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BUSH, GORE, FLORIDA, AND THE CONSTITUTION

Akhil Reed Amar[*]

Ten years ago this week, Dunwody Lecturer Cass Sunstein stood at this podium and offered some thoughts about the then–recent impeachment of President Clinton. Professor Sunstein titled his remarks *Lessons from a Debacle: From Impeachment to Reform.*[1] Today I shall share with you some thoughts about a different debacle, one that arose not from the effort to oust Bill Clinton, but from the effort to choose his successor.

The failed attempt to remove Clinton in the late 1990s and the Bush-Gore Florida extravaganza of 2000 share some obvious similarities. Both dramas gripped the nation and the world, dominating the headlines and the airwaves day after day. Both episodes featured intense, high-stakes political partisanship, not just behind the scenes, but also in the spotlight. Both chapters in America's unfolding constitutional saga forced participants to ask themselves whether, where, and how a

∗ Sterling Professor of Law and Political Science, Yale University.

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1. Cass R. Sunstein, *Lessons from a Debacle: From Impeachment to Reform*, 51 FLA. L. REV. 599 (1999).

coherent line could be drawn separating law from raw politics. And both times, Al Gore was the odd man out. (Remember, had Bill Clinton's opponents actually succeeded in forcing him from office in early 1999, his loyal Veep would have become President long before "butterfly ballots" and "dimpled chads" entered the national lexicon.)

In the years since the Florida recount, constitutional scholars from across the spectrum have weighed in with detailed legal analyses of many of the relevant statutory and constitutional issues. Two particularly fine collections of legal essays were published as books by the University of Chicago Press and by Yale University Press.[2] (Interestingly enough, the ubiquitous Professor Sunstein published three essays in these books;[3] yet another essay was authored by Professor Frank Michelman, who stood at this podium as the Dunwody Lecturer exactly one decade before Professor Sunstein and prophetically addressed the topic of voting rights.)[4]

At this late date—now that all the shouting here in Florida has subsided and so many scholarly assessments are already in print—some of you may quite reasonably be wondering whether there are any new things left to say about the Bush-Gore episode. In what follows, I hope to put the various pieces of the Bush-Gore puzzle together in a distinctive way and to highlight a few points that are not yet widely understood.

I. THE COURT(S) AND THE CONSTITUTION(S)

Let's start by noticing that a wide range of scholars seem to agree with the following proposition: "The Supreme Court twisted the law in the Bush-Gore affair." But here's the rub: *Which* Supreme Court did the twisting? Some scholars (mostly liberals) say that the *United States* Supreme Court played fast and loose with the law, while other scholars (mostly conservatives) insist that it was the *Florida* Supreme Court that acted in a lawless, partisan fashion.

Before I offer my own take on this topic, let me give you a flavor of the highly charged commentary thus far. On January 13, 2001, a month after the U.S. Supreme Court definitively ended the Florida recount,

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2. BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., Yale University Press 2002) [hereinafter LEGITIMACY]; THE VOTE: BUSH, GORE AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., University of Chicago Press 2001) [hereinafter THE VOTE].

3. *See* Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond* Bush v. Gore, *in* LEGITIMACY, *supra* note 2, at 177; Cass R. Sunstein, *Introduction: Of Law and Politics*, *in* THE VOTE, *supra* note 2, at 1; Cass R. Sunstein, *Order Without Law*, *in id.*, at 205.

4. Frank I. Michelman, *Suspicion, or the New Prince*, *in* THE VOTE, *supra* note 2, at 123; Frank I. Michelman**,** *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989).

more than 500 law professors from over 100 schools published a joint statement in the *New York Times*.[5] Signatories included Stanford's Margaret Jean Radin, Mark Kelman, and William Cohen; Columbia's George Fletcher; Yale's Robert Gordon; NYU's Derrick Bell; the University of Michigan's Terrance Sandalow; and the University of Texas's Sanford Levinson, to mention just a few.[6] In brief, their joint statement charged that:

> By stopping the vote count in Florida, the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law . . . [T]he conservative justices moved to avoid the "threat" that Americans might learn that in the recount, Gore got more votes than Bush. . . . But it is not the job of the courts to polish the image of legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges.[7]

Elaborating on her views in the Yale University Press book, Bush v. Gore*: The Question of Legitimacy*, Professor Radin pulled no punches:

> [I]nstead of deciding the case in accordance with preexisting legal principles, . . . five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican Party. . . . [T]he Republican justices' "analysis" doesn't pass the laugh test, particularly their decisions to stop the vote count and to forbid the Florida Supreme Court from addressing the constitutional problems the federal Supreme Court purported to find. . . .
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> How many readers can say with a straight face that if the case had been *Gore v. Bush*—that is, if all facts were the same except that Florida was controlled by Democratic officials, Gore were a few hundred votes ahead in the count, and Gore brought a federal case to stop a recount Bush had sought under state law—it would have come out the same?
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> . . . We cannot now afford, I think, to pretend that we

5. *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7.
6. *Id.*
7. *Id.* (capitalization altered).

> see the rule of law when we know that we are seeing the opposite. That is why I refer here to Republican justices rather than simply justices; they have forfeited the presumption of impartiality that goes with the judicial role.[8]

Several other distinguished contributors to *The Question of Legitimacy* volume leveled similar accusations of lawlessness against the United States Supreme Court. Professor Jed Rubenfeld proclaimed that *Bush v. Gore* was, "as a legal matter, utterly indefensible. . . . There was no December 12 deadline. The majority made it up. On this pretense, the presidential election was determined."[9] On Rubenfeld's view, the "illegality," "breathtaking indefensibility," and "wrongness" of the Justices' action reflected a complete lack of judicial principle, thereby making *Bush v. Gore* "worse even than the notorious *Plessy*."[10] Professor Jack Balkin opened his essay as follows: "On December 12, 2000, the Supreme Court of the United States *illegally* stopped the presidential election and handed the presidency to George W. Bush."[11] Professor Bruce Ackerman offered a similarly harsh assessment:

> I . . . protest[] in the name of the rule of law.
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> . . . *To demand equal protection but to prevent Florida from satisfying this demand*—this is not bad legal judgment; this is sheer willfulness.
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> The Court's defense—that no time remained for Florida to meet the state's own December 12 deadline—is simply preposterous. Florida law contains no such "deadline."
>
> Every lawyer knows that the Supreme Court should have sent the case back to the Florida courts . . .
>
> And the court gave *no* legally valid reason for this act of usurpation.[12]

So much for the scholars on one side of the debate. Now, hear the voices of scholars who saw the *Florida* Supreme Court as the lawless villain in the drama. Professor Richard Epstein condemned the Florida

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8. Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in* LEGITIMACY, *supra* note 2, at 114–15, 117, 122.

9. Jed Rubenfeld, *Not as Bad as* Plessy. *Worse*, *in* LEGITIMACY, *supra* note 2, at 20, 26.

10. *Id.* at 20–21.

11. Jack M. Balkin, *Legitimacy and the 2000 Election*, *in* LEGITIMACY, *supra* note 2, at 210 (emphasis added).

12. Bruce Ackerman, *Off Balance*, *in* LEGITIMACY, *supra* note 2, at 195–96.

Supreme Court for its "manifest errors" and its "abuse of discretion for partisan political ends."[13] Then-Professor Michael McConnell was even blunter:

> In the Florida Supreme Court, which [was] composed entirely of Democratic appointees, Gore's lawyers found a . . . sympathetic ear. On grounds that seemed dubious at best and disingenuous at worst, the Florida court ruled each time in favor of Gore. . . . [The Florida Supreme Court] disregarded the plain language of the [Florida election] statute and substituted a new deadline entirely of its own making. This was obviously not "interpretation." From its denunciation of "hyper-technical reliance upon statutory provisions" to its fabrication of new deadlines out of whole cloth, the court demonstrated that it would not be bound by the legislature's handiwork.[14]

Professor Charles Fried—himself a former member of the Massachusetts Supreme Judicial Court and former United States Solicitor General—was more pointed still.[15] He began his essay by quoting an "expla[nation of] Florida politics"[16] offered by the fictional gangster Johnny Rocco in the 1948 movie, *Key Largo*:

> You hick! . . . I take a nobody, see? . . . Get his name in the papers and pay for his campaign expenses. . . . Get my boys to bring the voters out. *And then count the votes over and over again till they added up right and he was elected*.[17]

Having set the stage with this unsubtle suggestion of fraud and chicane in the Sunshine State, Fried proceeded to flay the Florida Supreme Court for its "clear act of insubordination"[18] to the U.S. Supreme Court's *Bush v. Palm Beach County Canvassing Board* (*Bush I*) decision,[19] the Rehnquist Court's first foray into the Florida 2000 litigation. In *Bush I*, the U.S. Supreme Court

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13. Richard A. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*, *in* THE VOTE, *supra* note 2, at 36.

14. Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, *in* THE VOTE, *supra* note 2, at 101, 108–09.

15. Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, *in* LEGITIMACY, *supra* note 2, at 3.

16. *Id.*

17. *Id.* (emphasis altered).

18. *Id.* at 9.

19. 531 U.S. 70 (2000) (per curiam).

> had unanimously vacated [a prior] judgment of the Florida Supreme Court and asked the Florida court to clarify the basis for it. The Florida court . . . had disregarded the Supreme Court's mandate, and without even adverting to it, had given important effect to its own previous, now vacated, decision. . . . [Thus, the] Florida court, in a dispute that touched the whole nation, acted in a strangely irregular way[] . . . [that] gave rise to a reasonable concern that this was partisan manipulation. (As the Bush people put it: Keep on counting until Gore wins.)[20]

And if readers somehow missed the connection between this "keep on counting" barb and his opening punch line from the *Key Largo* gangster, Fried ended with a bang, intimating in his closing paragraph that *Bush v. Gore* was a case in which "a state court had been caught trying to steal the election."[21]

With the lines of scholarly debate now in plain view, let us take a step back. If, correctly or incorrectly, the Rehnquist Court believed that the Florida Supreme Court was indeed acting in bad faith, then perhaps this belief could explain why the U.S. Supremes felt they had to stop the recount altogether, rather than remand once again to judges whom they had come to view as judicial cheats. Perhaps the U.S. Justices might even have felt themselves justified in bending the law—if only to equitably straighten out the twists that they believed had been improperly introduced by the Florida justices. Indeed, as Professor David Strauss has shown in a splendid essay, many things both large and small that the Rehnquist Court did in the *Bush v. Gore* litigation make the most sense if the U.S. Justices had in fact believed that they were dealing with a lawless, partisan state bench trying to steal the presidency for its preferred candidate.[22]

Suspicion arose in part because in overseeing the recount, the Florida Supreme Court seemed to have gone well beyond the words of the Florida election statute. Suspicion also arose because the Florida justices were presiding over a recount with uneven standards for counting disputed ballots.

We will come soon enough to the issue of unevenness and inequality. For now, let's concentrate on the claim that the Florida

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20. Fried, *supra* note 15, at 8–10.

21. *Id.* at 19 (claiming that the "mirror image" of the actual *Bush v. Gore* would have been a case in which "a state court had been caught trying to steal the election for George Bush," thus implying that in *Bush v. Gore* itself, the Florida Supreme Court was caught trying to steal the election for Al Gore).

22. David A. Strauss, Bush v Gore*: What Were They Thinking?*, *in* THE VOTE, *supra* note 2, at 185.

justices were clearly wrong or perhaps even lawlessly partisan because they did not hew strictly to the letter of the Florida Election Code.

In his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist, joined by Justices Scalia and Thomas,[23] declared that by straying from the text of the election law adopted by the Florida Legislature, the Florida Supreme Court had violated the federal Constitution's Article II, Section 1, Clause 2, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors. For these three Justices—and for many subsequent scholarly defenders of the U.S. Supreme Court's ultimate decision in *Bush v. Gore*, such as Professors Epstein, McConnell, and Fried—the key word here is *legislature*. The U.S. Constitution says that the state *legislature* gets to make the rules about how presidential electors are to be chosen. And, the argument runs, if the state judiciary disregards those rules, the federal Constitution itself authorizes federal judges to step in to protect the state legislature's federally guaranteed role.

The Article II issue first arose in *Palm Beach County Canvassing Board v. Harris*,[24] an earlier round of the recount litigation. In a unanimous decision handed down in late November 2000, the Florida Supreme Court openly referred to its decades-long tradition of construing the Florida election statute in light of the Florida Constitution.[25] In particular, the Florida justices stressed the right to vote as expressed in the Florida Constitution's Declaration of Rights:

> Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote[.] . . . Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right.[26]

For this reason, the Florida Supreme Court declared that the Florida Election Code for presidential elections was valid only if the code provisions "impose no 'unreasonable or unnecessary restraints' on the

23. Bush v. Gore, 531 U.S. 98, 112–13, 122 (2000) (Rehnquist, C.J., concurring).

24. 772 So. 2d 1220 (Fla. 2000).

25. *Id.* at 1227–28 ("Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases . . . . 'By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right'"—a right guaranteed by "'[o]ur federal and state constitutions.'" (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975))).

26. *Id.* at 1237 (footnotes omitted).

right of suffrage[]" guaranteed by the state constitution.[27] On December 4, 2000, in *Bush I*, the Rehnquist Court unanimously vacated the Florida Supreme Court's *Palm Beach* ruling. [28] The *Bush I* Court's short per curiam opinion hinted that the Florida justices may well have violated the federal Constitution's Article II by using the Florida state constitution to limit the Florida state legislature—the body that, as we have seen, is broadly empowered by Article II to prescribe rules for presidential elections.[29]

On remand, the Florida Supreme Court failed to explain clearly why, notwithstanding Article II's broad grant of power to the Florida Legislature, the Florida judiciary nevertheless had understood itself to be authorized to use the state constitution to cabin, modify, disregard, and supplement various parts of the election code adopted by the state legislature.[30] Whereas the initial *Palm Beach* ruling had been unanimous, the Florida Supreme Court on December 8, 2000, split four to three, and its chief justice, Charles Wells, dissented in an opinion that worried aloud about the Article II issue.[31] Although the Florida Supreme Court supplemented its splintered decision three days later with yet another opinion—this one commanding the votes of six out of seven justices[32]—it was too little too late. The U.S. Supreme Court had already granted review of the earlier decision and had stayed the recount pending its review.[33]

As we have seen, Professor Fried pointed an accusatory finger at the Florida justices for their failure to address the U.S. Supreme Court's concerns in *Bush I* about whether, and how, the Florida Constitution could limit the Florida Legislature in the face of Article II's seemingly plenary empowerment of the state legislature.[34] For Fried, the Florida justices' actions were insubordinate to the U.S. Supreme Court, to Article II, and to the Florida Legislature.[35] Professors Epstein and McConnell likewise highlighted the Florida Supreme Court's seeming violation of Article II and usurpation of the Florida Legislature's role

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27. *Id.* at 1236 (quoting Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977)).

28. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam).

29. *Id.* at 75–78.

30. For one promising passage that began to lay the foundation of such an explanation, but failed to drive home the source and the breadth of the state judiciary's authority to forcefully deploy the state constitution in presidential elections, see Gore v. Harris, 772 So. 2d 1243, 1253–54 & n.11 (Fla. 2000).

31. *Gore*, 772 So. 2d at 1268 (Wells, C.J., dissenting).

32. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000). Chief Justice Wells dissented. *Id.* at 1292 (Wells, C.J., dissenting).

33. Bush v. Gore, 531 U.S. 1046 (2000).

34. *See* Fried, *supra* note 15, at 3, 8–10, 19.

35. *Id.* at 9.

under that federal constitutional provision.[36] (Indeed, Epstein disclaimed reliance on equal protection arguments against the Florida justices, preferring an Article II argument that inspired the very title of his essay—"*In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v Gore *Defended*.)

After the *Bush I* remand, it was a momentous mistake for the Florida Supreme Court to have issued a decision that neglected to address the Article II issue in detail. But this neglect was not necessarily the product of intentional insubordination to the U.S. Supreme Court. The clock was ticking down fast, and the Florida justices had many issues to deal with all at once.[37]

And here is the key point: Despite their failure to address the issue squarely, the Florida justices acted in perfect harmony with Article II, rightly understood, when they relied on the Florida Constitution to go behind and beyond the words of the Florida Legislature's Election Code. The very structure of that code deputized the Florida judiciary to construe and implement the code's myriad provisions in a manner that would strictly conform to the grand voting-rights principles of the Florida Constitution. Had the Florida Supreme Court been clearer on this pivotal issue, either in the initial *Palm Beach* case or on remand, the basic error of the Article II assault on the Florida judiciary would have been clear for all to see. Once we understand the proper role of the Florida Constitution in the *Bush* litigation, the arguments of Chief Justice Rehnquist and Justices Scalia and Thomas, and of Professors Epstein, McConnell, and Fried do not just dissolve. They boomerang.

Here is what the Florida Supreme Court should have said:

> Just as Article II of the U.S. Constitution empowers the Florida Legislature to direct the process of selecting presidential electors, Article II of course also allows the Florida Legislature, if it chooses, to cabin its own power in light of our state constitution, and to delegate the last word to resolve and manage disputed presidential elections in Florida to the Florida judiciary. We hereby hold that the Florida Legislature has done just that by deputizing us, the Florida judiciary, to construe the Florida statutes and regulations regarding presidential elections against the backdrop of the Florida Constitution. Indeed, the Florida legislature has empowered us, the Florida judiciary, to equitably adjust and modify the sometimes hypertechnical and confusing maze of election regulations and code provisions so as to bring the letter of election law into

36. Epstein, *supra* note 13, at 19–37; McConnell, *supra* note 14, at 103–05, 108–09.

37. *See Gore*, 772 So. 2d at 1279 n.2 (explaining the time crunch).

harmony with the spirit and grand principles of the state constitution. As our longstanding case law makes clear, the Florida Constitution emphatically affirms the people's right to vote and right to have every lawful vote reflecting a clearly discernable voter intent counted equally. We need not decide today whether, in a presidential election, the Florida Constitution applies *of its own force;* rather we hold that the Florida Constitution applies simply because *the Florida Legislature has made it applicable and has deputized us to vindicate its spirit in presidential elections here in Florida.*

This legislative power is not merely consistent with Article II; it derives from Article II. In general, no federal court (not even the U.S. Supreme Court!) may lawfully intervene to protect the Florida Legislature from the Florida courts in the name of Article II, for any such federal court intervention would itself violate the very principle of Article II being asserted. To repeat: pursuant to Article II, the Florida Legislature has designated the *Florida judiciary* as its chosen deputy in this matter.

Surely Article II would have been satisfied had the Florida election statute *explicitly* stated that "every provision of this presidential election code should be construed or judicially revised to conform to the letter and spirit of the right to vote under the Florida Constitution's Declaration of Rights, as that Declaration has been and will continue to be definitively construed by the Florida judiciary." We believe that the Florida statute has done just that in substance, albeit in different words. Here is why: The Florida Election Code rules for presidential elections are the same as the Florida Election Code rules for other elections, including state elections for state positions. It is absolutely clear that the Florida Constitution does apply to these other elections. It is equally clear that this Court—the Florida Supreme Court—is broadly empowered to protect the fundamental state constitutional right to vote in these state elections, even if protecting that right may require this Court to go beyond and behind the strict and at times hypertechnical words of the statutes and regulations. Unless the state legislature clearly indicates otherwise—and it has never done so—the same interpretive principles concerning the importance of the right to vote and the authority of Florida judges to construe all rules and regulations against the backdrop of that right apply to presidential elections as

> well.
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> For example, if a voter were to use an ink pen rather than a lead pencil to fill in the oval bubble that appeared next to a candidate's name on a printed ballot, longstanding Florida case law makes it clear that this pen mark would ordinarily constitute a valid vote, even if the regulations instructed voters to use number two pencils when marking their ballots. Given that pen marks on a particular ballot should be counted in an election for state representative, or for any other state, local, or federal official, surely the presidential-election section of the ballot should be handled the same way. It would be odd indeed—absent a very clear legislative indication to the contrary—to count pen marks *everywhere else* on this ballot and yet refuse to count virtually identical pen marks in the presidential-election section of *the very same ballot*.

Alas! The Florida justices never offered up such a crisp and cogent Article II explanation of their conduct in the 2000 election—although they did come very close to doing so in a too-little-too-late decision handed down days after the Rehnquist Court had dramatically stayed the recount and indeed just hours before that Court's final ruling in *Bush v. Gore*.[38] Despite their failure to hammer home the Article II propriety of their earlier reliance on the Florida Constitution, I believe that the Florida justices' actions in general were legally defensible, and often quite admirable, when understood in light of what I have just said.[39] Though the Florida Supreme Court did not explain itself

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38. *Id.* at 1282, 1291. In general, subsequent scholarly commentary has tended to slide past the three crucial Article II points, as I see them. First, regardless of whether the Florida Constitution applied of its own automatic self-executing force to the presidential election in Florida, it surely did apply because the Florida Legislature implicitly incorporated its principles into the basic structure of the unitary Florida election statute. Second, the Florida Supreme Court failed to make this first point crystal clear in its initial expositions. Third, had the Florida Supreme Court made the first point clear before the Rehnquist Court issued its fateful December 9 stay, the basic error of the Rehnquist concurrence would have been glaringly obvious—Rehnquist's Article II argument boomerangs once we see that the Florida Legislature itself gave the Florida judiciary the authority to deploy the Florida Constitution to interpret and implement the entire statutory election code and to adjust or even abandon provisions of the code that violated basic state constitutional principles, as construed by the state judiciary. For a particularly thoughtful, albeit less emphatic, exposition of the first point, see Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 683–88 (2001).

39. Although the notion that a state court can cabin, modify, disregard, and even supplement—in effect, "rewrite"—various parts of a state statute in order to bring the statute in conformity with the state constitution might initially raise an eyebrow, the judicial power to "rewrite" a statute in certain situations is simply one aspect of American-style judicial review.

perfectly in the rush of the moment, it largely did the right legal things and for the right legal reasons. What is more, its rulings in November and December of 2000 were quite consistent with its rulings on similar election issues that had arisen long before George W. Bush squared off against Al Gore. (The same, alas, cannot generally be said of the Rehnquist Court.)

Early on in the Bush-Gore litigation, the Florida justices intuitively saw the presidential election in light of similar issues that had come before them (and before other state supreme courts with similar state constitutional guarantees) in previous non-presidential elections.[40] In these earlier cases, the Florida courts and other, similarly situated state supreme courts had at times gone beyond—and even against—the strict letter of election laws in order to vindicate the larger spirit behind those laws, a spirit aimed at assuring that all votes would in fact be counted if voter intent could be deduced.[41] According to this longstanding and admirable set of cases, in Florida and elsewhere, even if a code or a regulation instructed a given voter to use a pencil to check a box or fill in a bubble on a printed ballot, a ballot that used a pen (a technical "undervote") should still be counted. Even if a code or a regulation instructed a voter not to write in the name of any candidate whose name already appeared printed on the ballot, a ballot that both checked the box alongside the candidate name and also wrote in the same name (a technical "overvote") should be counted. A fortiori, a voter should not have his or her vote go uncounted because some bureaucrat goofed or some machine failed to give effect to the voter's obvious and manifest intent. The Florida Legislature was fully aware of judicial rulings such as this, and the state legislature blessed this well-established case law when it continued to enact election statutes against the backdrop of, and in extended dialogue with, the various election-law rulings of the Florida courts.

For a prominent recent example of a federal court in effect "rewriting" a federal statute so as to render that statute compliant with the federal Constitution as construed by the Court, see United States v. Booker, 543 U.S. 220, 244–68 (2005) (opinion of the Court in part, per Breyer, J.), which effectively rewrote a federal sentencing guidelines statute so as to bring the statute into compliance with the Supreme Court's interpretation of the Sixth Amendment. For an even more recent case in which the U.S. Supreme Court sharply bent the seemingly plain meaning of a statute in order to minimize the statute's arguable unconstitutionality, see Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009), a case argued and decided only weeks after this lecture was delivered.

40. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1236–38 (Fla. 2000).

41. *See, e.g.*, Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977); Boardman v. Esteva, 323 So. 2d 259, 269–70 (Fla. 1975); State *ex rel*. Carpenter v. Barber, 198 So. 49, 50–51 (Fla. 1940). *See generally* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. (forthcoming 2009).

One final, parenthetical, point on this topic. Nothing in the Florida election code said that Florida courts owed super-strong, unwavering deference to all rulings of the secretary of state or county election boards, regardless of the context of the election issue involved or the reasonableness of the initial rulings made by these nonjudicial officials. General principles of state constitutional law and state administrative law properly counseled judicial skepticism of such nonjudicial decision-makers where basic elements of the fundamental right to vote were at stake and where these nonjudicial officials appeared to be acting in a highly partisan or highly inexpert manner.[42]

Nothing in Florida's laws or traditions required the secretary of state in 2000 to be law-trained, and in fact, Secretary of State Katherine Harris was not law-trained. She showed dubious legal judgment in deciding before the 2000 election to serve as a campaign official for candidate George W. Bush. (Professor Steven Calabresi, the co-founder of the Federalist Society, has labeled her decision "foolish.")[43] Early rulings made by Ms. Harris raised a vivid specter of severe partisanship, and also suggested that she simply failed to fully appreciate the deep constitutional principle that every legal vote with a truly discernable voter intent should be counted, regardless of bureaucratic mumbo jumbo or statutory legalese. (One particularly important Harris ruling early on was sharply and persuasively contested by the Florida Attorney General's office, an office with a long tradition of legal and state constitutional expertise.)[44] The law-trained Florida justices were sensitive stewards of deep and longstanding constitutional principles when they declined to give blind deference to dubious decision-makers such as Harris.

II. THE ROLE(S) OF THE LEGISLATURE(S)

Let us now turn to focus even more directly on the entity explicitly empowered by Article II, namely, the Florida Legislature.

In the umpteen-ring circus that was Florida 2000—with riveting dramas and curious comedies simultaneously playing out in various county canvassing boards, in multiple state and federal judicial proceedings, in the Florida Secretary of State's office, in the Florida Attorney General's office, and elsewhere—the Florida Legislature also craved a piece of the action and a part of the limelight. Meeting in Tallahassee, lawmakers in late November and early December began to make noises about their alleged right to take matters into their own hands by naming their own set of electors (who would be pledged to

42. *See* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1743 & n.113 (2001).

43. Steven G. Calabresi, *A Political Question*, *in* LEGITIMACY, *supra* note 2, at 129, 132.

44. Fla. Op. Att'y Gen. 2000-65 (2000), 2000 WL 1707267, at *1–3.

George W. Bush) if the recount did not end quickly and with the pro-Bush result that these legislators demanded.

At first blush, such a legislative assertion might seem wholly justifiable. As we have seen, Article II explicitly empowers the state legislature to direct how presidential electors shall be chosen. But on sober second thought, the rumblings of the Florida legislators should strike us as deeply troubling. For the Florida Legislature had *already* spoken—had already laid down the rules in its initial election laws. These rules provided that the Florida judiciary—and not the Florida Legislature—would ultimately oversee and adjudicate electoral disputes for all elections (other than, perhaps, elections for state legislative positions, for which each legislative house might indeed claim state constitutional authority to be the final election judge[45]).

To be clear: Prior to the November election, the Florida Legislature was not obliged to have structured the presidential election rules as it did. Had it so chosen, the Florida Legislature in, say, January 2000, might have enacted a law naming itself as the arbitration board of all presidential election disputes that might arise in November. Going against the grain of the unbroken and universal state practice of the last century and a half, perhaps the Florida Legislature might even have chosen to dispense with a presidential election altogether in Florida. In this weird alternative universe, perhaps the Florida legislators might have simply provided that the legislature itself would name its own set of presidential electors come November—the voters be damned!

But of course, the Florida Legislature did none of these things prior to election day. Instead, it kept in place its traditional election and adjudication process, which contemplated no ongoing legislative role after the people of Florida had spoken on election day and the courts had adjudged any legal issues that might have arisen. Had the legislature in December 2000 actually tried to insinuate itself into the process, it would have been changing the rules in the middle of—actually, after!—the game, in violation of basic rule-of-law ideals.

To recast the point in the more technical language of Article II, the "legislature" that was constitutionally empowered was the Florida Legislature before election day—not the Florida Legislature after election day. Any effort by that later legislature to change the rules would have come at the expense of the pre-election day legislature—the legislature empowered by Article II—and would thus have violated Article II itself, much as the Rehnquist concurrence that we considered earlier did violence to the very Article II provision it claimed to be championing. Therefore, in both Tallahassee and Washington, D.C., the

45. *See* FLA. CONST. art. III, § 2 ("Each house shall be the sole judge of the qualifications, elections, and returns of its members . . . .").

pro-Bush argument based on Article II did not merely dissolve; it boomeranged.

Other constitutional and federal statutory language completes and confirms this rule-of-law point. As we have seen, Article II, Section 1, Clause 2 does empower the state legislature; but one paragraph later, Article II, Section 1, Clause 4 clarifies the temporal boundaries of that empowerment: "The Congress may determine the Time of chusing the Electors . . . ." Acting pursuant to that clause, Congress long ago enacted a federal statute which clearly says that presidential electors shall be appointed in each state on America's traditional election day—the first Tuesday after the first Monday in November.[46] With this statute, Congress made plain which state legislature is empowered under Article II—namely, the legislature acting before election day.

But what should happen if the election-day selection process misfires? Here, too, Congress laid down a clear rule long ago, pursuant to its explicit authorization under Article II, Section 1, Clause 4. According to Congress, "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."[47] This section does empower a post-election day legislature to jump back into the game and to oust the voters—but only if the election "*failed* to make a choice." Imagine, for example, that Florida election law provided that a candidate would win electors on election day only if the candidate received an absolute majority of the statewide popular vote; but in a three-way race, no candidate emerged with such an absolute majority on election day. Under those circumstances, the Florida Legislature could step in post-election.

But nothing of the sort happened in 2000. The voters *had* made a choice on election day. True, uncertainty existed about which candidate the voters had in fact chosen. But this was not a *failed* election;[48] it was simply a *very close* election, one that called for an extremely careful final count. Nothing in the language of the congressional statute suggests any right of the state legislature to overturn the voters' verdict under these circumstances, and indeed the clear negative implication of the congressional statute is that the state legislature has no such right,

46. 3 U.S.C. § 1 (2006).

47. *Id.* § 2.

48. Laurence H. Tribe, eroG .v hsuB*: Through the Looking Glass*, *in* LEGITIMACY, *supra* note 2, at 39, 59 (stating that federal statute "empowers a state legislature to direct the choice of a new set of electors only when the state 'has held an election . . . and has *failed to make a choice* on the day prescribed by law,' not when it has *made* a choice but the choice has yet to be ascertained."); *but see* Calabresi, *supra* note 44, at 134 (suggesting, albeit with a notable hedge, that "[b]ecause Florida had *arguably* failed to make a choice on November 7," the Florida Legislature could properly jump back in under the terms of 3 U.S.C. § 2) (emphasis added).

outside the context of a truly failed election—that is, an election that had not yet generated *and that never would* generate a legally sufficient outcome after careful tabulation. It would be outlandish to read the congressional law as allowing a state legislature to oust the voters if no definitive victor had been declared before midnight on Election Night. And if the legislature may not oust the voters on the Wednesday morning after election day simply because careful counting is still taking place, then surely the legislature may likewise not oust the voters on any subsequent day simply because the counting continues. Nothing in the language of the federal statute suggests that the rule that obviously applies on the Wednesday morning after the election somehow lapses on Thursday or Friday or any later day.[49]

Here, too, it would seem that the harsh critics of the Florida judiciary have gotten the issue precisely wrong. The real problem in Florida 2000 was not that the state courts were inappropriately threatening to usurp the proper constitutional authority of the state legislature, but the reverse: The state legislature was inappropriately threatening to usurp the proper constitutional authority of the state courts (and of the pre-election state legislature that had deputized the state courts).

True, in late 2000 there *was* in fact one court that inappropriately inserted itself at the expense of the legislature—the Rehnquist Court, which took upon itself to resolve various issues that were properly Congress' to decide as the body tasked by the U.S. Constitution with the counting of electoral votes and the resolution of electoral-vote disputes.[50] The federal Constitution thus envisioned a certain adjudicatory role for Congress in presidential elections; however, state legislatures were not given a precisely analogous role.

In its rush to judgment, then, the Rehnquist Court not only did an injustice to the Florida judiciary—and to the pre-election Florida Legislature that had deputized the Florida judiciary—but also to Congress, and to the constitutional structure that made the federal legislature, and not the federal judiciary, the ultimate judge of close presidential elections.[51]

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49. Nor would a broad reading of the word "failure" vindicate Congress' purpose in enacting a uniform election day. "Congress established a level playing field among the states by requiring them to hold elections on the same day . . . Before [Congress enacted this statute] states competed with one another for influence by setting their election dates as late as possible, thereby swinging close elections by voting last." Bruce Ackerman, Op-Ed., *As Florida Goes . . .*, N.Y. TIMES, Dec. 12, 2000, at A33, *available at* 2000 WLNR 3191101. A loose reading of the word "failure" would encourage states to game the system in the very ways the statute was designed to prohibit.

50. *See* U.S. CONST. amend. XII; 3 U.S.C. § 15 (2006).

51. *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 208–09, 210–11 (Random House Trade 2005).

III. EQUAL PROTECTION

What about the claim that the recount being overseen by the Florida judiciary was proceeding with unacceptably uneven standards? Here, too, upon close inspection, many of the criticisms hurled at the Florida Supreme Court do not merely dissolve; they boomerang. The unevenness occurring in the judicially monitored recount was in general far less severe than the unevenness that had occurred in the initial, less-monitored counts on election day and shortly thereafter.[52] In many ways, the recount process being supervised by the Florida Supreme Court represented the last best chance to *reduce* and judicially *remedy* some of the inequalities and inaccuracies and disenfranchisements that had tainted the initial counting process. Some of the problems that seemed to surface in initial and intermediate stages of the recount might well have been cured by later corrective action from state judges, had these judges been allowed to proceed without interference from the Rehnquist Court, and with Congress waiting in the wings as the ultimate monitor and constitutionally appropriate final judge. Alternatively, the U.S. Supremes might have identified their specific concerns about the unfolding recount and remanded the matter to state courts with guidelines for a still-better recount process. Instead, by abruptly demanding an end to the recount process, the Rehnquist Court simply froze in place inequalities of the same sort, and of a greater magnitude, than the inequalities the Court claimed to care about.

What were the inequalities that captured the Court's imagination? During the recount process being overseen by the Florida judiciary, some dimpled chads were being treated as valid votes, others not. According to the Rehnquist Court per curiam opinion in *Bush v. Gore*,

> the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. . . . A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. . . . This is not a process with sufficient guarantees of equal treatment.[53]

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52. *See, e.g.*, Tribe, *supra* note 48, at 50 ("Minority voters were roughly *ten times* as likely not to have their votes correctly counted in this election as were non-minority voters . . . .").

53. Bush v. Gore, 531 U.S. 98, 106–07 (2000) (internal citation omitted).

This passage raises many questions.[54] If the Florida recount was constitutionally flawed, why wasn't the initial Florida count—which the Court's judgment in effect reinstated—even more flawed? The initial count, we must remember, featured highly uneven standards from county to county. Different counties used different ballots (including the infamous butterfly ballot); and even counties using the same ballot used different interpretive standards in counting them. This happened not just in Florida, but across the country. Were all these elections unconstitutional?

The idea that the Constitution requires absolute perfection and uniformity of standards in counting and/or recounting ballots is novel, to put it gently. For decades, if not centuries, American voters have been asked to put their "X" marks in boxes next to candidate names, and human umpires have had to judge if the "X" is close enough to the box to count. On election day, different umpires officiating in different precincts have always called slightly different strike zones. If these judgments are made in good faith and within a small zone of close calls, why are they unconstitutional? If they are unconstitutional, then virtually every election in American history has been unconstitutional.

As we have already seen, regardless of what the U.S. Supremes may themselves have thought at the time, it was a mistake to believe that the Florida recount process was proceeding in some especially bad-faith manner that should have caused that process to be viewed with more suspicion than the initial counting process (which occurred without judicial oversight). The Rehnquist Court claimed that its new-minted equality principles applied only to judicially supervised state recounts, and not necessarily to other aspects of the electoral system.[55] But the Court gave no principled reason for this absurdly ad hoc limitation. The fact that the *Bush* case involved recounts monitored by a judge with statewide supervisory power cuts precisely against the per curiam opinion: Generally speaking, less cheating in tabulation is likely when judges and special masters—and the eyes of the world—are watching; and a court with a statewide mandate could help mitigate inequalities across different parts of the state. True, in a recount it might at times be foreseeable that a particular ruling might tend to favor a given candidate, but this was also true of various rulings made during or even

54. Some of the material contained in the remainder of this section is borrowed from Akhil Reed Amar, Op-Ed., *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1, *available at* 2000 WLNR 8345547.

55. Bush v. Gore, 531 U.S. at 109 ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

before the initial counting.

Critics of the recount, both on and off the Rehnquist Court, were also far too quick to think they had somehow established smoking-gun evidence of foul play—"*Aha*!"—whenever they pointed to certain changes in counting protocols over time or certain variations across space. True, various Florida counties in the past had not counted dimpled chads.[56] But the Florida Supreme Court had not blessed this past practice; and no uniform anti-dimple rule applied in the many sister states that, like Florida, affirmed the primacy of voter intent.[57] Facts matter. If, for example, certain precincts in 2000 had particularly high rates of dimples or other mechanical undercounts, this statistic might well be evidence of chad buildup or machine deterioration over the years. A strict anti-dimple rule that made sense in 1990 might not have been sensible a decade later, given much older machines, more buildup, and a higher incidence of machine undercounts.[58]

So too, the chad-rule in precincts with short lines might not sensibly apply to precincts with much longer lines, where some voters may have felt a special need to vote fast so that others could take their turns. If in precincts where lines were longest and voters were most hurried—or were especially elderly and frail, or especially unlikely to understand English-language instructions about the proper use of punch-card styluses—the rates of dimpled chads or other undercounts were especially high, it might well make sense to treat dimples in those precincts as particularly likely to reflect genuine attempted votes rather than intentional nonvotes.[59] These sorts of issues could not have been easily addressed in each precinct on election day itself; but, they were just the sort of problems that a statewide court might have been able to address sensibly with an adequate factual background developed in the very process of recounting, a process in which fine-grained data about the precinct-by-precinct (and even machine-by-machine) distribution of each sort of voting problem would become available. But the U.S. Supremes short-circuited the whole recount and remedy process, privileging the less accurate, less inclusive, and more discriminatory initial counting process—and privileging that highly unequal process in the name of equality, no less!

The Rehnquist Court per curiam failed to cite a single case that, on its facts, came close to supporting the majority's analysis and result.[60]

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56. *Id.* at 106–07.

57. *See, e.g.*, Delahunt v. Johnston, 671 N.E.2d 1241, 1242–43 (Mass. 1996).

58. Bush v. Gore, 531 U.S. at 106–07.

59. *See* Tribe, *supra* note 48, at 45–46.

60. For a fascinating analysis of earlier Rehnquist Court election-law cases with very different facts, but similar voting line-ups, see Richard H. Pildes, *Democracy and Disorder*, *in* THE VOTE, *supra* note 2, at 140.

To be sure, we can find lots of forceful voting-equality language in the Supreme Court's pre-*Bush* case law—but on their facts, these cases were mainly about citizens simply being denied the right to vote (typically on race or class lines); or being assigned formally unequal voting power, with some (typically white) districts being overrepresented at the expense of other (typically black) districts.

The Equal Protection Clause was, first and foremost, designed to remedy the inequalities heaped upon blacks in America. The Fifteenth Amendment extended this idea by prohibiting race discrimination with respect to the vote. Yet, governments in the South mocked these rules for most of the twentieth century. For decades, most American blacks were simply not allowed to vote. When Congress finally acted to even things up in the 1960s, inequality persisted as a practical matter. In Florida, for example, black precincts in 2000 typically had much glitchier voting machines, which generated undercounts *many times* the rate of wealthier (white) precincts with sleek voting technology.[61] In raw numbers this sizable inequality far exceeded the picayune discrepancies magnified by the Rehnquist Court. Under-maintenance of voting machines, chad build-up, long voting lines in poor precincts—these were some of the real ballot inequalities in Florida 2000.

In Florida 2000, those who were the most serious about real equality, as envisioned by the architects of Reconstruction, persuasively argued that the government should not ignore the very large and racially nonrandom voting-machine skew. Rather, the government should do its best to minimize and remedy that skew, albeit imperfectly, via manual recounts. Even if such recounts were not required by equality, surely they were not prohibited by equality.[62] In fixating on the small glitches of the recount rather than on the large and systemic glitches of the machines, the Rehnquist Court majority turned a blind eye to the real inequalities staring them in the face, piously attributing the problems to "voter error" (as opposed to outdated and seriously flawed machines) and inviting "legislative bodies" to fix the mess for future elections.[63]

IV. VOTER INTENT IN BUSH VERSUS GORE AND *BUSH V. GORE*

Before I conclude, I should like to highlight one more aspect of Bush versus Gore (the election) and *Bush v. Gore* (the case). Let's talk for a few moments about voter intent.

Think first about the election. Sometimes, a voter might sensibly cast a vote for someone who is not in fact the voter's true first choice. Via a *strategic* vote, a voter might well vote for candidate *A*, even though she

61. *See supra* note 48, at 50.

62. Bush v. Gore, 531 U.S. 98, 147 (2000) (Breyer, J., dissenting).

63. *Id.* at 103–04 (per curiam).

truly prefers candidate *C*—because a sincere vote for *C* may increase the odds that her least favorite candidate, *B*, might win. Thus, in Florida 2000, many voters strategically voted for Al Gore, even if they sincerely preferred Ralph Nader, because they understood that a sincere vote for Nader would make it more likely that George W. Bush would in fact prevail. (And to those who actually did cast their votes for Nader, I ask: "What were you thinking?")

Other voters in Florida failed to vote for their true first choice not because they were *strategic* but because they were *confused*. Recall the infamous butterfly ballot, which effectively disfranchised thousands who fully intended to and in fact tried to vote for Gore, but who ended up casting mistaken ballots that had to be counted in favor of Patrick Buchanan. Consider finally, overvotes and undervotes. In an overvote, a voter might, in confusion, vote for two different candidates for the same single position—say, both Bush and Gore. In an undervote, a confused voter might simply fail to indicate which candidate he or she truly preferred.

Now turn from Bush versus Gore, the election, to *Bush v. Gore*, the case. Here too, we can see strategic voting in action, and also possibly confused voting—both overvotes and undervotes.

First, strategic voting. There are good reasons to suspect that Chief Justice Rehnquist and Justices Scalia and Thomas did not, deep down, sincerely agree with the exuberant and unprecedented equal protection analysis at the heart of the per curiam opinion that these three Justices formally joined. The equal protection approach ran counter to the general approach that these three Justices had typically followed in prior equal protection and voting rights cases. The per curiam also raised some special problems for principled originalists. (There is strong evidence that the Fourteenth Amendment was not intended or written to apply to voting discrimination.[64] This is indeed why a wholly separate amendment—the Fifteenth Amendment—was understood by the Reconstruction generation to be needed to end race-based suffrage laws.[65] Ordinarily, the inapplicability of the Equal Protection Clause might be thought to be a moot point for dedicated originalists because most of the voting cases that have relied on the Equal Protection Clause could be reconceptualized and defended as Article IV republican government cases. But, Article IV would not seem to apply to a presidential election.)

Moreover, the equal protection argument was in considerable tension

64. *See generally* AMAR, *supra* note 51, at 391–92 (noting that the Reconstructionists in 1866 made clear that the Fourteenth Amendment applied to civil and not political rights such as voting and militia service); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 216–17 & n.* (Yale University Press 1998) (same).

65. AMAR, *supra* note 51, at 392.

with the Article II analysis favored by these three concurring Justices. The more one insists on the plenary power of state legislatures under Article II to call the shots in presidential elections, the more awkward it is to also insist that the state must satisfy a super-strict system of voting equality, down to uniform micro-standards for evaluating chads, regardless of the counting and recounting system established by the legislature itself.

Why, then, did the three believers in the Article II argument join what they probably saw as a highly problematic and implausible equal protection opinion? In other words, why did they opt to concur in the per curiam opinion rather than simply concur in the judgment based solely on their Article II theory? Most likely, because they were voting strategically (much as the Naderites who voted for Gore in Florida). Without their three votes for the per curiam opinion, *Bush v. Gore* would have been a case in which there were five votes to end the recount and decide the election, but no single majority opinion or majority theory to justify this outcome. Imagine how the *New York Times* headline the next day might have read: *Court Backs Bush But Cannot Agree Why*. Or imagine the lead paragraph of such a news story:

> Last night, for the first time in American history, the U.S. Supreme Court decided a presidential election. By a 5-4 vote, the Court conclusively stopped votes from being recounted in Florida, even though a majority of Justices in fact rejected each of the only two theories put forth by the Bush campaign to end the recount. The only things the five Justices could agree on were that George W. Bush must win, Al Gore must lose, and the counting must stop.[66]

Strategic voting, it would seem, may thus well have occurred both in Florida and in Washington, D.C.

So too, at least one Justice in the case appears to have overvoted and undervoted, as did some confused Floridians the previous month. Justice Breyer joined in full both Justice Stevens' dissent and Justice Souter's dissent, even though these two dissents took diametrically opposite positions on the plausibility of the per curiam opinion's equal protection analysis. Justice Stevens thought the argument was a clear

66. For a similar analysis of the Justices' behavior in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 836 (5th ed. 2006). For a wide-ranging discussion of possible strategic voting in *Bush v. Gore*, see generally Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849 (2001).

loser, whereas Justice Souter bought this turkey.[67] And Justice Breyer—who is, I can personally attest as his former law clerk, one of the world's most agreeable humans—agreed entirely with both Justices Stevens and Souter.[68] Which brings to mind one of my favorite punch lines from *Fiddler on the Roof*: "But, Rabbi, they can't both be right!" Nor is the matter completely clarified in Justice Breyer's own opinion, in which he acknowledged that there were equality problems with the Florida recount, but did not quite say that these problems rose to the level of a constitutional violation.[69] I would call this an undervote, with no clear voter intent on the part of Justice Breyer. On this issue, my old boss and dear friend was as enigmatic as some of the dimpled Florida punchcards at the center of the storm.

V. REFORM

Ten years ago this week, Professor Sunstein's Dunwody Lecture moved from the 1999 impeachment "debacle" to various proposals for "reform."[70] Over the past hour, we have dwelt long enough on the debacle (if that is indeed the right word) of Florida 2000. It is time, in conclusion, to envision reform.

Although I have been quite critical of the Rehnquist Court's per curiam opinion in *Bush v. Gore*, I do strongly agree with that part of the opinion that spoke of the need for "legislative bodies nationwide [to] examine ways to improve the mechanisms and machinery for voting."[71]

Nor is this the only sort of reform that is desperately needed. In Florida 2000, a shockingly large number of lawful voters were incorrectly, and in many cases illegally, purged from state voting rolls

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67. *Compare Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting) ("The federal questions that ultimately emerged in this case are not substantial."), *with id.* at 133–34 (Souter, J., dissenting) ("It is only on the [equal protection] issue before us that there is a meritorious argument for relief, as this Court's *per curiam* opinion recognizes. . . . I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.").

68. *Id.* at 123 (Stevens, J., dissenting, joined by Justices Ginsburg and Breyer); *id.* at 129 (Souter, J., dissenting, joined by Justice Breyer and joined in part by Justices Stevens and Ginsburg).

69. *Id.* at 145–46 (Breyer, J., dissenting) ("[S]ince the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.").

70. Sunstein, *supra* note 1, at 599.

71. Bush v. Gore, 531 U.S. at 104.

on Katherine Harris' watch.[72] Even today, both in Florida and beyond, government officials have often made it too difficult to register to vote and too difficult to actually cast a vote on election day. Under the banner of combating fraud, many jurisdictions are imposing inappropriate burdens on those who are fully eligible to vote. The massive disenfranchisement of ex-felons—men and women who are, after all, our fellow citizens and who are disproportionately persons of color—is a genuine cause for concern.

At this late hour, I shall not burden you with my own pet list of reforms. Instead, I ask only that each of you in this room today begin to think seriously about the topic. To get you started, let me simply remind you that at end of the eighteenth century, Americans astonished the world by enacting a Constitution that had actually been voted upon by people across an entire continent. Never before in world history had such a thing occurred.[73] It was an amazing democratic reform—and the world has never been the same.

Let me further remind you that almost exactly one century later, America found itself in the midst of another amazing democratic reform movement. Recall that at the turn of the twentieth century, America had promised the elimination of racial barriers to suffrage but had yet to do the same thing for sex barriers. Beginning at first with a few states in the Rocky Mountains and then eventually sweeping across the land, woman suffrage transformed the political face of America—another truly epic expansion of democracy.[74]

And now, still one more century later—at the dawning of the Age of Obama—America stands poised once again to ponder democratic first principles. I urge all the persons in this room, and all the persons who have occasion hereafter to read this lecture in the pages of the *Florida Law Review*, to make election reform in Florida—heck, in America!—a priority. If all of today's listeners and tomorrow's readers do so, we shall have good reason to hope that when one of you stands here at this podium in the not-too-distant future—as, say, the Dunwody Lecturer of 2019—you will be able to say to your audience, with truth in your voice and a smile on your lips, that the right to vote has made great strides in the new millennium.

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72. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, EXECUTIVE SUMMARY (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/exesum.htm.

73. *See* AMAR, *supra* note 51, at 5–10.

74. *See id.* at 419–28.