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BUSH V. GORE—A CRITIQUE OF CRITIQUES

Martin H. Belsky*

On December 12, 2000, The United States Supreme Court determined the winner of the Presidential election of 2000.¹ Since that time, there have been at least nine books,² numerous short legal commentaries,³ many longer law review articles,⁴ and countless e-mail discussions⁵ analyzing this decision and its propriety.⁶ This article will

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1. *Bush v. Gore*, 531 U.S. 98 (2000).

2. *Bush v. Gore: The Court Cases and the Commentary* (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford U. Press 2001); Howard Gillman, *The Votes that Counted: How the Court Decided the 2000 Presidential Election* (U. Chi. Press 2001); Samuel Issacharoff, Pamala S. Karlen & Richard H. Pildes, *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000* (rev. ed., Found. Press 2001); Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution and the Courts* (Princeton U. Press 2001); Roger Simon, *Divided We Stand: How Al Gore Beat George Bush and Lost the Presidency* (Crown Publishers 2001); *Deadlock: The Inside Story of America's Closest Election* (Wash. Post ed., PublicAffairs 2001); *The Vote: Bush, Gore, and the Supreme Court* (Cass Sunstein & Richard Epstein eds., U. Chi. Press 2001); *36 Days: The Complete Chronology of the 2000 Presidential Election* (John Wright et al. eds., Times Books 2001).

3. See e.g. E.J. Dionne, Jr. & William Kristol, *supra* n. 2, at 165-341. There are, in addition, many short pieces or commentaries in law school alumni magazines, legal newspapers, and even in the *Chronicle of Higher Education*. See e.g. James Blumstein & Suzanna Sherry, *The 2000 Presidential Election: What Happens When Law and Politics Collide?* *Vanderbilt Law*. 18-27 (Spring 2001); Dan Lowenstein, *Election 2000*, *UCLA Law* 32-33 (Fall-Winter 2000-2001); Michael Dorf, *Was the Bush v. Gore Decision Political?*, *Colum. L. Sch. Report* 22-25 (Spring 2001); E. Joshua Rosenkranz, *High Court's Misuse of the Past*, 23 *Natl. L.J.* A20 (Jan. 15, 2001); Jonathan Ringel, *Does Ideology Count? Politics Sure Does*, *Leg. Times* 7 (July 2, 2001); *What We'll Remember in 2050: 9 Views on Bush v. Gore*, *Chron. Higher Educ.* B15-16 (Jan. 5, 2001).

4. See e.g. Symposium, *Bush v. Gore: Democracy and Disorder*, 68 *U. Chi. L. Rev.* 679 (2001); Student Author, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 *Harv. L. Rev.* 2170 (2001); Kim Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 *U. Pa. L. Rev.* 1361 (2001).

5. I belong to a listserv for constitutional law professors moderated by Professor Eugene Volokh. From election day 2000 to May of 2001, and even after, the number of comments, criticisms, defenses, and justifications seemed endless. At one point, in the Spring, I counted more than 250 *Bush v. Gore* entries. This is in addition to the numerous comments on the law prof listserv, open and available to all law professors.

6. I must confess, not wishing to lose the opportunity for educating the public and to bring visibility to The University of Tulsa College of Law, the law school and the College's Federalist Society joined in the analysis game and sponsored an evening symposium on January 11, 2001, entitled "Bush v. Gore: the Case of the Century." Speakers represented the Democratic and Republican official positions, and supposedly more neutral positions

review some of these criticisms.⁷

My goal is to organize the factual and legal history and the issues implicated by the Presidential election of 2000, followed by my own perspective. I do not claim that my opinions are any better. Nor do I claim that they will be more thoughtful, more objective, or even more articulate. I do hope that by putting some structure to the on-going debate, I can contribute to the effort to put the case into historical jurisprudential perspective.

I. THE STORY

A. Election Night

The entire factual and legal story concerning the contested Presidential election of 2000 has been extensively documented elsewhere, sometimes objectively and sometimes not.⁸ My goal here is to organize it in as straightforward a fashion as possible.

On Tuesday, November 7, 2000, the voting citizens of the United States⁹ cast their ballots for the next President of the United States, indirectly, of course, by voting for electors in each state who in turn would vote for the next President.¹⁰ Most voted for either Vice President Albert Gore, Jr., the nominee of the Democratic party, or Governor George W. Bush, the nominee of the Republican party.¹¹

The election was a close one, not only based on the popular vote, but also on the electoral vote. In fact, it soon became evident that the electoral vote, which of course determined who would be the next President,¹² was so close that the winner of Florida's electors would be

from academics and jurists. See David Harper, *Bush vs. Gore Put Into Perspectives*, Tulsa World 12 (Jan. 12, 2001).

7. Compare Posner, *supra* n. 2, at 3, 198-220 (criticism of the "professorial commentators").

8. Compare Posner, *supra* n. 2, at 12-149; Dershowitz, *supra* n. 2, at 15-93 with Wright *supra* n. 2; Wash. Post, *supra* n. 2.

9. This is not the forum to discuss the sad reality that, using 1996 statistics, 196,511,000 of the United States citizens were eligible to vote, and only 146,211,960 were registered (74.4%). Of that 146,211,960, only 96,456,345 in fact voted in the 1996 Presidential election. This indicates a turnout rate of 49.08%. *About Elections and Voting* <<http://www.fec.gov/pges/96TO.HTM>> (accessed Sept. 12, 2001). Assuming about the same rate of participation in 2000, this means that the President was elected with about 23% of those eligible to vote.

10. See U.S. Const. art. II, § 1; U.S. Const. amend. XII.

11. A small percentage, 3,000,000 of 101,000,000 or 3% voted for other candidates. *The World Almanac and Book of Facts 76* (World Almanac Educ. 2001).

12. Of course, under the United States Constitution, the voting citizens do not technically vote for the President. Instead, they vote for "electors" from each state, who in turn meet and vote for the President. Each state has electors equal to the number of Senators and Members of the House of Representatives. U.S. Const. art. II, § 1; U.S. Const. amend. XII. By specific Constitutional Amendment, the District of Columbia has three electors. U.S. Const. amend. XXIII.

the winner of the election.¹³

In the early evening of election day, the television networks and the Associated Press, based on exit poll projections, declared Vice President Gore the winner in the State of Florida.¹⁴ Then, by the early morning of November 8, 2000, all the pundits realized that they had made a mistake.¹⁵ By 2:30 a.m., Eastern Standard Time, most analysts predicted Governor Bush to win Florida and thus have a majority of the electoral votes. Vice President Gore then called Bush to concede.¹⁶ Yet, one hour later, after discussions with his advisors, and a tightening of the vote count, Vice President Gore retracted his concession in a follow-up phone call to Governor Bush.¹⁷ This ignited a thirty-six day post-election Presidential race.¹⁸

B. *Strategy and Litigation*

Through public relations and selected court cases, the Presidential Campaigns pursued two different strategies. The Gore campaign challenged the credibility of the voting tallies for certain areas of Florida.¹⁹ The votes, they urged, had never really been counted and it was necessary to allow recounting in certain areas to satisfy the requirement that every vote be counted.²⁰ Vice President Gore also contended that undervotes (where a punchcard had not been totally punched through) and overvotes (where two votes were cast for President) should be reviewed manually to determine the "intent of the voter."²¹

The Bush Campaign relied on the official conclusion that the vote had been counted, a new President had been selected, and the opposition was merely trying to steal the election.²² Florida law and

13. Wash. Post, *supra* n. 2, at 43.

14. *Id.* at vii.

15. Wright, *supra* n. 2, at xv.

16. Wash. Post, *supra* n. 2, at vii.

17. Wright, *supra* n. 2, at 3-4.

18. Simon, *supra* n. 2, at 256.

19. Vice President Gore has been criticized for seeking recounts and making challenges, at least at first, in only selected counties. This selectivity, lawyers, professors, and journalists argued, first raised Constitutional obstacles as the choice of Democratic strongholds for recounts gave credence to arguments and then the later decision of the Supreme Court based on "equal protection." It also made it "more difficult for Florida Courts to fashion a timely remedy that the Supreme Court might have found more tolerable." While it was true that he did ask for a statewide recount one month later (in a televised address), this wasn't ever argued in court. In fact, Gore campaign lawyer, David Bois, stated that they would "accept" a statewide recount but were not seeking it. David Bastow & Adam Nsgourney, *Gore's Critical Mistake, Failure to Ask for a Statewide Recount, in 36 Days: The Complete Chronology of the 2000 Presidential Election* 331, 331-34 (John Wright et al. eds., Times Books 2001). See Wash. Post, *supra* n. 2, at 106.

20. Simon, *supra* n. 2, at 258.

21. *Id.*

22. *Id.* at 257, 259-60.

federal law had set deadlines. Delays were nothing more than obstructionist tactics by a sore loser.²³

An important part of both teams' strategies included the filing of and response to lawsuits.²⁴ Florida law provides for automatic machine recounts of machine ballots when the electoral differentials are 0.5% or less²⁵ and allows candidates and political parties to request manual recounts in other circumstances.²⁶ It also provides for submission of all voting returns no later than seven days after an election.²⁷ Since the vote tally was less than 0.5%, an automatic machine recount was undertaken.²⁸ As a result, the vote difference between Governor Bush and Vice President Gore was reduced from 1,784 to 327.²⁹

On November 9, the Florida Democratic Party and Vice President Gore requested "hand" recounts of the votes in Volusia, Palm Beach, Broward, and Miami-Dade counties.³⁰ That same day, Palm Beach County and Volusia County agreed to conduct hand recounts.³¹ The Florida Secretary of State, Katherine Harris, indicated that, recount or no recount, Florida law required all county vote totals to be submitted by November 14th (the seventh day) and that she would not waive this requirement.³² On November 10, 2000, Broward County also agreed to the hand recount, but only of a sample of the votes.³³

Though Vice President Gore threatened a court fight over "questionable ballots,"³⁴ Governor Bush's campaign fired the first legal shot in the federal courts on November 11, 2000.³⁵ There were two

23. Wright, *supra* n. 2, at 336-46.

24. Wash. Post, *supra* n. 2, at 101.

Litigation was king. Before this was over, one firm—Steel Hector, representing Katherine Harris [the Florida Secretary of State]—would handle 40 law suits over 36 days, plus appeals to the Florida Supreme Court, two cases before the 11th U.S. Circuit Court of Appeals, a couple of federal district court cases and two appeals to the U.S. Supreme Court. One firm. There would be dozens of firms involved before it was over.

Id.

25. Fla. Stat. § 102.141(4) (2000).

26. Fla. Stat. § 102.166(5) (2000).

27. Fla. Stat. § 102.111 (2000) provides that county voting returns must be submitted by seven days to the Secretary of State after the election or they "shall be ignored." Fla. Stat. § 102.112 (2000) states that they must be submitted or they "may be ignored." Scheppele, *supra* n. 4, at 1396.

28. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000).

29. *Id.*; Wright, *supra* n. 2, at 28. After overseas ballots were counted, the number rose to 930 votes. Dionne & Kristol, *supra* n. 2, at xiii. At the time of certification, the differential was 537. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000). At the time of the remand by the Florida Supreme Court on December 8, 2000, the count was either 154 or 193, depending on the vote count in Palm Beach. Wright, *supra* n. 2, at 274.

30. *Stegjel v. LePore*, 120 F. Supp. 2d 1041, 1046 (S.D. Fla. 2000).

31. Wash. Post, *supra* n. 2, at vii-viii; Dionne & Kristol, *supra* n. 2, at xi.

32. *Id.*

33. *Id.*

34. Wright, *supra* n. 2, at 14-15.

35. Wright, *supra* n. 2, at 39-43.

directly opposite opinions from state officials on the validity of manual recounts. The Secretary of State, a Republican, issued an opinion stating that manual recounts were only allowable if fraud or machine breakdown occurred, not merely because of a small statistical inaccuracy. The Florida Attorney General, a Democrat, issued an opinion that manual recounts were appropriate in all cases.³⁶

The Bush Campaign petitioned the United States District Court for the Southern District of Florida to block the manual recounts saying that manual recounts were not appropriate for mere counting inaccuracies.³⁷ The motion was denied two days later.³⁸ The Court of Appeals for Eleventh Circuit refused to allow an emergency injunction, but granted the right to proceed.³⁹ The request for the preliminary injunction was later denied.⁴⁰

Numerous lawsuits relating to the Presidential election were then filed by Vice President Gore, predominant Democratic Florida county canvassing (election) boards, the Democratic Party, and the Gore-Lieberman campaign in the Florida state courts.⁴¹ Two became the bases for appeals to the Florida Supreme Court and the eventual confrontation between that court and the United States Supreme Court.⁴²

One lawsuit was filed before the votes were certified by the Florida Elections Canvassing Commission, before Leon County Circuit Judge

36. Scheppele, *supra* n. 4, at 1401; Wash. Post, *supra* n. 2, at 99-100. For the text of the Opinion for the Department of State, see Dionne & Kristol, *supra* n. 2, at 9-10. For the Advisory Legal Opinion of the Florida Attorney General, see Dionne & Kristol, *supra* n. 2, at 14-18.

37. A parallel lawsuit filed in the Middle District of Florida seeking an injunction was also denied. *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000). A request to the Eleventh Circuit for an emergency injunction was also denied. *Touchston v. McDermott*, 234 F.3d 1130 (11th Cir. 2000). The more formal request for a preliminary injunction was denied on December 6, 2000. *Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000).

38. *Seigel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000).

39. *Seigel v. LePore*, 234 F.3d 1162 (11th Cir. 2000).

40. *Seigel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). The Bush Campaign appealed both the denial of the injunction in *Seigel* and the later decision of the Florida Supreme Court in *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), which added seven days to the time allowed for manual recounts. *Infra* n. 59. Certiorari was denied in *Seigel v. LePore*, 531 U.S. 105 (2000).

41. See e.g. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (validity of "butterfly" style ballot); *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000); *Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517 (Fla. 2000) (absentee ballots).

42. The two tracks of litigation are sometimes confused. See e.g. *Term in Review: Elections: Justices Decide Landmark Cases on the Conduct of Federal Elections*, 70 L.W. 3081 (Aug. 7, 2001) (describing the Florida Supreme Court decision reviewing Leon County Judge Sauls' denial of relief as being "on remand" from the United States Supreme Court decision dealing with the appeal from Leon County Judge Lewis's decision). The confusion became worse after the Florida Supreme Court overruled Judge Sauls. "Stung by the reversal, [he] quickly removed himself from the case and the job of administering the order fell to Judge Terry Lewis," the judge in the other major *Bush v. Gore* Florida litigation. Wash. Post, *supra* n. 2, at 200-01.

Terry Lewis.⁴³ This “*Canvassing Board*” case led to the United States Supreme Court’s first decision pertaining to the election on December 4, 2000.⁴⁴ Vice President Gore filed the second lawsuit pursuant to a Florida statute, after certification of the vote tally on November 26, 2000, before Leon County Circuit Judge N. Sanders Sauls.⁴⁵ This is the “*Bush v. Gore*” case that led to the final decision of the United States Supreme Court on December 12, 2000.⁴⁶

C. *Canvassing Board Decision*

As noted above, several county canvassing boards had ordered manual recounts. The Florida Secretary of State had indicated that any recounts must be completed by the statutory date for certification of the election: November 14, 2000.⁴⁷ No exceptions were authorized.⁴⁸ Lawyers for Palm Beach and Volusia Counties immediately went to Leon County state court,⁴⁹ asking that the court order the Secretary of State to consider all votes counted, even if after the statutory certification date.⁵⁰ On November 13, 2000, Judge Terry Lewis, of the Florida Circuit Court for the Second Judicial Circuit, ruled that the deadline was statutorily mandated and that Harris could therefore certify the results on the date set in the statute.⁵¹ However, Harris could not rule out late returns without good reason, that is, after considering all the relevant facts and circumstances before deciding.⁵²

This decision was appealed to the Florida District Court of Appeals on November 14, 2000.⁵³ Certified returns were then received by the Secretary of State and, after rejecting reasons for exceptions claimed by various counties, Harris certified those returns as final, except for absentee ballots.⁵⁴ Representatives of the Gore campaign proceeded to file a motion to compel the Secretary of State to allow and accept amended returns.⁵⁵

43. *Volusia County Canvassing Bd. v. Harris*, No. CV 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000) (reprinted in Dionne & Kristol, *supra* n. 2, at 19-23).

44. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

45. *Gore v. Harris*, No. CV 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000) (reprinted in Dionne & Kristol, *supra* n. 2, at 53).

46. *Bush v. Gore*, 531 U.S. 98, 100-02 (2000).

47. Wash. Post, *supra* n. 2, at 98.

48. *Id.* at 98-99.

49. Leon County is where the state capitol, Tallahassee, is located. The lawsuit was filed there against the Secretary of State who resides in the state capitol.

50. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1226 (Fla. 2000).

51. *Id.*

52. Wash. Post, *supra* n. 2, at 104; *Volusia County Canvassing Bd. v. Harris*, No. CV 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

53. This part of the factual history of the litigation comes from the Florida Supreme Court’s decision in *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

54. *Id.* at 1226-27.

55. *Id.* at 1227.

On November 17, 2000, the Florida Circuit Court for the Second Judicial Circuit ruled that the Secretary of State had properly exercised her discretion and denied the motion.⁵⁶ An appeal to the First District Court of Appeals was then filed, consolidated with the November 14, 2000 appeal and certified to the Supreme Court of Florida for its “great public importance” and “requir[ing] immediate resolution by the [Florida] supreme court.”⁵⁷

An expedited procedure led to a decision by the Florida Supreme Court on November 21, 2000.⁵⁸ The Florida Supreme Court, in a unanimous *per curiam* decision, reversed the orders of the trial court, extended the deadline for certification by twelve days, and ordered the manual recounts to continue until Saturday, November 26, 2001.⁵⁹ The “guiding principle,” noted the Florida Supreme Court, is “the will of the people, not a hypertechnical reliance upon statutory provisions.”⁶⁰ A “statutory ambiguity” existed between provisions of Florida statutes.⁶¹ In that circumstance, the right to vote, and the right of every voter to have his or her tally count, means that a process securing the “intent of the voter”—in this case, reviewing each ballot—must apply.⁶²

The Bush Campaign then sought certiorari from the United States Supreme Court which was granted on November 24, 2000.⁶³

Oral argument was held on December 1, 2000, after the vote count was to have been completed.⁶⁴ The Supreme Court issued its opinion on December 4, 2000.⁶⁵

In the *per curiam* opinion, the Court noted that ordinarily it would defer to the State Court on the interpretation of a state statute.⁶⁶ Here, however, the state statute was implementing a federal Constitutional provision, Article II, section 1 clause 2, which gives to the state legislature the power of appointment of electors from that state to the

56. *Id.*

57. *Id.* at 1227 n. 7 (quoting Fla. Const. art. V, § (b)(5)).

58. *Id.* at 1220.

59. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000).

60. *Id.* at 1227.

61. *Id.* at 1231.

62. *Id.* at 1231-34.

63. Though numerous issues were raised by Governor Bush, only two issues were accepted for review:

[W]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2 of the United States Constitution.

Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 73 (2000).

64. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004 (2000).

65. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

66. *Id.* at 76.

electoral college to vote for President.⁶⁷ The United States Supreme Court was troubled by the possibility that the Florida Supreme Court did not adequately consider how Article II constrained Florida law, including how the Florida Constitution applies to elections for the President.⁶⁸

The Supreme Court was also troubled by the effect of other federal law in 3 U.S.C. § 5, a "Safe Harbor" provision, which the Florida Supreme Court failed to mention.⁶⁹ That provision provides a mechanism for presumptive validity of state election returns. If a state has a procedure for the final selection of electors, including resolution of all controversies, at least six days before the date set for the meeting of electors, the selection is "conclusive."⁷⁰

Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.⁷¹

On balance, then, the *per curiam* opinion concluded that the wiser course of action was to vacate and remand the judgment of the Florida Supreme Court and instruct it to consider explicitly the impact of the two federal provisions, one in the United States Constitution and one in federal statutes, on its decision.⁷²

D. "Gore v. Harris" Decision

A separate track of litigation started the day after the vote in Florida was certified by the Florida Elections Canvassing Commission. Vice President Gore challenged the certification of Dade, Palm Beach, and Nassau counties, arguing that recount votes should have been included in the certified results for those counties.⁷³ On the day the United States Supreme Court remanded the *Canvassing Board* decision to the Florida

67. *Id.* U.S. Const., art. II, § 1, cl. 2 provides:

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. . . .

68. *Bush*, 531 U.S. at 77.

69. *Id.* at 77-78.

70. 3 U.S.C. § 5 (1994). The statute provides in part:

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 . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated. . . .

Id.

71. *Bush*, 531 U.S. at 78.

72. *Id.*

73. Dionne & Kristol, *supra* n. 2, at 53.

Supreme Court (December 4, 2000),⁷⁴ Leon County Circuit Judge N. Sanders Sauls denied the Gore contest of the certification.⁷⁵ Sauls held that Florida law requires a “reasonable probability” that the results of the election would have been changed, which was not demonstrated.⁷⁶ Moreover, no “illegality, dishonesty, gross negligence, improper influence, coercion, or fraud” was shown.⁷⁷ Finally, in other areas, the county canvassing boards had properly exercised their discretion.⁷⁸

The Gore campaign, of course, immediately appealed this case to the District Court of Appeals, which certified the case to the Florida Supreme Court. The Florida Supreme Court partly reversed Judge Sauls on December 8, 2000 in a four to three decision.⁷⁹ In addition, it ordered relief beyond the decision of Judge Sauls.⁸⁰

In reviewing the applicable law, the Florida Supreme Court viewed its responsibility in interpreting Florida law, as required by the Florida Constitution and statutes.⁸¹ The traditional process of the state’s highest court interpreting and applying the language of the legislature was perfectly consistent with the federal constitutional provision that the state legislature is to “direct” the “manner” of selection of electors. Thus, the court was determining what “manner” the legislature meant in the statutes.⁸²

The court then considered the specific items in the decision by Judge Sauls and granted most and denied some.⁸³

74. *Id.* at xiii.

75. *Id.* at 53.

76. *Id.* at 55.

77. *Id.*

78. *Id.*

79. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

80. *Id.* at 1247. The court noted:

Although we find that the appellants are entitled to reversal in part of the trial court’s order and are entitled to a manual count of the Miami-Dade County undervote, we agree with the appellees that the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Id.

81. *Id.* at 1248-49.

82. *Id.* at 1268.

83. *Id.* at 1248.

The appellants’ election contest is based on five instances where the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes. These five instances . . . are as follows:

(1) The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach Canvassing Board as reflecting the clear intent of the voters. [The court ordered these included.]

(2) The rejection of 168 net votes for Gore, identified in the partial recount by the Miami-Dade County Canvassing Board. [The court ordered these included.]

(3) The receipt and certification after Thanksgiving of the election night returns

The court based its reversals on a rejection of Judge Sauls' "abuse of discretion" standard for review.⁸⁴ Florida law required a *de novo* review of canvassing board decisions.⁸⁵

The court proceeded to consider the contention of the Bush campaign that a count of the undervotes (votes that were not counted because the machine did not register them) in Miami-Dade would be inappropriate without a similar count of all undervotes in the entire state.⁸⁶ It held that, technically under Florida statutes, a limited recount was appropriate.⁸⁷ However, to preserve the democratic principle that the "will of the people" controls, as stated in Florida law and guaranteed by both the Florida and United States Constitutions,⁸⁸ the court "agreed" with the Bush campaign that:

[I]t is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted.⁸⁹

The test for determining whether a vote should be counted—i.e., whether it was a "legal vote"—is the "intent of the voter."⁹⁰ So long as a review, whether by machine or by hand, can ascertain that intent, that vote is legal and must be counted.⁹¹

The majority accepted the deadline set by the federal Safe Harbor statute, that all controversies must be resolved within six days before the counting of electoral votes⁹² (December 12, 2000),⁹³ only five days from the date of its decision.⁹⁴ It still believed that "with the cooperation of the officials in all the counties, the remaining undervotes in these

from Nassau County, instead of the statutorily mandated machine recount tabulation . . . resulting in an additional 51 net votes for Bush. [The court affirmed the exclusion of these votes.]

(4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's certified results[.] [The court affirmed the exclusion of these votes.]

(5) The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed. [The court ordered these votes to be manually examined.]

Id.

84. *Gore v. Harris*, 772 So. 2d at 1248, 1252.

85. *Id.* 1252.

86. *Id.*

87. *Id.* at 1253.

88. *Id.* at 1254.

89. *Id.* at 1253.

90. *Gore v. Harris*, 772 So. 2d at 1256.

91. *Id.*

92. *Supra* nn. 68-70.

93. *Wright*, *supra* n. 2, at 160.

94. *See Gore v. Harris*, 772 So. 2d at 1268 (Wells, C.J., dissenting).

counties could be accomplished within the required time frame."⁹⁵

In his dissent, Florida Chief Justice Wells⁹⁶ questioned the majority's broad decision.⁹⁷ He rejected the bases for the majority decision under Florida law, was concerned about the need for finality and the "constitutional crisis" caused by prolonging the controversy, and called for judicial restraint.⁹⁸

Chief Justice Wells specifically referred to Article II, section 1, clause 2 of the United States Constitution, and then reference to it by the United States Supreme Court in its December 4, 2000 decision.⁹⁹ He contended that partial or total recounts ordered by a court are inconsistent with that provision, which gives power to the state legislature.¹⁰⁰ He also expressed concern about the lack of standards for the manual vote counters to use.¹⁰¹

Two other Florida justices dissented on the basis that even if Judge Sauls had applied the improper standard of abuse of discretion, the Gore campaign had "not carried [its] burden of showing that the number of

95. *Id.* at 1262 n. 22. The court continued:

We note that public officials in many counties have worked diligently over the past thirty days in dealing with exigencies that have occurred because of this unique historical circumstance arising from the presidential election of 2000. We commend those dedicated public servants for attempting to make this election process truly reflect the vote of all Floridians.

Id.

96. According to observers at oral argument, Chief Justice Wells felt "spanked" by the United States Supreme Court in its December 4, 2000 decision, and felt that the Florida Supreme Court ought to now pay attention to what the federal Justices were saying. *Wash. Post, supra* n. 2, at 192.

97. *Id.* The actual order for action by the lower court was quite specific:

Accordingly, for the reasons stated in this opinion, we reverse the final judgment of the trial court dated December 4, 2000, and remand this cause for the circuit court to immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate. The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County and the 168 additional legal votes from Miami-Dade County.

Because time is of the essence, the circuit court shall commence the tabulation of the Miami-Dade ballots immediately. The circuit court is authorized . . . to be assisted by the Leon County Supervisor of Elections or its sworn designees. Moreover, since time is also of the essence in any statewide relief that the circuit court must consider, any further statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade undervotes.

In tabulating the ballots and in making a determination of what is a 'legal' vote, the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'

Id.

98. *See Gore v. Harris*, 772 So. 2d at 1262-70 (Wells, C.J., dissenting).

99. *Id.* at 1268.

100. *Id.*

101. *Id.* at 1269.

legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this statewide election.”¹⁰² Moreover, a statewide recount, which is in any way accurate, would not be realistically possible.¹⁰³

E. “*Bush v. Gore*”—*The Intervention*

Plans for the statewide recount began almost immediately after the Florida Supreme Court reversal.¹⁰⁴ The Bush campaign immediately sought a stay from the United States Supreme Court.¹⁰⁵ That night, Judge Terry Lewis, now handling the case on remand from the Florida Supreme Court,¹⁰⁶ had started to organize the state-wide recount of about 45,000 disputed ballots.¹⁰⁷ However, he set no specific standards for the counters (and the party watchers looking over their shoulders) except for the “intent of the voters” standard.¹⁰⁸

The statewide recount began the next day.¹⁰⁹ Then, at 2:30 p.m. on December 9, 2000, the United States Supreme Court, retitling the case “*Bush v. Gore*,” ordered an immediate halt to the recount.¹¹⁰ Within a half-hour, the recount had ceased.¹¹¹ With the clock ticking on the “Safe Harbor” deadline date of December 12, 2000, the Supreme Court indicated it was treating the stay request as a petition for certiorari, granting the petition, and setting oral argument for the morning of December 11, 2000.¹¹²

The decision to grant the stay was by a five to four vote with no majority opinion.¹¹³

102. *Id.* at 1271 (Harding & Shaw, J.J., dissenting).

103. *Id.* at 1272. The majority forcibly responded to this argument in a footnote:

The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

Id. at 1261 n. 21.

104. Wash. Post, *supra* n. 2, at 200.

105. *Id.* at 203.

106. *Supra* n. 46.

107. Wright, *supra* n. 2, at 275.

108. Wash. Post, *supra* n. 2, at 208-09.

109. *Id.* at 210-11.

110. *Id.* at 211.

111. *Id.*

112. *Bush v. Gore*, 121 S. Ct. 512 (2000).

113. *Id.* at 512. By eliminating the dissenters, the “majority” consisted of Chief Justice Rehnquist and Justices Kennedy, O’Connor, Scalia, and Thomas.

Justices Breyer, Ginsburg, and Souter¹¹⁴ joined a vehement dissent written by Justice Stevens, and Justice Scalia responded with a concurrence.¹¹⁵

The dissenters challenged the majority for its rejection of “three rules of self-restraint,” noting:

[1] On questions of state law, we have consistently respected the opinions of the highest courts of the States.

[2] On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously.

[3] On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion.

The majority has acted unwisely.¹¹⁶

Justice Stevens stressed that no “irreparable harm” could possibly be shown by “counting every legally cast vote” and that irreparable harm was more likely because the stay might be “tantamount” to a decision on the merits and “preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.”¹¹⁷

Justice Scalia responded by noting that a majority already believed that “the petitioner has a substantial probability of success.”¹¹⁸ Here the votes are of “questionable legality” and the “irreparable harm” is a “cloud upon what (Governor Bush) claims to be the legitimacy of his election.”¹¹⁹ Moreover, letting the standard for the recount differ for each county would “prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate.”¹²⁰

Oral argument was held on December 11, 2000.¹²¹ That same day, the Florida Supreme Court issued an opinion in response to the December 4, 2000 remand by the United States Supreme Court in the *Canvassing Board* decision.¹²² It focused on the date of certification of the county returns and whether later amended returns had to be

114. *Id.*

115. *Id.*

116. *Id.* at 512-13 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting).

117. *Id.* at 513. Linda Greenhouse of the New York Times saw this statement by Stevens as indicating he felt that there was a substantial risk that the stay was the equivalent of deciding for Bush. Wright, *supra* n. 2, at 277.

118. *Bush v. Gore*, 121 S. Ct. at 512.

119. *Id.*

120. *Id.* (Scalia, J., concurring).

121. Dionne & Kristol, *supra* n. 2, at xiv.

122. *Id.*

accepted by the Secretary of State.¹²³

F. “Canvassing Board” Revisited

The Florida Supreme Court decided to release its opinion in *Palm Beach County Canvassing Board*¹²⁴ in an effort to impact the United States Supreme Court action in the related “*Bush v. Gore*” decision.¹²⁵ The six to one majority opinion¹²⁶ again indicated that an ambiguity existed in Florida law and that it was the responsibility of the Supreme Court of Florida to resolve any ambiguities.¹²⁷ Thus, it was not making new law, only interpreting existing law.¹²⁸

Though the United States Constitution in Article II had given the state legislators the responsibility to appoint electors, it must be in accordance with state law.¹²⁹ In Florida, the legislature had delegated the power to appoint electors to the people of the state.¹³⁰ It did not establish different rules for election of the President and for other elections.¹³¹

As to the “Safe Harbor” provision of federal law, use of that provision was within the discretion of the state legislature and therefore Florida law, setting procedures for elections and for resolving

123. *Supra* nn. 47-62.

124. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (2000).

125. *Id.* at 1279 n. 2.

In its December 4, 2000, opinion and mandate, the Supreme Court of the United States remanded this case for further proceedings. On December 4, 2000, this Court entered its order authorizing . . . supplemental briefs . . . and briefs were filed on December 5, 2000, and considered by the Court. In the interim, this Court received briefs and conducted oral argument on December 7, 2000, in the case of *Gore v. Harris*, which also required immediate attention. We thereafter rendered our decision [in that case] on December 8, 2000, which is presently under review by the Supreme Court of the United States. While recognizing the dissent in this case does not agree with release of this opinion at this time, we have issued this decision as expeditiously as possible . . . in order to timely respond to the questions presented by the Supreme Court of the United States in the December 4, 2000, opinion and its remand instructions.

Id.

126. Chief Justice Wells dissented saying the court should not issue an opinion “while the United States Supreme Court has under consideration *Bush v. Gore*. . . .” *Id.* at 1292.

127. *Id.* at 1282.

Based on this Court’s status as the ultimate arbiter of conflicting Florida law, we conclude that our construction of the above statutes results in the formation of no new rules of state law but rather results simply in a narrow reading and clarification of those statutes, which were enacted long before the present election took place. We decline to rule more expansively in the present case, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it, the Legislature.

Id. at 1291.

128. See Wright, *supra* n. 2, at 299.

129. *Id.*

130. *Canvassing Bd.*, 772 So. 2d at 1281-82.

131. *Id.* at 1291.

controversies.¹³² However, if a risk existed that applying Florida law might result in loss of the right of Florida voters to “fully participate in federal elections, a strict timetable may be applied.”¹³³

The Florida Supreme Court then reviewed Florida law and ambiguities among statutory provisions. The Secretary of State could certify by the date set by Florida law, but must accept amended returns when it was necessary to insure “having each vote counted.”¹³⁴ Again, some limitation of that general rule may be appropriate in elections for the President, under the “Safe Harbor” provision, to avoid a risk to Florida’s citizens that their votes might not be counted.¹³⁵

II. BUSH V. GORE—THE FINAL CHAPTER

After oral argument before the United States Supreme Court on December 11, 2000, many expected, and the Gore campaign hoped for, an opinion that day or at least early the next day, with the possibility that a recount could continue at least until the “Safe Harbor” deadline on December 12, 2000. Yet, the actual decision was not released until after 10:00 p.m. on December 12, 2000.¹³⁶

A. The Action

The Supreme Court, of course, was considering only the appeal in *Gore v. Harris*.¹³⁷ But it also now had the new Florida Supreme Court opinion in *Canvassing Board*. Therefore, all issues were before it.¹³⁸ The unsigned majority opinion indicated that it felt bound by the Florida Court’s decision accepting the deadline date of December 12, under the “Safe Harbor” provision,¹³⁹ but otherwise did not discuss any of the issues in either Florida Supreme Court decision.¹⁴⁰

The Court reversed the Florida Supreme Court and remanded the

132. *Id.* at 1282.

133. *Id.* at 1282, 1289.

134. *Id.* at 1291.

135. *Id.*

136. Wash. Post, *supra* n. 2, at 224-27; Wright, *supra* n. 2, at 304.

137. *Bush v. Gore*, 531 U.S. 98, 101-04 (2000).

138. See text and discussion at *supra* nn. 124-35. See also *Bush*, 531 U.S. at 118 n. 2 (concurring opinion of Chief Justice Rehnquist citing the December 11th Florida Supreme Court *Canvassing Board* decision).

139. 3 U.S.C. § 5 (1994). The concurring opinion by Chief Justice Rehnquist also noted the time limitation set by the “Safe Harbor” language in 3 U.S.C. § 5 (1994). The state legislature wanted the deadline date of December 12, 2000 to apply. That date, said Chief Justice Rehnquist, was to include all possible appeals. . . .” *Bush*, 531 U.S. at 120-22 (Rehnquist, Breyer, Stevens & Ginsburg, JJ., dissenting). Cf. *id.* at 130 (Souter, J., dissenting: “[N]o State is required to conform to § 5.” It is each state’s choice and “the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its ‘safe harbor.’ And even that determination is to be made, if made anywhere, in the Congress.”). See *id.* at 143-44 (Ginsburg & Stevens, JJ., dissenting); *id.* at 153-58 (Breyer, Stevens & Ginsburg, JJ., dissenting).

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

matter “for further proceedings not inconsistent with its opinion.”¹⁴¹ After reviewing the opinion, Vice President Gore conceded on December 13, 2000.¹⁴² On December 14, 2000, the Florida Supreme Court, on remand, dismissed the case entitled “Gore v. Harris.”¹⁴³ On December 18, the Electoral College voted and Governor Bush won the election with 271 votes to Vice President Gore’s 266 votes.¹⁴⁴

Like the decision to stay the recount ordered on December 9, 2000,

141. *Id.* at 111.

142. Wright, *supra* n. 2, at 310-11.

143. On December 14th, the Florida Supreme Court entered its “Order on Remand.” *Gore v. Harris*, 779 So. 2d 270 (Fla. 2000). The Order cited the opinion of the United States Supreme Court and stated that:

On the date of the subject election, the Florida Election Code did not provide the elements necessary for a resolution of the disputed issues, based on the constitutional parameters expressed by the United States Supreme Court. Accordingly, relief cannot be granted, and this case is dismissed. Opinion may follow.

Id. at 270.

The actual opinion was released on December 22, 2000. *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000). The *per curiam* opinion expanded on its order by stating that for a manual recount to occur:

[The Supreme Court’s opinion] would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of equipment 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 [Florida law] The Supreme Court ultimately mandated that any manual recount be concluded by December 12, 2000. . . . In light of the time of the release of the Supreme Court opinion, these tasks and this deadline could not possibly be met. Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

...

Accordingly, pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief.

Id. at 526.

The Florida Chief Justice felt the *per curiam* decision was too defensive and so concurred in the result only. *Id.* at 527 (Wells, C.J., concurring). A concurrence by Florida Justice Shaw recited the chronological history of the case, questioned whether any date of finality is relevant except January 6 of 2001, when Florida is obligated under federal law, 3 U.S.C. § 15 (1994) to deliver its votes to Congress, hints at partisanship, but still assures all that “the basic principles of our democracy are intact.” *Id.* at 527-30 (Shaw, J., concurring). Florida Justice Pariente also concurred, urging reform of Florida law as to election contests and as to manual recounts, although believing that a recount could have been completed in a fair and equitable manner, had the United States Supreme Court not intervened. *Id.* at 530 (Pariente, J., concurring).

144. Dionne & Kristol, *supra* n. 2, at xiv.

the Supreme Court's December 12, 2000 decision was *per curiam*.¹⁴⁵ Since there was a concurring opinion by Chief Justice Rehnquist, joined by Justices Scalia and Thomas¹⁴⁶ and dissenting opinions by Justices Stevens, Ginsburg, Souter, and Breyer,¹⁴⁷ it is clear that the "swing votes" were the silent Justices Kennedy and O'Connor.¹⁴⁸

B. *The Basis—Equal Protection*

The majority decided the case on equal protection grounds, holding that, essentially, the state court failed to set "specific rules" for "uniform treatment" of contested ballots, which led to "arbitrary and disparate treatment" of the voters instead of equal weight.¹⁴⁹ The Constitution provides that once a state grants its citizens the right to vote for Presidential electors, it cannot, "by later arbitrary and disparate treatment, value one person's vote over that of another."¹⁵⁰ Here, the recount ordered by the Florida Supreme Court was too arbitrary. By setting no standards other than "the intent of the voter," the Florida decision led to "unequal evaluation of ballots in various respects."¹⁵¹ Intent must be based on "specific rules designed to ensure uniform treatment."¹⁵²

Arbitrariness was demonstrated by the actions already taken by the Florida Supreme Court in allowing recount totals from different counties, each of which "used varying standards to determine what was a legal vote."¹⁵³

In addition, differing treatment of undervotes and overvotes was applied.¹⁵⁴ Finally, the Florida Supreme Court "did not specify who would recount the ballots."¹⁵⁵ As a result, different county canvassing boards pulled together *ad hoc* teams of judges "with no previous training in handling and interpreting the ballots."¹⁵⁶

The *per curiam* opinion concluded with a limiting series of comments. "Our consideration is limited to the present circumstances,

145. *Bush*, 531 U.S. 98 (2000).

146. *Id.* at 111.

147. There were four dissenting opinions: (1) Justice Stevens, joined by Justices Breyer and Ginsburg; (2) Justice Souter, joined by Justices Breyer and Stevens and Justice Ginsburg in part; (3) Justice Ginsburg, joined Justice Stevens and in part by Justices Souter and Breyer; and (4) Justice Breyer, joined in part by Justices Ginsburg, Stevens, and Souter. *Id.* at 123, 129, 135, 144.

148. Wash. Post, *supra* n. 2, at 229.

149. *Term in Review: Justices Decide Landmark Cases on the Conduct of Federal Elections*, 70 L.W. 3081, 3082 (Aug. 7, 2001).

150. *Bush*, 531 U.S. at 104-05.

151. *Id.* at 106.

152. *Id.*

153. *Id.* at 107.

154. *Id.*

155. *Id.* at 109.

156. *Bush*, 531 U.S. at 109.

for the problem of equal protection in election processes generally presents many complexities."¹⁵⁷ There is no intent to specify specific rules as "local entities, in the exercise of their expertise, may develop different systems for implementing elections."¹⁵⁸ But here, the "situation [is one] where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."¹⁵⁹

Here, a need existed for "substantial additional work" to comply with the requirements of equal protection and, yet, the Florida Supreme Court had indicated its desire to comply with the "Safe Harbor" provision, requiring a final decision by December 12, 2000, the date the opinion was issued.¹⁶⁰

Therefore, as "it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, [the Court reversed] the judgment of the Supreme Court of Florida ordering a recount to proceed."¹⁶¹

As indicated by the *per curiam* opinion, seven Justices believed that the Florida procedure had equal protection problems. Aside from the five votes indicated by the majority decision, Justices Souter and Breyer indicated equal protection concerns. They still dissented, however, as they believed the remedy of the majority constituted an inappropriate usurpation of state authority and was "out of proportion to the asserted harm."¹⁶² Justice Breyer wrote:

An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida . . . whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single-uniform substandard.

Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide.¹⁶³

157. *Id.*

158. *Id.*

159. *Id.*

160. The *per curiam* opinion rejects Justice Breyer's "proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18" as it would be against the intent of the Florida legislature as indicated by the Florida Supreme Court to seek the "safe harbor benefits" of federal law. *Id.* at 111.

161. *Id.* at 110.

162. *Bush*, 531 U.S. at 147 (Breyer, Stevens, Ginsburg & Souter, JJ., dissenting).

163. *Id.* at 146-47.

Justice Souter similarly asserted that accepting that an equal protection problem existed:

It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute.¹⁶⁴

The differences that existed between counties were arbitrary, but the remedy was remand:

to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. . . . To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.¹⁶⁵

Justices Ginsburg and Stevens rejected the equal protection argument totally. Specifically, Justice Stevens noted that the “intent of the voter” standard is no less arbitrary than many other legal doctrines, such as “beyond a reasonable doubt.”¹⁶⁶

Moreover, allowing differing counties to have different standards is no more a violation of equal protection than the delegation by state legislatures to counties as to voting systems and ballot design.¹⁶⁷ And, there will be some consistency as “a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.”¹⁶⁸

Justice Ginsburg was more blunt in stating that we live “in an imperfect world,” and the issue therefore is not really equal protection, but rather who makes the decision.¹⁶⁹ Here, the Florida Supreme Court has spoken and “I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount.”¹⁷⁰

164. *Id.* at 133.

165. *Id.* at 134-35.

166. *Id.* at 125 (Stevens, Ginsburg & Breyer, JJ., dissenting).

167. *Id.* at 126.

168. *Bush*, 531 U.S. at 126.

169. *Id.* at 143.

170. *Id.* (Ginsburg & Stevens, JJ., dissenting).

C. *The “Non-Issue”—The Power to Select Electors*

In remanding the *Canvassing Board* case, the Supreme Court indicated that it was concerned about the interference of the Florida Supreme Court in the decision of the legislature to choose electors, in accordance with Article II, section 1, clause 2.¹⁷¹ On remand, the Florida Supreme Court assumed that it had the right to interpret what the Florida legislature meant in various statutes dealing with the selection of electors. Applying legislative intent was perfectly consistent with the Constitutional language that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”¹⁷² The Florida Supreme Court was merely interpreting the “manner” that the state legislature had “directed.”¹⁷³

In *Bush v. Gore*, the *per curiam* opinion did not consider the Article II issue.¹⁷⁴ However, as the concurrence and the dissents did give the issue some treatment, we have the positions of at least seven of the Justices on this issue.¹⁷⁵

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, indicated that Article II, section 1, clause 2 provided that the legislature has the exclusive right to define the method of appointment of electors.¹⁷⁶ Here, the legislature has delegated power over the election to the Secretary of State, and the Florida Supreme Court did not have the authority to “alter[] . . . by judicial interpretation . . . the statutorily provided apportionment of responsibility among these various bodies.”¹⁷⁷

All the dissenters disagreed and in fact argued that this issue is not even substantial.¹⁷⁸ Justice Stevens stated their position.¹⁷⁹ The states, acting through their legislatures, establish in statutes the procedures for selection of Presidential electors. That power is confirmed by Article II of the federal Constitution. However,

[w]hen questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.¹⁸⁰

171. *Supra* nn. 67-68.

172. U.S. Const. art. II, § 1, cl. 2.

173. *Supra* nn. 127-35.

174. See Posner, *supra* n. 2, at 5 (indicating that applying Article II would have been more legitimate and less criticized basis for the decision).

175. See *supra* nn. 146-47.

176. *Bush*, 531 U.S. at 113-14 (Rehnquist, Scalia & Thomas, JJ., concurring).

177. *Id.* at 114.

178. *Term in Review: Justices Decide Landmark Cases on the Conduct of Federal Elections*, 70 L.W. 3081, 3082-83 (Aug. 7, 2001).

179. *Bush*, 531 U.S. at 123.

180. *Id.*

Here, the Florida Supreme Court, in fulfilling its obligation, was interpreting Florida law and inconsistent provisions of Florida law, and this role was “wholly consistent with, and indeed contemplated by, the grant of authority in Article II.”¹⁸¹

Separate opinions by Justices Souter, Ginsburg, and Breyer reaffirmed the idea that no Article II issue existed at all. Statutes, said Justice Souter, including election statutes, “require interpretation, which does not, without more affect the legislative character of a statute within the meaning of [Article II of] the Constitution.”¹⁸² Here, the Florida Supreme Court “engaged in permissible construction [of election statutes].”¹⁸³ The intent of the framers in Article II, said Justice Ginsburg, was that “the judiciary would construe legislative enactments.”¹⁸⁴

It is not necessary to spend much time on the criticisms and supporters of the concurring opinions as to the application of Article II. The political/legal reality is that concurring Justices did not get the two swing Justices on the issue. The impact of Article II, section 1, clause 2 on future cases is therefore unknown.

Judge Posner and Professor Epstein are the biggest defenders of applying Article II instead of equal protection to resolve the dispute. The final authority, they urge, under that Constitutional provision, resides in the state legislature and indicates that the Florida Supreme Court overstepped its authority by interpreting it as it did.¹⁸⁵ The dissenters,¹⁸⁶ Professor Dershowitz¹⁸⁷ and others,¹⁸⁸ indicate that it is the historic function of the judiciary to interpret state law and all the Florida Court did was exercise its traditional function.¹⁸⁹ In fact, they urge that the

181. *Id.* at 124. Justice Stevens wrote:

Article II provides that ‘each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.’ It does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions. The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature’s own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes.

Id.

182. *Id.* at 130-31 (Souter, Breyer, Stevens & Ginsburg, JJ., dissenting).

183. *Bush*, 531 U.S. at 133 (Souter, Breyer, Stevens & Ginsburg, JJ., dissenting).

184. *Id.* at 141 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

185. Posner, *supra* n. 2, at 111-14, 151-62; Richard A. Epstein, “*In Such a Manner as the Legislature Thereof May Direct: The Outcome in Bush v. Gore Defended*,” 68 U. Chi. L. Rev. 613, 620 (2001).

186. *Supra* nn. 183-84.

187. Dershowitz, *supra* n. 2, at 129.

188. See e.g. Joseph M. Fisher, *A Political Case Makes Bad Law*, 23 Natl. L.J. (Jan. 8, 2001).

189. This is, of course, the argument made by the Florida Supreme Court itself in its

concurrents violated their own individual histories by not deferring to federalism.¹⁹⁰

D. Federalism

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, indicated that “[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”¹⁹¹ Here, however, the Court was dealing not with an ordinary election, but with an election for the President of the United States. It could not avoid the issue, but instead had to address the specific Constitutional issue.¹⁹² In fact, in choosing to interpret a federal constitutional provision and not accepting the interpretation of the state Supreme Court, it was not acting contrary to federalism principles, but rather enhancing federalism by giving the state legislature its rightful authority.¹⁹³

The primary response to the Chief Justice came from Justice Ginsburg, joined by Justices Stevens, Breyer, and Souter. Ginsburg attacked the Chief Justice’s concurrence as a direct insult to federalism, arguing that even if she disagreed with the Florida Supreme Court, it is not the role of United States Supreme Court Justices to interpret Florida law.¹⁹⁴ “There is no cause here to believe that the members of Florida’s high court have done less than ‘their mortal best to discharge their oath of office,’ and no cause to upset their reasoned interpretation of Florida law.”¹⁹⁵

decision on the remand of the *Canvassing Board* case. See text and discussion at *supra* nn. 124-35.

190. E.J. Dionne, Jr., *So Much for States’ Rights*, in *Bush v. Gore: The Court Cases and the Commentary* 287 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

191. *Bush*, 531 U.S. at 112 (Rehnquist, Scalia & Thomas, JJ., concurring).

192. *Id.* at 114.

In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida’s executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court’s actions. But, with respect to a Presidential election, the court must be both mindful of the legislature’s role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

Id.

193. *Id.* at 115-16.

This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

Id. (emphasis in original)

194. *Bush*, 531 U.S. at 136 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

195. *Id.*

Just as the Court defers to administrative agencies, unless they violate the clear intent of Congress, federalism demands that the Court show equal “respect . . . to a state high court’s interpretation of its own state’s law.”¹⁹⁶ In fact, it is not uncommon to “let stand state-court interpretations of *federal* law with which [the Court] might disagree.”¹⁹⁷

This case is a break from past practice where the Court “appropriately recognize[s] that [it] acts as an “outsider’ lacking the common exposure to local law which comes from sitting in the jurisdiction.”¹⁹⁸ In fact, it is the highly, highly unusual case where the United States Supreme Court rejects “outright” an interpretation of state law by a state high court.¹⁹⁹

Justice Ginsburg concluded:²⁰⁰

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts’ interpretations of their state’s own law. This principle reflects the core of federalism, on which all agree. “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.” THE CHIEF JUSTICE’s solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature’s sovereign. Were the other [m]embers of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.²⁰¹

Justice Stevens also expressed his concern that the Court flouted acceptable federalism principles in its decision. The majority of the Supreme Court gave credence “to an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed.”²⁰² Justice Breyer’s dissent similarly criticized the concurrence as giving mere lip service to federalism, arguing that it essentially “second-guessed” the state court when it resolved conflicts among state statutes.²⁰³

III. THE DEFENSES AND CRITICISMS

My critique will focus solely on two issues: the conflict between

196. *Id.*

197. *Id.*

198. *Id.* at 138-39 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting). Justice Ginsburg pointed to many incidents where the Supreme Court, unsure of the meaning of a state statute or set of statutes, “certifies” that issue to the state supreme court. *Id.*

199. *Id.* at 140-41. Justice Ginsburg noted that the only exceptions involved early cases establishing federal supremacy over state law (like *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816)) and then in the 1950’s and 1960’s civil rights cases in the South. *Id.*

200. *Bush*, 531 U.S. at 142-43 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

201. *Id.*

202. *Id.* at 128 (Stevens, Ginsburg & Breyer, JJ., dissenting).

203. *Id.* at 149 (Breyer, Stevens, Ginsburg & Souter, JJ., dissenting).

equal protection and federalism, and the method of decision-making by the Court, particularly the stays and timing of its actions. I will not focus directly on allegations and counter-allegations of “politics” and on the “partisan nature” of these decisions. However, I do want to make some general comments about this dialogue.²⁰⁴

A. Partisanship

All during the judicial process, the judges of the state courts and then the Justices of the United States Supreme Court were attacked for partisanship.²⁰⁵ Before the Justices accepted an appeal and issued a stay in the *Canvassing Board* case, many pundits believed that the Justices of the United States Supreme Court would find some way to avoid this highly political case.²⁰⁶ When the Court proceeded to decide it, pundits then worried about the “credibility” of the Court in the future.²⁰⁷ Others defended the decision as bringing a difficult election process to a close and suggested that there would be no real long-term

204. Professor Dershowitz and Judge Posner have written two books presenting two contrasting views as to the *Bush v. Gore* decision. Posner, *supra* n. 2; Dershowitz, *supra* n. 2. See Ethan Bronner, *Posner v. Dershowitz*, N.Y. Times Book Rev. 11-12 (Jul. 15, 2001). This was then followed by an extremely interesting and combative Internet “dialogue”—particularly as to partisanship and politics and the decision. Alan M. Dershowitz & Richard A. Posner, *The Supreme Court and the 2000 Election* <<http://slate.msn.com/code/story/actions/. . . %2F01%2D07%D02%2Fdialogues%2Exml&iMsg=1>> (accessed July 9, 2001).

205. Frank Bruni, *Bush Camp Angrily Vows to Fight [Florida Supreme Court] Ruling*, in *36 Days: The Complete Chronology of the 2000 Presidential Election* 127, 127-28 (John Wright et al. eds., Times Books 2001); Richard L. Berke, *Angry Republicans Vow Bitter Fight*, in *36 Days: The Complete Chronology of the 2000 Presidential Election* 268, 268-69 (John Wright et al. eds., Times Books 2001); Richard L. Berke, *Stunned Democrats Attack [United States Supreme] Court's Decision*, in *36 Days: The Complete Chronology of the 2000 Presidential Election* 281, 281-82 (John Wright et al. eds., Times Books 2001); William Glaberson, *Legal Scholars Question Supreme Court's Role*, in *36 Days: The Complete Chronology of the 2000 Presidential Election* 346, 346-47 (John Wright et al. eds., Times Books 2001); Richard Lowry, *Why the Restraint?*, in *Bush v. Gore: The Court Cases and the Commentary* 189 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); Charles Krauthammer, *Our Imperial Judiciary: We Need to Bring a Gavel Down on Arrogant Judges Like Florida's Supremes*, in *Bush v. Gore: The Court Cases and the Commentary* 206, 206-08 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); Ronald Brownstein, *Blocking Vote Count, High Court Shows Which Team It's Routing For*, in *Bush v. Gore: The Court Cases and the Commentary* 266, 266-69 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); Eric Foner, *Partisanship Rules*, in *Bush v. Gore: The Court Cases and the Commentary* 293, 293-94 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

206. See Nelson Lund, *An Act of Courage*, in *Bush v. Gore: The Court Cases and the Commentary* 319 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001) (reviewing what was expected and praising the Court for its “courage” in rejecting those expectations); Douglas W. Kmiec, *The Many Faces of Equal Treatment*, 8 *Preview* 428, 430 (Aug. 2, 2001); Scheppele, *supra* n. 4, at 1406.

207. Max Boot, *Rule of Law: Law Professors v. the Supreme Court*, Wall St. J. A13 (Aug. 13, 2001). But see James Blumstein & Suzanna Sherry, *The 2000 Presidential Election: What Happens When Law and Politics Collide?* *Vanderbilt Law*. 18, 18-27 (Spring 2001); Paul Star, *The Betrayal*, Am. Prospect 4 (Jan. 1-15, 2001); Richard Rorty, in *What We'll Remember in 2050: 9 Views on Bush v. Gore*, *Chron. Higher Educ.* B16 (Jan. 5, 2001).

impact on the public's confidence in the Court.²⁰⁸

The Justices themselves also focused on this issue. Dissenting Justice Breyer compared the majority decision to the actions of Supreme Court Justice Bradley in resolving the Presidential election of 1876. In the 1876 election, there was an electoral contest because three states sent two slates of electors to Washington.²⁰⁹ Congress appointed a fifteen person electoral commission, which included five Justices.²¹⁰ Supreme Court Justice Bradley issued the ultimate deciding vote.²¹¹ Breyer noted that:

[T]he participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.²¹²

He went on to state:

[A]bove all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.²¹³

In his dissent, Justice Stevens was more blunt:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the

208. Harvey J. Mansfield, in *What We'll Remember in 2050: 9 Views on Bush v. Gore*, Chron. Higher Educ. B15 (Jan. 5, 2001); Michael Dorf, *Was the Bush v. Gore Decision Political?* Colum. L. Sch. Rpt. 22-25 (Spring 2001).

209. *Bush*, 531 U.S. at 156.

210. *Id.*

211. Justice Breyer noted that Bradley was sharply attacked, though later shown to be honest and impartial, and to have based his decision on legitimate legal principles - one of which was that "Congress [should not] go behind election returns [but rather] accept them as certified by state authorities." See *Bush*, 531 U.S. at 156-57 (Breyer, Ginsburg & Stevens, JJ., dissenting) (citing and quoting from Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 185 (Yale U. Press 1962)). Professor Kmiec criticizes this reference to the election of 1876, arguing that, in 1876, the Justices participated in an "extra-judicial capacity" on a Commission. By contrast, here they participated pursuant to their regular duties. Kmiec, *supra* n. 206, at 432.

212. *Bush*, 531 U.S. at 157 (Breyer, Stevens & Ginsburg, JJ., dissenting).

213. *Id.* at 157-58.

judge as an impartial guardian of the rule of law.”²¹⁴

In response, the *per curiam* opinion defended itself:

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.²¹⁵

Perhaps the most vocal spokesperson attacking the *Bush v. Gore* decision as “partisan” and decrying the implications of that partisanship is Professor Alan Dershowitz in his book, “Supreme Injustice.”²¹⁶ The language he uses is direct and stark:

The five Justices who ended election 2000 . . . have damaged the credibility of the U.S. Supreme Court and their lawless decision . . . promises to have a more enduring impact on Americans than the outcome of the election itself.²¹⁷

In so voting, they [the five vote majority] shamed themselves and the Court on which they serve, and they defiled their places in history.²¹⁸

[T]here is . . . widespread public outrage at what the high court did . . . [and when the Court members] act in an unprincipled and partisan manner—as they did in *Bush v. Gore*—they risk losing respect and frittering away the moral capital of accumulated by their predecessors over generations.²¹⁹

It is naive to believe that there will be any lasting impact on public confidence in the Judiciary because of its decision in *Bush v. Gore*.²²⁰ Even outrageous decisions, such as those on slavery,²²¹ segregation,²²² and Japanese-American internment,²²³ which have been universally condemned,²²⁴ did not lead to a permanent disrespect to the Court.²²⁵

214. *Id.* at 128-29 (Stevens, Ginsburg & Breyer, JJ., dissenting).

215. *Id.* at 111 (*per curiam*).

216. Dershowitz, *supra* n. 2, at 3.

217. *Id.*

218. *Id.* at 4.

219. *Id.* at 5-6.

220. A recent article in the *Judicature* reported on a survey that showed the Supreme Court’s decision in *Bush v. Gore* had only a modest influence on the public’s perceptions and knowledge of the Court. Herbert Kritzer, *The Impact of Bush v. Gore on Public Perceptions of the Supreme Court*, 85 *Judicature* 1, 32 (July-Aug. 2001).

221. *Scott v. Sandford*, 60 U.S. 393 (1856).

222. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

223. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

224. See Bernard Schwartz, *A Book of Legal Lists* 69, 70-72, 76-78 (Oxford U. Press 1997) (listing these cases as three of the “Ten Worst Supreme Court Decisions”).

225. John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 *U. Chi. L. Rev.* 775, 776-778 (2001).

Other decisions which caused deep splits in the public response, such as those on abortion,²²⁶ school prayer,²²⁷ and suspect rights,²²⁸ may have led to anger,²²⁹ attempts to "rein in the Court,"²³⁰ and debates on selection of future Justices.²³¹ They did not, however, lead to a wholesale rejection of the legitimacy of the Court.

As a result of the decision, there may be some partisan bickering and heavy questioning of future Supreme Court nominees along with some lingering resentment.²³² But the public and the bar want the Court to have credibility and they will give it.²³³

On a philosophic level, the decision in *Bush v. Gore* will be seen as just another example of the real world.²³⁴ Are the Justices of the Supreme Court political? Are the Justices ideological? Are the Justices biased toward certain people, ideas, and perspectives?²³⁵ Surprise, surprise!²³⁶

Traditional scholars, legal realists, critical legal scholars, and post-modernists can all agree that decisions, even or especially those of the United States Supreme Court, are not based on fixed precedents and

226. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

227. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

228. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Ariz.*, 384 U.S. 436 (1966).

229. Martin H. Belsky, *The Burger Court & Criminal Justice: A Counter-Revolution in Expectations*, in *The Burger Court: Counter-Revolution or Confirmation?* 131 (Bernard Schwartz ed., Oxford U. Press 1998); Martin H. Belsky, *Anti-disestablishmentarianism - The Religion Clauses at the End of the Millennium*, 33 *Tulsa L.J.* 93 (1997); Martin H. Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right,"* 36 *Tulsa L.J.* 43 (2000).

230. See *Dickerson v. U.S.*, 530 U.S. 428 (2000) (discussing congressional attempts to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)).

231. Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* 317 (Rowan & Littlefield 1999).

232. Tony Mauro, *Justices Double-Team Circuit*, *Leg. Times* 8, 10 (May 21, 2001).

233. See Kmiec, *supra* n. 206, at 432 (quoting Yale Professor Paul Kahn: "The rule of law is our national myth. We must believe the myth if we are to overcome our political disagreements. . . . [We point] to our faith in law and the institutional locus of that faith is the [United States] Supreme Court."); Mark A. Aronchich & Stephen A. Sheller, *Butterflies, Chads and American History*, *Phila. Law.* 23-26, 57 (Spring 2001).

234. See Frank I. Michelman, *Suspicion, or the New Prince*, 68 *U. Chi. L. Rev.* 679, 682 (2001), stating:

There is nothing inherently untoward about a polarized Supreme Court, by which I mean a Court whose members line up repeatedly and often predictably in opposing wings having stable memberships. To find something amiss in that would be to eject ideology from constitutional adjudication in a way that can only be called wrongheaded in light of our country's long experience with this form of public decisionmaking. . . . [G]rownup Americans accept the ideological difference as unavoidable fact.

Id.

235. See Dershowitz, *supra* n. 2, at 9 (quoting Justice Scalia in an article he wrote as a professor).

236. See Kmiec, *supra* n. 206, at 432 (quoting Yale Professor Paul Kahn: "[W]e can always find the politician behind the robes of the justice."); Jonathan Groner, *Will Election Case Do Damage to the Judiciary?* *Leg. Times* 15 (Dec. 18, 2000); Jonathan Ringel, *What the High Courts Says When It Votes 5-4*, *Leg. Times* 14 (Dec. 18, 2000) (noting that majority in *Bush v. Gore* is the same majority in half of the split decisions of the Court).

doctrines but include the judge's history and personality.²³⁷ My now deceased colleague, Chapman Professor Bernard Schwartz, documented this in his books reviewing drafts of Supreme Court opinions.²³⁸ Here, supposed "states rights" Justices overruled a state's highest court.²³⁹ Justices who had not been proponents of voters' rights urged a new application of equal protection to safeguard such rights.²⁴⁰ Supposed activist judges urged restraint and even avoidance²⁴¹ whereas individual and federal rights proponents argued for acceptance of a state decision rejecting claims of equal protection.²⁴² If there was bias, argued others, it was the partisanship of the Florida courts.²⁴³ To quote my favorite legal scholar, Yogi Berra, in this and in most situations: "Where you stand, depends on where you sit."

That said, we should expect, and did in fact receive, partisanship. Now, let's move on to the bases of the Court's actions and their legitimacy.

B. *Equal Protection and Federalism*

It is not surprising, from a "small p" political point of view,²⁴⁴ why the majority of the Supreme Court chose to rest its decision on equal protection grounds. First, only three Justices who joined the majority were willing to use Article II, section 2 as a basis for the decision. All the dissenters urged that the issue was not even substantial.²⁴⁵ Two of the Justices, O'Connor and Kennedy, obviously felt uncomfortable about

237. See Kermit Hall, *The Magic Mirror* 270 (1989); David Kairys, *Introduction*, in *The Politics of Law: A Progressive Technique* 4-5 (David Kairys ed., 3d ed., Pantheon Books 1998); Richard Posner, *Overcoming Law* 387-405 (Harv. U. Press 1995); Stephen Feldman, *Playing with the Pieces: Postmodernism in the Lawyers Toolbox*, 85 Va. L. Rev. 151, 161 (1999).

238. Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (Oxford U. Press 1985); Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (Oxford U. Press 1988); Bernard Schwartz, *The Unpublished Opinions of the Rehnquist Court* (Oxford U. Press 1996).

239. See Linda Greenhouse, *Another Kind of Bitter Split*, in *Bush v. Gore: The Court Cases and the Commentary* 296, 299 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001) (quoting Professor Suzanne Sherry).

240. David Kairys, *Bush v. Gore Blues*, *Jurist Leg. Educ. Network* <wysiwyg://23/http://jurist.law.pitt.edu/forumnew23.html> (accessed Aug. 6, 2001).

241. Randy E. Barnett, *Left Tells Right: "Heads I Win, Tails You Lose."*, in *Bush v. Gore: The Court Cases and the Commentary* 264 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

242. Michael Greve, *The Equal Protection Card: The Worst Grounds May Be the Best*, in *Bush v. Gore: The Court Cases and the Commentary* 260 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); Kairys, *supra* n. 262.

243. See Scott Turow, *A Brand New Game: No Turning Back From the Dart the Court Has Thrown*, in *Bush v. Gore: The Court Cases and the Commentary* 301 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001). Turow believes that the United States Supreme Court's role in *Bush v. Gore* was a game of "tit-for-tat" with the Florida Supreme Court, and that the United States Supreme Court Justices were voting purely along partisan lines themselves. *Id.* at 303-04.

244. Randall Kennedy, *Contempt of Court*, *Am. Prospect* 15-16 (Jan. 1-15, 2001).

245. See text and discussion at *supra* nn. 171-84.

deciding the issue on this basis.²⁴⁶

It is, of course, speculation, but Justice O'Connor has long been a defender of deference to the state courts, especially when state law is involved.²⁴⁷ Similarly Justice Kennedy, especially in recent cases, has been a strong and articulate proponent of states as "sovereign powers" independent of action by the federal judiciary and of letting state courts resolve conflicts between federal law and state powers.²⁴⁸

It might be unseemly to intervene and resolve a conflict between the state supreme court and the state executive or legislature as to how an election should be managed or, to use the language of Article II, how the "manner" of selecting electors should be determined. To let the federal courts, even the United States Supreme Court, resolve a dispute between the branches of a state government as to the meaning and application of state laws and the state constitution must have, in the final moments of decision-making, been too much.

Resting the decision on equal protection grounds reduces the federalism concerns. Justice O'Connor, joined by Justice Kennedy, had recently reaffirmed that federal judicial intervention and interpretation is perfectly appropriate when applying the Fourteenth Amendment Equal Protection Clause.²⁴⁹ By definition, any limitation on federal judicial power because of the historic state role in determining the manner of electors in Article II, must be constrained by the later requirements of the Fourteenth Amendment, applying equal protection principles to the right to vote.²⁵⁰

Second, using equal protection grounds might capture some of the dissenting Justices, and that, of course, is exactly what happened. Justices Souter and Breyer accepted the equal protection analysis even if they did not accept the remedy of remand without the possibility of a recount.²⁵¹ Some "spin" might be able to express the decision as seven to two and not five to four and, again, that is how the decision was first perceived.²⁵²

Third, and here is where policy and politics intersect, there are some real and substantial reasons to apply the equal protection clause to the election process. Disregard for the moment, what happened to the 2000 election because of the stays, delays, and time deadlines. Stating that there must be some standards for counting votes will ring true to

246. Greve, *supra* n. 292.

247. *Coleman v. Thompson*, 501 U.S. 722 (1991); Bernard Schwartz, *The Unpublished Opinions of the Rehnquist Court* 14 (Oxford U. Press 1996).

248. *Alden v. Me.*, 527 U.S. 706 (1999).

249. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

250. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

251. See text and discussion at *supra* nn. 162-65.

252. Wash. Post, *supra* n. 2, at 227; *Unsafe Harbor*, in *Bush v. Gore: The Court Cases and the Commentary* 317 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

almost anyone who has had experience with the actual running of elections and the counting of votes.²⁵³

Candidate supporters, poll watchers, judges of elections, and the press can all describe the near chaos that can occur, especially in close elections, when there is a challenge to a voter, because of registration, or to a vote because of some impropriety. Each precinct or ward in a metropolitan area and each voting site in suburban or rural sites set their own rules—with very little guidance and almost no oversight.²⁵⁴

Ghost voters, multiple voters, forgotten voters, broken machines, and lost ballots pre-existed by many years “butterflies” and “dimpled chads.” Specially assigned judges, and then later appellate judges, ruled on an *ad hoc* basis as to whether a particular person should be able to vote because he or she lost their registration card and was not on the rolls. Other judges would have to decide whether an election return was valid because some individuals voted who seemed to be dead or an election box or machine appeared to be tampered with.²⁵⁵

Indicating that there should be some standards to be followed by those given the responsibility to determine the “intent of the voter” does not sound unreasonable. In fact, the controversy over the application of an “arbitrary and capricious” test to say that there should be rules for “uniform treatment” seems to me to make eminent common sense.²⁵⁶ If the equal protection basis for the decision had merely led to a remand to the Florida Supreme Court, and that court had had the time to develop standards for a recount, there would have been little criticism of the Supreme Court.²⁵⁷ Perhaps the Court would have been praised by “good government” types, and liberals for taking the next step in “democratizing” our election process.²⁵⁸

The Supreme Court in *Baker v. Carr*²⁵⁹ took the first step and told

253. John Mintz & Peter Slevin, *The Florida Fiasco*, Wash. Post Natl. Wkly. Ed. 6, 6-8 (June 11-17, 2001).

254. Early in my professional career, I served as a prosecutor in the Philadelphia District Attorney's office. One of my duties was to oversee election day activities. This involved receiving complaints from other Assistant District Attorneys, lawyers, those representing candidates (poll watchers), and judges of elections. My observations and comments are based on these experiences. See Arlen Specter, District Attorney, *The 1970-71 Report to the People of Philadelphia* 283-84.

255. There was some allegation of serious fraud or impropriety during every election, whether primary or general, that occurred while I worked as election day prosecutor. Some resulted in subsequent prosecutions. See Arlen Specter, *Passion for Truth: From Finding JFK's Single Bullet to Questioning Anita Hill to Impeaching Clinton* 225-26 (HarperCollins 2000).

256. *But see* Dershowitz, *supra* n. 2, at 84: “I challenge any law professor or Supreme Court litigator to defend the majority's equal protection conclusion and remedy in a public debate.”

257. Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. Chi. L. Rev. 657, 673 (2001).

258. David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. Chi. Rev. 737, 740 (2001).

259. *Baker v. Carr*, 369 U.S. 186 (1962).

us that federal Constitutional doctrines applied to elections and that it would not avoid applying the Constitution to election challenges. *Wesbury v. Sanders*,²⁶⁰ *Reynolds v. Sims*,²⁶¹ and later *Harper v. Virginia State Board of Elections*²⁶² set strict scrutiny as the outside parameter for application of the equal protection clause. Election laws cannot make affluence a basis for a vote (*Harper*). Apportionment schemes would be based on a one person, one vote standard (*Wesbury*²⁶³ and *Reynolds*).

Though some argued that these cases stood for a strict scrutiny of all partisan election apportionment standards,²⁶⁴ the Court took a middle view in later cases. Strict scrutiny of all deviations would not be required. Some flexibility would be allowed to preserve the normal functioning of state governments²⁶⁵ and for minor population differences.²⁶⁶ Politics is an acceptable component of an election process,²⁶⁷ but it cannot be allowed to go so far as to intentionally frustrate the will of the majority or to intentionally discriminate against an identified minority of voters.²⁶⁸

Bush v. Gore can be seen as the logical next step.²⁶⁹ The Court accepts the general standard of “the intent of the voter” and will not impose a strict review of how the state applies that standard. However, it cannot allow that standard to be so loosely applied as to allow “arbitrary and disparate treatment” to dilute the “weight of a citizen’s vote.”²⁷⁰

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.²⁷¹

Critics have argued with some justification that an analysis like

260. *Wesbury v. Sanders*, 376 U.S. 1 (1964).

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

262. See *Harper v. State Bd. of Elections*, 383 U.S. 663 (1966) (invalidity of poll tax).

263. Of course, *Westbury v. Sanders*, 376 U.S. 1 (1964), applied Article I, § 2 of the Constitution, to congressional elections, but it used “equal protection” concepts. *Reynolds*, 377 U.S. at 561.

264. See Martin H. Belsky, *Reapportionment in the 1970’s: A Pennsylvania Illustration*, 47 Temp. L.Q. 3 (1973).

265. *Mahan v. Powell*, 410 U.S. 315 (1973).

266. *White v. Regester*, 412 U.S. 755 (1973).

267. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

268. *Davis v. Bandemer*, 478 U.S. 109 (1986).

269. Judge Posner would have preferred the Court use the due process clause as a basis to require a more rational election recount process. Posner, *supra* n. 2, at 130-32.

270. *Bush v. Gore*, 531 U.S. 98, 104-5 (2000) (citing and quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533 (1964)).

271. *Bush v. Gore*, 531 U.S. at 109.

mine above is naive.²⁷² The argument is that Supreme Court's decision has no precedential value and is limited its use in the future by specific language: "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."²⁷³ On this point, Professor Dershowitz is quite harsh:

The purpose of [this] remarkable cautionary line—which is virtually an admission that this decision does not fit into a line of continuing precedents—was to cobble together a majority for Bush. . . . Like a great spot-relief pitcher in baseball, this equal protection argument was trotted out to do its singular job of striking out Vice President Gore and was immediately sent to the showers, never to reappear in the game.²⁷⁴

However, if I am right about why the Justices voted as they did on this issue, *Bush v. Gore* may well have precedential implications.²⁷⁵ The four dissenting Justices might be willing to uphold lower court decisions mandating standards for vote counting and they could be joined by Justices O'Connor and Kennedy. I am not alone in this analysis.²⁷⁶ At least three federal judges have applied the new equal protection standard and have rejected defense motions to dismiss voting rights cases based on *Bush v. Gore*.²⁷⁷ At least one commentator has argued that *Bush v. Gore* might have implications in the criminal justice system.²⁷⁸ Professor Lani Guinier hopes that "the conservative majority will now look closely at other suits based on the principal of equal protection—challenging disparate treatment of voters in voting procedures."²⁷⁹

C. Finality, Timing, and Stays

Rejection of the critics of the Supreme Court's decision applying equal protection principles to the Florida recount still leaves the argument that the procedure followed had no legitimate basis. First, some critics note that the Supreme Court stayed the recount just when it looked like Vice President Gore might be catching up and even

272. See Samuel Issacharoff, *Political Judgments*, 68 U. Chi. L. Rev. 637, 650 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. Chi. Rev. 737, 751 (2001).

273. *Bush*, 531 U.S. at 109.

274. Dershowitz, *supra* n. 2, at 81-82.

275. Cass R. Sunstein, *Order Without Law*, 68 U. Chi. Rev. 757, 771 (2001).

276. See John J. DiIulio Jr., *Equal Protection Run Amok: Conservatives Will Come to Regret the Court's Rationale for Bush v. Gore*, in *Bush v. Gore: The Court Cases and the Commentary* 321 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001); William C. Smith, *Bush v. Gore: Evermore*, ABA J. 16 (May 2001).

277. B.J. Palermo, *Bush v. Gore Lives On*, 23 Natl. L.J. A1 (Sept. 10, 2001).

278. Michael J. Saks, *Equal Protection After "Bush v. Gore,"* 85 *Judicature* 1, 8 (July-Aug. 2001).

279. Lani Guinier, *A New Voting Rights Movement*, in *Bush v. Gore: The Court Cases and the Commentary* 306 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

surpassing Governor Bush. The Court, it is argued, wanted to stop any switch in the public's attitude that Gore should concede and let the winner go on.²⁸⁰

Next, critics, including the Justices dissenting from the Court's *per curiam* opinion,²⁸¹ stated that adopting a fixed deadline of December 12th and deciding the case on that same date, indicated the extra-legal nature of the Court's action.²⁸² It is one thing to be political, even partisan. It is another to not even attempt to follow proper form and give the appearance of justice.²⁸³

Defenders of the Court's decision argue that "finality" to the controversy was essential.²⁸⁴ If we accept the legitimacy of the equal protection analysis, allowing the recount to continue under an improper methodology would have been wrong. The initial stay was essential to assure the status quo.²⁸⁵ As to the date of decision and its finality, the Court needed to end the election contest, let the new President begin his transition, and allow society to "move on."²⁸⁶ The "Safe Harbor" provision gave an air of legitimacy to the Court's decision to fix the date at December 12, 2000.²⁸⁷

On this issue, I must partly and ultimately side with the critics. Once the Court decided to get involved in the controversy - by reviewing the Florida Supreme Court's decision in the *Canvassing Board* case - its involvement in post-certification dispute was logical. Granting a stay to determine the appropriate set of rules to apply was also appropriate.²⁸⁸ However, remanding the case back to the Florida Supreme Court with explicit directions that it could not act further was inappropriate.

First, it was and is the State of Florida's choice, and not the United States Supreme Court's mandate, to apply the federal statutory "Safe Harbor" provision.²⁸⁹ All 3 U.S.C. § 5 provides is a mechanism for

280. Ronald Brownstein, *In Blocking Vote Count, High Court Shows Which Team It's Rooting For*, in *Bush v. Gore: The Court Cases and the Commentary* 266 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

281. *Bush v. Gore*, 531 U.S. 98, 146-47 (Breyer, J. dissenting).

282. See Scott Turow, *A Brand New Game: No Turning Back From the Dart the Court Has Thrown*, in *Bush v. Gore: The Court Cases and the Commentary* 301, 304 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001) (quoting "conservative legal scholar" Terrance Sandalow).

283. Anthony Lewis, *A Failure of Reason*, in *Bush v. Gore: The Court Cases and the Commentary* 299 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

284. Posner, *supra* n. 2, at 255-56.

285. Michael W. McConnell, *A Muddled Ruling*, in *Bush v. Gore: The Court Cases and the Commentary* 289, 291 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001). See *Bush v. Gore*, 531 U.S. 1036, 1046 (2000) (Scalia, J.)

286. Harvey J. Mansfield, *What We'll Remember in 2050: 9 Views on Bush v. Gore*, in *Bush v. Gore: The Court Cases and the Commentary* 340, 340-41 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

287. *Bush v. Gore*, 531 U.S. 98, 111 (2000).

288. See Posner, *supra* n. 2, at 166.

289. *Palm Beach County Canvassing Bd. v. Harris*, 772 S.2d 1273, 1282 (2000).

presumptive validity of state election returns. A state could decide that it wanted to proceed beyond that date,²⁹⁰ up to and including the date that the House of Representatives accepts the voting tally of the electors.²⁹¹ As to all other issues relating to election procedures, or to the “manner” of selecting electors (to use the phrase specifically related to the election of a President), who in the state makes that decision is, again, a matter for state law and not a federal matter.²⁹²

Second, even if the “Safe Harbor” provision is applicable, surely it is overridden by the need to apply the federal Constitution. All statutes must be read to be consistent with the Constitution. If the Constitution requires application of equal protection standards to a voting recount, those standards should be applied and a statute providing a choice for the decision-maker as to the time of the decision should not be seen as a limitation, let alone a bar.²⁹³

Third, finality is important, but American history has examples of situations in which a delay in selecting the President has occurred, and when things go on too long, the Congress, under Article II and the Twelfth Amendment, has made the ultimate call.²⁹⁴ Our nation can cope with assassinations and attempted assassinations of the President, incapacity of the President, and clouds of impeachment over a President. Surely it could cope with a few weeks delay in deciding who is to be the President.²⁹⁵

IV. CONCLUSION

What are the practical implications of the *Bush v. Gore* decision? As noted earlier, I do not believe the decision will have a long-term impact on the Supreme Court’s credibility. Based on recent studies,²⁹⁶ it is highly likely that the decision did not even have an impact on the ultimate result.²⁹⁷ I do believe, however, that there are other and

290. Posner, *supra* n. 2, at 133.

291. Kmiec, *supra* n. 206, at 431. Congress is required by federal law to meet to count the electoral votes on January 6. 3 U.S.C. § 15 (1994).

292. McConnell, *supra* n. 285, at 292.

293. *But see Miller v. Johnson*, 515 U.S. 900 (1995) (Attorney General’s application of § 5 of the Voting Rights Act must be limited by superseding equal protection clause mandate against race-based election districting).

294. *See* Posner, *supra* n. 2, at 139-40 (discussing the Hayes-Tilden election of 1877).

There have been press reports that Justice Souter believes that if he could have delayed the decision by a few days, Justice Kennedy would have made a majority to have the Court not decide the case and let the Congress decide. *Newsweek Book Rev.* 32 (Sept. 17, 2001) (previewing David A. Kaplan, *The Accidental President: How 413 Lawyers, 9 Supreme Court Justices, and 5,963,110 Floridians (Give or Take a Few) Landed George W. Bush in the White House* (William Morrow & Co. 2001)).

295. *See* Dershowitz, *supra* n. 2, at 91 (rejecting claims of the need for finality because of a finality and the existence of a crisis).

296. Dennis Cauchon & Jim Drinkard, *Florida Voter Errors Cost Gore the Election*, *USA Today* 1, 4 (May 11-13, 2001).

297. An analogous situation might be found in the Steel Seizures case, where President

significant implications. Procedures were manipulated and the process was disregarded. Many lay people criticize lawyers as being interested in "process" instead of just getting things done.²⁹⁸ Police and often government officials complain about constitutional procedures as tying their hands.²⁹⁹ Businesspersons fret over the forms and regulations with which they must comply to undertake an enterprise.³⁰⁰ The public, often through the press, hearkens to a less complicated world and a less law-oriented society.³⁰¹

Some of these complaints are justified. More lawyers should be spending time on "preventive law" and less on litigation.³⁰² More rules and regulations should be written in "plain English."³⁰³ Attorneys should be addressing "how to" get something accomplished and spending less time saying that something cannot be accomplished.³⁰⁴ But, there must be rules and at least the veneer that we live in a society governed by laws and not just raw partisanship.³⁰⁵ In *Bush v. Gore*, by deciding an election instead of just a case, the Supreme Court may have damaged that overlay.³⁰⁶

Truman seized the steel mills to stop a strike. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Supreme Court's decision to grant certiorari was made "only hours before a planned announcement that the parties . . . had reached a settlement." When the steel mills learned that the appeal would be heard, the planned deal was off. Later [after the decision declaring the seizure unconstitutional], in fact, the unions went on to strike anyway and a settlement was worked out, very close to the original one. Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction; Cases, Notes, and Problems* 104-05 (West Wadsworth 2001).

298. See e.g. Paul Bergman & Michael Asimow, *Reel Justice* 251 (Universal Press Syndicate Co. 1996) (discussing the popular movie *The Star Chamber* (Twentieth Cent. Fox 1983) (motion picture)).

299. Martin H. Belsky, *Whither Miranda*, 62 Tex. L. Rev. 1341, 1341-42 (1984).

300. See Martin H. Belsky, *Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof*, 12 Ecology L.Q. 1, 44-61 (1984) (discussing proposals for environmental regulatory reform).

301. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 Cal. L. Rev. 379 (1979).

302. Stephen Goldberg, Frank Sander & Nancy Rogers, *Dispute Resolution* (2d ed., Little, Brown & Co. 1992).

303. Of course this should be true of all legal writing. See e.g. C. Edward Good, *Mightier Than the Sword* xix-xxiii (Blue Jeans Press 1989).

304. See e.g. Model Rules of Professional Conduct, Article Two, *Editor's Note in Regulation of Lawyers: Statutes and Standards* 174 (Stephen Gillers & Roy Simon eds., Aspen Publishers, Inc. 2001) (lawyer's primary role is as counselor and advisor, not as litigator).

305. Kmiec, *supra* n. 206, at 432; Jeffrey Rosen, *The Supreme Court Commits Suicide*, in *Bush v. Gore: The Court Cases and the Commentary* 311 (E.J. Dionne, Jr. & William Kristol eds., Brookings Instn. Press 2001).

306. Paul Star, *The Betrayal*, Am. Prospect 4 (Jan. 1-15, 2001). See Michael Dorf, *Was the "Bush v. Gore" Decision Political?*, Colum. L. Sch. Rpt. 22, 25 (Spring 2001): "The problem with *Bush v. Gore* is not that the Court made a poor choice among a range of legitimate options. The problem is that the Court appeared to choose a result from completely outside that range." *Id.*

