

CHAPTER 7

FLORIDA: GETTING TO THE BOTTOM OF *BUSH V. GORE*

The Bush-Gore Florida extravaganza at the end of the 2000 presidential election gripped the nation and the world, dominating the headlines and the airwaves day after day. In the battle for the most powerful position the planet has ever known, more than 100 million Americans had gone to the polls on Election Day (or in early voting), and Democrat Al Gore had an undeniable edge in the national popular vote over Republican George W. Bush. But legally, Gore's half-million-vote advantage in this national vote counted for naught. Without Florida's 25 electoral votes, Gore had only 266 of these golden tickets—four shy of the 270 needed to win. If Bush could prevail in Florida, he, and not Gore, would take the oath of office in January.

So everything came down to vote counting and recounting (and re-recounting . . .) in a single electorally dysfunctional state. Within that state, Bush and Gore were locked in a statistical dead heat, with the contest so close that a mere feather on either side of the scale—a few hundred votes here or there—would actually tip the balance. If only a feather could be found or fabricated! The heat was on and tempers flared.

For weeks, complex and fast-paced litigation ping-ponged between multiple courthouses as various Florida counts and recounts occurred. And then, in mid-December, the United States Supreme Court abruptly stepped in to announce that the recounting must stop. Now! Five justices purported to join a per curiam opinion proclaiming that the state recount process was an irreparable violation of voting-equality principles; and three of these five wrote a separate opinion claiming, in addition, that the

state judiciary overseeing the recount had usurped the constitutional authority of the Florida legislature. Game over, said the Court. Bush won.*

Fifteen years later, now that all the shouting has subsided and the case has receded from the public eye, what is left to say about this Florida fiasco? 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.

In this chapter I explain who was right and who was wrong in *Bush v. Gore*, and why it still matters.

THE COURT(S) AND THE CONSTITUTION(S)

Before I offer my own take on this topic, here is a taste of the highly charged commentary thus far. On January 13, 2001, a month after the United States Supreme Court definitively ended the Florida recount, more than five hundred law professors from over one hundred schools published a joint statement in the *New York Times*. Signatories included Stanford's

* Ever since the days of Chief Justice John Marshall, the Court has tried when possible to speak with one voice, by designating one opinion as an opinion of the Court joined by at least a majority of the Court's members. Usually, the justice who takes the lead drafting this opinion puts his name on it, even as others also join it and thereby affirm that they accept its reasoning and result. (Recall from Chapter 2 that opinion-writing resembles baseball in featuring identifiable individual performance within the context of a team effort.) However, in a "per curiam" opinion—Latin for "by the Court"—no single justice claims credit as the lead author. The opinion is presented as a pure team product of every member who signs onto it. In *Bush v. Gore*, four justices—John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—dissented from the Court's decision that the recount must end. Three other members of the Court—Chief Justice William Rehnquist and Justices Clarence Thomas and Antonin Scalia—purported to join the Court's per curiam opinion, but wrote a separate concurrence that, as we shall see, suggests that they did not really buy into the per curiam opinion's approach. By a process of elimination, we may deduce that the Court's "per curiam" opinion was in reality the joint product of Justices Anthony Kennedy and Sandra Day O'Connor.

Margaret Jean Radin, Mark Kelman, and William Cohen; Columbia's George Fletcher; Yale's Robert Gordon; New York University's Derrick Bell; the University of Michigan's Terrance Sandalow; and the University of Texas's Sanford Levinson, to mention just a few. 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."¹

Elaborating on her views in *Bush v. Gore: The Question of Legitimacy*, which collected the commentary of many prominent legal scholars, 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 forbid the Florida Supreme Court from addressing the constitutional problems the federal Supreme Court purported to find." Radin went on to ask, "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?" Her bottom line was that "we cannot now afford . . . to pretend that we see the rule of law when we know that we are seeing the opposite."²

Several other distinguished contributors to the *Question of Legitimacy* volume leveled similar accusations of lawlessness against the US Supreme Court. Professor Jed Rubenfeld proclaimed that *Bush v. Gore* was, "as a legal matter, utterly indefensible. . . . There was no December 12 deadline [for completing recounts]. The majority made it up. On this pretense, the presidential election was determined." On Rubenfeld's view, the "illegality," "breathhtaking 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*." 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.”³

Professor Bruce Ackerman offered a similarly harsh assessment: “I . . . protest[] in the name of the rule of law. . . . *To demand equal protection but to prevent Florida from satisfying this demand*—this is not bad legal judgment; this is sheer willfulness. 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.”⁴

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. In a 2001 essay collection, *The Vote: Bush, Gore and the Supreme Court*, Professor Richard Epstein condemned the Florida Supreme Court for its “manifest errors” and its “abuse of discretion for partisan political ends.” 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 ‘hypertechnical 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.”⁵

Professor Charles Fried—himself a former member of the Massachusetts Supreme Judicial Court and former US solicitor general—was more pointed still. He began his essay by quoting an “expla[nation of] Florida politics” offered by the fictional gangster Johnny Rocco in the 1948 movie *Key Largo*: “I take a nobody [and] 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.*”⁶

Having set the stage with this unsubtle suggestion of fraud and chicanery in the Sunshine State, Fried proceeded to flay the Florida Supreme Court for its “clear act of insubordination” to the US Supreme Court’s *Bush v. Palm Beach County Canvassing Board* (*Bush I*) decision, the Court’s

first foray into the Florida 2000 litigation. According to Fried, the US Supreme Court in *Bush I* “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 advert[ing] to it, had [by continuing and extending the recount] 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.)”⁷

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.”⁸

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 acting in bad faith, then perhaps this belief could explain why the US 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 US 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. 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 US justices had in fact believed that they were dealing with a lawless, partisan state bench trying to steal the presidency for its preferred candidate.⁹

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 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 William Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, 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 US Supreme Court's ultimate decision in *Bush v. Gore*, such as Professors Epstein, McConnell, and Fried—the key word here is *legislature*. The US Constitution says that the state *legislature* gets to make the rules for choosing presidential electors. 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. Although this argument did not command a majority in the Supreme Court, we must consider it with great care, because the most prominent conservative legal academics who have tried to defend the result in *Bush v. Gore* have hung their hat on this peg—a peg that turns out to be embarrassingly unsteady.

The Article II issue first arose in the *Palm Beach* case, 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. 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." 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 right of suffrage" guaranteed by the state constitution.¹⁰

On December 4, 2000, in *Bush v. Palm Beach County Canvassing Board* (*Bush I*), the Rehnquist Court unanimously vacated the Florida Supreme Court's *Palm Beach* ruling and sent the case back to the state court system for clarification. 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.

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.¹¹ Whereas the initial *Palm Beach* ruling had been unanimous, the Florida Supreme Court on December 8 split 4–3, and its chief justice, Charles Wells, dissented in an opinion that worried aloud about the Article II issue.¹² Although the Florida court supplemented its splintered decision three days later with yet another opinion—this one commanding the votes of six out of seven justices¹³—it was too little too late: the US Supreme Court had already granted review of the earlier decision and had stayed the recount pending its review.¹⁴

As we have seen, Professor Fried pointed an accusatory finger at the Florida justices for their failure to address the US 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. For Fried, the Florida justices' actions were insubordinate to the US Supreme Court, to Article II, and to the Florida legislature. Professors Epstein and McConnell likewise highlighted the Florida Supreme Court's seeming violation of Article II and usurpation of the Florida legislature's role under that federal constitutional provision.¹⁵

It was a momentous mistake for the Florida Supreme Court, after the *Bush I* remand, 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 US Supreme Court. The clock was ticking down fast, and the Florida justices had a head-spinning number of intricate legal issues to deal with all at once.¹⁶

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 Florida's 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 Florida's 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 in response to the Rehnquist Court's per curiam opinion in *Bush I*:

Just as Article II of the US 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 once again deputizing us, the Florida judiciary, to construe the Florida statutes and regulations regarding presidential elections against the backdrop of the Florida Constitution—just as the legislature has deputized us in previous elections going back many decades. 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 harmony with the spirit and grand principles of the state constitution.

As our long-standing 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 in fact derives from Article II. In general, no federal court (not even the US 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 in logic boomerang: such attempted federal judicial 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 judicially construed or judicially revised to conform to the letter and spirit of the Florida state constitutional 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’s rules for presidential elections are the same as the Florida election code’s 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 sensibly apply to presidential elections as well.

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, long-standing 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 exceedingly odd—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 just hours before that Court's final ruling in *Bush v. Gore*.¹⁷

Despite their failure to hammer home the Article II propriety of their earlier reliance on the Florida Constitution, the Florida justices' actions in general were thus legally defensible, and often quite admirable. Though the Florida Supreme Court did not explain itself 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 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 cannot generally be said of the Rehnquist Court.)¹⁸

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 nonpresidential elections. 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.¹⁹

According to this long-standing 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. Even more obviously, a voter should not have his vote go uncounted because some bureaucrat goofed or some machine failed to give effect to the voter's manifest intent. The Florida legislature was fully aware of judicial rulings championing voter intent, 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.

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 Florida's 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.²⁰

Nothing in Florida's laws or traditions required Florida's secretary of state in 2000 to be law-trained, and in fact, Florida's 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 cofounder of the Federalist Society, an organization with strong ties to America's leading conservative thinkers and doers—has publicly labeled her decision “foolish.”²¹

Early rulings made by 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.) The law-trained Florida justices were sensitive stewards of deep and long-standing constitutional principles when they declined to give blind deference to dubious decision-makers such as Harris.²²

THE ROLE(S) OF THE LEGISLATURE(S)

Let us now 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 Republican-controlled 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 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. After all, 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).²³

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 past 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 outlandish things prior to Election Day. Instead, it kept in place the state's 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, supplement, or “clarify” 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. Again, in both Tallahassee and Washington, DC, the 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. True, 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, 3 USC section 1, 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. 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 clause 4. According to 3 USC section 2, “[w]henver 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 a State may direct.” 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; and that 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; 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 the clear negative implication of the congressional statute is that the state legislature has no such right, outside the context of a truly failed election—that is, an election that had not yet *and that never would or could* generate a legally sufficient outcome after careful tabulation.²⁴

It would be silly 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.

Nor would a broad reading of the word “failure” vindicate Congress’s purpose in enacting a uniform Election Day. As Professor Bruce Ackerman astutely observed in the *New York Times* as the Florida fireworks were exploding, “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.” A loose reading of the word “failure” would encourage states to game the system in the very ways the statute was plainly designed to prohibit.²⁵

Here, too, it would seem that the harsh critics of the Florida judiciary have gotten the issue 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. Or, more precisely still, the post-election state legislature was threatening to usurp the proper authority of the pre-election state legislature, which had deputized the state courts to resolve any disputes that might arise—and in the process, to do what judges typically do with any statutory scheme, namely, clarify its ambiguities and iron out its wrinkles.

IN LATE 2000, there *was* in fact one court that inappropriately inserted itself at the expense of the legislature. But that court was the Rehnquist Court, which took upon itself to resolve various issues that were properly Congress’s to decide as the body tasked by the US Constitution with the counting of electoral votes and the resolution of electoral-vote disputes. The federal Constitution thus envisioned a certain adjudicatory role for

Congress in presidential elections, but state legislatures and the Supreme Court were not given an 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.²⁶

EQUAL PROTECTION

What about the claim in the Supreme Court's per curiam opinion 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. Harvard professor Laurence Tribe has pointed out that "[m]inority voters were roughly *ten times* as likely not to have their votes correctly counted in this election as were non-minority voters." 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 disfranchisements that had tainted the initial counting process.²⁷

Some of the problems that seemed to surface in the 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 US 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 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 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 also revealed that at least one county changed its evaluative standards in the counting process. . . . This is not a process with sufficient guarantees of equal treatment.”

This passage raises many questions. 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 recounting ballots is novel, to put it gently. For decades, if not centuries, American voters have been asked to

* Though many political junkies in 2000 learned the lexicon, it's worth reminding general readers fifteen years later what a “dimpled chad” was (and is). Some parts of Florida relied on a system in which the voter used a stylus to punch a tiny rectangular hole in a thin cardboard punch card opposite each preferred candidate's name for each contest on the ballot. An IBM-style punch-card reader would then process and tabulate the hole-filled punch cards. But if the stylus did not push all the way through the card, the tiny paper rectangle (the chad) that was supposed to fall away cleanly, and thereby create the hole, would not do so, and the punch card might be merely indented—dimpled—rather than properly holed. Also, if this system was not properly maintained, chads created by previous voters could accumulate and make punching-through and tabulating more difficult. This was known in the business as “chad buildup.”

† The so-called butterfly ballot configured candidate names in a confusing way. Literally thousands of Florida voters ended up having their votes counted for a third-party candidate they likely loathed—Pat Buchanan—instead of the man they thought they were voting for, Al Gore. These several thousand lost votes for Gore easily surpassed Bush's official 537-vote margin of victory.

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 America has ever had has been unconstitutional.

Regardless of what the US 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. But the Court gave no principled reason for this absurdly ad hoc limitation.²⁸

The fact that the *Bush* case involved recounts monitored by a judge with statewide supervisory power cuts against the Court’s per curiam opinion: 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 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—“*Aba!*”—whenever they pointed to certain changes in counting protocols over time or certain variations across space. True, various Florida counties in prior elections had not counted dimpled chads. 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.²⁹

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.

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 the rates of dimpled chads or other undercounts were especially high in precincts where lines were longest, and where 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—it might well make sense to treat dimples in those precincts as particularly likely to reflect genuine attempted votes rather than intentional non-votes.³⁰

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 sensibly address 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 US 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 opinion failed to cite a single case that, on its facts, came close to supporting the majority's analysis and result. 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 were mainly cases 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.³¹

The Fourteenth Amendment's equal-protection clause, adopted in the wake of the Civil War, 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. For most of the twentieth century, various state governments—and especially state governments in the Old South, most emphatically including governments in Florida—mocked these rules. For decades, large numbers of blacks in many southern jurisdictions were simply not allowed to vote.

When Congress finally acted to protect the rights of black voters in the 1960s, the situation dramatically improved overall, but subtle inequality persisted in various places. In Florida, for example, black precincts in 2000

typically had much glitchier voting machines, which generated undercounts many times the undercount rates of wealthier (white) precincts with sleek voting technology. In raw numbers, this sizable inequality dwarfed the pica-yune discrepancies magnified by the Rehnquist Court. Under-maintenance of voting machines, chad buildup, long voting lines in poor precincts—these were some of the real ballot inequalities in Florida 2000.³²

In Florida, 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.³³

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.

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

Before we conclude our analysis of the Florida fiasco of 2000 and turn our eyes to the future, one more aspect of Bush versus Gore, the election, and *Bush v. Gore*, the case, deserves attention: the issue of 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 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 in effect be a wasted vote that (compared to a vote for Gore) 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? Did you intend to throw your vote away? Did you truly have no preference whatsoever between Bush and Gore, who were the only two candidates who had a realistic chance of winning?)

Other voters in Florida failed to vote for their true first choice not because they were *strategic* but because they were *confused*. The notorious butterfly ballot 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 opinion also raised some special problems for principled originalists.*

* In brief: There is strong evidence that the equal-protection clause of the Fourteenth Amendment was not intended to apply or written to apply to voting discrimination. 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. 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 without some fancy footwork of the sort that Rehnquist, Scalia, and Thomas typically disavow, Article IV would not seem to apply to a presidential election; nor have these justices ever endorsed any other textualist or originalist theory trying to link the Constitution's words to a general right to vote equally. For background on the inapplicability of the equal-protection clause, as originally understood, to voting, and discussion of alternative textual theories of voting-equality rights, see, generally, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998), 216–217, and n.*; Akhil Reed Amar, *America's Constitution: A Biography* (2005), 391–392; Akhil Reed Amar, *America's Unwritten Constitution* (2012), 183–194, 223–230. See also *supra* Chapter 2, p. 51, and p. 318n.34; and Chapter 5, p. 118.

Moreover, the Court's equal-protection argument was in considerable tension 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 make the rules for presidential elections, the more awkward it is to also insist that the state must satisfy a super-strict system of voting equality, down to the third decimal point of 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 join the per curiam opinion—thereby purporting to accept its reasoning—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 US 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.”³⁴

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

So, too, at least one justice in the case appears to have overvoted and undervoted, as some confused Floridians had the previous month. Although both Justices John Paul Stevens and David Souter dissented in *Bush v. Gore*, they dissented in separate opinions, and for good reason: these two justices took diametrically opposite positions on the plausibility of the per curiam opinion's equal-protection analysis. Justice Stevens thought the argument was a clear loser, whereas Justice Souter bought this turkey. And Justice Stephen 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. Which brings to mind one of my favorite punch lines from *Fiddler on the Roof*: “But, Rabbi, they can’t both be right!”³⁵

Nor is the matter completely clarified in Justice Breyer’s own dissenting 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. I would call this an undervote, with no clear voter intent on Breyer’s part. On this issue, my old boss was as enigmatic as some of the dimpled Florida punch cards at the center of the storm.³⁶

THE FUTURE

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.” Nor is this the only sort of reform that is desperately needed. In the 2000 election in Florida, thousands of lawful voters—disproportionately black—were incorrectly, and in many cases illegally, purged from state voting rolls on Katherine Harris’s watch.³⁷

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, burdens that often disproportionately disadvantage young, old, nonwhite, and non-wealthy voters.

The integrity of voting rights in each state would be enormously important even if only state and local offices were at stake. Recall that every leading man considered in Part I of this book—Lincoln, Black, Jackson, and Kennedy—championed a vigorous federal role in guaranteeing rights of individual Americans against their own home states; and recall further that in both of the other cases featured in Part II of this book, *Brown* and *Tinker*, the federal judiciary nobly protected citizens from state and local officials who were violating core constitutional rights of liberty and equality.

But the issue of electoral integrity in Florida involves far more than the rights of Floridians. Thanks to the electoral college and the

winner-take-all system in place in virtually all states, a shabby state-run election for president adversely affects all Americans, and does so especially in a big swing state such as Florida.

To be sure, Florida is not the only important state in the continental presidential sweepstakes. Thus, our next two chapters explore issues of presidential selection and succession with a special emphasis on two other states that have played outsized roles in modern presidential selection, Ohio and Texas.*

* Both of these states played particularly notable roles in the 2000 election. The Florida fiasco would have been irrelevant to the ultimate presidential outcome in 2000 had Gore managed to carry Ohio. But George W. Bush—then the sitting governor of Texas and the son of a former president from Texas—won Ohio by a comfortable margin, 3.5 percentage points. Four years later, incumbent President Bush would have lost his bid for reelection had he lost Ohio, even though he still would have had a considerable national popular-vote edge over his opponent, John Kerry. But once again, the Texan carried Ohio, this time by a nail-biting 2.1 percentage points.