make clear that any authoritative state determination is conclusive." Josephson & Ross, *supra* note 76, at 182. Even this suggestion, however, begs the question posed in our hypothetical scenario, which is whether the Florida Supreme Court, the Florida legislature, or the executive branch is *the* body that makes the authoritative determination about the appointment of electors.

Justice Breyer, dissenting in *Bush II*, preferred to rely on the counting rules in 3 U.S.C. § 15 rather than support the majority's decision that brought finality.¹²⁵ He argued that "the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes."¹²⁶ Thus, in Justice Breyer's view, the Court should not have ended the recount.¹²⁷

To be sure, Congress, not the Court, has the duty to count the votes and to accept or reject electors.¹²⁸ However, the language of the Twelfth Amendment does not specifically prohibit the Court from making decisions that affect the counting before Congress meets in joint session. In fact, 3 U.S.C. § 5 "represented an effort by Congress to wash its hands of these [counting] matters after the disputed Hayes-Tilden election in 1876."¹²⁹ The Court's intervention kept Congress's hands clean.

Why would Justice Breyer prefer to encounter the minefields embedded in 3 U.S.C. § 15 when Congress, by enacting 3 U.S.C. § 5, preferred to adhere to Article II and allow the state legislatures to retain their traditional responsibility to resolve controversies over electors? One answer may lie in Justice Breyer's assertion that "[James] Madison . . . believed that allowing the judiciary to choose the presidential electors 'was out of the question.'"¹³⁰ This assertion is half true. Madison's own notes taken at the Philadelphia Convention reveal that after he stated that it "was out of the question" for the judiciary to choose the President in a contingency election, he then said that the choice by Congress "was in his Judgment liable to insuperable objections."¹³¹ Madison's personal preference was for a direct election of the President by the people.¹³²

125. *Bush II*, 121 S. Ct. 525, 556–58 (2000) (Breyer, J., dissenting).

126. *Id.* at 555.

127. *See id.* at 551, 558.

128. *See* U.S. CONST. amend. XII; 3 U.S.C. § 15 (1994).

129. GLENNON, *supra* note 61, at 31.

130. *Bush II*, 121 S. Ct. at 556 (Breyer, J., dissenting) (quoting James Madison (July 25, 1787), in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 363 (Jonathan Elliot ed., 2d ed. 1876)).

131. NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 363 (W.W. Norton & Co. 1987) (1893). Gouverneur Morris warned that giving Congress power to select the President would inevitably be productive of "intrigue, of cabal, and of faction," producing a pliable official who would be the willing tool of his supporters." JACK N. RAKOVE, ORIGINAL MEANING 259 (1996).

132. *See* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE

Justice Breyer agreed that, given the safe harbor deadline, "it [was] too late for any such recount to take place by December 12."¹³³ He pointed out, however, that the electoral college's vote was only six days away (on December 18) and that a continuation of the manual recount during those six days might have allowed for its completion.¹³⁴ That wishful thinking emulates Pollyanna's optimism. Nevertheless, Justice Breyer, relying on notions of comity, insisted that "[w]hether there [was] time to conduct a recount prior to December 18, when the electors [were] scheduled to meet, [was] a matter for the state courts to determine."¹³⁵ As to whether a six-day extension violated any state statute, as the Court had held,¹³⁶ that question too was one for the Florida Supreme Court,¹³⁷ even though that court risked the loss of the safe harbor benefit, which Justice Breyer admitted was gone.¹³⁸

Justice Breyer must have been aware that his proposal to extend the counting period until December 18 (the day the electoral college votes) was unrealistic. There were 170,000 ballots to visually inspect,¹³⁹ and it takes time to devise new counting standards that comply with state law, federal statutes, and the U.S. Constitution.¹⁴⁰ It would have taken even more time to hold an evidentiary hearing in Leon County if voters had filed suit and objected to the revised counting procedures.

To comply strictly with due process of law, the Florida Supreme Court would have been obligated to hear objections to its new counting standards, give the parties a hearing, and provide an opportunity to have an oral argument and file briefs.¹⁴¹ This process could have commenced as early as December 13. Is it

FOUNDING 85 (1992).

133. *Bush II*, 121 S. Ct. at 552 (Breyer, J., dissenting).

134. *See id.*

135. *Id.*

136. *Id.* at 533 (per curiam).

137. *See id.* at 552 (Breyer, J., dissenting).

138. *See id.*

139. *Id.* at 546. This number includes overvotes as well as undervotes, which the Court concluded should have been included in any recount that comports with the Equal Protection Clause. *See id.* at 532 (per curiam); *id.* at 545-46 (Souter, J., dissenting) (citing *Harris II*, 772 So. 2d 1243, 1264 n.26 (Fla. 2000) (Wells, C.J., dissenting)); *see also Harris II*, 772 So. 2d at 1270-71 (Harding, J., dissenting). The figure of 170,000 ballots was also found in a public record affording Justice Breyer the opportunity to take judicial notice of it. *See id.* at 1271 n.33.

140. *See Bush II*, 121 S. Ct. at 532.

141. *See id.*

likely that the counting could have begun before December 16?¹⁴² Assuming that counting could have begun on December 16 (a Saturday) and continued all day Sunday, it would have been virtually impossible to complete the counting of 170,000 ballots early enough on Monday, December 18 to give Gore time to obtain a certificate of ascertainment.¹⁴³ The Secretary of State might well have been ordered, as a party in *Harris II*, to sign the certificate, but the signature of the Governor is also required.¹⁴⁴ Certainly, the Governor would have been in no hurry to sign a certification of electors appointed by the Democratic Party, since he would have likely just signed the certification of electors appointed by the Florida legislature (on or about December 14).

In addition, there would have been numerous new lawsuits filed over the objections overruled or sustained during the manual recounts in sixty-seven counties. This inevitable new round of litigation naming several county canvassing boards as defendants should have ended any speculation by Justice Breyer that a timely slate of electors appointed by Democrats could have voted in the electoral college.¹⁴⁵ Moreover, even if a Democratic slate of electors had actually voted on December 18, Justice Breyer's proposal was still risky because the Electoral Count Act is drafted too imprecisely to solve the problem of choosing between the Florida legislature's slate, pledged to Bush, and a last minute slate pledged to Gore.¹⁴⁶ Justice Breyer's proposal also runs counter to the Court's plausible conclusion that the Florida legislature intended to abide, not by the December 18 deadline, but by the

142. The Miami Herald's manual recount of 10,000 undervotes in Miami-Dade County completed on (or about) February 26 required eighty hours of work. Amy Driscoll, *'Undervote' Review Holds Win for Bush, Independent Recount Held in South Florida*, FLA. TIMES-UNION (Jacksonville), Feb. 26, 2001, at A1, available at 2001 WL 7004484. Had they counted the overvotes, it probably would have taken twice as long.

143. See 3 U.S.C. § 6 (1994) (explaining the necessity and importance of certificates of final ascertainment and how they are transmitted to Congress from the states).

144. See FLA. STAT. ANN. §§ 102.111 to .121 (West 1982 & Cum. Supp. 2001).

The plan of Tom Feeney, Speaker of the Florida House of Representatives was to file the legislature's appointment of electors pledged to Bush with the Secretary of State, and to have a copy certified by her delivered to the Archives in Washington, D.C. under a second transmittal letter signed by Governor Jeb Bush. E-mail from Donald Rubottom, Aide and Legal Advisory to Tom Feeney, Speaker of the Florida House of Representatives, to Gary C. Leedes, Professor of Law, Emeritus, University of Richmond School of Law (Mar. 15, 2001, 13:54:10 EST) (on file with author).

145. Cf. *Bush II*, 121 S. Ct. at 552 (Breyer, J., dissenting) (stating that whether or not there was time to complete a manual recount by December 18 was a matter for the Florida courts to decide).

146. See Electoral Count Act, ch. 90, 24 Stat. 373 (1887).

December 12 deadline specified in 3 U.S.C. § 5.¹⁴⁷

There was little likelihood that both Houses of Congress would have rejected the electors certified by Florida's executive branch, as there were just too many Republicans in the House of Representatives.¹⁴⁸ As a result, the following requirement in 3 U.S.C. § 15 would have been triggered: "If the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted."¹⁴⁹

The irony implicit in the disagreement between Justice Breyer and the *Bush II* majority is that, under the most likely scenario, Bush would have become President even if Justice Breyer's proposal had been adopted. Thus, the Court sensibly avoided wasting time and effort by rejecting his proposal. Even if most of the Republicans voting to count Florida's twenty-five electoral votes were hoping that President Bush's future appointees to the Court would overrule *Roe v. Wade*,¹⁵⁰ any unethical motivation attributed to three of the Justices¹⁵¹ was unnecessary and, therefore, untenable. If Chief Justice Rehnquist and Justices Scalia and Thomas wanted the Court stacked with Justices intent on overruling *Roe*, they could have accomplished this goal by accepting Justice Breyer's proposal.¹⁵²

With reference to the focal points covered in this article, the majority's decision to stop the counting is defensible because it avoided (1) the risk, however slight, of throwing the election to the House, (2) the likely risk that the outcome of the presidential election would have been delayed until the joint session of Congress convened, and (3) the likelihood that the new President's legitimacy would have been tainted, perhaps beyond repair, if his election depended on the partisan votes of a Republican House of Representatives.

147. See *Bush II*, 121 S. Ct at 538.

148. See *supra* note 112.

149. 3 U.S.C. § 15 (1994).

150. 410 U.S. 113 (1973).

151. See *supra* text accompanying notes 40–41.

152. Justice Breyer also took the concurring Justices to task because they concluded that the Florida court impermissibly distorted state law. See *Bush II*, 121 S. Ct. at 553 (Breyer, J., dissenting) (citing *id.* at 535 (Rehnquist, C.J., concurring)). In order to evaluate the arguments of Justice Breyer and the concurring Justices, it is necessary to become immersed in the details of some very confusing state statutes.

II. PRAGMATIC CRISIS MANAGEMENT

A. *Prelude*

On November 8, 2000, Florida's Secretary of State,¹⁵³ Katherine Harris, informed the public that Bush had won the election in Florida by 1784 votes.¹⁵⁴ This margin of victory was so narrow that it required an automatic recount under Florida law.¹⁵⁵ The automatic recount narrowed Bush's lead to 300 votes.¹⁵⁶

That same day several citizens who intended to vote for Gore but unwittingly voted for Pat Buchanan filed voter disenfranchisement suits claiming that Palm Beach County's misleading "butterfly" ballot confused them.¹⁵⁷ They wanted the ballot design that bewildered them declared illegal, the election to be declared null and void, and a decree ordering a revote in Palm Beach County.¹⁵⁸ Similar lawsuits were also filed on November 9.¹⁵⁹ These plaintiffs were ultimately unsuccessful in the Florida Supreme Court,¹⁶⁰ and early bird plaintiffs in other lawsuits (including two filed in federal district courts) also did not prevail.¹⁶¹

153. The Secretary of State is an elected constitutional officer and a member of Florida's executive cabinet. *See* FLA. CONST. art IV, § 4(a). The Florida legislature designated the Secretary of State as the state's chief election officer. *See* FLA. STAT. ANN. § 15.13 (West 1982 & Cum. Supp. 2001). The Secretary is required to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." *Id.* § 97.012(1).

154. *See Bush II*, 121 S. Ct. at 527–28.

155. Florida law requires an automatic recount in all races where the final differential between two candidates is 0.5% or less. FLA. STAT. ANN. § 102.141(4) (West 1982 & Cum. Supp. 2001). The mandatory, automatic recount repeats the same tabulation procedures that were followed by sixty-seven Florida canvassing boards on November 7. *See id.*

156. *Touchston v. McDermott*, 234 F.3d 1133, 1135 (11th Cir. 2000) (Tjoflat, J., dissenting), *cert. denied*, 121 S. Ct. 749 (2000) (mem.).

157. Complaint for Declaratory Relief ¶ 15, *Fladell v. Palm Beach County Canvassing Bd.*, No. CL 00-10965 AB (Fla. Cir. Ct. filed Nov. 18, 2000); *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000) (per curiam).

158. *See* Complaint for Declaratory Relief ¶ 26, *Fladell v. Palm Beach County Canvassing Bd.*, No. CL 00-10965 AB (Fla. Cir. Ct. filed Nov. 18, 2000); *Fladell*, 772 So. 2d at 1242; *see also* Margaret Graham Tebo & Siobhan Morrissey, *A Week in the Hurricane*, A.B.A. J., Jan. 2001, at 45.

159. *E.g.*, *Complaint for Declaratory Judgment* ¶ 10, *Elkin v. LePore*, No. CL 00-109888 AE (Fla. Cir. Ct. filed Nov. 9, 2000).

160. *Fladell*, 772 So. 2d at 1242.

161. *See Siegel v. LePore*, 234 F.3d 1163, 1168 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 510 (2000) (mem.); *Touchston*, 234 F.3d at 1134.

The issues resolved in the state court cases¹⁶² are not germane to the very different issues eventually resolved by the Supreme Court in *Bush v. Palm Beach County Canvassing Board*¹⁶³ (*Bush I*) and *Bush II*. The plaintiffs in the two cases filed in federal court, however, based their claims for injunctive relief on the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.¹⁶⁴ The district courts denied all plaintiffs relief because they failed, inter alia, to establish irreparable harm.¹⁶⁵ On December 6, the Eleventh Circuit affirmed the decisions of the district courts without prejudice to the plaintiffs.¹⁶⁶ Two days later, the Florida Supreme Court decided *Harris II*, which was later found by a majority of the Supreme Court to have caused irreparable harm in violation of the Fourteenth Amendment.¹⁶⁷

The timeline pertinent to the issues resolved in *Bush II* began on November 9, when the Florida Democratic Executive Commit-

162. On December 12, the Florida Supreme Court refused to invalidate all or a portion of 25,000 absentee ballots from Seminole and Martin counties, and it affirmed the rulings of the two lower courts that had refused to disqualify any of the ballots. *See Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517, 519 (Fla. 2000) (per curiam); *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519, 523–24 (Fla. 2000) (per curiam).

The plaintiffs in *Taylor* alleged that many absentee ballots had been cast by voters who received help from Republican officials in filling out the ballot applications. *Taylor*, 773 So. 2d at 518. The trial court held “that ‘despite these irregularities . . . the sanctity of the ballot and the integrity of the election were not affected’ and that ‘[t]he election . . . was a full and fair expression of the will of the people.’” *Id.* at 519 (quoting *Taylor v. Martin County Canvassing Bd.*, No. CV 00-2850, 2000 WL 1793409, at *5 (Fla. Cir. Ct. Dec. 8, 2000)).

The plaintiff in *Jacobs* alleged irregularities, including the acceptance by the Supervisor of Elections of help from Republican Party representatives. *Jacobs*, 773 So. 2d at 521. The representatives had gained access to the County Supervisor’s office to add voter identification numbers to requests for absentee ballots that did not contain that information. *Id.* at 521. The lower court concluded that this assistance did not affect the integrity of the election, and that the irregularities did not violate applicable Florida law. *Id.* at 523. The Florida Supreme Court affirmed the conclusion of the trial court. *Id.* at 523–24.

163. 121 S. Ct. 471 (2000) (per curiam).

164. *See Siegel*, 234 F.3d at 1175; *Touchston*, 234 F.3d at 1137 (Tjoflat, J., dissenting).

165. *See Siegel*, 234 F.3d at 1170; *Touchston*, 234 F.3d at 1138 (Tjoflat, J., dissenting).

166. *Siegel*, 234 F.3d at 1179; *Touchston*, 234 F.3d at 1134.

167. *See Bush II*, 121 S. Ct. 525, 529–33 (2000) (per curiam). Indeed, on December 8, the Florida Supreme Court ordered a new round of manual recounts that fully ripened the Equal Protection and Due Process issues. *See Harris II*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam). Days before the Supreme Court decided *Bush II*, plaintiffs in *Siegel* and *Touchston* filed petitions for certiorari with the Court. *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 510 (2000) (mem.); *Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 749 (2000) (mem.).

tee requested manual recounts in four heavily Democratic counties—Broward, Miami-Dade, Palm Beach, and Volusia.¹⁶⁸ Sample recounts began shortly thereafter.¹⁶⁹

B. *The Law Applicable to Precertification Manual Recounts*

1. The Permissibility of Manual Recounts

Under Florida law, any candidate or voter has the right to file a protest of an election with a county canvassing board.¹⁷⁰ In response to a timely request for a manual recount, a county canvassing board may conduct a partial recount involving at least three precincts and at least one percent of the votes cast for the protesting candidate or political party.¹⁷¹ If this sampling shows an “error in vote tabulation,” section 102.166(5) of the Florida Election Code applies, which provides that the county canvassing board shall “[c]orrect the error and recount the remaining precincts with the vote tabulation system; [r]equest the Department of State to verify the tabulation software; or [m]anually recount all ballots.”¹⁷²

Although Florida’s Election Code describes the functions of officials responsible for conducting manual recounts, it does not contain any specific standard for evaluating voter intent.¹⁷³ Therefore, counties may adopt stricter or more lenient evaluative standards.

Section 102.166 is susceptible to two different and conflicting interpretations. First, it can be interpreted to authorize manual recounts only if a county’s vote counting system (machine and

168. *Harris III*, 772 So. 2d 1273, 1279 (Fla. 2000) (per curiam).

169. *See id.* The county canvassing boards of the four counties selected by Gore “determined that the [sample] manual recounts showed an ‘error in the vote tabulation which could affect the outcome of the election,’ and the Boards voted to conduct countywide manual recounts.” *Id.* (quoting FLA. STAT. ANN. § 102.166(5) (West Cum. Supp. 2000)).

The reason to conduct a manual recount, of course, is to determine whether a human being’s eyes might discern the voter’s intent from ballots that were unreadable by machines. For example, this may be due to a voter’s failure to mark or punch the ballots in a manner that the machine can read.

170. FLA. STAT. ANN. § 102.166(1) (West 1982 & Cum. Supp. 2001).

171. *See id.* § 102.166(4)(d) (West Cum. Supp. 2001).

172. *Id.* § 102.166(5)(a)–(c).

173. *See id.* § 102.166(7)(b).

software) does not function as intended. The Florida Division of Elections¹⁷⁴ and the Secretary of State endorsed this comparatively objective interpretation.¹⁷⁵

Florida's Secretary of State, Katherine Harris, argued that "[b]efore the decision of the Florida Supreme Court, the Division had interpreted the Election Code to allow for a manual recount *only* when there was some failure in the vote tabulation system."¹⁷⁶ The Division's interpretation, she argued, was based on the language of the statute, its legislative history, and the absence of any precedent indicating that manual recounts could be used to determine voter intent simply because the ballot was not marked or punched properly by the voter.¹⁷⁷ The county canvassing boards decided not to follow the Division of Election's advisory opinion,¹⁷⁸ and, instead, relied on conflicting advice obtained from Florida's Attorney General.¹⁷⁹

174. Florida's Division of Elections is a subagency of the Department of State and is subordinate to the Secretary of State and to the Election Canvassing Commission, which itself is a special purpose agency composed of the Governor, the Secretary of State, and the Director of the Division of Elections. *See id.* § 102.111(1)-(2) (West 1982 & Cum. Supp. 2000). The Florida legislature has charged the Division of Elections with the responsibility of responding to questions submitted by county canvassing boards concerning the conduct of elections. *Id.* § 106.23. These responses are binding advisory opinions. *Id.*

175. Op. Fla. Div. of Elections No. DE 00-11 (Nov. 13, 2000), *reprinted in* Joint Appendix at 52-53, *Bush I*, 121 S. Ct. 471 (2000) (No. 00-836); Brief on the Merits of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford as Members of the Florida Elections Canvassing Commission at 9, *Bush I*, 121 S. Ct. 471 (2000) (No. 00-836) [hereinafter Brief on the Merits of Respondents Katherine Harris et al.]

Judge Tjoflat stated that "[t]he Secretary's vote counting model . . . applied a fixed, objective standard for determining voter intent—voters were required to indicate their voting intent unequivocally by marking [or punching] their ballots in such a way that the vote tabulating machine, with its preprogrammed evaluation standard [can] read it." *Touchston v. McDermott*, 234 F.3d 1133, 1141 (11th Cir. 2000) (Tjoflat, J., dissenting). Judge Tjoflat went on to state that "[t]he machine model thus relies on an objective tabulating machine that admits of no discretion to count votes—if a vote is properly cast according to instructions given to the voter, the machine will count it." *Id.* Finally, he concluded that "[t]he Secretary of State, pursuant to her authority under section 97.012(1), interpreted the statutory system as the machine model." *Id.* at 1142.

176. Brief on the Merits of Respondents Katherine Harris et al. at 9, *Bush I* (No. 00-836).

177. *See id.*

178. *See Harris I*, 772 So. 2d 1220, 1225 (Fla. 2000) (per curiam).

179. *See* Brief on the Merits of Respondents Katherine Harris et al. at 10 n.6, *Bush I* (No. 00-836).

The Florida Attorney General is an independently elected, coequal cabinet officer who is the chief legal officer of the state and who may issue advisory opinions. *See* FLA. STAT. ANN. § 16.01(3) (West 1998). "Opinions of the Attorney General unlike those of the Divi-

The Division of Elections' binding advisory opinion stated:

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense¹⁸⁰ or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched card ballot is not a [sic] "error in the vote tabulation."¹⁸¹

In other words, the failure of voters to execute their ballots in accordance with the instructions supplied to them by the counties was not a basis for conducting a precertification manual recount.¹⁸²

sion [of Elections], are not binding on the party seeking the opinion." Brief on the Merits of Respondents Katherine Harris et al. at 5, *Bush I* (No. 00-836). Florida's Attorney General does not usually issue opinions on election matters. *See id.* ("[I]t is the policy of this office to refer all questions concerning the Elections Code . . . to the Division [of Elections] for its response.") (citing Fla. Opp. Att'y Gen. No. 86-55 (1986)). It is also doubtful that the Attorney General has jurisdiction in such matters. *See id.*

180. In *Touchston*, Judge Tjoflat explained:

In counties that use so-called marksense technology, voters record their votes by using a pen or a pencil to fill in geometric figures (circles, ovals, squares, or rectangles) next to candidates for which they wish to vote. Marksense vote tabulating machines use optical scanning technology to detect the darkened figures and count the votes accordingly.

Touchston, 234 F.3d at 1140 n.16 (Tjoflat, J., dissenting).

181. Op. Fla. Div. of Elections No. DE 00-11 (Nov. 13, 2000), reprinted in Joint Appendix at 53, *Bush I* (No. 00-836). The Division issued its advisory opinion in response to a request from the Palm Beach Board. *Id.* at 52.

182. *See* Op. Fla. Div. of Elections No. DE 00-12 (Nov. 13, 2000), reprinted in Joint Appendix at 55, *Bush I* (No. 00-836). The opinion of the Florida Division of Elections guided the Secretary of State, the official authorized to issue binding instructions concerning the implementation of the election code. *See* FLA. STAT. ANN. §§ 97.012, 106.23 (West 1982 & Cum. Supp. 2001). She rejected the unprecedented interpretation of the Attorney General, who lacked authority to countermand her interpretations. *See Harris I*, 772 So. 2d at 1226. According to the Secretary, a ballot improperly cast is not a legal vote. *See id.* at 1226 n.5.

Each county and precinct within the county on and before election day must provide instructions on how to properly cast a vote, and each voting booth provided a sample ballot. *See* FLA. STAT. ANN. § 101.46 (West 1982 & Cum. Supp. 2001). For example, Palm Beach County, which used punch card ballots, provided instructions that stated in bold capital letters: "After voting, check your ballot card to be sure your voting selections are clearly and cleanly punched and that there are no chips left hanging on the back of the card." *Bush II*, 121 S. Ct. 525, 537 (2000) (Rehnquist, C.J., concurring); *Touchston*, 234 F.3d at 1141 n.19 (Tjoflat, J., dissenting). In Broward County, which also uses punch card technology, the instructions stated: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice." *Touchston*, 234 F.3d at 1141 n.19 (Tjoflat, J., dissenting).

Florida's Attorney General disagreed.¹⁸³ Under his view, a vote was valid so long as a visual inspection of the punch card demonstrated the voter's intent in any ascertainable manner.¹⁸⁴ Therefore, manual recounts were warranted even if voters improperly executed their ballots.

Like the Attorney General, the Florida Supreme Court rejected the Division of Election's interpretation of the law stating that the Division's interpretation was "contrary to . . . the plain meaning of section 102.166(5)."¹⁸⁵ Arguably, this startling conclusion was a retroactive change in state law because Florida courts are expected to "defer to an agency's interpretation of statutes and rules the agency is charged with implementing and enforcing."¹⁸⁶ Whether the court impermissibly changed state law retroactively is the question that Congress would have had to address and answer if it had been required to decide whether to reject Florida's twenty-five electoral votes.¹⁸⁷ Indeed, if Congress had concluded that the Florida court retroactively changed state law as it existed on election day, Florida's certified electors would have been vulnerable to objections made by Democrats because they would have lost their safe harbor immunity.¹⁸⁸

183. Fla. Op. Att'y. Gen. No. 00-65 (Nov. 14, 2000), available at 2000 WL 1707267, at *3 ("[T]he term 'error in voter tabulation' encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts . . .").

The Attorney General preferred the model backed by the Florida Democratic Executive Committee that also turned out to be the model endorsed by the Florida Supreme Court on November 21. *Harris I*, 772 So. 2d at 1229-30. The vote counting model that emerged from *Harris I* required the canvassing boards to count votes that were cast improperly; thereby allowing hand-counters in some counties to conclude that an indented or dimpled ballot was a legal vote, even though the voting machines were not programmed to count these erroneously punched ballots. See *id.* at 1229. Gore selected the counties before the Supreme Court of Florida got involved.

184. See Fla. Op. Att'y. Gen. No. 00-65 (Nov. 14, 2000), available at 2000 WL 1707267, at *2. In *Touchston*, Judge Tjoflat noted in his dissent that a letter, dated November 14, from Attorney General Robert Butterworth to Palm Beach Board Member Charles Burton stated that "the Division's opinion is wrong in several respects," adding that "where a ballot is so marked as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated." *Touchston*, 234 F.3d at 147-48 (Tjoflat, J., dissenting).

185. *Harris I*, 772 So. 2d at 1228.

186. *Id.* In the past, the Florida Supreme Court gave "deference to decisions made by executive officials charged with implementing Florida's election laws." *Harris II*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting) (citing *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840 (Fla. 1993)).

187. See 3 U.S.C. § 5 (1994).

188. See *id.*

Bush's allegation that the court changed the law retroactively was corroborated by several comments made in *Palm Beach County Canvassing Board v. Harris*¹⁸⁹ (*Harris I*). For example, the court "commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be [the court's] guiding principle in election cases."¹⁹⁰ Moreover, the court stressed that "[t]he abiding principle governing all election law in Florida is set forth in . . . [the] Florida Constitution."¹⁹¹ The court noted that Article I, Section 1 of the Florida Constitution states that "[a]ll political power is inherent in the people."¹⁹² In the concluding section of its opinion, the court emphasized that an equitable remedy was required to correct the harm caused by the conflicting advice given by the Division of Elections and the Attorney General.¹⁹³

The court fashioned an equitable remedy that gave counties more time to file amended certifications.¹⁹⁴ The court's new deadline was November 26, at 5:00 p.m. (twelve days after the deadline indicated in the relevant Florida statutes).¹⁹⁵ Thus, the court relied on a combination of its equitable powers, the Florida Constitution, and its case law—case law that did not deal with federal elections.¹⁹⁶ This eclectic selection of authority strengthened Bush's claim that the court's retroactive tampering with election laws jeopardized the safe harbor that the Florida legislature wished to preserve.¹⁹⁷ Attorneys for Bush took advantage of the fact that the court never explicitly cited 3 U.S.C. § 5 as a provision that circumscribed its discretion to determine what was a reasonable extension of the time specified in the Florida statutes.¹⁹⁸

189. 772 So. 2d 1220 (Fla. 2000) (per curiam).

190. *Id.* at 1227. The Florida Supreme Court relied on precedent in state and county elections, but there was no case law supporting these guiding principles in elections for federal officials.

191. *Id.* at 1230.

192. *Id.* (quoting FLA. CONST. art. I, § 1).

193. *Id.* at 1240.

194. *Id.*

195. *Id.*

196. *Id.* at 1239–40.

197. See Brief for Petitioners at 35–36, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949); cf. *Bush II*, 121 S. Ct. at 538 (Rehnquist, C.J., concurring) ("Surely when the Florida legislature empowered the courts of the State to grant 'appropriate' relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5.").

198. See *infra* notes 199–201, 216 and accompanying text (discussing the Florida

The court cited 3 U.S.C. § 5 only once in a footnote that referred generically to 3 U.S.C. §§ 1-10.¹⁹⁹ The footnote, inserted without comment, supposedly clarified the statement that the Secretary may ignore late returns if they would "preclud[e] Florida voters from participating fully in the federal electoral process."²⁰⁰ When one considers, this *mélange* of equity *plus* guiding, abiding, and novel principles *minus* adequate references to federal law, the court's vacatur is not shocking.²⁰¹

The remand in *Bush I* directed the court to clarify precisely upon what law it was relying, and to explain the extent to which it considered the safe harbor privilege afforded by 3 U.S.C. § 5.²⁰² Simply put, the Court looked at the Florida Supreme Court's opinion and said: "Your decision is vacated! Please read Article II of the U.S. Constitution and 3 U.S.C. § 5 more carefully."

The Supreme Court informed the Florida court that the state laws it had so generously interpreted to discern the will of the people²⁰³ were enacted by a legislature that "[was] *not* acting

court's analysis of the relevant statutory provisions).

199. *Harris I*, 772 So. 2d at 1237 n.55.

200. *Id.* at 1237.

201. The court did not rely on Article II of the Constitution, but it did rely on *Roudebush v. Harke*, 405 U.S. 15 (1972), a case that construed Article I, Section 4. *See Harris I*, 772 So. 2d at 1238. Article I, Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations" U.S. CONST. art. I, § 4, cl. 1. The Court, in *Roudebush*, held that Indiana's law authorizing recounts in an election of a U.S. Senator, which delays the Secretary of State's certification, did not infringe upon the power of the U.S. Senate to be the judge of the elections, returns, and qualifications of its own members. *Roudebush*, 405 U.S. at 25-26. This holding indicates, rather precisely, what was wrong with the Florida court's reliance on Article I, Section 4. Florida's legislature, unlike Indiana's, did not want Congress to be the judge of Florida's electors; it wished to have the protection afforded by 3 U.S.C. § 5. Brief for Petitioners at 35, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949). The electors' immunity from congressional scrutiny disappeared when the state judiciary changed state law concerning recounts after the election. For that reason, Justice Stevens's dissent in *Bush II* misses the point. Justice Stevens could not see why Article II, Section 1 should be interpreted any differently than Article I, Section 4. *See Bush II*, 121 S. Ct. at 539 n.1 (Stevens, J., dissenting). The reason, assuming *arguendo* that Article II is being interpreted differently, is 3 U.S.C. § 5, which gives the state legislature a privilege and immunity not granted by Congress in Article I, Section 4 cases.

Moreover, there was no dispute about the meaning of state law in *Roudebush*. The state legislature itself, not the state judiciary, provided that its recount procedure superseded the deadline for certification. *See* Brief for Petitioners at 25 n.22, *Bush II* (No. 00-949).

202. *Bush I*, 121 S. Ct. 471, 475 (2000) (per curiam).

203. In a striking admission, the Florida Supreme Court stated that "[b]y refusing to

solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Article II, § 1, cl. 2, of the United States Constitution.”²⁰⁴ In view of this reminder, the Florida court was put on notice that the statutory right of Florida citizens to vote in presidential elections is revocable by the legislature. Moreover, the court was aware that 3 U.S.C. § 2 secures for the legislature the power to appoint its own electors when courts place those certified by the executive branch of government in jeopardy.²⁰⁵

2. The Florida Supreme Court Extended the Deadline for Filing Amended Voting Returns Containing the Additional Votes Produced by Manual Recounts

Appeals by Palm Beach County and Gore to the Florida Supreme Court presented a difficult question: must the Secretary of State and the Elections Canvassing Commission (“Commission”)²⁰⁶ accept the results of manual recounts received after November 14—the deadline set forth in sections 102.111 and 102.112 of the Florida Statutes?²⁰⁷ Section 102.111(1) provides in part:

The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. . . . If the county returns are not received by the Department of

recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.” *Harris I*, 772 So. 2d at 1228 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)).

204. *Bush I*, 121 S. Ct. at 474 (emphasis added).

205. See 3 U.S.C. § 2 (1994). For the text of 3 U.S.C. § 2, see *supra* note 68.

In *Bush I*, the Supreme Court pointed out that “[Art. II, § 1, cl. 2] does not read that the people or the citizens shall appoint [electors], but that ‘each state shall’ . . . ‘in such manner as the legislature thereof may direct’” *Bush I*, 121 S. Ct. at 474 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)) (first alteration in original).

206. The functions of the Florida Elections Canvassing Commission, whose members include the Governor (who recused himself because his brother was a candidate for President), the Secretary of State, and the Director of the Division of Elections, are to certify the results of an election and to declare the winner. FLA. STAT. ANN. § 102.111(1) (West Cum. Supp. 2001); see also *Harris I*, 772 So. 2d at 1233 (quoting FLA. STAT. ANN. § 102.111 (West Cum. Supp. 2000)).

207. *Harris I*, 772 So. 2d at 1228. The Florida court extended the deadline to November 26. *Id.* at 1240. The court reached this conclusion although neither section 102.111 nor section 102.112 of the Florida Statutes appears to require the Secretary and the Commission to extend the deadline. See FLA. STAT. ANN. §§ 102.111, 102.112 (West Cum. Supp. 2001).

State by 5 p.m. of the seventh day following an election, all missing counties *shall* be ignored, and the results shown by the returns on file shall be certified.²⁰⁸

Section 102.112, entitled "Deadline for submission of county returns to the Department of State; penalties," directs the county canvassing boards to file their returns for the election of a federal or state officer with the Department of State immediately after the certification of election returns.²⁰⁹ It also provides that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election If the returns are not received by the department by the time specified, such returns *may* be ignored and the results on file at that time *may* be certified by the department."²¹⁰

The Florida Supreme Court discerned a conflict, noting that "[w]hereas section 102.111 is mandatory, section 102.112 is permissive."²¹¹ This dichotomy was dubbed by the court as "The 'Shall' and 'May' Conflict."²¹² After seeking guidance from other sections of the Election Code and the Florida Constitution, the court held that the Secretary lacked the authority to reject the late returns.²¹³ The court pointed out that section 102.112(2) imposes penalties (fines) on canvassing board members who "engag[e] in dilatory conduct . . . that results in the late certification of a county's returns."²¹⁴ The court inferred that the statutory penalty provided the only deterrent intended by the legislature, and that the Secretary's decision to ignore the late certification "punishe[d] not the Board members themselves but rather the county's electors [meaning voters], for it in effect disenfranchise[d] them."²¹⁵

The court discerned in the penumbra of the two statutes the following unstated rule: The Secretary has discretion to ignore late returns if, and only if, by doing so she either (1) precludes persons from contesting the certification when she finds that a canvassing board's late filing shortens the contest period, or (2)

208. FLA. STAT. ANN. § 102.111(1) (West Cum. Supp. 2001) (emphasis added).

209. *Id.* § 102.112(1).

210. *Id.* (emphasis added).

211. *Harris I*, 772 So. 2d at 1233-34.

212. *Id.* at 1233.

213. *Id.* at 1236-37.

214. *Id.* at 1237.

215. *Id.*

when such delay precludes voters from “participating fully in the electoral process.”²¹⁶ In short, the court inventively construed one statute stating that the Secretary *shall* ignore late returns and another indicating she *may* ignore late returns into the commandment, “Thou Shalt Not Ignore Late Returns (until November 26).”

The court accomplished this miracle mutation by bringing into play sections 101.5614(5) and 101.5614(6). The court stated:

Sections 101.5614(5) and (6) also support the proposition that the “error in vote tabulation” encompasses more than a mere determination of whether the vote tabulation is functioning. Section 101.5614(5) provides that “[n]o 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.” Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together these sections suggest that “error in the vote tabulation” includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.²¹⁷

The court’s interpretation of an “error in vote tabulation” was unprecedented, and cannot be harmonized with several other provisions of the Election Code. For example, the term “tabulation” is used in the context of equipment in Section 101.5603.²¹⁸ Moreover, section 101.5606(3) states that “automatic tabulating equipment will be set to reject all votes” under certain circumstances.²¹⁹ Furthermore, section 101.5607(1)(b) states that “the supervisor of elections [in each county] shall send by certified mail to the Department of State a copy of the tabulation program which was used in the logic and accuracy testing.”²²⁰ Another relevant section of the Election Code, section 101.5612, states that “the supervisor of elections shall have the automatic tabulating equipment tested to ascertain that the equipment will correctly tabulate the votes.”²²¹ These provisions all support the Division of Elections’ advisory opinion, which adopted an objective

216. *Id.* The opinion cites obliquely 3 U.S.C. §§ 1–10. *Id.* at 1237 n.55.

217. *Id.* at 1229.

218. FLA. STAT. ANN. § 101.5603 (West Cum. Supp. 2001) (defining automatic tabulating equipment).

219. *Id.* § 101.5606(3).

220. *Id.* § 101.5607(1)(b).

221. *Id.* § 101.5612(1).

interpretation (voting machine-equipment-software).²²²

The court relied on section 102.166 to resolve the conflict between section 102.111 (the “shall” section of the Election Code) and section 102.112 (the “may” section of the Election Code).²²³ This section provides, *inter alia*, “that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department [of State] and, if the initial recount indicates a significant error, the Board ‘shall’ conduct a countywide manual recount in certain cases.”²²⁴ Relying on this language, the court reasoned that if a manual recount was filed on the sixth day following the election (in this case November 13), there would not be enough time to complete the recount if returns were due only one day after the request (November 14).²²⁵ A court demanding such a quick turnaround would be rendering a nonsensical interpretation of section 102.166. This is why the Division of Elections and the Florida Secretary of State concluded that the applicable legislation requires an objective model, since an equipment malfunction could probably be fixed in one day, whereas a recount may take more than a week to complete.²²⁶

The irony of Gore’s Pyrrhic victory in the Florida Supreme Court is that his success in lengthening the protest phase shortened the contest phase, a mistake that may have cost him the election. Gore would have been better off if the court had not heeded his plea for more time. Had it not, the contest period could have begun on November 15, and there may have been time to complete the manual recounts.

The court could also have helped Gore by extending the deadline from November 14 to November 18, instead of extending it to November 26. Federal law delayed certification until November 18, the date absentee ballots and late returns were submitted by the canvassing boards.²²⁷ Inspired by some unknown equitable

222. See *supra* notes 175–82 and accompanying text.

223. *Harris I*, 772 So. 2d at 1228–29.

224. *Id.* at 1235 (paraphrasing FLA. STAT. ANN. § 102.166 (West Cum. Supp. 2000)).

225. See *id.*

226. Cf. Brief on the Merits of Respondents Katherine Harris et al. at 13 n.7, *Bush I*, 121 S. Ct. 471 (2000) (No. 00-836) (“By expanding the rights created by the legislature in this manner, the court created the very conflict it sought to resolve—the fact that manual recounts cannot always be completed in seven days.”).

227. The Florida Supreme Court referred to a federal consent decree, federal law, a sec-

principle, the court, instead, selected November 26. The Supreme Court was confused by the court's explanation and remanded the case back to the state court for a clarification of its reasoning.²²⁸

C. *The Postcertification Contest Initiated by Gore*

On November 26, pursuant to *Harris I*, the Secretary of State and the Election Canvassing Commission certified the amended returns and declared Bush as the winner in Florida.²²⁹ On November 27, Gore filed a complaint contesting the certification.²³⁰ Time was Gore's primary enemy, as two weeks later the safe harbor privilege would expire.

There are many legally significant, as well as time-consuming, differences between a postelection contest and a precertification protest. During the protest period, canvassing boards respond to requests for manual recounts informally, and there are no trial type procedures.²³¹ A contest, however, is litigation. An evidentiary hearing is held immediately if the complaint sets forth the grounds specified in section 102.168(3)(a)–(e).²³² If the plaintiff-contestant successfully carries his burden of proof, the circuit court judge is empowered to “fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.”²³³ In a contest, the circuit court judge takes into account the impact of any perceived irregularities on the statewide results.²³⁴ Protests, in contrast, are limited to voting discrepancies occurring in the county where a manual recount is requested.²³⁵ No evidence is required from the party requesting a

tion of the Election Code, and an administrative regulation requiring the Secretary to delay certification of official results until the counties have received absentee ballots from citizens overseas, which in this case made the official certification date November 18. *Harris I*, 772 So. 2d at 1235 n.47 (citing FLA. ADMIN. CODE ANN. r. 1S-2.013 (1998)).

228. *Bush I*, 121 S. Ct. 471, 474–75 (2000) (per curiam).

229. *Harris II*, 772 So. 2d 1243, 1247 (Fla. 2000) (per curiam).

230. Complaint to Contest Election, *Gore v. Harris* (Fla. Cir. Ct. Dec. 4, 2000) (No. 00-2808).

231. See FLA. STAT. ANN. § 102.166 (West Cum. Supp. 2001).

232. See *id.* § 102.168(7).

233. *Id.* § 102.168(8).

234. See *id.* § 102.168.

235. See *id.* § 102.166(1).

manual recount during the protest period.²³⁶ On the other hand, a petitioner contesting an election must produce evidence proving: (a) misconduct, fraud, or corruption, (b) ineligibility of the winning candidate, (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, (d) bribery of an elector, election official or canvassing board member, or (e) any other allegation which would show that the contestant is entitled to the office.²³⁷ Gore attempted to prove (c) rather than (a), (b), (d), or (e).²³⁸

D. Gore's Allegations

Gore and Joseph I. Lieberman alleged that the Miami-Dade County Canvassing Board ("Miami-Dade Board") abused its discretion by refusing to complete and certify the results of the manual recount begun during the protest period on November 19.²³⁹ Certifying the results of the partial recount would have yielded Gore a net gain of 168 votes.²⁴⁰ Gore also sought injunctive relief requiring the Miami-Dade Board to start counting the 9000 uncounted undervotes.²⁴¹

Gore sought similar relief against the Palm Beach County Canvassing Board ("Palm Beach Board").²⁴² Its partial recount, never certified, would have given Gore a 215 vote net gain.²⁴³ In addition, there were 3300 ballots actually counted in Palm Beach County that were not included in its certification because the ballots were indented or dimpled and did not comply with the standard then applicable in the county.²⁴⁴ Gore claimed that the

236. See *id.* § 102.166(4).

237. *Id.* § 102.168(3)(a)–(e).

238. *Harris II*, 772 So. 2d at 1247.

239. *Id.* at 1248.

240. *Id.* at 1258.

241. *Id.* When the Miami-Dade Board stopped counting, 9000 of the 10,750 undervotes remained unreviewed. *Id.*

242. *Id.* at 1248.

243. *Id.* at 1260; Complaint to Contest Election ¶ 3(a), *Gore v. Harris* (Fla. Cir. Ct. Dec. 4, 2000) (No. 00-2808).

244. *Harris II*, 772 So. 2d at 1248; see also Complaint to Contest Election ¶ 81, *Gore v. Harris* (Fla. Cir. Ct. Dec. 4, 2000) (No. 00-2808). The Complaint alleged that:

The Palm Beach Board failed to count numerous votes cast for presidential candidates For example, the Palm Beach Board failed to count numerous votes cast by voters whose ballots contained an incompletely punched or indented chad in the first column. These ballots have been segregated and preserved for judicial review.

Id.

Palm Beach Board abused its discretion by violating a court order requiring those ballots to be examined under a more forgiving standard.²⁴⁵

The Nassau County Canvassing Board ("Nassau Board") allegedly abused its discretion by certifying its original machine count, even though the automatic machine recount yielded fifty-one more votes for Gore.²⁴⁶ Gore sought an order compelling the Nassau Board to amend its certification.²⁴⁷

E. Gore Loses Ground in the Lower Court

Gore did not prevail in the Leon County Circuit Court.²⁴⁸ Judge N. Sanders Sauls found "that the Plaintiff failed to carry the requisite burden of proof"²⁴⁹ According to Judge Sauls, the plaintiff's burden of proof in a contest was not merely to produce evidence that demonstrates a reasonable possibility that election returns could have been altered.²⁵⁰ Instead, the evidence must demonstrate a reasonable probability that the election returns would have been changed but for the alleged irregularities and inaccuracies.²⁵¹ Judge Sauls deemed the plaintiff's credible and substantial evidence, statistical and otherwise, totally inadequate.²⁵²

Judge Sauls concluded that discretionary decisions of the canvassing boards are not subject to de novo review by the circuit courts.²⁵³ In Judge Sauls's view, "[t]he local boards have been given broad discretion which no court may overrule, absent a clear abuse of discretion."²⁵⁴ More specifically, Judge Sauls concluded that neither the Miami-Dade Board nor the Palm Beach Board abused its discretion by refusing to amend its certifications

245. See *Harris II*, 772 So. 2d at 1259.

246. See *id.* at 1248; Complaint to Contest Election ¶ 3(b), *Gore v. Harris* (Fla. Cir. Ct. Dec. 4, 2000) (No. 00-2808).

247. *Harris II*, 772 So. 2d at 1248.

248. *Id.* at 1243.

249. Transcript of Oral Ruling at 0013, *Gore v. Harris* (Fla. Cir. Ct. Dec. 3, 2000) (No. 00-2808) (on file with author).

250. *Id.* at 0009.

251. *Id.*

252. *Id.*

253. *Id.* at 0010.

254. *Id.*

to include partial and late returns.²⁵⁵ Judge Sauls stated:

[T]here is no authority under Florida law or [sic] certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commission, nor any authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election.²⁵⁶

Judge Sauls found that "although the record show[ed] voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in [Miami-]Dade and Palm Beach Counties . . . these . . . problems cannot support . . . any recounting . . . absent the establishment of a reasonable probability that the statewide election would be different"²⁵⁷ Although plaintiffs claimed that the Palm Beach Board violated a court ruling when it did not count dimpled and indented ballots as legal votes, Judge Sauls ruled that the Board acted in full compliance with the circuit court order during its manual recount.²⁵⁸

Judge Sauls volunteered some words of caution to the court that would be reviewing his decision, stating that the counting standard proposed by Gore was "perhaps contrary to Title III, Section (5) of the United States Code."²⁵⁹ He reasoned that the standard proposed by Gore would create a "two-tier situation" that would treat voters differently depending on where they lived.²⁶⁰ According to Judge Sauls, a two-tier system of counting votes (one that allowed counties selected by Gore to apply a more liberal standard than other counties) placed the state's electors in jeopardy.²⁶¹ Immediately after the circuit court's ruling was announced, David Boies, Gore's attorney, said: "They won. We lost. We're appealing. This is going to be resolved by the Florida Supreme Court promptly, and what I think is that that will be the end of the matter."²⁶²

255. *Id.* at 0010.

256. *Id.* at 0009-10.

257. *Id.* at 0010.

258. *Id.* at 0011.

259. *Id.*

260. *Id.*

261. *Id.* at 0012 (reasoning that under the United States and Florida Constitutions, Florida's electors could potentially be disqualified, thereby barring the state from the electoral college's election of the President).

262. Robert B. Schmitt et al., *No Contest: State Court Deals Blow to Al Gore's Hopes for*

F. *The Florida Supreme Court's Decision in Harris II*

1. Summary of the Florida Supreme Court's Remedy to Alleviate the Canvassing Board's Abuse of Discretion

According to conventional wisdom, Judge Sauls made it virtually impossible for the Florida Supreme Court to overrule his decision. To do so, the court would seemingly have to reverse its prior position that "[t]he decision whether to conduct a manual recount is vested in the sound discretion of the [Canvassing] Board[s]."²⁶³ The court would also have to conclude that Judge Sauls's findings of fact were clearly erroneous and that he abused his discretion. Moreover, the issues posed by 3 U.S.C. § 5 appeared difficult to evade. Finally, as Judge Sauls observed, Equal Protection Clause problems flawed the two-tier system of manual recounts authorized by the court in *Harris I*.²⁶⁴

The Florida Supreme Court affirmed the trial court's ruling that denied the relief Gore sought from the Nassau Board.²⁶⁵ It also upheld the trial court's refusal to compel the Palm Beach Board to review and recount 3300 votes that were not counted because the punch card was merely indented.²⁶⁶

Nonetheless, Gore obtained what he needed to keep hope alive. By a four-to-three vote, the court instructed a circuit court judge to (1) begin an immediate manual recount of 9000 plus Miami-Dade undervotes, (2) order a manual recount of undervotes in any county where such recounts had not yet occurred, (3) devise procedures to facilitate the counting teams' efforts to ascertain the clear intent of the voter, and (4) enter orders to add to the total statewide certifications additional legal votes for Gore from Palm Beach County "and the 168 additional legal votes from Miami-Dade County."²⁶⁷

the White House, WALL ST. J., Dec. 5, 2000, at A14.

263. *Harris I*, 772 So. 2d 1220, 1229 (Fla. 2000) (per curiam).

264. *See supra* text accompanying note 261.

265. *Harris II*, 772 So. 2d 1243, 1248 (Fla. 2000) (per curiam).

266. *Id.* The Supreme Court did not discuss the Florida Supreme Court's disposition of these matters. *See Bush II*, 121 S. Ct. 525, 527 (2000) (per curiam).

267. *Harris II*, 772 So. 2d at 1262. The Florida court required the canvassing boards to use the clear intent of the voter standard as set forth in section 101.5614(5) of the Florida Statutes to determine whether a ballot is a legal vote. *Id.*

Gore's first words to his aides were: "This is great."²⁶⁸ On the other side of the fence, the stunned Chief of Staff for the Republican National Committee stated: "We're moving out of a political crisis into a constitutional crisis, with very likely competing slates of electors."²⁶⁹

2. The Future According to the Morning Newspapers

The day after the Florida Supreme Court revived Gore's hopes the front page of the *New York Times*, in five columns, explained the possible consequences of the decision.²⁷⁰ The Florida legislature would, on or about December 13, appoint a slate of Bush electors due to its apprehension that the House of Representatives and Senate would reject Florida's previously certified slate of electors that would probably not be protected by the safe harbor privilege.²⁷¹ If the House voted along party lines, a narrow majority would count the votes of the Bush electors.²⁷² If the Senate voted along party lines, there would be a fifty-fifty tie vote that would place Gore in the position to cast the deciding vote.²⁷³ If neither slate of Florida's electors was counted, Congress would decide whether Gore's 267 electors (three less than a majority if the votes of all 538 electors were counted) was a majority. If 270 electoral votes were required by Congress, the House of Representatives would elect the next President.²⁷⁴ Each state delegation would cast one vote.²⁷⁵ In the House of Representatives, twenty-eight state delegations were Republican dominated; thus, a party line vote would elect Bush.²⁷⁶

If these media projections had been accurate, a Bush presidency would have been stigmatized as "stolen" because Gore not

268. Katharine Q. Seelye, *A Miraculous Revival Brings Elation but No Rest for Gore*, N.Y. TIMES, Dec. 9, 2000, at A1.

269. Richard L. Berke, *Stunned Republicans Vow Fight to End*, N.Y. TIMES, Dec. 9, 2000, at A1.

270. See *What if Florida Winds Up With Two Sets of Electors?*, N.Y. TIMES, Dec. 9, 2000, at A1.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

only had more electoral votes, but he arguably won the popular vote in Florida. The immediate future looked bleak to Chief Justice Wells, whose dissent in *Harris II* stated that “the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country. . . .”²⁷⁷ The crisis was averted. On January 1, 2001, Chief Justice Rehnquist, in his annual report to Congress stated that “[d]espite the seesaw aftermath of the Presidential election, we are once again witnessing an orderly transition of power from one Presidential administration to another.”²⁷⁸

The following subsections of this article examine critically the Florida Supreme Court’s decision. Subsection 3 addresses the state court’s failure to include overvotes in the statewide recount. Subsection 4 argues that the Florida Supreme Court misconstrued and misapplied section 101.5614(5) and section 102.168 of the Florida Statutes.²⁷⁹

3. The Florida Supreme Court’s Order of a Statewide Recount of Undervotes

The Florida Supreme Court directed the Leon County Circuit Court to order appropriate officials “in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located.”²⁸⁰ The court’s justification for this directive, at best, contains inconsistent principles. According to the court, it was “absolutely essential” under the statutory scheme established by the Florida Legislature to count every vote unless it was “impossible to

277. *Harris II*, 772 So. 2d at 1263 (Wells, C.J., dissenting).

278. 2000 Year-End Report of the Federal Judiciary, available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html> (last modified Jan. 2, 2001).

279. See *Harris II*, 772 So. 2d at 1262 (discussing these statutory sections).

280. *Id.* Noting that pursuant to section 102.168(5) of the Florida Statutes, the circuit court is vested with broad discretion to “provide any relief appropriate under the circumstances,” the Florida Supreme Court delegated to the circuit court the duty of filling in the details and administering the manual recounts. *Id.* (quoting FLA. STAT. ANN. § 102.168(8) (West Cum. Supp. 2000)).

determine the elector's [meaning voter's] choice."²⁸¹ The majority's order, however, did not direct the canvassing boards to count every vote.²⁸²

The court relied, in part, on section 102.168, which lists the grounds providing a legal basis for a cause of action (that is, a contest),²⁸³ and cited specifically subsections 101.5614(5)–(6) which articulate a clear indication of the voter intent standard.²⁸⁴ However, the supreme court did not direct the circuit court to order a statewide recount of overvotes, despite the fact that as many as 110,000 overvotes were never counted.²⁸⁵

The court's refusal to recount overvotes is inconsistent with its principle that the "outcome of elections [should] be determined by the will of the voters."²⁸⁶ Indeed, the majority's exclusion of approximately 110,000 overvotes is inexplicable in view of its frequently emphasized "concern that not every citizen's vote was counted" by the voting machines.²⁸⁷

The court never bothered to explain its under-inclusive distinction. Instead, the majority completely ignored Chief Justice Wells's pertinent question: "How about the 'over-votes?'"²⁸⁸ Chief Justice Wells's critique of the majority opinion was provocative enough to deserve a response. The Chief Justice wrote:

Section 101.5614(6) provides that a ballot should not be counted "[i]f an elector marks more names than there are persons to be elected to an office," meaning the voter voted for more than one person as president. The underlying premise of the majority's rationale is that in such a close race a manual review of the ballots rejected by the machines is necessary to ensure that all legal votes cast are counted. The majority, however, ignores the over-votes. Could it be said, without reviewing the over-votes, that the machine did not err in not counting them?

281. See *id.* at 1253–54 (quoting FLA. STAT. ANN. §§ 102.5614(5)–(6), 102.166(7) (West Cum. Supp. 2000)).

282. See *id.* at 1262 (discussing the counting of undervotes).

283. *Id.* at 1253. Section 102.168(3)(c) provides, in part, that a ground for a contest includes the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." FLA. STAT. ANN. § 102.168(3)(c) (West Cum. Supp. 2001).

284. *Harris II*, 772 So. 2d at 1254.

285. *Bush II*, 121 S. Ct. 525, 531 (2000) (per curiam).

286. *Harris II*, 772 So. 2d at 1253.

287. *Id.*

288. *Id.* at 1264 n.26 (Wells, C.J., dissenting).

It seems patently erroneous to me to assume that the vote counting machine can err when reading under-votes but not err when reading over-votes. Can the majority say, without having the over-votes looked at, that there are no legal votes among the over-votes?²⁸⁹

The answer to Chief Justice Wells's question is: "No."

The court's exclusion of overvotes changed the law as it existed on election day.²⁹⁰ Although, as the majority asserts, the Election Code requires courts to protect the right of every voter "to select the electors for President and Vice President of the United States,"²⁹¹ the Election Code makes no distinction between over-votes and undervotes.²⁹² The court, however, created this distinction,²⁹³ which had the effect of privileging those citizens who erroneously cast undervotes and disenfranchising those citizens who cast overvotes.

The Supreme Court discerned a more fundamental flaw. The Court pointed out that some overvotes were already recounted in three counties prior to the Florida court's decision on December 8.²⁹⁴ In these counties, "the recounts . . . were not limited to so-called undervotes but extended to all of the ballots."²⁹⁵ Therefore, the Florida Supreme Court's "remedy" discriminated against citizens living in different counties whose overvotes were excluded from the manual recount it authorized.

One explanation for the Florida court's curious distinction is its realization that, in addition to the 60,000 undervotes, approximately 110,000 overvotes also had to be processed, screened, isolated, and then inspected.²⁹⁶ Thus, in all likelihood the recount

289. *Id.*

290. *See Bush II*, 121 S. Ct. at 536–38 (Rehnquist, C.J., concurring).

291. *Harris II*, 772 So. 2d at 1253 (referencing FLA. STAT. ANN. § 103.011 (West Cum. Supp. 2000)).

292. *See* FLA. STAT. ANN. §§ 101.5614, 102.168 (West Cum. Supp. 2001).

293. *See Harris II*, 772 So. 2d at 1264 n.26 (Wells, C.J., dissenting).

294. *Bush II*, 121 S. Ct. at 531.

295. *Id.*

296. Justice Harding explained in his dissent:

Clearly, the only remedy authorized by law would be a statewide recount of more than 170,000 "no-vote" ballots by December 12. Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions. In order to undertake this unprecedented task, the majority has established standards for manual recounts—a step that this Court re-

could not have been completed before midnight on December 12. The majority eliminated this time-consuming problem by ignoring the overvotes that would have delayed the recount.²⁹⁷ To paraphrase George Orwell, some votes were more equal than others.²⁹⁸

4. The Florida Supreme Court's Novel Definition of a Legal Vote Eliminated a Substantial Amount of Discretion Previously Exercised by Canvassing Boards

The Florida Supreme Court enlarged the scope of two subsections of section 101 of the Election Code to convert an improperly cast ballot into a legal vote.²⁹⁹ Section 101.5614(5) provides that "[n]o 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."³⁰⁰ Conversely, section 101.5614(6) provides that any vote in which the board cannot discern the intent of the voter must be discarded.³⁰¹ Section 102 governs the procedures of a contest,³⁰² yet the Florida court borrowed from section 101 to interpret the provision governing contests.³⁰³ If the court's "borrowing" changed existing state law on election day, then it jeopardized the legislature's safe harbor privilege pursuant to 3 U.S.C. § 5.

The court held that that there were "sufficient allegations made which, if analyzed pursuant to the proper standard, compel the conclusion that legal votes sufficient to place in doubt the election results have been rejected in this case [by the Miami-Dade and Palm Beach Boards]."³⁰⁴ An allegation is one thing, but

fused to take in [*Harris I*], presumably because there was no authority for such action and nothing in the record to guide the Court in setting such standards. The same circumstances exist in this case.

Harris II, 772 So. 2d at 1272-73 (Harding, J., dissenting).

297. A recount of overvotes would have required a special screening process and the equipment used for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by section 101.015 of the Florida Statutes. See *Bush II*, 121 S. Ct. at 532-33.

298. GEORGE ORWELL, *ANIMAL FARM* 123 (Signet Classic 1954) (1946).

299. See *Harris II*, 772 So. 2d at 1256.

300. FLA. STAT. ANN. § 101.5614(5) (West Cum. Supp. 2001).

301. *Id.* § 101.5614(6).

302. *Id.* § 102.168.

303. See *Harris II*, 772 So. 2d at 1256 (concluding that each section demonstrates a "legislative emphasis on discerning the voter's intent [that] is mirrored in the case law . . .").

304. *Id.* at 1257.

evidence to back up the allegation is quite another. The majority relied on statistical common sense to construct a syllogism or, more accurately, a quasi-syllogism. The major premise was that the standard for reviewing uncounted ballots is contained in sections 101.5614(5) and 101.5614(6), which define a legal vote as a ballot indicating the clear intent of the voter.³⁰⁵ The minor premise was that the Miami-Dade Board abused its discretion when it left uncounted 9000 undervotes.³⁰⁶ From this, the court concluded that “there can be no question that there are legal votes within the 9,000 uncounted [Miami-Dade] votes sufficient to place the results of this election in doubt.”³⁰⁷ As a remedy for the Board’s abuse of discretion, the court ordered a hand recount of the 9000 ballots in Miami-Dade as a part of the statewide recount.³⁰⁸

The problem with the court’s reasoning is that sections 101.5614(5) and 101.5614(6) are designed to remedy a special situation involving defective ballots discovered during the protest period.³⁰⁹ According to Chief Justice Wells, section 101 “authorizes the creation of a duplicate ballot where a ‘ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment.’”³¹⁰ According to the legislative history of the Florida Election Code, the subsections were designed to ensure an accurate count of a properly cast ballot by a properly working machine.³¹¹ The subsections were not designed to justify a remedy that authorized godlike counting teams to divine the intent of a voter who erroneously casts his or her ballot.

305. See *id.* at 1256; FLA. STAT. ANN. § 101.5614(5)–(6) (West Cum. Supp. 2001).

306. *Harris II*, 772 So. 2d at 1258.

307. *Id.* at 1261.

308. *Id.* at 1261–62.

309. *Id.* at 1267 (Wells, C.J., dissenting).

310. *Id.* (quoting FLA. STAT. ANN. § 101.5614(5) (West Cum. Supp. 2000)).

311. According to the legislative history, the subsections in section 102 were intended to supply a remedy only when the vote tabulating equipment or software was working improperly. See Response of Katherine Harris, Florida Secretary of State, Katherine Harris, Lawrence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, to Petition for Writ of Certiorari at 13 & 13–14 n.10, *Bush I*, 121 S. Ct. 471 (2000) (No. 00-836). For example, there had been a problem in a prior election in which “an apparent software ‘glitch’ or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.” *Id.* (citing STATE OF FLA. ETHICS AND ELECTIONS COM., SENATE AND STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, CS/SB 499 (1999)). Before legislation was enacted to cope with these problems, there were also other “horror stories” relating to electronic voting systems. *Id.*

In short, the subsections were enacted to cope with machine error, not voter error.³¹²

According to Justice Harding, who was joined by Justice Shaw, "the majority has established [new] standards for manual recounts—a step that this Court refused to take in [*Harris I*] presumably because there was no authority for such action and nothing in the record to guide the Court in setting such standards."³¹³

Arguing on behalf of Gore, a lawyer representing Florida's Attorney General candidly admitted that "never before the [2000 presidential] election had a manual recount been conducted on the basis of the contention that 'undervotes' should have been examined to determine voter intent."³¹⁴ According to the three concurring Justices in *Bush II*, this concession was strong testimony indicating that the Florida Supreme Court departed from the Election Code enacted by the legislature.³¹⁵

The Florida court's decision ordering the Miami-Dade Board to count undervotes that were not counted due to a lack of time is also questionable. The recount was never completed because the Miami-Dade Board, exercising its discretion, decided that it could not be finished before the November 26 deadline established in *Harris I*.³¹⁶ In *Harris II*, however, the Miami-Dade Board learned that the November 26 "deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results"³¹⁷ Therefore, the court ordered the Miami-Dade and Palm Beach Boards to amend the certificates each had submitted on November 26, resulting in a net gain of 383 votes for Gore.³¹⁸

The Florida court's reasoning concerned Chief Justice Rehnquist. He noted that in *Harris I* the court extended the certi-

312. See *supra* notes 170–93 (comparing the views of Florida's Division of Elections, Secretary of State, Attorney General, and the Florida Supreme Court).

313. *Harris II*, 772 So. 2d at 1273 (Harding, J., dissenting).

314. *Bush II*, 121 S. Ct. 525, 538 (2000) (Rehnquist, C.J., concurring) (citing Transcript of Oral Argument, *Bush I*, 121 S. Ct. 471 (Dec. 1, 2000) (No. 00-836), available at 2000 WL 1763666, at *39-40)).

315. See *id.* (noting that for the court "to step away from this established practice . . . was to depart from the legislative scheme").

316. See *Harris II*, 772 So. 2d at 1267 (Wells, C.J., dissenting).

317. *Id.* at 1260 (per curiam).

318. *Id.* at 1262.

fication deadline established by the legislature presumably because "certification was a matter of significance."³¹⁹ In contrast to this earlier reasoning, the Chief Justice observed that "the [Florida] court emptie[d] certification of virtually all legal consequences during the contest, and in doing so depart[ed] from the provisions enacted by the Florida Legislature" by holding "that all late vote tallies . . . should be automatically included in the certification regardless of the certification deadline"³²⁰

Chief Justice Rehnquist was also concerned with the manner in which the Florida court mishandled the safe harbor problem in *Harris II*. The Florida court had concluded that federal law "[n]otwithstanding, [and] consistent with the legislative mandate and [the court's] precedent, although the time constraints are limited, [the court] must do everything required by [state] law to ensure that legal votes that have not been counted are included in the final election results."³²¹ As will be discussed, this subordination of federal law did not please the Chief Justice.

5. Chief Justice Rehnquist's Analysis of *Harris II* in Light of Article II of the U.S. Constitution

The Chief Justice prefaced his analysis of the Florida Supreme Court's decision with the following statement:

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no question of federal constitutional law But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President.³²²

319. *Bush II*, 121 S. Ct. at 536–37 (Rehnquist, C.J., concurring). Chief Justice Rehnquist also noted that Chief Justice Wells, in his dissent in *Harris II*, pointed out that section 101.5614(5) is "entirely irrelevant." *Id.* at 538.

320. *Id.* at 537.

321. *Harris II*, 772 So. 2d at 1261. The court indicated that "practical difficulties may well end up controlling the outcome of the election." *Id.* at 1262 n.21. This could have meant that the contest period might well have extended beyond December 12, or it could have meant that any legal votes found during the partial recounts would have been certified even if the manual recount could not be completed.

322. *Bush II*, 121 S. Ct. at 534 (Rehnquist, C.J., concurring) (quoting U.S. CONST. art.

The Chief Justice concluded that the text of a state's election law itself, and not just its interpretation by the courts of the state, takes on independent significance.³²³ Having laid the groundwork for an unusual departure from the Court's traditional position, the Chief Justice wrote: "Though we generally defer to state courts on the interpretation of state law . . . there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."³²⁴ In presidential elections, deference to the state supreme court's interpretations of state law "would be to abdicate our responsibility to enforce the explicit requirements of Article II."³²⁵ According to Chief Justice Rehnquist, the Court's responsibility for a more careful review of the Florida court's interpretation of state law was the critical issue, because the preservation of the electors' safe harbor depended on "whether the [Florida court's definition of a legal vote] ha[d] actually departed from the statutory meaning."³²⁶ Chief Justice Rehnquist then argued that Article II authorizes the Court to deviate from its usual canons of federalism, comity, and equity in order to preserve the Article II authority granted by Congress to the state legislatures.³²⁷ This view, while debatable, is a fair reading of Article II and a fair summary of *McPherson v. Blacker*,³²⁸ a venerable case in which the Court unanimously agreed that Article II "leaves it to the legislature exclusively to define the method of [an elector's appointment]."³²⁹

Having concluded that the state court's interpretation of sections 101.5614(5) and 101.5614(6) "emptie[d] certification of virtually all legal consequences,"³³⁰ the Chief Justice further explained that the December 8 court order, compelling the Palm Beach and Miami-Dade Boards to amend their certificates (submitted by November 26), usurped authority given to the Secretary of State by the Florida Legislature.³³¹ The Chief Justice re-

II, § 1, cl. 2).

323. *Id.*

324. *Id.* at 535.

325. *Id.*

326. *Id.*

327. *Id.* at 535-36.

328. 146 U.S. 1 (1892).

329. *Id.* at 27.

330. *Bush II*, 121 S. Ct. at 537 (Rehnquist, C.J., concurring).

331. *Id.*

marked that the Florida court's conclusion that a legal vote included those ballots that were not counted by a properly functioning machine due to the failure of the voter to follow instructions was "of course absurd."³³² The recounting "of tens of thousands of so-called 'undervotes' spread though 64 of the State's 67 counties," was inappropriate under section 102.168(3)(c) because it "authorized open-ended further proceedings which could not be completed by December 12."³³³ This was so, even though the Florida court itself recognized the legislature's intention "to bring Florida within the 'safe harbor' provision of 3 U.S.C § 5"³³⁴ For Chief Justice Rehnquist, the bottom line was this: "If we are to respect the legislature's Article II powers . . . we must ensure that postelection state-court [interpretations of state law] do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5."³³⁵

In response to the dissenters' attacks on his independent analysis of a state court's interpretation of state law,³³⁶ the Chief Justice stated that "[t]his inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*."³³⁷

332. *Id.* Chief Justice Rehnquist, seemingly exasperated by the Florida Supreme Court's reasoning stated that "[i]t is inconceivable that what constitutes a vote that must be counted under the 'error in the vote tabulation' language of the protest phase is different from what constitutes a vote that must be counted under the 'legal votes' language of the contest phase." *Id.* at 537 n.4.

333. *Id.* at 538, 539.

334. *Id.*

335. *Id.* at 534.

336. *Id.* at 539–40 (Stevens, J., dissenting); *id.* at 543–44 (Souter, J., dissenting); *id.* at 546–50 (Ginsburg, J., dissenting); *id.* at 552–55 (Breyer, J., dissenting).

337. *Id.* at 535 (Rehnquist, C.J., concurring).

Although Justice O'Connor did not join Chief Justice Rehnquist's concurring opinion, during oral argument in *Bush II* she asked David Boies, Gore's lawyer, whether a state court interpreting a state provision governing contest of presidential elections must "give special deference to the legislature's choices [concerning the § 5 safe harbor] insofar as a presidential election is concerned?" Transcript of Oral Argument, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949), available at 2000 WL 1804429, at *43. Boies responded that the Florida Supreme Court's interpretation of the contest provision was "within the normal ambit of judicial interpretation" of a statute. *Id.* Justice O'Connor was perplexed. She replied: "You are responding as though there was no special burden [for state courts] to show some deference to legislative choices. In this [presidential] context . . . in the context of selection of presidential electors, isn't there a big red flag up there [signifying] watch out?" *Id.* at *43–44. In short, during the oral argument, Justice O'Connor did not see *Bush II* as a garden-variety case involving pure state law since state and federal law were inextricably entwined. See *id.* at *37–44.

The four dissenters in *Bush II* vigorously challenged the Chief Justice's claim that the Florida court impermissibly distorted the provisions of the Election Code. They argued, as had Gore, that the court merely interpreted, rather than changed, state law.³³⁸ Justice Souter admitted that section 101.5614(5) deals with "damaged and defective ballots," that the Florida Supreme Court's "majority might have chosen a different meaning," and that a "different reading . . . is possible."³³⁹ However, Justice Souter did not think that the court's interpretation changed state law in violation of Article II, Section 1, Clause 2.³⁴⁰ As to the safe harbor problem, Justice Souter optimistically believed that Congress could handle it under 3 U.S.C. § 15,³⁴¹ an optimism that was not shared by the Florida legislature.³⁴²

Justice Breyer's dissent defended the state court's interpretation of Florida law. Although he conceded that section 101.5614(5) is "a provision that addresses damaged or defective ballots,"³⁴³ he rejected the conclusion that the Florida Supreme Court may not use that subsection to define the meaning of a legal vote—even when ballots are not damaged or defective.³⁴⁴ Jus-

Justice Kennedy, who also did not join in the concurring opinion, helped make Chief Justice Rehnquist's views more credible by asking Boies some probing questions during oral argument. For example, he asked whether it would violate federal law if, after the November 7 election, Florida's legislature had changed deadlines and allowed for selective recounts in contests. *Id.* at *39–40. Boies replied, "I think that would be unusual. I haven't really thought about the question." *Id.* at *40. Regaining his composure, Boies added that it would be contrary to federal law for the Florida legislature to have done what the Florida Supreme Court did because that "would be a legislative enactment as opposed to a judicial interpretation of an existing law." *Id.* This answer by Boies suggests that the Florida Supreme Court complies with federal law so long as state laws (dealing with defective ballots) can be expanded by judges to protect what the court perceives is the legislature's intention to delegate the selection of the President to the people. But if the expansion distorts the legislative intent indicated in a particular subsection that is designed only for defective ballots and ballots damaged by a malfunctioning machine, Boies' argument is not convincing. For a transcript of the Oral Argument in *Bush II* that identifies each speaker, see *Contesting the Vote: The Questions Before the Court*, N.Y. TIMES, Dec. 12, 2000, at A19.

338. See *Bush II*, 121 S. Ct. at 552–55 (Breyer, J., dissenting); Brief of Respondent Albert Gore, Jr. at 11–15, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949).

339. *Bush II*, 121 S. Ct. at 544 (Souter, J., dissenting).

340. *Id.* at 543–44.

341. *Id.* at 543.

342. See FLA. LEGISLATURE, SELECT JOINT COMMITTEE ON THE MANNER OF APPOINTMENTS OF PRESIDENTIAL ELECTORS, REPORT AND RECOMMENDATIONS, at 9–10 (Dec. 4, 2000) [hereinafter COMMITTEE ON THE MANNER OF APPOINTMENT OF PRESIDENTIAL ELECTORS].

343. *Bush II*, 121 S. Ct. at 554 (Breyer, J., dissenting).

344. *Id.* at 554.

tice Breyer claimed that no one could say that this determination by the court was an “impermissible distortion.”³⁴⁵ This assertion is simply not true. If Gore had won the recount after December 12, on January 6, Congress had the authority, if not the duty, to find that the Florida Supreme Court impermissibly required the canvassing boards to count votes that were not legal.³⁴⁶

The foregoing discussion has immersed the reader in the complexities of Florida law because, without doing so, it is difficult to evaluate whether the state court’s interpretation of Florida law was correct, debatable, or, as the Chief Justice argued, “absurd.”³⁴⁷ Whether the Florida Supreme Court simply distorted the text of the state statutes or impermissibly distorted them is an interesting question. The point, however, is that the Chief Justice’s interpretation is plausible. Most certainly, it is not “an act no less reprehensible than the partisan resolution of the election of 1876.”³⁴⁸

G. *The Per Curiam Opinion*

1. Summary of the Supreme Court’s General Approach in Disputed Election Cases

In voting rights cases, different sets of facts take courts in different directions, and different levels of judicial scrutiny apply depending on the character and magnitude of the state’s deprivation of a citizen’s right to participate in an election. Not unlike the scenario seen in *Harper v. Virginia Board of Elections*,³⁴⁹ a case involving a poll tax,³⁵⁰ in *Bush II* there was no intent to discriminate against any class of voters, and there was no classification against individuals or groups of people identified by an immutable trait.³⁵¹ *Harper* arose from a Virginia constitutional

345. *Id.* at 555.

346. 3 U.S.C. § 15 (1994); see *supra* text accompanying note 149.

347. *Bush II*, 121 S. Ct. at 537 (Rehnquist, C.J., concurring).

348. *The Election Mess*, *supra* note 10, at 48. The outraged historians forgot about the overvotes when they concluded that the Court’s “decision to halt the full and accurate counting of Florida’s legal votes prevents the American people from selecting the next president of the United States.” *Id.*

349. 383 U.S. 663 (1966).

350. *Id.* at 664.

351. The equal protection claim raised by the petitioners in *Bush II* did not involve “immutable traits” such as race or gender, but rather it challenged “[t]he new electoral

provision authorizing the Commonwealth to charge between \$1.50 and \$3.00 for the right to vote, regardless of whether the citizen was poor or affluent, black or white.³⁵² Nevertheless, the Court was concerned with the comparatively harsher effect of the tax on the poor, and categorized the line drawn by Virginia as arbitrary.³⁵³ As in *Harper*, the disturbing element of Florida's voting system was that it was based on arbitrarily drawn lines.

The elastic "clear intent of the voter" standard turned out to be substantially overbroad and potentially discriminatory because it delegated power to vote counters who were not sufficiently qualified or experienced enough to determine a voter's intent from mere marks and chads.³⁵⁴ Broad delegations of power are usually tolerated, so long as they have an intelligible principle that narrows their breadth; however, "[t]he area of permissible indefiniteness narrows . . . when the [standard] . . . potentially affects fundamental rights,"³⁵⁵ such as voting rights and those protected by the First Amendment. It may well be that *Bush II* will henceforth be limited to a unique category of presidential election cases. Certainly, it does not fit snugly in any other particular box of cases labeled "rational basis"³⁵⁶ or "strict scrutiny."³⁵⁷ Instead, the competing federal, state, and individual voter interests required the Court to strike a proper balance.

Unlike the early apportionment cases dealing with vote dilution, such as *Reynolds v. Sims*,³⁵⁸ the Court in *Bush II* was not attempting to formulate a judicially manageable standard. The Court did, however, plausibly explain why Florida's standard was

system created by the Florida Supreme Court . . . based on the counties or geographic regions in which [voters] live" Brief for Petitioners at 41, *Bush II*, 121 S. Ct. 525 (2000) (No. 00-949); see also *Bush II*, 121 S. Ct. at 545 (Souter, J., dissenting) ("Petitioners have raised an equal protection claim, in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions . . .") (emphasis added) (internal citation omitted).

352. *Harper*, 383 U.S. at 664 n.1.

353. *Id.* at 668.

354. *Bush II*, 121 S. Ct. at 532.

355. *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

356. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (public health); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (local advertising regulations).

357. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (federal affirmative action programs); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (state and local affirmative action programs).

358. 377 U.S. 533 (1964).

unmanageable.³⁵⁹ As discussed, the Florida Supreme Court authorized manual recounts of undervotes,³⁶⁰ thereby arbitrarily excluding overvotes.³⁶¹ The court did this even though the applicable statute authorized canvassing boards to manually recount all ballots.³⁶² As in *Harper*, an arbitrary line was drawn, and it was causing chaos. As Justice Ginsburg recently noted, “there must be a substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic processes.”³⁶³

In *Timmons v. Twin Cities Area New Party*,³⁶⁴ Chief Justice Rehnquist described the Court’s discretionary approach in voting rights cases when he wrote:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the “character and magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.” No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. (“[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious. . . . The rule is not self executing and is no substitute for the hard judgments that must be made”).³⁶⁵

In *Bush II*, the state’s interest, as conceived by the Florida Supreme Court, was regulatory only in a Panglossian sense. Its interest was to count all the votes at the expense of the federal interest in promptly resolving the dispute. Another federal interest that the Court took seriously was that of equal protection, which guarantees to all qualified voters an equally weighted vote.³⁶⁶

359. *Bush II*, 121 S. Ct. at 530–32.

360. *Harris II*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam).

361. *Id.* at 1264 n.26 (Wells, C.J., dissenting).

362. See FLA. STAT. ANN. §§ 102.166(4)(d), 102.166(5)(c) (West Cum. Supp. 2001).

363. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 187 (1999) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

364. 520 U.S. 351 (1997).

365. *Id.* at 358–59 (citations omitted) (alterations in original).

366. *Bush II*, 121 S. Ct. at 530–32.

2. Reapportionment Cases Relied Upon in *Bush II*

Five Justices usually inclined to exercise judicial restraint in cases involving unwritten constitutional rights held that the standard used to count votes in Florida violated the Equal Protection Clause.³⁶⁷ My summary of their argument runs as follows: *Harper v. Virginia Board of Elections*³⁶⁸ and *Reynolds v. Sims*³⁶⁹ are applicable, as these cases protect the right to vote granted to Florida citizens by the state legislature.³⁷⁰ In *Bush II*, the Court relied on the principle that once a state grants "the right to vote on equal terms, [it] may not, by later arbitrary and disparate treatment, value one person's vote over that of another."³⁷¹ According to *Harper*, disparate treatment that gives more weight to one person's vote than another's occurs when lines are drawn which are inconsistent with the Equal Protection Clause.³⁷² Quoting *Reynolds*, the majority in *Bush II* went further, stating 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."³⁷³ Since the Florida court's standard diluted and debased the votes of Florida citizens, and since this standard was applied arbitrarily, it could not survive heightened scrutiny.³⁷⁴ As in both *Harper* and *Reynolds*, a less probing level of scrutiny, like the rational basis test, was deemed inappropriate.³⁷⁵ The right of suffrage, once granted, cannot be diluted simply because the lines drawn by the state are rational.

One of the many ironies in *Bush II* is that the hyperactive Warren Court supplied a defensible basis for a ruling that second-guessed the judgment of a state court purporting to apply state

367. *Id.* at 529.

368. 383 U.S. 663 (1966).

369. 377 U.S. 533 (1964).

370. *Cf. Harper*, 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); *Reynolds*, 377 U.S. at 566 (concluding "that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators").

371. *Bush II*, 121 S. Ct. at 530 (citing *Harper*, 383 U.S. at 665).

372. *Harper*, 383 U.S. at 668.

373. *Bush II*, 121 S. Ct. at 530 (quoting *Reynolds*, 377 U.S. at 555).

374. *Id.* at 532.

375. *Id.* at 530.

law. What the Warren Court did in both *Harper* and *Reynolds* is what the Rehnquist Court did in *Bush II*. The irony is that neither *Harper* nor *Reynolds* is well grounded in tradition, precedent, original intent, or text, and both cases are radical departures from the manner in which equal protection principles have been traditionally applied.³⁷⁶ In both cases, the dissenters' arguments were stronger than the majority's, focusing on the role of judges and their power to intervene in a domain that is traditionally reserved to the state.³⁷⁷

We tend to forget that the "Constitution is guilty of an embarrassing lapse; it contains no broad guarantee of the right to participate in the democratic process."³⁷⁸ In fact, "the Constitution appears to have treated voting rights as a matter of solely state concern and [Article I, Section 4] permitted the states wide tolerance in deciding who could—and who could not—vote."³⁷⁹ Therefore, "courts prior to the Warren [Court] era were unable—or unwilling—to fashion broad constitutional protection of voting rights."³⁸⁰ Nonetheless, while not supported by history, the Warren Court decisions articulate a desirable ideal that is consistent with a contemporary consensus of opinion.

The hurdle for the Warren Court to overcome was the political question doctrine, which, if applicable, would make a vote dilution case, like *Bush II*, nonjusticiable. For example, the political question doctrine resulted in the dismissal of a vote dilution case in *South v. Peters*.³⁸¹ That suit challenged the constitutionality of Georgia's county unit system, a winner-take-all system that enabled the candidate with the most votes in each country to get

376. See *Harper*, 383 U.S. at 682 (Harlan, J., dissenting) ("[*Reynolds*] among its other breaks with the past also marked a departure from . . . traditional and wise principle."); *Reynolds*, 377 U.S. at 615 (Harlan, J., dissenting) (stating that the Court's decision is "unequivocally refuted by history and by consistent theory and practice from the time of adoption of the Fourteenth Amendment").

377. See *Harper*, 383 U.S. at 675–80 (Black, J., dissenting) (noting that with regard to state laws in prior cases the Court "properly respected the limitation of its power under the Equal Protection Clause"); *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting) (stating that the holding will result in "a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary").

378. BURT NEUBORNE & ARTHUR EISENBERG, *THE RIGHTS OF CANDIDATES AND VOTERS* 13 (1980).

379. *Id.*

380. *Id.*

381. 339 U.S. 276 (1950).

that county's full unit vote.³⁸² However, some counties with large populations had fewer unit votes than counties with small populations.³⁸³ The plaintiff demonstrated that a vote in one county was valued at 120 times more than a vote in another county.³⁸⁴ The Supreme Court affirmed dismissal of the suit, reasoning that "[f]ederal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."³⁸⁵ This outcome was not surprising in light of the decision in *Colegrove v. Green*,³⁸⁶ a case involving apportionment of congressional districts.³⁸⁷

Colegrove was qualified to vote in the November 1946 congressional election; however, his vote was diluted because of the way in which the state's congressional districts were apportioned.³⁸⁸ He petitioned a federal district court to prevent the scheduled congressional election until such time as the legislature apportioned the state more equitably.³⁸⁹ In a three-three-one decision, the Court affirmed the district court's decision denying Colegrove relief.³⁹⁰ Justice Frankfurter, referring to the issue's "peculiarly political nature"³⁹¹ wrote that "this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people."³⁹² In a famous warning no longer heeded, Justice Frankfurter admonished federal courts not to enter the "political thicket" of reapportionment litigation.³⁹³

No member of the Court in *Bush I* or *Bush II* explicitly invoked the political question doctrine,³⁹⁴ despite the Court's obvious in-

382. *Id.* at 277.

383. *Id.*

384. *Id.*

385. *Id.*

386. 328 U.S. 549 (1946).

387. *Id.* at 550.

388. *Id.*

389. *Id.*

390. *Id.* at 556.

391. *Id.* at 552.

392. *Id.* at 553-54.

393. *Id.* at 556.

394. Justice Breyer, who objected to the remand that stopped the manual recount,

vovement in a political battle between the Republican and Democratic parties. Therefore, in *Bush II*, the Rehnquist Court entered the “political thicket” full throttle, and the five conservative Justices in the majority have, as a result, bruised reputations.³⁹⁵

The political question doctrine was permanently discarded in reapportionment cases after Justice Brennan’s opinion for the Court in *Baker v. Carr*.³⁹⁶ Now, a citizen whose vote is not equally weighted with the votes of citizens living in other counties or districts will likely prevail if he or she seeks to enjoin a scheduled election.³⁹⁷ Indeed, Georgia’s county unit system of voting was challenged a second time,³⁹⁸ this time successfully, in *Gray v. Sanders*.³⁹⁹ The Court stated that state power may not be “used as an instrument for circumventing a federally protected right.”⁴⁰⁰ Justice Douglas’s opinion implicitly supported a one person, one vote standard,⁴⁰¹ and Justice Stewart, concurring, explicitly stated that “there can only be room for but a single constitutional rule—one voter, one vote.”⁴⁰² This principle has since become bedrock doctrine. In *Reynolds v. Sims*,⁴⁰³ the Court made it clear that “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to . . . place of residence within a State.”⁴⁰⁴ In

made an argument based on the need for judicial restraint that resembled the political question doctrine. See *Bush II*, 121 S. Ct. 525, 555–58 (2000) (Breyer, J., dissenting).

395. The Justices have been stung by the slings and arrows of outraged critics who have accused them of acting injudiciously—owing to their zeal to protect their own agenda from new Justices likely to be appointed by Gore. See *supra* notes 40–48 and accompanying text.

396. 369 U.S. 186 (1962). In *Baker*, urban voters claimed that Tennessee’s system of apportionment enabled counties with populations as low as 2340 persons to have the same representation in the legislature as counties having up to 33,900 persons. See *id.* at 255 (Clark, J., concurring). They sought a declaration that this inequality of representation abridged their rights to equal protection of the laws. *Id.* at 187–88. The district court dismissed their complaint, but the Supreme Court reinstated the voter’s lawsuit and directed the district court to try the case. *Id.* at 237.

397. See *infra* text accompanying notes 399–404, 425–27.

398. For a discussion of the first unsuccessful challenge, see *supra* notes 381–85 and accompanying text.

399. 372 U.S. 368 (1963).

400. *Id.* at 381 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1957)).

401. See *id.* at 381.

402. *Id.* at 382 (Stewart, J., concurring).

403. 377 U.S. 533 (1964).

404. *Id.* at 560–61. In this vein, the Court stated that “[t]he fact that a citizen lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his

Reynolds, the Court refused to apply the rational basis test.⁴⁰⁵ Instead, it demanded “careful judicial scrutiny” in all cases if “the right of all of the State’s citizens to cast an effective and adequately weighted vote [is] unconstitutionally impaired.”⁴⁰⁶ One can argue until blue in the face that no voter or voting group in Florida was singled out for discriminatory treatment. Perhaps that argument may have been good at one time, but the “effects” test in *Harper* and the one person, one vote formula in *Reynolds* are easy to remember, grasp, apply, and difficult to attack, even now, four decades after they were injected into Equal Protection Clause analysis. Are these reapportionment cases applicable to *Bush II*? The answer is yes, even if they are not tailor-made.

3. Unequally Weighted Votes in Florida’s Court-Ordered Recount

The procedures authorized by the Florida Supreme Court for counting legal votes had several, obvious problems. As to under-votes, the standard was to discern the clear intent of the voter,⁴⁰⁷ which had the effect of creating unequally weighted votes.⁴⁰⁸ Perhaps a single counter could divine a voter’s subjective intent by looking at marks, scratches, holes, or bits of hanging paper; but maybe the counter in an adjoining county (or sitting next to him or her) could not or has a different point of view. Of course, when reading a will, a judge interprets the testator’s intent,⁴⁰⁹ and while two judges in different counties may disagree as to a testator’s intent, there are interpretive canons, cases, books, rules of construction, and qualified persons with law degrees to apply these guides. With chads, however, there is neither an authoritative guidebook, nor are there specific rules of interpretation applicable to every ballot. In Florida, many counters assigned to inspect ballots were untrained.⁴¹⁰ It was not clear who could object

vote.” *Id.* at 567.

405. *Id.* at 581.

406. *Id.*

407. *Harris II*, 772 So. 2d 1243, 1262 (Fla. 2000) (per curiam).

408. See *Bush II*, 121 S. Ct. 525, 530–31 (2000) (per curiam).

409. E.g., *In re Marine Midland Bank*, 547 N.E.2d 1152, 1153–54 (N.Y. 1989) (“Courts construing donative instruments are governed by a threshold axiom: a testator’s intent, as ascertained ‘from the words used in the will . . . according to their everyday and ordinary meaning,’ reigns supreme.”).

410. *Bush II*, 121 S. Ct. at 532.

to a counter's decision or what a valid objection would be.⁴¹¹ Thus, the system of counting could be fairly labeled as arbitrary and inconsistent with the principles of equal protection. Moreover, the system favored Gore—who had nothing to lose and the presidency to gain by contesting the election. Notably, as the candidate certified under Florida law, Bush could not contest the election.⁴¹²

The Supreme Court gladly conceded that the “intent of the voter” standard “is unobjectionable as an abstract proposition and as a starting principle.”⁴¹³ The problem, as the Court saw it, “inhere[d] in the absence of specific standards to ensure its equal application.”⁴¹⁴ Even Justice Souter, dissenting on other grounds, pointed out that the rules in different counties, as applied to identical looking ballots, were different and “no legitimate state interest [was] served by these differing treatments of the expressions of voters’ fundamental rights.”⁴¹⁵

The Court accepted the fact, but rejected the argument, that general standards to determine the intent of an actor are common in many areas of the law.⁴¹⁶ It noted that in most of these situations, the applicable general standard “is not susceptible to much further refinement.”⁴¹⁷ The counting teams were dealing with ballots having “marks or holes or scratches,” and they were evaluating “a thing, not a person.”⁴¹⁸ Thus, the Court concluded that more specific and objective rules were “practicable” and “necessary” and must be “designed to ensure uniform treatment.”⁴¹⁹

More specific guidelines were necessary because “the standards for accepting or rejecting contested ballots varied not only from county to county but indeed within a single county from one recount team to another.”⁴²⁰ Not surprisingly, the absence of specific

411. *Id.* at 530–32.

412. FLA. STAT. ANN. § 102.168 (West Cum. Supp. 2001).

413. *Bush II*, 121 S. Ct. at 530.

414. *Id.*

415. *Id.* at 545 (Souter, J., dissenting).

416. *Id.* at 530 (per curiam).

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.* at 531.

rules "led to the unequal valuation of ballots" within counties and in different counties.⁴²¹

The Court provided concrete examples of the varying standards that were being used. First, it noted that "three members of the [Miami-Dade] canvassing board applied different standards in defining a legal vote . . . [and] at least one county changed its evaluative standards during the counting process."⁴²² The Palm Beach Board first began the process with 1990 standards, and then changed the law governing the counting by applying a different, stricter standard, and then—pursuant to an appellate court order—started considering dimpled chads as legal votes.⁴²³

Citing *Gray v. Sanders*,⁴²⁴ the Court concluded that these incidences added up to "arbitrary and disparate treatment to voters in . . . different counties."⁴²⁵ The Court also cited *Moore v. Ogilvie*,⁴²⁶ noting that in that case the Court had "invalidated a county-based procedure that diluted the influence of citizens [in other counties]."⁴²⁷ In *Bush II*, the Court repeated its observation from *Moore* that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."⁴²⁸ Based on this precedent, the Court was well within reason to hold that the Florida court's authorization and ratification of uneven treatment did not comply with bedrock equal protection principles.⁴²⁹

The Court also noted several other violations of equal protec-

421. *Id.* at 530. During oral argument, Justice O'Connor asked Gore attorney David Boies, "Well, why isn't the standard [for ascertaining legal votes] the one that voters are instructed to follow, for goodness sake? I mean it [the instructions] couldn't be clearer." Transcript of Oral Argument, *supra* note 337, at *58. Mr. Boies replied, "Well Your Honor, because in Florida law since 1917, Darby against State, the Florida Supreme Court has held that where a voter's intent can be discerned, even if they don't do what they're told, that's supposed to be counted . . ." *Id.* The equal protection problem, however, was that the counting teams were never informed how to discern that intent, and, therefore, what counted as clear intent in one county was not the same in other counties.

422. *Bush II*, 121 S. Ct. at 531.

423. *Id.*

424. 372 U.S. 368 (1963).

425. *Bush II*, 121 S. Ct. at 531.

426. 394 U.S. 814 (1969).

427. *Bush II*, 121 S. Ct. at 531 (citing *Moore*, 394 U.S. at 819).

428. *Id.* (quoting *Moore*, 394 U.S. at 819).

429. *Id.* at 531. "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 533.

tion principles. For example, recount totals from Miami-Dade and Palm Beach were “included in the certified total” of votes, even though those counties used different standards than Broward County.⁴³⁰ In addition, those three counties counted overvotes, whereas overvotes were excluded from all the manual recounts authorized by the Florida Supreme Court on December 8.⁴³¹

Some of the equal protection problems caused by the procedures authorized by the Florida court also violated the basic requirements of due process of law. For example, no one objecting to the counting teams’ decisions was permitted to object during the recount.⁴³² The Court’s due process concerns were not alleviated by the fact that objections could be subsequently brought to “a single state judicial officer.”⁴³³ In sum, the Court adequately addressed why the one person, one equally weighted vote principle was violated by the standard authorized by the Florida Supreme Court.

Justice Ginsburg, in dissent, argued for the application of the Court’s most deferential level of scrutiny, the rational basis test (also known as the rubber stamp test).⁴³⁴ Her argument, however, is not in line with the holding in *Reynolds*, which instructs judges to apply “careful scrutiny” in one person, one vote cases and warns judges that “a clearly rational state policy” may fall short of the strict standards demanded by the Equal Protection Clause.⁴³⁵

Justice Stevens admitted that “the use of differing substan-

430. *Id.* at 531 (noting that Broward County’s standard was more “forgiving”).

431. *Id.*; see *Harris II*, 772 So. 2d 1243, 1253 (Fla. 2000) (per curiam) (stating that a manual recount should “be conducted for all legal votes in this State . . . in all Florida counties where there was an undervote”).

432. *Bush II*, 121 S. Ct. at 532.

433. *Id.* But see *id.* at 541 (Stevens, J., dissenting) (arguing that any equal protection concerns are “alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process”).

434. *Id.* at 549–50 (Ginsburg, J., dissenting). Justice Ginsburg cites *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802 (1969), a case that concerned a claim by qualified voters in jail who wanted absentee ballots provided to other classes of persons absent from their county of residence. *Id.* at 803. Commentators have described the scrutiny in this case as “[p]erhaps the most extremely deferential version of traditional equal protection criteria.” GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 642 (13th ed. 1997). Chief Justice Warren, writing for the Court, distinguished *McDonald* from cases that dealt with the fundamental right to vote because a right to an absentee ballot was involved, not an impact on “the fundamental right to vote.” *McDonald*, 394 U.S. at 807.

435. *Reynolds*, 377 U.S. at 581.

dards for determining voter intent in different counties employing similar voting systems may raise serious concerns.”⁴³⁶ These concerns, he reasoned, were alleviated because there was an impartial magistrate assigned to handle objections to a counting team’s decisions.⁴³⁷ The presence of an impartial magistrate, however, was window dressing. The magistrate merely evaluated objections in accordance with the varying standards in each county. In other words, the magistrate used the one corner hanging chad standard in county X, the two corner standard in county Y, and the indentation standard in county Z.

Justice Stevens claimed that the Court’s interest in “finality . . . effectively order[ed] the disenfranchisement of an unknown number of voters whose ballots reveal[ed] their intent.”⁴³⁸ This assertion ignores the fact that it was the Florida Supreme Court’s system that created the risk that six million voters, who cast legal votes would be disenfranchised. These voters would also have been disenfranchised if Congress had determined that Florida’s slate of electors was unlawful.⁴³⁹ In short, the dissents of Justices Stevens and Ginsburg do not convincingly demonstrate that the Court erred in holding that “the recount [could not] be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”⁴⁴⁰

I. *The Remand*

The Court gave a terse justification for its remand, reasoning that “[b]ecause the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe harbor benefits of 3 U.S.C. § 5 . . . ,” any remedy that directed further action by that court could not be appropriate if it extended the manual recount beyond December 12.⁴⁴¹ Because there were equal protection flaws in the system of counting, there was “no recount procedure

436. *Bush II*, 121 S. Ct. at 541 (Stevens, J., dissenting).

437. *Id.*

438. *Id.*

439. See COMMITTEE ON THE MANNER OF APPOINTMENTS OF PRESIDENTIAL ELECTORS, *supra* note 342, at 13. Congress could also rely on the same equal protection principles articulated in the per curiam opinion, and on *Harper*, *Reynolds*, *Moore*, and *Gray* to reject the twenty-five electoral votes from Florida.

440. *Bush II*, 121 S. Ct. at 532.

441. *Id.* at 533.

in place . . . that comport[ed] with minimal constitutional standards.”⁴⁴² In short, if the recount had been started anew, the system in place would have required revision, and there was not enough time to do so in the few remaining hours before the deadline imposed by 3 U.S.C. § 5 expired.

As stated previously, many experts view the Supreme Court’s order to stop counting as indefensible.⁴⁴³ This assertion, however, is incorrect. The remand is defensible because the Florida court itself indicated that it was required to protect the safe harbor.⁴⁴⁴ The court’s “fatal” concessions, however, are not clearly spelled out in any one of its three opinions. The scattered bits and pieces are isolated and then pieced together in the following paragraphs.

First: The Florida court noted that 3 U.S.C. § 5 limits the power of Florida’s Secretary of State to ignore late returns, since ignoring them might “preclud[e] Florida voters from participating fully in the federal electoral process.”⁴⁴⁵ This reasoning concedes that the discretion of the executive branch is circumscribed by 3 U.S.C. § 5. In *Palm Beach County Canvassing Board v. Harris*⁴⁴⁶ (*Harris III*), the court recognized that owing to 3 U.S.C. § 5, “the time to complete a manual recount must be reasonable.”⁴⁴⁷ The court also conceded this important point with regard to an election for “presidential electors”: The conception of reasonableness “must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000 as the date for the final determination of any state’s dispute concerning its electors in order for that determination to be given conclusive effect in Congress.”⁴⁴⁸

The foregoing admission demonstrates that the court understood, on December 11, that 3 U.S.C. § 5 circumscribed its discretion to establish time limits on the manual recounts of ballots by canvassing boards. The court’s clarification was referring to manual recounts during the precertification protest phase of the liti-

442. *Id.*

443. *See supra* notes 10, 40, and accompanying text.

444. *See infra* notes 445–58 and accompanying text.

445. *Harris I*, 772 So. 2d 1220, 1237 (Fla. 2000) (per curiam).

446. 772 So. 2d 1273 (Fla. 2000) (per curiam).

447. *Id.* at 1286.

448. *Id.* at 1286 n.17.

gation;⁴⁴⁹ nonetheless, it can be inferred that the discretion of the state's judicial branch is also circumscribed during a contest. Indeed, the court limited its own discretion during the protest phase to make sure that the contest ended before December 12.⁴⁵⁰ What other reason could it have had?

Second: The Florida court also understood that “[a] fundamental principle governing presidential election law in the United States is set forth in article II [sic], section 1 of the United States Constitution, which confers on state legislatures the power to regulate the appointment of presidential electors.”⁴⁵¹ Citing *McPherson v. Blacker*,⁴⁵² the court recognized that this grant of power to the state legislature operates as a limit on its own power to circumscribe the legislature.⁴⁵³ It would be odd if Article II constrained the power of the executive branch but not the judicial branch, particularly since the judicial branch decides whether a candidate may contest an election.

Third: In the section entitled “Applicable Law” in *Harris III* the Florida court acknowledged that (1) Congress enacted 3 U.S.C. § 5 to make sure that controversies about the appointment of electors are settled by a date certain, and (2) Florida’s legislature “enacted legislation” consistent with 3 U.S.C. § 5.⁴⁵⁴

Fourth: The Florida court also noted that the extension of the legislature’s specified certification period was set no later than November 26 “to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.”⁴⁵⁵ The court removed any lingering doubt about its obligation to protect the safe harbor when it stated that “because the selection and participation of Florida’s electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law

449. See *id.* at 1284–85 (discussing section 102.166(1), which provides for a “right of protest”); *id.* at 1291 (“[E]lection 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.”).

450. *Bush II*, 121 S. Ct. at 536–37 (Rehnquist, C.J., concurring).

451. *Harris III*, 772 So. 2d at 1281.

452. 146 U.S. 1 (1892).

453. *Harris III*, 772 So. 2d at 1281–82.

454. *Id.*

455. *Id.* at 1290 n.22.

scheme must yield in the event of a conflict.”⁴⁵⁶

In sum, the court’s opinions in *Harris II* and *Harris III* were based on the “view that the Legislature would not wish to endanger Florida’s vote not being counted in a presidential election.”⁴⁵⁷ The court must have recognized that it too could endanger the electoral vote, even though it claimed that it did not wish to do so.⁴⁵⁸

Justice Stevens argued that 3 U.S.C. § 5 “did not impose any affirmative duties upon the States.”⁴⁵⁹ This argument, however, is irrelevant. Naturally, Congress did not mandate compliance with 3 U.S.C. § 5 in a manner that would impose fines and penalties on states that do not meet the deadline. Instead, 3 U.S.C. § 5 is an inducement.⁴⁶⁰ The condition attached to 3 U.S.C. § 5 is similar to many federal statutes that grant privileges with conditions attached.⁴⁶¹ Consider, for example, a statute that gives a state federal funds for highway construction so long as the state legislature enacts laws in accordance with a speed limit specified by Congress. In such a case, the question is not whether the state has an affirmative duty to comply with the speed limit specified, nor is the question whether the state is mandated to comply. The only question is whether the state law, as construed by the state judiciary, complies with the conditions attached to a statute granting the conditional benefit.⁴⁶²

456. *Harris II*, 772 So. 2d 1243, 1254 n.11 (Fla. 2000) (per curiam). Moreover, in its December 11 response to the first remand, the court justified overruling the Secretary’s November 14 deadline by concluding that “the decision as to when amended returns can be excluded from the statewide certification must necessarily be considered in conjunction with the contest provisions of section 102.168 and the deadlines set forth in 3 U.S.C. § 5.” *Harris III*, 772 So. 2d at 1289.

457. *Harris III*, 772 So. 2d at 1291.

458. *See id.*

459. *Bush II*, 121 S. Ct. at 540 (Stevens, J., dissenting).

460. It would be unconstitutional for Congress to enact a law that coerced action left to state control. *See New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”); *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting) (“The power to tax and spend is not without constitutional restraints. . . . [I]t may not be used to coerce action left to state control.”).

461. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (addressing 23 U.S.C. § 158, which reduced federal highway funding to states with a minimum drinking age below twenty-one).

462. *Cf. id.* at 210 (stating that the “proposition that the [Federal] power [to grant a state privileges with conditions] may not be used to induce the states to engage in activities that would themselves be unconstitutional”).

The incurable flaw in *Harris II* was the court's failure to specify any time limits to end the contest. The court's failure to take any action to end the recount cannot be attributed solely to absent-mindedness. Instead, the court was more likely attempting to balance "the need for prompt resolution and finality" against what it perceived to be "the need for accuracy."⁴⁶³ The court, however, erred in giving too much weight to the need for accuracy.

The Supreme Court had the duty to protect the congressionally created safe harbor immunity from the competing interest that placed the rights of the agents (the Florida voters) above the intentions of their principal (the Florida legislature).⁴⁶⁴ The Court made sure that the appropriate balance was struck.

III. CONCLUDING REMARKS: DEFENDING THE REMAND AGAINST THE COURT'S HARSHTEST CRITICS

The clock was ticking towards midnight on December 12, when the Court issued its final remand in *Bush II*.⁴⁶⁵ This decision brought finality "to a badly flawed" presidential election.⁴⁶⁶ By February 8, Bush's approval rating on a Fox News Channel opinion poll was sixty-two percent and rising.⁴⁶⁷ Clinton's rating was under fifty percent.⁴⁶⁸ No one polled the public for Gore's rating.⁴⁶⁹

While, in the opinion of this author, the Court's *coup de morte* was deft and daring, numerous critics disagree. For example, Jesse Jackson compared *Bush II* to *Dred Scott*.⁴⁷⁰ Anthony Lewis

463. *Harris II*, 772 So. 2d at 1261. Because fidelity to the letter and spirit of preexisting Florida law is a requirement of federal law, the state court did not strike the right balance, and needed to be corrected. See Charles Fried, 'A Badly Flawed Election.' *An Exchange*, N.Y. REV. OF BOOKS, Feb. 22, 2001, at 8-9.

464. In its enthusiasm to have every legal vote counted, the Florida Supreme Court authorized the continuation of the manual recount beyond December 12 notwithstanding the federal law establishing "an outside deadline." *Harris II*, 772 So. 2d at 1261. This remedy, which the Florida court believed was appropriate for the failure of 60,000 voters to cast their ballots properly, was not the right balance to strike.

465. See Richard L. Berke, *Bush Prevails*, N.Y. TIMES, Dec. 13, 2000, at A1.

466. Dworkin, *supra* note 40, at 53.

467. *Special Report with Brit Hume* (FOX News television broadcast, Feb. 8, 2001).

468. *Id.*

469. See *id.*

470. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857); R.W. Apple, Jr., *The 43rd Presi-*

thought the decision was a self-inflicted wound that would harm the nation.⁴⁷¹ Some critics have viciously attacked Chief Justice Rehnquist and Justices Thomas and Scalia, even though many of these newly minted Article I, Section 2 experts, it seems, never bothered to read *McPherson v. Blacker*.⁴⁷² The five Justices under attack undoubtedly anticipated a barrage of criticism;⁴⁷³ however, they did not simply take the easy way out. Since chaos was a clear and present danger, the Justices had the fortitude to end Gore's Sisyphean effort.

Aside from the fact that Justice Breyer's proposal to extend the deadline was not in accordance with state law,⁴⁷⁴ it also would have served no useful purpose.⁴⁷⁵ Justice Breyer's proposal would have simply resulted in a new slate of electors being appointed by the Florida legislature.⁴⁷⁶ That dramatic move, in turn, would

dent: *News Analysis; Now, Lifting the Clouds*, N.Y. TIMES, Dec. 14, 2000, at A1.

471. See Anthony Lewis, *Abroad at Home; Raising the Stakes*, N.Y. TIMES, Dec. 11, 2000, at A31.

472. 146 U.S. 1 (1892).

473. Supreme Court Justices obviously are aware that in the United States debates surrounding controversial public issues "may well include vehement, caustic, and sometime unpleasantly sharp attacks on government and government officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

474. See *supra* Part II.B.-C.

475. Charles Fried, counsel for the State legislature, has written that, if the Florida Supreme Court devised a standard on December 13, a recount based on a revised standard compatible with the Equal Protection Clause could not have been completed on December 18, especially since the overvotes would have to be counted. Fried, *supra* note 463, at 8 "That is because [the] recount would go forward under the contest provisions of Florida law, and those envisage not a simple tally, but a full-blown legal process, complete with briefing, oral argument, and a full recourse to appellate process. Such contests in Florida have been known to require sixteen months." *Id.* Fried goes on to say that after "further arguments in the Florida Supreme Court, on remand, followed by an opinion from that court—which may have occasioned further review of the Supreme Court of the United States [only] then would the recount have [commenced] and there would be still more process about that." *Id.* Fried asks, "Would such a continuation of the legal proceedings, inevitably leading to an indeterminate outcome [that is, another statistical tie], really have been a satisfactory course? Surely, if that was the alternative, the Court did well to shut the thing down then and there [on December 12]." *Id.*

476. The apparent confidence that the dissenting Justices had in the ability of the State of Florida and Congress to cope with any problems caused by the loss of the safe harbor is not consistent with scenarios projected by the Florida legislature. On November 30, 2000, the Select Joint Committee on the Manner of Appointment of Presidential Electors adopted the following motion proposed by Senator John Laurent:

It is clear from the expert testimony presented to this Committee that the Legislature has the fundamental obligation under Article II of the United States Constitution to ensure that Florida's electors are counted on January 6 when Congress counts the votes of the Electoral College. Based on the entire

have energized Gore supporters to seek injunctive relief. If the Florida Supreme Court had granted that relief and then enjoined the certification of the legislative slate, how would Congress have voted when it examined the electoral returns from Florida? How would Governor Jeb Bush have reacted to the injunction? One option that was being seriously considered was to seek relief from the federal courts, if either the Governor or other members of the executive branch were enjoined by the Florida court.⁴⁷⁷ Under these circumstances, had the Court not ended this flawed election when it did, a new millennium version of the 1877 Hayes-Tilden fiasco was highly probable.

Apparently Justice Breyer was willing to react to these events if and when they occurred; however, the Court took a proactive approach, seemingly realizing that any hesitation on its part would have interfered with the orderly transition of administrations on January 20.⁴⁷⁸ As this article goes to press, it seems clear

testimony presented to this Committee, there appears to be a significant risk that all of Florida's voters may be disenfranchised if the Legislature does not act to fulfill its responsibility. If the election controversies and contests now pending are not finally and conclusively determined by December 12, there can be no assurance that Congress will count the votes of Florida's 25 electors. From the testimony presented, it appears likely that the determination necessary to ensure Congress counts the votes will not occur by December 12 and that, even if made, such determination may not be conclusive because of postelection changes in the election laws.

I, therefore, move that this committee recommend to the President of the Senate and the Speaker of the House of Representatives that the Legislature convene in special session to determine the manner in which the electors of this state shall be appointed and to consider, and if necessary, take such other action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted.

COMMITTEE ON THE MANNER OF APPOINTMENTS OF PRESIDENTIAL ELECTORS, *supra* note 342, at 9–10.

477. A staff member of the speaker of the Florida House of Representatives stated that members of the executive branch were prepared to resist any order from the Florida court concerning the appointment of electors. E-mail from Donald Rubottom, Aide & Legal Advisor to Tom Feeney, Speaker of the Florida House of Representatives, to Gary C. Leedes, Professor of Law, Emeritus, University of Richmond School of Law (Feb. 7, 2001, 15:34 EST) (on file with author). This concern was based on a widespread distrust of the Florida Supreme Court. I asked him whether there was any real concern that the supreme court would try to enjoin the Governor. He replied: "Very much so." *Id.* Staff members were getting ready to prepare briefs and memos for a floor fight in Congress, if and when objections were made during the joint session on January 6 to electors appointed by the legislature. *Id.* What was occurring in Florida was a bare-knuckled power struggle; thus, what was needed was a final arbiter who would put an end to the struggle. The Supreme Court, exercising its power to decide federal questions in cases and controversies, did just that.

478. *Cf. Bush II*, 121 S. Ct. 525, 538–39 (2000) (Rehnquist, C.J., concurring) ("[T]he

that the Court acted appropriately. President Bush's inauguration and the first several months of his presidency have gone smoothly. Moreover, despite its critics, the Court also has received the public support it needed.⁴⁷⁹ At a time when respect for every other government institution is declining, the country still looks to the Supreme Court for authority and finality.⁴⁸⁰

The underlying theme of this article has been that five risk-averse Justices exposed themselves to severe criticism and unfair ridicule in order to avoid likely perils to our system of government.⁴⁸¹ As the first months of the Bush presidency demonstrate, the decision made by these five Justices was wise and prudent.⁴⁸² Nonetheless, one must still ask: did the Court have the authority to stop the presidential election in its tracks before the "train-wreck?"⁴⁸³ Election challenges frequently present the question of whether an election should be halted when votes are not being weighted equally. A federal court deciding whether to grant voters "immediately effective relief" must make its decision guided by equitable principles.⁴⁸⁴ In short, there was no real binding precedent that compelled the Supreme Court to end or allow resumption of the recount. The applicable law was open textured and the Court adopted a pragmatic approach in order to achieve a forward looking and useful result.⁴⁸⁵ Neither the Constitution nor the federal statutes yield a single correct answer with regard to the Court's final remand. *Bush II* was a unique and difficult case that had to be considered in light of its peculiar facts and circum-

federal deadlines for the Presidential election simply do not permit even such a shortened [counting] process.").

479. See Krauthammer, *supra* note 39, at 104.

480. *Id.*

481. Justice Stevens concludes his dissent with a not-so-subtle attack on the majority, claiming that they collectively failed to act "as an impartial guardian of the rule of law." *Bush II*, 121 S. Ct. at 542 (Stevens, J., dissenting). He wrote that "[t]ime will one day heal the wound . . . that will be inflicted by today's decision." *Id.* Justice Breyer also wanted the majority to avoid "the risk of undermining the public's confidence in the Court itself." *Id.* at 557 (Breyer, J., dissenting).

482. In the long run, the Court's decision will have a salutary effect if election laws in our country are changed to forestall another traumatic hurricane like the one that tore through Florida during the five absurd weeks of suspense, drama, and farce.

483. Filkins & Canedy, *supra* note 32, at A17 (quoting Bruce Ackerman's use of this descriptive term).

484. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

485. Cf. POSNER, *supra* note 42, at 4-5, 11.

stances.⁴⁸⁶ This assessment involves the exercise of sound judicial discretion.⁴⁸⁷

The election-ending remand in *Bush II* was clearly within the discretion of the Supreme Court: (1) Given the variable methods of discerning a voter's intent put in place by the Florida Supreme Court after the election; (2) the other extraordinary circumstances that flawed the presidential election in Florida and resulted in a statistical tie unbreakable under any recount; (3) the imminent and irreparable harm that would have flown from continuation of the contest until an uncertain, future date; (4) the conclusion that the Florida Supreme Court understood that the state legislature wanted to take advantage of the safe harbor; (5) and the imminent and certain expiration of the safe harbor deadline.

486. See *Bush II*, 121 S. Ct. at 533 (Rehnquist, C.J., concurring) ("We deal here not with an ordinary election, but with an election for the President of the United States."). In the future, lawyers will argue that Rehnquist's opinion limits the scope of *Bush II* to presidential elections. It seems likely that Chief Justice Rehnquist and Justices Scalia and Thomas would not want *Bush II* to open up the floodgates for litigation that challenges every instance of disparate treatment of voters in elections conducted under state law.

487. The Chief Justice had previously explained that discretion is required in some voting rights cases and that there "is no substitute for the hard judgments that must be made." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (quoting *Storer v. Brown*, 415 U.S. 725, 730 (1974)).