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ARTICLES

Is it “The Will of the People” or a Broken Arrow? Collective Preferences, Out-of-the-Money Options, *Bush v. Gore*, and Arguments for Quashing Post-Balloting Litigation Absent Specific Allegations of Fraud

MARK KLOCK*

The law school faculty was debating three proposed revisions to the curriculum. Twenty of the thirty faculty present ranked proposal *A* preferable to proposal *B*. Twenty ranked proposal *B* preferable to proposal *C*. Twenty ranked proposal *C* preferable to proposal *A*. After countless hours of debate without agreement the faculty finally reached a decision. It decided that any decisions made would be subject to change. Having accomplished something positive, it moved on to debate the schedule for discussing the changes yet to be made.

INTRODUCTION

It has now been over a year since the litigation involving the 2000 presidential election ended. An avalanche of emotional commentary has subsided and given way to careful academic analysis. The *University of Chicago Law Review* published a symposium on the decision with some contributors claiming that heated emotions have cooled down.¹ But

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1. Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome of Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 613 (2001) (“After a short flurry of

have they really? Alan Dershowitz's book, *Supreme Injustice*, engaged in admittedly *ad hominem* personal attacks on the five Republican Justices.² Dershowitz not only opines that these five Justices illegally decided the result to achieve their personal ends and then concocted a legal justification—he claims to have compiled evidence that includes motive to prove his case.³ The core of his evidence is his claim that these five Justices would have decided the case differently if the parties' positions had been reversed.⁴ That is obviously not a testable hypothesis.⁵

Professor Dershowitz has a reputation for provocative and flamboyant writing, and his book clearly displays strong rhetorical skills.⁶ Arguing that he has compiled probative evidence to support his faith, however, is as ludicrous as arguing that I have proof that the North Pole lies at the bottom of the planet. The logical reasoning is a far larger embarrassment to the legal profession than *anything* written by *any* of the Justices in *any* of the proceedings involving the 2000 presidential election.⁷

heated debate over the soundness of the decision, the nation buckled down to business as usual. The attention of the media was, to say the least, short-lived.”).

2. ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 110 (2001) (“The criticism I am making of the majority justices includes a significant *ad hominem* component. . . . I am also accusing them of dishonesty These criticisms are directed at the justices *personally* . . .”).

3. Professor Dershowitz repeatedly refers to the decision and motives with labels such as lawless and improper and characterizes his arguments as based on proof and evidence. *See, e.g., id.* at 95 (“I will demonstrate that by any reasonable standard of evaluation, the majority justices [decided for Bush] because of malice aforethought.”).

4. *Id.* at 12.

5. *See generally* Mark Klock, *Finding Random Coincidences While Searching for the Holy Writ of Truth: Specification Searches in Law and Public Policy or Cum Hoc Ergo Propter Hoc?*, 2001 WIS. L. REV. 1007, 1018-22 (providing an explanation of hypothesis testing); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (criticizing inferences in legal scholarship).

6. *See* Murray B. Light, *Dershowitz Shows Contempt for Court*, BUFF. NEWS, Aug. 26, 2001, at F4.

7. One of Professor Dershowitz's arguments is that it is morally wrong for academics to defend the decision unless they honestly believe that the majority Justices would have voted the other way if the candidates' positions were reversed. DERSHOWITZ, *supra* note 2, at 108. It is not obvious to me why his moral authority should supersede my religious beliefs. His position seems a bit one-sided since it implies that someone who honestly believes that they have no way of knowing what the Justices would have done in a different case, is morally wrong to defend the decision but free to criticize without sin. I strongly suspect (but cannot prove) that Professor Dershowitz fails his own test that he applies to the five Justices. I have in mind the case of *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). This was the famous case in which the Court created new constitutional law regarding the defamation of public officials to overturn the Supreme Court of Alabama's affirmation of a defamation judgement for southern segregationists against the *Times*. *Id.* at 256. Presumably, Professor Dershowitz supports the case since it affords him legal protection for his otherwise defamatory book. My rhetorical question for Mr. Dershowitz then is, how can one intellectually reconcile the blatantly contrived result in *N.Y. Times v. Sullivan* with

A detailed analysis of Dershowitz's book is far afield of the analysis of this article. However, such an analysis provides some motivation because it supports two of the three facts justifying this article. First, the historical significance of the case means that analysis and commentary will continue for years.⁸ Second, while much has been written already, no one has previously applied the insights provided by the literature on options to the policy arguments. Litigation has significant embedded option components that were particularly acute in the context of the 2000 presidential election. An understanding of this is important for a thorough analysis. Third, Dershowitz's claim that the five Justices substituted their political judgment for that of the people⁹ exemplifies a fairly widespread ignorance of Professor Arrow's relatively well-known Noble Prize-winning work proving that the conception of collective judgment is a construct with internally flawed logic.¹⁰

What can option theory teach us about elections? Al Gore's position from November 8th to December 12th with respect to the outcome of the 2000 presidential election is perfectly analogous to an individual with an out-of-the-money option when the person with the option exercises some control over the riskiness of the underlying asset.¹¹ Possession of the ability to create and increase risk creates a moral hazard problem for the individual with the out-of-the-money option.¹² It is

his criticism of the Court in *Bush v. Gore* given that "[t]wo partisan wrongs do not make a judicial right"? DERSHOWITZ, *supra* note 2, at 8.

8. DERSHOWITZ, *supra* note 2, at 81 ("The majority per curiam opinion is likely to become one of the most analyzed, criticized, and defended opinions in the history of the Supreme Court.").

9. *Id.* at 3.

10. *See, e.g.*, Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 975-81 (1998) (observing the pervasiveness of Professor Arrow's proof that collective decisions cannot be made in such a manner that they will obey basic principles of rationality).

11. November 8, 2000, was the day after the election, at which time the first ballot count was completed and showed Mr. Gore to have fewer votes than Mr. Bush. *See Bush v. Gore*, 531 U.S. 98, 100 (2000) (per curiam). Every subsequent ballot count led to the same result. *See 5 Weeks of History*, USA TODAY, Dec. 14, 2000, at 3A, available at 2000 WL 5798249. On December 13, 2000, with his option to challenge effectively extinguished by the Supreme Court, Mr. Gore finally conceded defeat. *See John F. Harris & Ceci Connolly, Gore Offers Olive Branch and Finality; Concession's Grace Notes May Decide His Future*, WASH. POST, Dec. 14, 2000, at A1, available at 2000 WL 29921521.

12. *See, e.g.*, PHILIPPE JORION, *VALUE AT RISK* 43 (1997). Describing the relation between moral hazard and risk when one exerts influence over the risk, Professor Jorion wrote:

This government guarantee is no panacea, for it creates a host of other problems, generally described under the rubric of *moral hazard*. Given government guarantees, there is even less incentive for depositors to monitor their banks, but rather to flock to institutions offering high deposit rates. Bank owners are now offered what is the equivalent of a "put" option. If they take risks and prosper, they partake in the benefits. If they lose, the government steps in and pays back the depositors. As long as the cost of deposit insurance is not related to the riskiness of activities, there will be perverse incentives to take on additional risk.

well-known that moral hazard creates economic inefficiency and that rules that mitigate the moral hazard problem can improve the allocation of social resources.¹³ This article seeks to explore the analogy between the recent presidential election and financial options, and argues that as a matter of public policy, vague and ambiguous statutes and case law should be interpreted so as to destroy any option to challenge objective election results on the basis of technology and ballot design *ex post* election results.

The argument is further strengthened by the assertion that the purpose of elections is not to determine the will of the people. Indeed, the will of the people is an internally inconsistent, illogical construct that serves no useful purpose outside of the mathematical proofs that it cannot exist.¹⁴ Thus, it is argued that the purpose of elections is to provide a socially acceptable method of allocating political power when there is no consensus in order to end pointless and unresolvable debate so that society can move on to other business.¹⁵ “[W]hat the people want cannot be social policy simply because we do not and cannot know what the people want.”¹⁶

Finally, it is advanced that these policy arguments are consistent with the pertinent legal authority. The Supreme Court of Florida’s decisions in this dispute were not based on controlling legal authority, but were based on policy arguments which are not logical, and legal authority that is subordinate to the U.S. Constitution.¹⁷ The U.S. Supreme

Id.

13. See Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537, 538 (1968) [hereinafter Arrow, *Moral Hazard*] (“The underlying point is that . . . the resulting resource allocation will certainly not be socially optimal.”).

14. There is a vast literature spanning many disciplines (including ethics, philosophy, economics, sociology, psychology, and political science) on the fundamental incompatibility between voter sovereignty and rational collective choice. For an accessible description of this incompatibility, see ALFRED F. MACKAY, *ARROW’S THEOREM: THE PARADOX OF SOCIAL CHOICE: A CASE STUDY IN THE PHILOSOPHY OF ECONOMICS* 1-12 (1980). This literature is highly cited within the legal literature. See generally, e.g., Block, *supra* note 10, at 975-81.

15. It is well-known that rational individual preferences cannot be aggregated to achieve a rational social preference ordering without imposing socially unacceptable constraints such as dictatorship. See, e.g., IAIN McLEAN, *PUBLIC CHOICE: AN INTRODUCTION* 25 (1987) (“[T]here are deep problems with all procedures of getting from many preferences to one decision.”). A commonly given example of this is the fact that there is nothing inconsistent with a majority preferring *A* to *B*, another majority preferring *B* to *C*, and another preferring *C* to *A*. See, e.g., *id.* at 25-27. This implies that there is no such thing as a “best policy” for the government because there is no platform that another platform cannot beat. See *id.* at 103. Mechanisms like plurality voting, or institutional devices such as the electoral college, can serve to break this cycle and reach a decision, albeit an unstable one, because efficiency demands that a decision be made rather than endure an infinite filibuster.

16. WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 238 (1988).

17. The Florida Supreme Court relied heavily on the “will of the people” in making its

Court on the other hand, based its ruling on a strict application of the law,¹⁸ but the additional public policy arguments presented here could further support and advance the Court's ruling.

I. OPTIONS, MORAL HAZARD, AND THE PARADOX OF VOTING

A. *The Mechanics of a Call Option*

A call option conveys the right to purchase a security at a fixed price (which is called the strike price or exercise price) for a finite time period.¹⁹ When the underlying security is selling in the market for more than the strike price, the option has an intrinsic value equal to the difference between the price of the security and the strike price.²⁰ This is due to the fact that the option holder could exercise the option to purchase the security at the strike price and immediately resell it at the current market price, thereby capturing the difference. Such an option is said to be "in-the-money."²¹ If the underlying security is selling in the market for less than the strike price, then the option has an intrinsic value equal to zero, since it would obviously not be rational to exercise the option given that the security could be purchased for less than the exercise price. This scenario is called "out-of-the-money."²²

Options with time remaining before expiration are typically worth much more than their intrinsic value.²³ This is because an option puts the holder in a situation in which losses are truncated, but gains are not. It makes no difference whether the option expires one dollar out of the money or one hundred dollars out of the money. The result is the same. But it does make a difference whether the option expires one dollar in the money or one hundred dollars in the money. Consider an option that is at the money (the security market price equals the option's strike price).²⁴ If the value of the underlying security rises, there is a corre-

decision. *See Gore v. Harris*, 772 So. 2d 1243, 1254 (Fla. 2000) (per curiam) ("[T]his Court, consistent with legislative policy, has pointed to the 'will of the voters' as the primary guiding principle to be utilized by trial courts in resolving election contests."). The "will of the voters" principle is derived from the Florida Constitution's vague and innocuous pronouncement that "[a]ll political power is inherent in the people." *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1230 (Fla. 2000) (per curiam). But the laws of Florida are subordinate to the U.S. Constitution under the Supremacy Clause. *See U.S. CONST.* art. VI, cl. 2.

18. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) ("Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy.").

19. JOHN C. HULL, *OPTIONS, FUTURES, & OTHER DERIVATIVES* 6 (4th ed. 2000).

20. *Id.* at 154.

21. *Id.*

22. *Id.*

23. ZVI BODIE ET AL., *ESSENTIALS OF INVESTMENTS* 541-42 (4th ed. 2001) (discussing the time value of an option).

24. HULL, *supra* note 19, at 154.

sponding one-for-one increase in the option's intrinsic value.²⁵ However, if the value of the underlying security declines, there is no drop in the option's intrinsic value.²⁶ As a first and fairly accurate approximation, the probability of the security decreasing by certain amounts is offset by the potential gains in the security.²⁷ Otherwise, the expected price of the security would not equal the current price and some reason would need to exist for securities to trade at prices other than their expected value.

The truncation of losses without truncation of gains is what gives additional value to options.²⁸ An analogy to holding a call option at-the-money is the right to enter a casino or poker game in which winnings were permitted to be kept while losses were refunded in full. This right would be valuable and individuals would be willing to pay admission to enter the casino or game. Modifying the example to an in or out-of-the-money option merely modifies the analogy to a situation in which losses are only refunded beyond some deductible or gains are only kept beyond some threshold. Either way, the option with time remaining before expiration still has significant value due to the truncation of losses.

This situation is somewhat analogous to an election because it makes no difference whether one loses by one vote or ten million votes. A loss is a loss. For an individual trailing after an initial election count, increasing the uncertainty regarding the rules of the election and the counting of votes can only help the candidate. Votes gained can potentially be sufficient to bring victory while votes lost make no difference in the status quo.²⁹

A fundamental insight, which the option literature brings to this scenario, is that when losses are truncated, risk creates value.³⁰ The greater the risk, the more valuable the option.³¹ This is because greater risk implies higher probabilities for large changes in the status quo, but

25. *See id.* (showing that since a rise in the stock price will put an at-the-money option in the money and the intrinsic value of an in-the-money option equals the stock price minus the fixed strike price, a one dollar increase in stock price will create a one dollar increase in intrinsic value for the at-the-money or in-the-money option).

26. *See id.* (giving equation for intrinsic value that shows that the intrinsic value is always zero for an out-of-the money option).

27. *See id.* at 219-26 (describing the mathematical process for stock price changes used to value options for which positive and negative changes of given size are equally likely).

28. *See* BODIE ET AL., *supra* note 23, at 542.

29. There is a difference in that the election involves a discontinuity—the gains only help if the trailing candidate overcomes a threshold, and beyond that threshold further gains do not help. But the fundamental asymmetry between the lack of harm from further losses in votes and the potential benefit from gains in votes is analogous to an option.

30. *See* BODIE ET AL., *supra* note 23, at 543 (stating that increased volatility increases option value due to limited losses).

31. *Id.* at 542.

losses from the status quo are truncated.³² Therefore, the potential gains are not offset by potential losses and the increased risk creates value.³³ This is not typically a problem with plain vanilla listed options on public equities because the individuals buying the options have no control over the riskiness of the underlying equity. Their risk is exogenous.

This is not the case in all option-like scenarios, however. It is well-known that where the holder of an option exercises influence over the riskiness of the underlying asset, a moral hazard problem exists.³⁴ The moral hazard problem leads to socially undesirable conduct in the sense that resources are not allocated to their best use.³⁵ The view expressed in this article is that the tactics utilized to contest the initial election results were a predictable consequence of a moral hazard problem and that this further led to a tremendous misallocation of legal resources,³⁶ increased political risk,³⁷ a negative impact on financial markets and the economy,³⁸ and some loss in the credibility of the political system.³⁹ It is further argued that as a matter of policy, arguments that an election resulted in an incorrect winner should not be considered absent a showing of manipulation of election results—without election tampering, the loser should not receive a free option with an inescapable moral hazard.

Critics of this view can be expected to argue that the choice of a national president is far too important a decision to worry about slowing down the docket in some courts and losing some resources here and there.⁴⁰ Installing either the best president or the correct one will lead to a better designation (or better alignment) of national priorities and long-run resources which will more than offset any short-term losses. This is an ends-justify-the-means argument, whereas I argue that the efficiency

32. See *id.* at 543 (“[E]xtremely good stock outcomes can improve the option payoff without limit, but extremely poor outcomes cannot worsen the payoff below zero.”).

33. See *id.* (“This asymmetry means volatility in the underlying stock price increases the expected payoff to the option, thereby enhancing its value.”).

34. See JORION, *supra* note 12, at 286-87 (giving an example of suboptimal behavior resulting from a moral hazard in an option where the option holder controls risk).

35. See STEPHEN A. ROSS ET AL., CORPORATE FINANCE 597-98 (4th ed. 1996) (explaining that managers, working for stockholders who have an option to default, have incentives to invest in projects in which they should not invest, and not invest in projects in which they should invest).

36. See *A Question of Trust: As Confidence in Balloting Weakens, Bush, Gore Make Matters Worse*, USA TODAY, Nov. 13, 2000, at 29A (describing Gore’s “utterly self-interested bid to have the vote count turn out his way at any legal cost”).

37. See *id.* (describing politicians’ concerns over “serious danger in a protracted fight”).

38. See Peter G. Gosselin, *Political Mess Raises Fears of Recession Economy*, L.A. TIMES, Nov. 15, 2000, at C1, available at 2000 WL 25918071 (reporting on economists’ concern about negative impact of recounts on the economy and financial markets).

39. See *A Question of Trust*, *supra* note 36 (describing candidates’ loss of credibility and crisis scenarios).

40. See Laurence H. Tribe, *Let the Courts Decide*, N.Y. TIMES, Nov. 12, 2000, § 4, at 15 (restating the argument that it is more important to count right than to finish counting).

of the means, or process, is the more important element at stake. This view is supported by Professor Arrow's Impossibility Theorem,⁴¹ and public choice theory.⁴² Advocates of the alternative view—that the Florida courts appropriately devoted resources and increased uncertainty regarding the process—must overcome at least two other problems: there is no evidence that society preferred one candidate over the other,⁴³ and even if there was, social preferences revealed from elections are known to be irrational.⁴⁴

It is not clear that any court could have done anything that would have resulted in a better president. The fact is, when one considers the normal error rates in ballot counting, the election was a statistical tie, both in the national popular vote and in Florida.⁴⁵ Thus, using the plurality rules model of selecting one candidate as best (a model which lacks theoretical support but is assumed correct for this argument), there is no demonstrable evidence that one candidate is better than the other. That is, all systems of counting are subject to error since we cannot observe the intent of the voter at the precise moment the choice is made—at best we can only observe a ballot which is a proxy for voter intent. This election was so close that, statistically, we cannot reject the hypothesis that the difference in votes for the top two candidates was

41. Professor Arrow's work suggests that the means cannot be justified by the goal of reaching society's preferred decision because such a concept cannot exist. Professor Arrow gives the following interpretation of his theorem:

If we exclude the possibility of interpersonal comparisons of utility [weighing some votes more than others], then the only methods of passing from individual tastes to social preferences which will be satisfactory and which will be defined for a wide range of sets of individual orderings are either imposed or dictatorial.

KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59 (2d ed. 1963) [hereinafter ARROW, *SOCIAL CHOICE*]. If rational collective social preferences do not exist, then we should at least use a decisive process. Negotiating over the rules after the contest is certainly not decisive.

42. Cf. DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 53 (1989) (explaining that the cost of time lost through decision making is an important consideration in public choice).

43. Aside from the fact that the margin of victory was lower than the *potential* error rate ("potential" describes the error rate because we do not know whether voters whose ballot did not register a vote chose to choose no candidate), consider that only approximately 100 million votes were cast in a nation with a population exceeding 281 million.

44. Given the votes for minor candidates, it is fair to say that a majority of voters voted against both Mr. Bush and Mr. Gore. Thus, we would have a president who a majority of voters voted against regardless of which candidate won the legal battle.

45. The initial count gave Mr. Bush a lead in Florida of 1,784 out of 5,816,482 votes that were cast for the two top candidates. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam). This margin is 0.03%. When considering votes for minor candidates, the margin is smaller. Nationally, Mr. Gore lead Mr. Bush by 232,895 out of 97,451,927 votes that were cast for the two of them. See Dan Balz, *Bush's Florida Lead Shrinks to 300*, WASH. POST, Nov. 15, 2000, at A1, available at 2000 WL 25428401. This margin is 0.2%. Again, considering votes for minor candidates, the margin is smaller. Nationally, two percent of all ballots do not register a vote for president. See *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam).

zero. Additionally, advocates of a prolonged process must overcome the well-known fact that our voting system does not necessarily select either the most desirable or the least objectionable candidate.⁴⁶ From a public choice perspective, our society has decided that it is less inefficient to have a system for selecting elected officials that is clear, final, and socially acceptable, than to have a system which expends more resources debating who should select the best officials and by which method. This is an argument against giving a losing candidate the option to litigate over the rules and standards for interpreting ballots after the election.

B. *Moral Hazard*

Moral hazard can be described as a situation in which an individual has been insulated from the economic consequences of his actions.⁴⁷ The classic example is the case of an insured individual.⁴⁸ A person with full coverage for all automobile losses lacks the economic incentive to drive as carefully as he otherwise would were there no insurance.⁴⁹ Likewise, an individual with full medical coverage lacks the economic incentive to control costs, find the best prices, avoid frivolous treatments, and exercise a degree of prudence which would be exercised in the absence of insurance.⁵⁰ In the insurance context, the moral hazard problem exists wherever the event against which insurance is taken out is at least partially within the control of the individual.⁵¹ The widespread use of copayments and deductibles is an effort to mitigate the moral hazard problem.⁵²

Professor Arrow, a Nobel laureate, is among those who have noted the economic importance of the moral hazard problem:

There is one particular case of the effect of differential information on the workings of the market economy (or indeed any complex economy) which is so important as to deserve special comment: one agent can observe the joint effects of the unknown state of the world

46. See McLEAN, *supra* note 15, at 156 (explaining why plurality voting fails all desirable criteria for voting systems abysmally).

47. See KENNETH J. ARROW, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, reprinted in 2 COLLECTED PAPERS OF KENNETH J. ARROW 143 (1983) [hereinafter ARROW, *Economic Activity*].

48. *Id.*

49. *Id.*

50. *Id.*

51. KENNETH J. ARROW, *General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice*, reprinted in 2 COLLECTED PAPERS OF KENNETH J. ARROW 222 (1983) [hereinafter ARROW, *Economic Equilibrium*].

52. Cf. ARROW, *Moral Hazard*, *supra* note 13, at 538 (describing healthcare rationing as a reasonable method for improving the allocation of resources in the presence of moral hazard).

and of decisions by another economic agent, but not the state or the decision separately. This case is known in the insurance literature as "moral hazard," but . . . insurance examples are only a small fraction of all the illustrations of this case and . . . the case will be referred to here as the "confounding of risks and decisions." An insurance company may easily observe that a fire has occurred but cannot, without special investigation, know whether the fire was due to causes exogenous to the insured or to decisions of his (arson, or at least carelessness). In general, any system which, in effect, insures against adverse final outcomes automatically reduces the incentives to good decision making.⁵³

Professor Arrow further observed how the moral hazard problem is applicable to a wide range of areas and diverse fields including medical care.⁵⁴ He further stated:

In fact, it is not a mere empirical accident that not all the contingent markets needed for efficiency exist, but a necessary fact with deep implications for the workings and structure of economic institutions. . . . The very existence of insurance will change individual behavior in the direction of less care in avoiding risks. The insurance policy that would be called for by an optimal allocation of risk bearing would only cover unavoidable risks and would distinguish their effects from those due to behavior of the individual. But in fact all the insurer can observe is a result, for example, a fire or the success or failure of a business, and he cannot decompose it into exogenous and endogenous components. Contingent contracts, to speak generally, can be written only on mutually observed events, not on aspects of the state of the world which may be known to one but not both of the parties.⁵⁵

In Mr. Gore's case, once the polls had closed and the initial count showed him to have been defeated, Mr. Gore was effectively insured against adverse outcomes resulting from legal and political challenges to the election. This impediment to good decision making described by Professor Arrow refers to good decision making from the point of allocating scarce resources to their most socially valuable use, not to any impediment to good decision making from the point of maximizing Mr. Gore's own personal welfare. Mr. Gore's option position was immediately apparent to anyone with a basic understanding of business. As one Iowa farmer observed, "[H]e's got nothing to lose. . . . I'd think he was a fool if he didn't challenge the thing."⁵⁶ But this is precisely the

53. ARROW, *Economic Activity*, *supra* note 47, at 143.

54. Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 960-62 (1963).

55. ARROW, *Economic Equilibrium*, *supra* note 51, at 222.

56. Jon Sawyer & Bill Lambrecht, *Opinions Run the Gamut Among Citizens Waiting for*

point—because of the situation, Mr. Gore’s claim that election laws were misinterpreted and misapplied had absolutely no credibility and never should have been considered in the first place absent evidence of manipulation.

In the financial setting, an option can be viewed as a form of insurance.⁵⁷ Options truncate potential losses, which is essentially the definition of insurance. An alternative way of understanding the comparison is to consider a call option as protection against future price increases. Where the individual has some control of the event affecting the exercise of the option (or the payout of insurance), however, the moral hazard problem in the financial option context is much more severe than in the traditional insurance context. In the traditional insurance context the individual has only lost the economic incentive to avoid excessive risk.⁵⁸ At worst, the individual becomes ambivalent towards risk, but more likely the individual continues to have some nonpecuniary incentives to live healthy and drive safely. This is because one cannot profit from traditional insurance—one can only avoid losses. In the financial setting, the individual with the option actually benefits from increasing risk without bearing any of the social costs this risk may create.⁵⁹

This is essentially the situation that the trailing candidate in a close, contested election result finds himself. The incentive is to create the greatest amount of legal and political uncertainty about the validity of the outcome because he has nothing to lose (truncated losses) and everything to gain. This suggests that we can learn something about optimal policy regarding election contests from the economic literature on moral hazard and the financial literature on options. I suggest that the lesson is that the option should not exist, and courts should not consider such cases absent a showing of fraud. I further argue that this conclusion is implied by our legal system in which the impossible goal of selecting the “best” candidate is sacrificed (so far as one can sacrifice that which is unattainable) in furtherance of the goal of having political contests settled with quickness and finality according to rules fixed in advance of the vote.

If Mr. Gore had stated in his campaign that he would seek judicial

Election’s Conclusion, ST. LOUIS POST-DISPATCH, Dec. 3, 2000, at A1, available at 2000 WL 3563952.

57. JORION, *supra* note 12, at 43 (describing bank deposit insurance as a type of option).

58. Cf. ARROW, *Moral Hazard*, *supra* note 13, at 538 (“Because of the moral hazard, complete reliance on economic incentives does not lead to an optimal allocation of resources in general. In most societies alternative relationships are built up which to some extent serve to permit cooperation and risk sharing.”).

59. See JORION, *supra* note 12, at 287 (describing how individuals with options benefit from increasing risk).

intervention and hand examination of selected ballots, in the event of a close vote, he would have borne much of the risk of his subsequent action. But by being given the opportunity to wait until the ballots had been marked and counted in Mr. Bush's favor, Mr. Gore was able to create uncertainty about the legal and political interpretation of the election laws and the methods used to count the ballots without taking risk himself while benefitting from increased risk placed on society. If the Florida legal system had reacted as some legal experts initially predicted the law required, Mr. Gore would have been called out before reaching first base.⁶⁰ This would have sent a strong message that society will not suffer the costs of giving free options with a moral hazard to the candidate losing a fair, albeit imperfect, election.

C. *Options with Endogenous Risk*

A commonly utilized example of an option with endogenous risk is the case of a corporation financed in part with debt that is owned by someone other than the stockholders.⁶¹ This scenario is the equivalent of the equity owners of the firm having sold the firm to the debt holders while simultaneously buying a call option on the firm from the bondholders.⁶² The limited liability nature of equity allows the equity holders to wait until the debt is maturing (which is when their option expires), and then make a decision to exercise their option.⁶³ If the value of the firm's assets is less than the face value of the debt (which is the exercise price), then the stockholders walk and allow their option to expire.⁶⁴ On the other hand, if the value of the firm exceeds the face value of the debt, the equity holders will exercise their call and buy back the business.⁶⁵

This insight further leads to the conclusion that, under certain circumstances, the equity holders—through their control on management—have powerful incentives to make decisions that are detrimental to the corporation and simply bad capital investment decisions when analyzed in isolation.⁶⁶ This incentive is strongest when the value of the firm is low relative to the face value of the debt—i.e., when the equity owners' option is out-of-the-money (or when the election count results

60. See Tim Novak & Abdon M. Pallasch, *Overturf of Election is Unlikely: Evidence of Fraud Needed*, CHI. SUN-TIMES, Nov. 10, 2000, at 6 (reporting on interviews with election experts).

61. See ROSS ET AL., *supra* note 35, at 592-93.

62. *Id.*

63. *Id.* at 593.

64. *Id.*

65. *Id.*

66. See *id.* at 421-23 (giving examples).

in a loss).⁶⁷ The explanation for this result is that the truncation of losses puts those with the option in a position to benefit from excessive risk and to suffer from prudent and optimal levels of risk taking.⁶⁸ The reason is that the out-of-the-money option holders who control the level of risk are able to engage in a scenario in which they are essentially able to gamble with another's money and keep any winnings while disavowing liability for losses—the old “heads I win, tails you lose” game.⁶⁹ Additionally, they may pass up highly profitable, low-risk investments—especially where an infusion of capital is needed—because they will not reap the benefits of the gains.⁷⁰

This can be illustrated with a highly simplified example. Suppose we have a corporation whose only asset is \$1 million in cash. Further, suppose that the firm has a \$2 million debt obligation maturing tomorrow. From the stockholder's viewpoint, the best decision the corporation could possibly make would be to buy \$1 million worth of tickets for tonight's drawing in the Powerball lottery. Only an incredibly speculative investment could generate enough of a payoff to benefit the shareholders, and due to limited liability they can impose such risks on others without bearing it themselves. (Much like Al Gore could impose the risk created by disputing the interpretation of ambiguous statutes and case law without bearing the brunt of the risk himself.⁷¹)

Of course, one could argue that my example is not realistic and that the bondholders would have a cause of action in this hypothetical. That is not the point. Fiduciary duties to creditors are extremely weak at best,⁷² and in this scenario the legal system operates as little more than a last chance to salvage an already wrecked train.⁷³ Even if bondholders could make a claim, it would be after the fact and entail significant legal

67. See *id.* at 421 (“Firms near bankruptcy oftentimes take great chances, because they feel that they are playing with someone else's money.”).

68. See *id.* at 421-23 (giving examples).

69. A story, perhaps apocryphal, illustrates this idea. It seems that Federal Express was near financial collapse within a few years of its inception. The founder, Frederick Smith, took \$20,000 of corporate funds to Las Vegas in despair. He won at the gaming tables, providing enough capital to allow the firm to survive. Had he lost, the banks would simply have received \$20,000 less when the firm reached bankruptcy.

Id. at 421-22.

70. *Id.* at 422.

71. Indeed, some analysts have suggested that Mr. Gore enhanced his political future with the challenge. See Harris & Connolly, *supra* note 11.

72. Cf. Lawrence E. Mitchell, *The Puzzling Paradox of Preferred Stock (and Why We Should Care About It)*, 51 BUS. LAW. 443, 449 (1996) (noting that creditors can bring derivative litigation, but it will generally be of little benefit to them).

73. Cf. Victor Brudney, *Corporate Bondholders and Debtor Opportunism: In Bad Times and Good*, 105 HARV. L. REV. 1821, 1828-29 (1992) (noting further reduction in the value of creditor claims in insolvency brought about by the Bankruptcy Act of 1978).

costs and hurdles. Furthermore, they could only obtain judgment against the directors, not all stockholders. Bankruptcy would provide a further shield reinforcing limited liability. The purpose of a simplified example is merely to show a change in incentives, and thus a change in behavior. The ultimate point is that the holder of an out-of-the-money option benefits from increased risk, and to the extent that she exerts influence over the level of risk, a moral hazard problem exists. Clearly, such extreme speculative investments create a misallocation of capital.⁷⁴

As mentioned earlier, not only do the equity holders have incentives to take poor investments, but they might also have an incentive to bypass good investments.⁷⁵ Suppose our firm above was presented with the opportunity to invest \$1.25 million overnight without any risk and receive a gross \$1.5 million the next day. Clearly a no-risk return of 20 percent per day is good. But the equity holders will not benefit from the investment, and will even lose since they would have to infuse additional equity which would subsequently be taken by the creditors.⁷⁶

D. *The Paradox of Voting*

It has long been known that voting is not an effective method of reaching optimal social goals.⁷⁷ The paradox of voting—the fact that election results need not map into social preferences and social preferences need not be transitive—was formally proven by Professor Arrow about fifty years ago.⁷⁸ While variations and refinements on the proof have been presented, the conclusions have withstood rigorous scrutiny over the test of time.⁷⁹ Indeed, the importance of Professor Arrow's proof is in large part responsible for his Nobel Prize in economics in 1972.⁸⁰

While Professor Arrow was given credit for development of the formal proof that no solution exists to the paradox of voting, he traces knowledge of the paradox back to a 1770 paper by Jean-Charles de Borda. Professor Arrow also relies on several papers by the Marquis de Condorcet and others written in the eighteenth century that indicate that

74. See JORION, *supra* note 12, at 43 (giving the great savings and loan debacle that cost taxpayers \$150 billion as an example of such capital misallocation).

75. See ROSS ET AL., *supra* note 35, at 422 (giving an example).

76. *Id.*

77. The inception of mathematical analysis applied to voting rules is attributed to Jean-Charles de Borda (1781) and the Marquis de Condorcet (1785). Dennis C. Mueller, *Public Choice in Perspective*, in PERSPECTIVES ON PUBLIC CHOICE I (Dennis C. Mueller ed., 1997).

78. ARROW, SOCIAL CHOICE, *supra* note 41, at 46-59. The first edition was published in 1951. See *id.* at Preface.

79. See Block, *supra* note 10, at 982 (stating that no one has argued that the paradox is false).

80. See Kathy Sawyer, *A Paradox of Majority Politics*, WASH. POST, Oct. 9, 1995, at A3, available at 2000 WL 9266242.

the paradox of voting was well known.⁸¹ Interestingly, the paradox was independently discovered again about one hundred years later when Lewis Carroll, while on the faculty at an Oxford college, observed that the outcomes of faculty meetings were inconsistent and sensitive to procedural rules.⁸² Professor Arrow's modern contribution is formally proving under very general conditions that it is *impossible* to create *any* democratic voting scheme that will result in rational social preferences.⁸³ In other words, democracy and a coherent ordering of social choices are logically incompatible.⁸⁴ One of the great ironies of the 2000 presidential election challenge is that Professor Tribe argued before the U.S. Supreme Court in support of the Florida Supreme Court's reliance on the will of the people as the paramount interest. He had previously noted in his popular textbook on constitutional law that Arrow's Impossibility Theorem suggests that there is no such thing as the will of the people.⁸⁵ It seems likely that if the Justices had been aware of this, they might have questioned him as to how he could argue in support of an opinion based on something he knew to be impossible to exist.

The paradox of voting is shown with a simple example. Suppose there are three voters and three alternatives: X, Y, and Z. Suppose that the first voter prefers alternative X to Y and Y to Z; the second voter prefers Y to Z and Z to X; and the third prefers Z to X and X to Y. Then a majority of voters prefer X to Y and Y to Z. Thus, transitivity of majority preferences would imply that X is preferred to Z—but this is not true.

This example is obviously a simplified special case of voting. Arrow formally showed with an axiomatic approach that when reasonable conditions for the process of social choice are laid down (essentially that preferences not be dictated or imposed and that choices be responsive to the desires of the individuals), then this set of conditions is internally inconsistent.⁸⁶ "That is, there is no democratic constitution, no matter how complicated, which can always be sure of producing a method of social choice that satisfies certain ordinary properties of

81. ARROW, *SOCIAL CHOICE*, *supra* note 41, at 93-94.

82. McLEAN, *supra* note 15, at 10.

83. MACKEY, *supra* note 14, at 1-5.

84. ARROW, *SOCIAL CHOICE*, *supra* note 41, at 59 (showing that his Theorem 2 proves it is impossible to construct any method of voting which will result in rational social choices without restricting individual preferences).

85. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-8, at 12 n.6 (2d ed. 1988) (noting that Arrow's theorem suggests that there is no hope of meaningfully constructing majority will).

86. MACKEY, *supra* note 14, at 3 ("Arrow shows that no device can jointly satisfy four apparently reasonable requirements . . .").

coherence.”⁸⁷

While the mathematical proof of the paradox of voting may be difficult for nonmathematicians, the intuition should not be surprising. It could easily be conceived that a majority of people prefer Bush to McCain, McCain to Gore, and Gore to Bush. Throw Bradley into the equation and the possibilities for intransitivities increase multiplicatively. The outcome can then be dependent on how the choices are paired. Primary elections are a method that can lead to a result inconsistent with majority preferences. A general election with a runoff between the top two will do the same. Consider the Bush-McCain-Gore example. The person winning the election would be the person dominated by the first one eliminated.⁸⁸

Majority voting can lead to situations far more repugnant than a misallocation of government expenditures. Voting systems have been used to legitimize and reaffirm the institution of slavery. Many authors have written at length on tyranny of the majority.⁸⁹ Majority religions have imposed their will on minority religions. One well documented example of a worldwide majority that imposes their own interests on a sizeable worldwide minority without much compromise or serious thought is the right-handed majority.⁹⁰

Public choice theory suggests that institutions develop for reasons.⁹¹ The motivation behind the plurality rules method of voting is not promotion of society's preferred choices. This follows from the fact that no voting system produces a consistent set of choices. Indeed, the most reasonable argument which has ever been made in defense of our voting system is that it is no worse than any alternatives.⁹² Given that our system of voting (or any system of voting) does not exist to promote

87. ARROW, *SOCIAL CHOICE*, *supra* note 41, at book cover.

88. We can arbitrarily pick one person to lose in the first round, say McCain. Then Gore would defeat Bush, but McCain was preferred to Gore. If we start by eliminating either of the other two, we get the same anomaly. Obviously, institutions such as the two party system and primary elections are important in determining the outcome. Arrow's theorem, however, proves that there is no system that will consistently result in selecting the people's choice, essentially because the people's choice does not exist—it is an internally inconsistent concept.

89. See, e.g., RIKER, *supra* note 16, at 247-48.

90. See Sharon Wong, *Their Right to be Left*, *NEW STRAITS TIMES (MALAYSIA)*, Aug. 6, 2000, at 10, available at 2000 WL 22843731; Deborah Bach, *Left Out? Today's Your Day to Celebrate: Left-Handers Look for a Little Recognition in a Right-Handed World*, *BALT. SUN*, Aug. 13, 2000, at 6F, available at 2000 WL 4876026; Peter Silvertown, *On the Other Hand: Colour-Blindness, Dyslexia, High Morality, and Unsavory Reputations*, *OBSERVER*, Aug. 13, 2000, at 39, available at 2000 WL 21300949; Andrew Cunningham, *Schools Deny Left-Handers Their Rights*, *SUNDAY TIMES (LONDON)*, Nov. 12, 2000, at Features Section, available at 2000 WL 29756975.

91. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 287 (1962) (arguing that institutions develop to benefit groups of individuals).

92. See Robert D. Tollison, *Public Choice and Legislation*, 74 *V.A. L. REV.* 339, 368 (1988) (“[D]emocracy is still better than the alternatives.”).

the best social choices, we must look elsewhere for its motivating factors. We vote because it is an acceptable method for making a decision about who will govern, and then we move on. We recognize that there is no socially acceptable method of making the best decisions. Therefore, rather than seeking efficiency in the decisions, we, as a society, seek efficiency in the process. There is value in quickly settling disputes, making decisions, and moving on. Casting ballots and then objectively counting those ballots is efficient. Litigating over appropriate subjective standards to employ in counting ballots after the initial counts is not efficient. The uncountable opinions given throughout the contest expressing the need to resolve the contest and move forward with an effective government regardless of the outcome demonstrates that many in society view elections in this manner.⁹³ It would seem more efficient and decisive to have machines correctly tabulate ballots marked in accordance with instructions than to have thousands of individuals with no specific guidance divine the intent of voters who mark their ballots contrary to instructions.

II. LEGAL BACKDROP TO THE ELECTION CHALLENGE

A. *Federal Law*

A summary of the relevant federal law prior to analyzing the Florida law is useful. Three written provisions of federal law received the most attention in the contest. These will be summarized in the following order: Article II of the U.S. Constitution, which vests the power to select electors with the States;⁹⁴ 3 U.S.C. § 5, providing for Congressional recognition of electors under certain conditions;⁹⁵ and the Equal Protection Clause of the Fourteenth Amendment.⁹⁶

In Article II, Clause 2 of Section 1 begins, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”⁹⁷ A simple reading of this language suggests the following points. First, the right to select electors belongs to the states, not the people—i.e., there is no right of suffrage in the U.S. Constitution.⁹⁸ There are only limits on the states’ ability to grant suffrage selec-

93. See, e.g., *Seeking Redress Through the Courts Bush-Gore*, BALT. SUN, NOV. 25, 2000, at 16A, available at 2000 WL 4885059 (noting that some people were impatient and desiring a quick resolution).

94. U.S. CONST. art. II, § 1, cl. 2.

95. 3 U.S.C. § 5 (2000).

96. U.S. CONST. amend. XIV, § 1.

97. U.S. CONST. art. II, § 1, cl. 2.

98. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States . . .”).

tively.⁹⁹ Second, the power to choose the method for selecting electors is vested exclusively in the state legislatures.¹⁰⁰ This is not a matter which can be abridged by state constitutions.¹⁰¹ A state constitution vesting power in the electorate would be unconstitutional under the U.S. Constitution's Supremacy Clause in Article VI, Clause 2.¹⁰² However, a state legislature, having the power to appoint electors, could pass a law specifying how the electors would be selected, therefore placing its determination in the electorate.¹⁰³ Arguably, the legislature could do this through a simple resolution, which would not require a Governor's approval nor a veto override, and would also make the legislature the arbiter of interpretation rather than the judiciary. Where the legislature has provided for the selection of electors by statute, though, reason suggests that the judiciary has authority to interpret that statute, particularly where the legislature has assigned the judiciary a role in resolving election contests.¹⁰⁴

Nevertheless, the power to determine the method of appointing electors is vested solely in the legislatures.¹⁰⁵ Thus, while they can delegate the power, they cannot sever their authority under the U.S. Constitution.¹⁰⁶ This means that they can change their minds and override any delegation of their authority just as the president can delegate decisions to the cabinet and override their decisions.¹⁰⁷ The selection of electors by the legislature is not reviewable by the state judiciary.¹⁰⁸

There is another subtle but important point which has not been adequately emphasized. The power to select electors resides solely in the legislatures. Thus, although state courts may interpret statutory provisions delegating this legislative power to the people, the state judiciary—in the context of a presidential election—cannot modify or expand this legislative delegation.¹⁰⁹ The practical significance of this is that

99. *Id.* at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

100. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The Constitution . . . leaves it to the legislature exclusively to define the method of effecting the object.").

101. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam) (vacating the Supreme Court of Florida's decision in *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) (per curiam), in part because it might be construed as relying on the Florida Constitution as circumscribing legislative authority under Article II).

102. U.S. CONST. art. VI, cl. 2.

103. *Blacker*, 146 U.S. at 27.

104. *See Gore v. Harris*, 772 So. 2d 1249 (Fla. 2000) (per curiam) (observing that the legislature intended for election contests to be resolved in a judicial forum).

105. *Blacker*, 146 U.S. at 27.

106. *Id.* at 35.

107. *Id.* (calling legislative power to appoint electors "plenary").

108. *Id.*

109. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ.,

judicially created case law and dicta pertaining to the same code in the context of state elections is not applicable in the context of a presidential election.¹¹⁰ In other words, it is perfectly reasonable and proper for the state court to consider constraints imposed by the state constitution in interpreting a statute in the context of a local election, but the state constitution cannot be construed in a manner inconsistent with the U.S. Constitution.¹¹¹ Furthermore, the prior Florida case law interpreting the election statutes in the context of local elections could be persuasive, but cannot be binding authority in the context of a presidential election.¹¹² For example, the Florida Constitution could provide that in all elections where no individual received a majority, a runoff between the top two candidates would be held within four weeks. Clearly this could not apply to a presidential election without the consent of the legislature.¹¹³ And, if the legislature were to pass an act stating that presidential electors would be awarded to the plurality winner, then the Florida Supreme Court would not be free to rule such an act invalid under Florida law.

Thus, the Florida Supreme Court's assertion that under the Florida Constitution the will of the people is the paramount interest,¹¹⁴ is an argument which—in the context of a presidential election—is overridden by both the plain language of the U.S. Constitution and its established interpretation. In *McPherson v. Blacker*, the Supreme Court reviewed the history of Article II and found precisely this interpretation.¹¹⁵ If the Florida Supreme Court could have made an argument that it was merely interpreting the legislature's delegation of power, then it might have had some hope of surviving this constitutional obstacle to effecting its result.¹¹⁶ In *Gore I*, The Florida Supreme Court required the Secretary of State to accept amended returns until the Court fashioned a new deadline from its power to invoke an equitable remedy.

concurring) (“[T]he text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”).

110. *Id.* at 115 (“To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.”).

111. *Id.*

112. *Id.*

113. *Blacker*, 146 U.S. at 34-35.

114. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 (Fla. 2000) (per curiam) (“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 . . .”).

115. *Blacker*, 146 U.S. at 25-35.

116. Justice Ginsburg argued vehemently that the Florida court was merely interpreting the legislative scheme as the legislature intended it should. *Bush v. Gore*, 531 U.S. at 136 (Ginsburg, J., dissenting). If the Supreme Court of Florida had provided different reasoning in its opinion, it is possible that more Justices would have accepted her argument.

There is little question that the Florida Supreme Court based that decision on its interpretation of Florida's constitution,¹¹⁷ and it clearly interpreted Florida's constitution in such a way as to be unconstitutional under the U.S. Constitution.¹¹⁸ Specifically, the Court appears to have interpreted Article I, Section 1 of the Florida Constitution stating, "All political power is inherent in the people" to mean that the will of the people is more important than the technical delegation of elector selection given by the legislature via statute.¹¹⁹ The Florida court further went on to state that the legislature could not impose unreasonable or unnecessary restraints on the right to vote (such as following voting instructions in marking a ballot).¹²⁰

Thus, it appears that the Florida Supreme Court based its decision on the premise that under the state constitution the power to choose electors resides in the people, and that the legislature may not unnecessarily restrict that right. This is unconstitutional, and in hindsight it appears as if the U.S. Supreme Court really demonstrated exceptional polity in its first remand to Florida's high court, giving them an opportunity to base their results on a different theory or find a less embarrassing way out.¹²¹ For some inexplicable reason, the Florida Supreme Court chose to ignore this second chance and should bear the blame for the resulting consequences. By hammering over and over that its decision was based on "the will of the electorate"—a judicial invention—rather than relying solely on findings of legislative intent, the court missed any opportunity it might have had to obtain its desired result.

There is yet another point which should be made in this subsection pertaining to the interaction of the U.S. Supreme Court and the Florida Supreme Court and criticism of the former. It has been argued that the U.S. Supreme Court should not have accepted the case because the case dealt solely with Florida law, and the Florida Supreme Court is obviously the final arbiter of Florida law.¹²² This is an incredibly weak legal argument for two reasons. First, the Florida Supreme Court is obviously not the final arbiter of the U.S. Constitution.¹²³ Since the Florida Court was obligated to interpret the state law in a manner consistent with the

117. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1235-37.

118. See *id.* at 1236 (stating that the Florida Constitution prohibits unnecessary restraints on voting and technical statutory requirement cannot take priority over citizens' right to vote, thereby abridging legislative prerogative to choose the manner of appointing electors).

119. See *id.*

120. *Id.*

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

122. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (per curiam) (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting) ("The federal questions that ultimately emerged in this case are not substantial.").

123. *Id.* at 103 (stating the Constitutional questions presented by the case).

U.S. Constitution, it obviously was obligated to interpret the U.S. Constitution (if it were doing its job) in order to perform the former function. Thus, if the Florida court had discussed its interpretation of the U.S. Constitutional limitations, then the U.S. Supreme Court would clearly have the opportunity to determine whether the Florida court had done so correctly. The fact that the Florida court did not provide a coherent discussion of pertinent federal constitutional law cannot create an effective wall to hide from U.S. Supreme Court scrutiny.¹²⁴

Second, while selecting Florida's presidential electors is *primarily* a Florida matter, the notion that it is *exclusively* a matter solely internal to Florida is overly simplistic.¹²⁵ In the context of presidential elections, state and federal law are intractably intertwined. Federal law has preempted state law on the regulation of certain aspects of absentee ballots.¹²⁶ Elections are regulated by the Federal Election Commission and limits are set regarding the means and amounts which can be raised and spent.¹²⁷ Clearly, Florida could not pass a law stating that presidential election campaigns in Florida are exempt from federal regulation.¹²⁸ Clearly, Florida could not pass a law stating that television and radio stations in Florida do not have to provide candidates with equal free time.¹²⁹ While the U.S. Supreme Court should not intrude into matters purely of state law, it is naïve to suggest that this is one of those occasions. The fact that nine Supreme Court Justices unanimously agreed that the potential for conflict with the U.S. Constitution existed depending on the Florida Court's theory¹³⁰ suggests that the subsequent criticism of the Supreme Court majority alleging partisan interference is highly unfair.

In *McPherson v. Blacker*, the U.S. Supreme Court held that the power of the legislature to select electors is absolute under the U.S. Constitution.¹³¹ *Blacker* involved a challenge to the Michigan legislature's action in 1891 to change the manner in which the state's presidential electors were selected to a district election system.¹³² *McPherson* brought a challenge to the law on the grounds that it was repugnant to the federal Constitution.¹³³ The Supreme Court of Michigan upheld the legislature, and the decision was unanimously affirmed on appeal to the

124. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 78.

125. *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

126. 42 U.S.C. § 1973ff (2000).

127. 2 U.S.C. §§ 431-442 (2000).

128. 47 U.S.C. § 315 (2000).

129. *Id.*

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

131. *McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892) (quoting S. REP. NO. 395).

132. *Id.* at 1-3.

133. *Id.*

U.S. Supreme Court.¹³⁴ In its opinion, the Michigan court noted that the plain language of the Constitution is clear, and that the interpretation that the state legislatures have the exclusive power to select presidential electors has always been given the interpretation.¹³⁵ It further noted that the manner of selection cannot be limited by state constitutions, nor even irrevocably constrained by the legislature itself for the power “can neither be taken away nor abdicated.”¹³⁶

3 U.S.C. § 5 has been interpreted as a safe harbor for recognition of a state’s presidential electors by Congress.¹³⁷ The section states that if a state has provided for the appointment of electors by laws enacted prior to election day, and if the final determination of this appointment shall have been made at least six days prior to the meeting of the electoral college, then such determination shall be conclusive.¹³⁸ This section came into play during the election challenge in two respects. First, it was argued in the U.S. Supreme Court’s unanimous opinion in *Bush I* that action by the Florida Supreme Court could be construed to go beyond mere interpretation of existing law and be deemed to be creation of new law placing the State’s electors chosen by the challenge process outside of the safe harbor provision.¹³⁹ Second, the Florida Supreme Court’s holding, that the Florida legislature intended to obtain the full protection of the safe harbor, proved to be the basis for the U.S. Supreme Court’s halt of all recounts on December 12, 2000.¹⁴⁰ December 12th was six days before the meeting of the electoral college and it was impossible to come up with a manual recount process that fulfilled minimal equal protection requirements before the end of the day on December 12th.¹⁴¹

Finally, equal protection arguments were raised in several areas.¹⁴² The arguments were essentially that: recounts conducted only in portions of the state violated equal protection;¹⁴³ recounts which manually examined only ballots registering no vote by machine, and not examining ballots registering one vote or more than one vote, violated equal

134. *Id.* at 42.

135. *Id.* at 36 (“The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.”).

136. *Id.* at 35.

137. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam).

138. 3 U.S.C. § 5 (2000).

139. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 78.

140. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

141. *Id.*

142. *Id.* at 103-10.

143. *Id.* at 106-07.

protection;¹⁴⁴ and recounts that applied widely varying standards in accessing voter intent violated equal protection.¹⁴⁵ These arguments proved to be the ones which ultimately prevailed in the opinion of the majority of Justices on the U.S. Supreme Court.¹⁴⁶ One dissent suggested that the majority created new equal protection law because it had never applied equal protection analysis to the manner in which votes are counted, only to the allocation of votes.¹⁴⁷ However, it is difficult to see why this distinction should be dispositive given that the question of equal protection in vote tabulation had not been before the Court previously.

It may be that a majority of the Justices felt that equal protection was the strongest argument because in the context of a fundamental right such as voting,¹⁴⁸ the state cannot treat people differently unless it can survive strict scrutiny and show that the unequal treatment is *necessary* to promote a *compelling* state interest.¹⁴⁹ While the state might have a compelling interest in the conflicting objectives of speedy and accurate vote tabulation, it is hard to argue that requiring manual recounts on a subset of votes without any uniform standards is *necessary* to promote those interests.

B. Florida Law

A summary of pertinent Florida law is also useful prior to analysis of the events taking place during the election contest. As Professor Lowenstein noted, the Florida election statutes are not the most coherent,¹⁵⁰ and the Florida Supreme Court found a number of ambiguous and inconsistent sections.¹⁵¹ Any attempt to try to analyze the entire code is probably counterproductive, and just a few of the key provisions are summarized. With respect to the timing for counting votes, the Florida code requires counties to have their results submitted by 5:00 p.m. on the seventh day following the election, and further provides that any

144. *Id.* at 108.

145. *Id.* at 109.

146. *Id.* at 110 (per curiam) (“Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy.”).

147. *Id.* at 125 (Stevens, Souter, Ginsburg, & Breyer JJ., dissenting) (“[W]e have never before called into question the substantive standard by which a State determines that a vote has been legally cast.”).

148. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966).

149. Gerald Gunther, *Forward to The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 21 (1972) (stating that strict scrutiny asks whether the ends are compelling and the means are necessary).

150. David G. Savage & Henry Weinstein, *America Waits: Justices Focus on the ‘How’ of Recounts*, L.A. TIMES, Nov. 21, 2000, at A1, available at 2000 WL 25920609.

151. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1231 (Fla. 2000) (per curiam) (“The provisions of the Code are ambiguous . . .”).

counties that have not met the deadline shall have their returns ignored.¹⁵² This was the basis for Harris's original announcement that she would not extend the deadline.¹⁵³ However, the time issue is confounded by the fact that a candidate may protest the results any time until certification and a manual recount may be conducted.¹⁵⁴ Allowing for someone to file a protest at the last moment while still certifying the results would effectively deny the opportunity to conduct a manual recount.¹⁵⁵

The second key issue involved manual recounts authorized as the result of a protest.¹⁵⁶ The Florida code authorizes manual recounts when there has been "an error in the vote tabulation sufficient to place the results in question."¹⁵⁷ The interpretation of this language became one of the more controversial aspects of the case.¹⁵⁸ Whether a machine not reading an improperly marked ballot constituted an error in vote tabulation became a point of disagreement.¹⁵⁹

A third key issue became the grounds for contesting certified results.¹⁶⁰ Under Florida law, the results may be contested due to the "rejection of a sufficient number of legal votes."¹⁶¹ The meaning of this language also became a point of heated dispute at the end of the challenge because the last series of manual recounts was conducted under the theory that machines reading an improperly marked ballot as "no vote" constituted the rejection of a legal vote if manual inspection could discern voter intent.¹⁶²

Florida election law also consists of some judicial opinions. In *Gore I*, the Florida Supreme Court wrote, "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. . . ."¹⁶³ That reference was to *Boardman v. Esteva*.¹⁶⁴ Interestingly, prior to *Boardman*, Florida law generally required strict compliance with statutory voting requirements, but the *Boardman* court

152. FLA. STAT. ch. 102.111 (2000).

153. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1225-26.

154. FLA. STAT. ch. 102.166 (2000).

155. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1235.

156. *See id.* at 1231-32.

157. *See* FLA. STAT. ch. 102.166 (2000).

158. *See* *Bush v. Gore*, 531 U.S. 98, 119 (2000) (per curiam) (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring) (characterizing the Florida Supreme Court's interpretation as absurd).

159. *Id.*

160. *See* *Gore v. Harris*, 772 So. 2d 1243, 1248-52 (Fla. 2000) (per curiam).

161. FLA. STAT. ch. 102.168 (2000).

162. *Gore v. Harris*, 772 So. 2d at 1260-61.

163. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 (Fla. 2000) (per curiam).

164. 323 So. 2d 259 (Fla. 1975).

expressly rescinded this rule in favor of a substantial compliance rule.¹⁶⁵ However, there are three important distinctions between *Boardman* and the 2000 presidential election that should limit its applicability. First, *Boardman* involved a local election, not a presidential nor even state-wide election.¹⁶⁶ Obviously, there is greater potential for conflict with the Constitution in an election for president. Second, *Boardman* only dealt with the validity of absentee ballots.¹⁶⁷ Third, the *Boardman* court gave deference to both the trial court and election officials, noting “that returns certified by election officials are presumed to be correct.”¹⁶⁸ Aside from dicta about the will of the people being the paramount interest, there is nothing in Florida’s case law which would appear to support an order that election officials conduct a partial manual recount absent fraud.¹⁶⁹

III. THE LEGAL CHALLENGE

A. Overview

The statistical closeness of the election results created an opportunity for Mr. Gore to get in the money if he could first create sufficient uncertainty about the legality of the method of counting votes and then get that uncertainty to resolve itself in his favor. The criticism of the events is not intended as personal criticism of Mr. Gore. One can hardly blame someone for acting as economic theory predicts they should and acting to exploit a free option. One thing is clear though, the dispute was never about getting every vote counted, as Mr. Gore claimed in his political rhetoric.¹⁷⁰ Mr. Gore undermined his rhetoric in that respect by initially seeking to throw out large numbers of absentee ballots, which were known to favor Mr. Bush while seeking manual recounts only selectively.¹⁷¹ But the idea that Mr. Gore only wanted to count every

165. *Id.* at 264.

166. *Id.* at 261.

167. *Id.* at 262 (“At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot.”).

168. *Id.* at 268.

169. *Cf.* *Gore v. Harris*, 772 So. 2d 1243, 1264 (Fla. 2000) (per curiam) (Wells, C.J., dissenting) (citation omitted):

Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections. This to me is the import of this Court’s decision in *Boardman v. Esteva*.

170. *Cf.* *Sawyer & Lambrecht*, *supra* note 56 (reporting on a lawyer who voted for Gore who complained, “But the way Gore’s lawyers are talking, it’s starting to sound like unless you count them the way Gore wants them to be counted, they haven’t been counted”).

171. *See* Richard Perez-Pena, *Counting the Vote: The Absentee Ballots*, N.Y. TIMES, NOV. 20,

vote was undermined even more by his position in court. Mr. Gore, while publicly asserting that he wanted to count every vote and implying that many votes were never counted, failed to take the position in court that any ballots were never counted.¹⁷² Every disputed ballot was counted at least twice and tabulated as either being a vote for a candidate, a vote for no candidate (an undervote), or a vote for more than one candidate (an overvote).¹⁷³ Mr. Gore's strategy was aimed solely at creating uncertainty, and hence value for his option with truncated losses and potentially large gains, by focusing on emotional arguments that undervotes from selected counties should be interpreted under the vague intent of the voter standard rather than under the instructions that were given to the voters.

The following facts are not in serious dispute. After the election on November 6th, 2000, the results suggested razor-thin margins in several states smaller than the error rate in vote tabulation.¹⁷⁴ The national popular vote margin was also razor thin, being reported around 0.0017%.¹⁷⁵ Neither candidate received a majority of the popular vote.¹⁷⁶ According to the reported vote counts outside Florida, it appeared that the outcome in the electoral college would be determined by the outcome in Florida.¹⁷⁷

Voters who used punch card ballots were given the following instructions: "AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD."¹⁷⁸ After the election, the initial results showed Mr. Bush to have 1,784 more votes than Mr. Gore out of a total of approximately six million, a margin of 0.03%.¹⁷⁹ No party to the election alleged in court that there were any ballots which were not

2000, at A1, available at 2000 WL 28283862 (reporting on the ticket's retreat from contesting absentee ballots).

172. *Bush v. Gore*, 531 U.S. 98, 121 (2000) (per curiam) (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

173. *Id.*

174. David Westphal, *A Divided Nation Waits*, STAR-TRIBUNE (Minneapolis), Nov. 9, 2000, at 1A, available at 2000 WL 6996842.

175. *Id.*

176. B. Drummond Ayres, Jr., *The 2000 Elections: The Pollsters*, N.Y. TIMES, Nov. 9, 2000, at B2, available at 2000 WL 32001839.

177. Richard L. Berke & Alison Mitchell, *Bush and Advisers, Confident of a Victory in Recount, Urge Gore Not to Stand in Way*, N.Y. TIMES, Nov. 11, 2000, at A1, available at 2000 WL 32002360 (quoting House Representative minority leader Richard A. Gephardt stating, "Florida is the obvious decider of this race").

178. *Bush v. Gore*, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

179. *Id.* at 100-01.

counted.¹⁸⁰ No party to the election alleged in court that there was any fraud in the election.¹⁸¹ No party alleged that the counting equipment malfunctioned.¹⁸²

At this point, the events and dispute could be cast in a different light by different people. One characterization of the events might be that although it was known in advance that the election would be close,¹⁸³ and that due to inadvertence some voters do not mark their ballots carefully and mark their ballots in a way other than they intended,¹⁸⁴ or in a way which renders the ballots unreadable using the machines, Mr. Gore's campaign chose not to say anything about the matter until after the polls closed and the initial count was revealed. At that point, Mr. Gore's campaign argued that the law could and should be interpreted so as to remove legislative deadlines and remove discretionary authority from the Secretary of State, local canvassing boards, and trial judges. Also, the law should require hand examination of a subset of ballots under standards differing from the voter instructions given, and such a process might determine that more voters had intended to vote for Mr. Gore than for Mr. Bush.

An alternative characterization of the events could be that Mr. Gore believed it possible, and perhaps likely, that more people casting ballots believed that they were voting for him than for Mr. Bush, but that technological problems with the counting equipment caused many ballots to be tabulated as non-votes when looking at them could suggest otherwise. Fairness to the voters and justice required that an opportunity be given to attempt to discern whether more voters intended to vote for Mr. Gore rather than relying on technical compliance with voting instructions necessitated by counting equipment technology.

Before proceeding to more discussion of the law, it should be noted that fairness, while being a principal that the law attempts to advance, is not a legal argument.¹⁸⁵ Furthermore, fairness is a double-edged sword.¹⁸⁶ While it might be considered unfair not to count a vote merely because a hole was not cleanly punched, it might also be considered unfair to count the vote to those who took the care to punch the ballot cleanly. If it is unfair not to count a vote in the way a voter intended,

180. *Id.* at 121 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

181. *Id.*

182. *Id.*

183. Bryan Smith, *Bush or Gore: You Decide*, CHI. SUN-TIMES, Nov. 7, 2000, at 1.

184. *Bush v. Gore*, 531 U.S. at 103 (per curiam).

185. *Cf.* Henry G. Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547, 549 (1970) (asserting that arguments based on fairness and morals are the refuge of the intellectually bankrupt).

186. *Cf. id.* at 550-51 (giving an example of conduct regarded as fair for some and unfair for others).

then it might also be unfair not to count a vote from a voter on the way to the polls, but who never made it due to unpredictable traffic, an accident, illness, and so on. Machine tabulation is fair in the sense that the machine does not know who the ballot came from nor who the voter intended to vote for, only how it is marked. The machine does not care who wins and is therefore fully objective. Whatever alternative standard is used, there is no standard which can consistently determine what every voter intended because there is a wide variety of explanations for undervotes.¹⁸⁷ The principle of objectivity and avoiding subjective interpretations is usually desired in designing a fair method for grading student exams. It is customary to grade a student on what he writes, rather than on what the grader speculates the student intended to write. If a student “knows” something on an exam, but phrases it incorrectly and is downgraded for that, then the student might consider it unfair. But if the grader decides that the student must have meant to write the material correctly and scores the test as if it was written correctly, then that might be considered unfair to other students. One is not likely to get far with the bar examiners by arguing that on the multistate bar exam the questions were marked correctly in the answer book, but transcribed incorrectly on the sheet. The argument that the result is unfair would be treated even less seriously if it was not raised until after learning that the answers submitted were incorrect and the result was a failure.

The point of this argument is that fairness is a principle which serves no constructive purpose in resolving the controversy presented by a close election. There is no possible change in the status quo which will universally, or even widely, be regarded as fair. The uncountable number of “what ifs” will all result in a significant cry of unfairness.

B. *The Cases*

The number of cases and complexities are so great that one could easily write a thousand pages on the topic in an effort to cover every aspect of the case. In the interest of clarity and focusing on the most important issues, this article confines discussion to limited elements of four hearings and opinions. The two in the Supreme Court of Florida resulting in opinions issued November 21, 2000, and December 8, 2000, (hereinafter *Gore I*¹⁸⁸ and *Gore II*,¹⁸⁹ respectively), and the two in the U.S. Supreme Court resulting in opinions issued December 4, 2000, and

187. *Bush v. Gore*, 531 U.S. at 103.

188. 772 So. 2d 1220 (Fla. 2000) (per curiam).

189. 772 So. 2d 1243 (Fla. 2000) (per curiam).

December 12, 2000 (hereinafter *Bush I*¹⁹⁰ and *Bush II*,¹⁹¹ respectively).

1. GORE I

As referenced earlier, Florida law provides for the opportunity to conduct manual recounts where there is “an error in the vote tabulation which could affect the outcome of the election.”¹⁹² This language was intended to apply to situations involving equipment failure or malfunction,¹⁹³ but Mr. Gore’s campaign argued that the language covered the alleged discrepancies between voter intent and machine tabulation.¹⁹⁴ A manual recount was then sought under this provision in three counties.¹⁹⁵ Concerned that the recount could not be completed by the statutory deadline for submitting returns, one county canvassing board sought an advisory opinion from the State’s Division of Elections regarding the interpretation of the deadline.¹⁹⁶ The advisory opinion stated that absent unforeseen circumstances, the returns either must be submitted by the deadline or ignored.¹⁹⁷ Relying on that opinion, Katherine Harris, Florida’s Secretary of State, issued a statement that she would ignore manual recounts submitted after the deadline.¹⁹⁸ One of the county canvassing boards then brought suit against Harris, and the candidates intervened.¹⁹⁹ In the trial court, the judge ruled that the deadline was mandatory, but that amended returns could be submitted afterwards.²⁰⁰ The judge further ruled that acceptance of amended returns was within the discretion of Harris, but that she could not exercise that discretion in an arbitrary

190. 531 U.S. 70 (2000) (per curiam).

191. 531 U.S. 98 (2000) (per curiam).

192. FLA. STAT. ch. 102.166 (2000).

193. *Cf.* *Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring). The Chief Justice wrote:

No reasonable person would call it “an error in the vote tabulation,” . . . when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court’s opinion attributes to the legislature is one in which machines are *required* to be “capable of correctly counting votes,” § 101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required.

Id. (internal citation and footnote omitted).

194. *See* *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1229 (Fla. 2000) (per curiam).

195. *Id.* at 1225.

196. *Id.*

197. *Id.* at 1226.

198. *Id.*

199. *Id.*

200. *Id.*

manner.²⁰¹ Harris then requested that those seeking to submit amended returns provide letters stating the facts and circumstances which warranted amending returns.²⁰² Harris subsequently compared these letters with specific criteria for determining whether amended returns should be submitted, and announced that the facts and circumstances did not warrant amending returns after the statutory deadline.²⁰³ She further announced that she would certify the election results based on the previously submitted returns and absentee ballots upon completion of the absentee ballot count.²⁰⁴ The Florida Supreme Court took jurisdiction of the case before completion of the absentee ballot count and enjoined Harris from certifying the election results until after a hearing.²⁰⁵

After briefs and oral arguments, the Florida Supreme Court dealt with two issues of law. First, it dealt with the issue of whether the circumstances required for a manual recount under the statute applied.²⁰⁶ The court simply ruled that the plain language “error in the vote tabulation which could affect the outcome” applied.²⁰⁷ The court then turned to the more complex problem of resolving ambiguous provisions of the statutory scheme which put the time frame for conducting a manual recount in conflict with the plainly written deadline for submitting returns.²⁰⁸ The court ultimately concluded that the conflicting language relating to deadlines in the statute required the court to exercise its power to fashion an equitable remedy, and the court extended the deadline for filing returns to November 26th—twelve days beyond the statutory deadline.²⁰⁹ The basis for the opinion was not entirely clear, but the court appeared to emphasize the provision in the Florida Constitution that places all political power in the hands of the people, and appeared to emphasize prior judicial doctrine in local election disputes which holds the “will of the people” to be dispositive.²¹⁰ The Florida Supreme Court invoked its equitable power to fashion an appropriate remedy to create a new deadline for submitting election returns, and ordered Harris to accept such returns up to the new deadline.²¹¹

201. *Id.*

202. *Id.*

203. *Id.* at 1226-27.

204. *Id.* at 1227.

205. *Id.*

206. *Id.* at 1228.

207. *Id.* at 1229.

208. *Id.* at 1231.

209. *Id.* at 1240.

210. *Cf. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (per curiam) (“[W]e are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority . . .”).

211. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1240.

2. BUSH I

The U.S. Supreme Court granted certiorari on two questions.²¹² The first question being whether the Florida Supreme Court's change in the elector appointment procedures after election day constituted a violation of either due process or 3 U.S.C. § 5, the provision that provides a safe harbor for congressional recognition of state electors.²¹³ It is important to note that the Supreme Court's opinion framed this question in such a way as to indicate that there was no quibbling over whether the Florida Supreme Court did in fact change the elector appointment procedures.²¹⁴ The second question before the Court was whether or not the Florida Supreme Court's decision changed the manner in which electors are to be selected to a degree which would violate the legislature's power under Art. II, § 1, cl. 2 of the U.S. Constitution.²¹⁵

In a unanimous opinion, the Court briefly reviewed these issues and noted several key facts. First, the Court noted that the Florida Supreme Court had held under the plain meaning of Florida's code that a discrepancy between a sample manual recount and machine recounts attributable to the manner in which ballots were punched or marked constituted an "error in vote tabulation" that triggers statutory provisions for a full manual recount.²¹⁶ The Court also noted that the Florida court's invocation of its equitable powers to fashion a remedy including a newly created deadline was based in part on a right to vote set forth in the state constitution.²¹⁷ The Court also noted that while it will normally defer to a state court on questions of state law, the law at issue in this case was not based solely on power given to the legislature by the people of Florida, but by a direct grant of power in the U.S. Constitution.²¹⁸ In *Blacker*, the Court had previously held that power could not be circumscribed by the state.²¹⁹

The Court expressed concern that the Florida court had reached its decision without indicating whether it had considered limitations imposed by the U.S. Constitution.²²⁰ It also observed that judicial construction of Florida code potentially placing Florida's electors outside

212. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 73.

213. *Id.*

214. *Id.* (phrasing the question as, "[w]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5 . . .") (emphasis added).

215. *Id.*

216. *Id.* at 75.

217. *Id.* at 75-76.

218. *Id.* at 76.

219. *McPherson v. Blacker*, 146 U.S. 1, 35-36 (1892) (quoting S. REP. NO. 395 and stating that this construction has prevailed too long to overturn).

220. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 77.

the safe harbor of 3 U.S.C. § 5 would be ill-advised when the legislature intended to receive the full advantage of that provision.²²¹

After reviewing the Florida opinion, the High Court began its conclusion by quoting:

It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.²²²

Finally, the Court held that there was considerable uncertainty regarding the precise grounds on which the Florida opinion was based and uncertainty as to whether the Florida Court interpreted the state constitution to violate federal law (under Art. II or 3 U.S.C. § 5).²²³ Therefore, the Court vacated the judgment and remanded the case.²²⁴

3. GORE II

The unanimity of the Florida Supreme Court in *Gore I* fractured in *Gore II* with the Justices splitting four to three. Hints of a divide came out at oral argument where the Chief Justice questioned whether the court had any jurisdiction in light of the *Blacker* holding that the power of the legislature to appoint electors is absolute, and further questioned both parties' counsel as to why *Blacker* was not brought to the court's attention in *Gore I*.²²⁵ The Chief Justice also expressed skepticism about the legality of a partial (and obviously cherry-picked, cream-skimming) recount.²²⁶

The majority opinion, however, did not dwell on these issues. The emphasis at that time had shifted from the "error in vote tabulation" language in the code, governing recount provisions prior to certification, to "rejection of legal votes" language in the code, governing provisions for contesting certified results.²²⁷ Mr. Gore had brought a new suit in the trial court to contest the certified results by this time.²²⁸ He sought to compel completion of selected manual recounts that had stopped.²²⁹

221. *Id.* at 78.

222. *Id.* (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

223. *Id.*

224. *Id.*

225. See *Election 2000/Proceedings*, BOSTON GLOBE, Dec. 8, 2000, at A50, available at 2000 WL 3354862.

226. *Id.*

227. See *Gore v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000) (per curiam).

228. *Id.* at 1247.

229. See *id.* (reversing the trial court order denying a manual recount in Miami-Dade County).

The trial court held that it had to review the local canvassing boards' actions under an abuse of discretion standard and found that they had not abused their discretion.²³⁰

This time the majority opinion paid nominal service to federal law, noting that the Court is mindful of the federal grant of authority to the legislature.²³¹ However, the majority did not provide a detailed analysis directly discussing legal issues under the U.S. Constitution. Essentially, the majority asserted that it was confining its decision to its interpretation of the state statute, and that the legislators who had enacted the statute intended for the judiciary to have this role.²³² For that reason alone, one could certainly argue that this is a less than thorough analysis of the federal questions.

The Court held that the trial court had applied incorrect standards in both treating the local canvassing boards so deferentially and in requiring a high burden of the plaintiff.²³³ In reaching its decision, the majority focused on two elements of the code. The first being the phrase, "rejection of a number of legal votes sufficient to place the results of the election in doubt," and the second being the broad statutory grant to the judiciary to fashion an "appropriate remedy."²³⁴ While a reasonable interpretation of the "rejection of legal votes" language is arguably that it refers to situations in which legal ballots, most likely absentee, are rejected without being counted, the Court interpreted rejection to mean the counting of the ballots as "no vote."²³⁵ In resolving this, the court did not pay nearly as much attention to the interpretation of "rejection" as it did to the interpretation of "legal vote."²³⁶ In interpreting the phrase "legal vote," the court again relied heavily on prior Florida cases pertaining to local elections that held that when votes are counted manually, they must be tabulated in accordance with the intent of the voter rather than technicalities.²³⁷

The majority, having interpreted ballots showing a visible indication of intent that were not machine recognized to constitute rejection of legal votes, utilized the legislative grant to fashion appropriate relief to

230. *Id.* at 1252.

231. *Id.* at 1248.

232. *See id.* at 1249.

233. *Id.* at 1258-59.

234. *Id.* at 1253.

235. *See id.* at 1259.

236. *See id.* at 1256-57 (discussing the meaning of legal vote at length and finding that not counting a legal vote constitutes a rejection, but not discussing whether counting a vote as a non-vote constitutes a rejection).

237. *See id.*

order manual recounts and their inclusion in the final vote count.²³⁸ No direction as to how a person can determine intent was provided.²³⁹ The majority ordered that the standards employed in determining what constitutes a legal vote should be a “clear indication of the intent of the voter,” as referenced in Section 101.5614(5), *Florida Statutes*.²⁴⁰

The three most senior Justices dissented and wrote two opinions.²⁴¹ Chief Justice Wells joined in most of the opinion written by Justice Shaw, but wrote his additional concerns in a separate opinion.²⁴² He summarized his opinion as follows:

My succinct conclusion is that the majority’s decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown.²⁴³

The main thrust of Chief Justice Wells argument is that the trial court must be sustained if there is any legal theory supporting the decision, and that there are more than enough such theories.²⁴⁴ An important element he emphasized is that there is no common law right to contest elections, and thus election contests must be governed strictly by the statute, which he persuasively argues can only be reasonably interpreted as giving much discretion in contests to local canvassing boards.²⁴⁵ According to the Chief Justice, the majority’s opinion suggests that any loser can get an additional recount in court simply by filing a contest without any evidence, and the statute does not contemplate such a low standard for judicial intervention, nor has the Court ever before used such a low standard.²⁴⁶ Chief Justice Wells also observed that “the trial

238. *Id.* at 1262; *but cf. id.* at 1268 (Wells, C.J., dissenting) (arguing that no legal authority exists to order partial recounts).

239. *Id.* at 1269 (Wells, C.J., dissenting).

240. *Id.* at 1262.

241. *See id.*

242. *Id.* at 1262-63 (Wells, C.J., dissenting).

243. *Id.* at 1263.

244. *Id.*

245. *Id.* at 1268 (“The Legislature has given to the county canvassing boards—and only these boards—the authority to ascertain the intent of the voter.”).

246. *Id.* at 1266. Chief Justice Wells wrote:

Although it is unclear from case law what standard must be satisfied in order to grant appropriate relief, it undoubtedly cannot be a low standard. Recently . . . this Court declined to invalidate an election despite a finding that the canvassing board was grossly negligent and in substantial noncompliance with the absentee voting

court expressly found no dishonesty, gross negligence, improper influence, coercion, or fraud”²⁴⁷ He further noted that the statutory provision that the majority relied upon in asserting that legal votes are votes where there is a clear indication of voter intent is a statute pertaining to damaged, crumpled, or bent ballots.²⁴⁸

Chief Justice Wells additionally argued that the majority opinion, besides construing Florida law incorrectly, was invalid under Article II of the U.S. Constitution as well as the Equal Protection Clause because the majority ordered only recounts of some non-votes and not others (undervotes but not overvotes) and provided no uniform standards.²⁴⁹ Chief Justice Wells did not impugn the motives of the majority, but he did suggest that it failed to understand the ramifications of its decision, and that it failed to exercise appropriate restraint in attempting to reach for what they believed to be right.²⁵⁰

Finally, in language supporting this article’s argument that the primary purpose underlying elections is to reach a decision, Chief Justice Wells stated:

This case has reached the point where finality must take precedence over continued judicial process. I agree with the view attributed to John Allen Paulos, a professor of mathematics at Temple University, who was quoted as saying “The margin of error in this election is far greater than the margin of victory, no matter who wins.” Further judicial process will not change this self-evident fact and will only result in confusion and disorder.²⁵¹

The other dissenting opinion argued to affirm the trial court on somewhat narrower grounds—that Mr. Gore had failed to meet his burden of proof.²⁵² This analysis determines that the legislative code as it applies to contests in statewide elections (all prior cases dealt strictly

statutes. . . . [M]erely stating the cause of action under the contest statute does not entitle a party to a recount or require the court to set aside an election. More must be required. This is especially true here, where . . . the trial judge found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes. . . . It is illogical to interpret section 102.168(3)(c) to set such a low standard where a plaintiff merely has to allege a cause of action to successfully carry the contest.

Id. (footnote omitted).

247. *Id.* at 1264 (“[T]he trial court expressly found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes based upon the evidence presented. I conclude this finding should curtail this Court’s involvement in this election through this case”).

248. *Id.* at 1267.

249. *Id.* at 1269.

250. *Id.* at 1263.

251. *Id.* at 1270 (footnote omitted).

252. *Id.* (Harding & Shaw, JJ., dissenting).

with local elections) can only mean a statewide contest rather than many county contests.²⁵³ Therefore, there is no legal basis for seeking recounts on a subset of votes.²⁵⁴ Furthermore, Mr. Gore would need to show that a statewide recount could change the outcome, something which he had failed to do.²⁵⁵ This dissent also argued that selective recounts would violate equal protection and have no basis in law.²⁵⁶

This second dissent further supported the argument by noting that a statewide recount could not possibly be conducted in time and with accuracy.²⁵⁷ Florida law does not require futile acts or orders that are impossible to execute.²⁵⁸ Such recounts would have no faith or credibility.²⁵⁹

In order to undertake this unprecedented task, the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case, presumably because there was no authority for such action and nothing in the record to guide the Court in setting such standards. The same circumstances exist in this case.²⁶⁰

Justice Harding expressed his strongest concern at the end of the dissent:

I am more concerned that the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos. In giving Judge Sauls the direction to order a statewide recount, the majority permits a remedy which was not prayed for, which is based upon a premise for which there is no evidence, and which presents Judge Sauls with directions to order entities (i.e., local canvassing boards) to conduct recounts when they have not been served, have not been named as parties, but, most importantly, have not had the opportunity to be heard. In effect, the majority is allowing the results of the statewide election to be determined by the manual recount in Miami-Dade County because a statewide recount will be impossible to accomplish. Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable. The uncertainty of the outcome of this election will be greater under the remedy afforded by the majority than the uncertainty that now exists.²⁶¹

253. *Id.* at 1272.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1273.

258. *Id.* at 1272.

259. *Id.* at 1273.

260. *Id.* (footnote omitted).

261. *Id.*

4. BUSH II

The U.S. Supreme Court issued an emergency stay of the recount and scheduled a hearing.²⁶² At oral argument, the Justices emphasized the lack of uniform standards and equal protection.²⁶³ Justice O'Connor wanted to know why some precise standard could not be set, such as that given by the instructions on the ballot.²⁶⁴ Obviously, Mr. Gore would not wish to have a recount under such a standard since it would likely yield substantially the same result as the machine count.

In a per curiam opinion which apparently was joined by five of the Justices, the Court reversed the Florida Supreme Court.²⁶⁵ The Court's opinion begins with a summary of the case's history and states the questions before the court: "[W]hether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses."²⁶⁶ The opinion then holds a violation of equal protection.²⁶⁷

Before sharing its equal protection analysis, the Court provided some relevant background information—particularly the fact that two percent of ballots cast nationwide do not register a vote for President for a variety of reasons.²⁶⁸ While the microscope was on Florida, the issues surrounding accuracy were not confined to Florida.²⁶⁹ The Court also observed that individual citizens have no federal constitutional right to vote for electors for the presidency unless and until the state legislature chooses a statewide election as the means to implement its power to appoint electors.²⁷⁰ When the state legislature chooses such a method, equal protection must be given both in the apportionment and manner of exercise.²⁷¹

Without commenting as to whether the Florida Supreme Court had the power under the legislative scheme to define a legal vote and order

262. *Bush v. Gore*, 531 U.S. 98, 100 (2000) (per curiam).

263. "Where's the Federal Question?"; *Justices Probe Both Sides for Key Issues, Standards for Recounts, Remedies*, WASH. POST, Dec. 12, 2000, at A36, available at 2000 WL 29920954 (quoting Justice O'Connor: "Why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?").

264. *See id.*

265. *Bush v. Gore*, 531 U.S. at 111.

266. *Id.* at 103.

267. *Id.*

268. *Id.*

269. John Mintz & Dan Keating, *A Racial Gap in Voided Votes*, WASH. POST, Dec. 27, 2000, at A1 (reporting that ballot tabulation rates have the greatest racial disparity in Illinois).

270. *Bush v. Gore*, 531 U.S. at 104.

271. *Id.* at 104-05.

manual recounts implementing such definition, the U.S. Supreme Court held that the process in place did not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right to equal protection.²⁷² The court noted the unequal evaluation of ballots in several respects.²⁷³ Only some ballots were ordered to be recounted.²⁷⁴ No uniformity existed.²⁷⁵ Different counties utilized different standards.²⁷⁶ Within counties, different teams used different standards.²⁷⁷ Even a given team was noted to have used three different standards for different ballots.²⁷⁸

Relying on the Florida Supreme Court's finding that the legislature intended the state's electors to obtain the safe harbor benefit of 3 U.S.C. § 5, requiring determination of the electors to be completed by December 12, 2000, and the obvious proposition that no statewide recount meeting minimal equal protection standards could occur in the few remaining hours, the majority effectively ordered an end to the recounts.²⁷⁹ Two of the four dissenting opinions agreed that the Florida court should be reversed on equal protection grounds, but disagreed that the recounts should be halted.²⁸⁰ The two harsher dissents argued that there was neither an equal protection concern nor any other federal question warranting the Court's jurisdiction.²⁸¹ The harsh rhetoric of these two dissents seems particularly unfair in light of the unanimity behind the opinion in *Bush I*, holding that potentially important federal questions could exist depending on the Florida Supreme Court's legal theory underlying its decision, and the fact that the Florida Supreme Court never properly addressed these concerns (except in dissenting opinions).

The dissenting Justices lacked cohesiveness. Justice Stevens's dissenting opinion—which contained highly publicized harsh criticism of the majority²⁸²—begins from the incredible position that state constitu-

272. *Id.*

273. *Id.* at 106.

274. *Id.* at 107-08.

275. *Id.* at 106-07.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 110.

280. *See id.* at 111.

281. *Id.* at 123 (Stevens, J., dissenting) ("The federal questions that ultimately emerged in this case are not substantial."); *see id.* at 142 (Ginsburg, J., dissenting).

282. Justice Stevens's final passage in his dissent was widely quoted. It reads:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most

tions can constrain power expressly given to the state legislatures by direct authority of the U.S. Constitution.²⁸³ Justices Souter and Breyer, who agreed with the majority that the Florida Supreme Court's order violated the Equal Protection Clause, but disagreed as to the remedy, wrote dissents that were a bit more reasoned, if not more persuasive. They viewed the Florida Supreme Court's decisions as mere interpretations of Florida statutes rather than as modifications of legislative intent, and argued that the interpretations deserved deference since they were among the set of plausible interpretations.²⁸⁴ But they also found merit in the argument that the process in place rose to the level of an equal protection violation.²⁸⁵

Justice Ginsburg, on the other hand, simply characterized the majority as overturning state law—she did not acknowledge the mixed questions of federal and state law.²⁸⁶ Interestingly, Justice Ginsburg criticizes the Chief Justice for using only three cases that support the U.S. Supreme Court in overturning a state court's interpretation of state law when it so radically changes prior existing law to constitute a denial of due process, and noted that those cases involved state high courts of the Jim Crow South.²⁸⁷ Justice Ginsburg thought it unfair to bracket the Florida Court with these other courts, but the argument can be turned around. Claiming that the ends are just as a justification for any means without legal foundation is obviously a tactic which is not confined to the deplorable, but can be advanced by anyone feeling righteous when it is convenient to do so. Justice Ginsburg provides little authority for her opinion that no equal protection violation was created by the Florida court. She expresses this conclusion in a single paragraph of her opinion, basing it on her own notion of fairness, stating, "I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount."²⁸⁸ This, of course, misses the underlying purpose of the

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

Id. at 128-29 (Stevens, J., dissenting).

283. *See id.* at 123 ("[Article II] does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.").

284. *Id.* at 131 (Souter, J., dissenting); *id.* at 149 (Breyer, J., dissenting).

285. *Id.* at 133-34 (Souter, J., dissenting); *id.* at 145-46 (Breyer, J., dissenting).

286. *Id.* at 135-36 (Ginsburg, J., dissenting).

287. *Id.* at 139-41.

288. *Id.* at 143.

traditional presumption that certified returns are valid absent evidence of fraud—to avoid pointless debate about which rules are the most fair after the voting has taken place.

The concurring opinion, written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas, argued that additional grounds beyond equal protection existed for reversing the Florida Supreme Court.²⁸⁹ The Chief Justice noted that, while state courts ordinarily issue the definitive pronouncements of state law, the direct grant of power to the state legislatures under Art. II, § 1, cl. 2 creates a situation in which “the text of the election law itself, and not just its interpretation by the courts of the states, takes on independent significance.”²⁹⁰ He then argued that the Florida Supreme Court deviated from the statutory scheme in several material respects.²⁹¹ The statutory scheme gave discretion in certain matters to the Secretary of State and the local canvassing boards which the *Gore I* opinion gutted.²⁹² It also gave important significance to the certified election results which *Gore II* stripped.²⁹³ It also set deadlines and other institutional features which the court modified.²⁹⁴ The Chief Justice was particularly critical of the interpretation of rejection of a legal vote, arguing that, “Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots.”²⁹⁵ After observing that each polling place contains a working model of a voting machine, and that each booth contains a sample ballot with clear instructions, the concurrence argued,

No reasonable person would call it “an error in the vote tabulation,” . . . or a “rejection of legal votes,” . . . when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court’s opinion attributes to the legislature is one in which machines are *required* to be “capable of correctly counting votes,” . . . but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary of State, who is authorized by law to issue binding interpretations of the election code, . . . rejected this peculiar reading of the statutes. . . . The Florida Supreme Court, although it must defer to the Secretary’s interpreta-

289. *Id.* at 111 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

290. *Id.* at 113.

291. *Id.* at 117-22.

292. *Id.* at 116-18.

293. *Id.* at 116-17.

294. *Id.* at 117-18.

295. *Id.* at 118-19.

tions, . . . rejected her reasonable interpretation and embraced the peculiar one.²⁹⁶

IV. ANALYSIS

A. *Legal Analysis*

The battle in Florida raises at least two important legal issues. First is the question of whether the Florida court decided Florida law correctly.²⁹⁷ The second is whether the Florida court paid appropriate attention to constraints imposed by federal law.²⁹⁸ During oral arguments and in written opinions, several of the Supreme Court Justices, including some of those ultimately dissenting from the final disposition of the case, hinted that they felt the Florida court was wrong on Florida law.²⁹⁹ Chief Justice Rehnquist's concurring opinion, joined by Justices Scalia and Thomas, makes a compelling argument that the Florida Supreme Court's interpretation of "error in vote tabulation" and "rejection of legal votes" language is absurd.³⁰⁰ Also, the Florida Supreme Court's modified deadline for filing returns was clearly pulled from thin air by the court, raising a colorable claim of Article II and Due Process violations.³⁰¹

Normally, a state's highest court is the final arbiter of state law.³⁰² State courts, however, are not the final arbiters of federal law and this case clearly involved mixed questions of state and federal law.³⁰³ State law is subordinate to federal law in areas enumerated in the U.S. Constitution.³⁰⁴ A state court is certainly free to construe state law in a manner inconsistent with the U.S. Constitution, but of course it is then subject to a federal court vacating its judgment. Because Article II explicitly places the manner of selecting presidential electors in the hands of the legislature, and since *Blacker* finds that the right is absolute and not subject to modification by state constitutions,³⁰⁵ it is unquestionable the

296. *Id.* at 119-20 (citations and footnote omitted).

297. *Id.* at 112 (noting that a Presidential election is one of those cases requiring an independent analysis of state law).

298. *See* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam).

299. *Bush v. Gore*, 531 U.S. at 131 (Souter, J., dissenting) (stating that other interpretations of Florida law might have been better); *id.* at 136 (Ginsburg, J., dissenting) ("I might join the Chief Justice were it my commission to interpret Florida law.").

300. *Id.* at 119 (Rehnquist, C.J., Scalia, & Thomas, J.J., concurring). *But see id.* at 131 (Souter, J., dissenting); *id.* at 136 (Ginsburg, J., dissenting) (arguing that the Florida Supreme Court's interpretation is within the set of viable alternatives).

301. *See* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 75-76.

302. *Id.* at 76.

303. *Id.*

304. U.S. CONST. amend. XIV, § 1.

305. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

Florida court's decision is reviewable.³⁰⁶ Where the legislature provides for the selection of electors by popular vote and statute, it might be reasonable for the judiciary to interpret the statute.³⁰⁷ But clearly, the judiciary cannot usurp the legislature's power and declare that it alone will select the electors.³⁰⁸ Nor can it declare that the governor will select the electors.³⁰⁹ Nor can it declare that the people will select the electors without the legislature's consent, which the legislature can revoke at any time.³¹⁰ Reasonable people can differ about where one crosses the line between interpreting a statute and usurping legislative prerogative, but no one can reasonably argue that the decision is not reviewable. Such a position can only imply that states can evade constitutional limits by simply asserting that they are interpreting pure state law matters. This is, of course, inconsistent with fundamental principles of constitutional law,³¹¹ and the U.S. Supreme Court's two strongest dissenters' failure to address this directly suggests that they were having difficulty coherently expressing their legal analysis under the pressing time constraints.

Justice Stevens makes a weak attempt to address this argument in his *Bush II* dissent by suggesting that Article II should be read to mean that authority to select electors is given to the legislatures as they exist, subject to constraints imposed on them by the states.³¹² But this analysis is incomplete. Could the state constitution permissibly strip the legislature of all authority and place it in the hands of the governor? Could the courts, through power of judicial review and equitable remedies, usurp all legislative efforts? The question is where the line between statutory interpretation and judicial legislation is to be drawn, but Justice Stevens cannot persuasively make the argument that there is no line to review. Refusing to acknowledge the existence of a federal question and hiding behind state sovereignty—an ironic position for this Justice³¹³—does lit-

306. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 78 (finding considerable uncertainty as to how the Florida court handled federal questions).

307. *See Gore v. Harris*, 772, So. 2d 1243, 1248-49 (Fla. 2000) (per curiam).

308. *Blacker*, 146 U.S. at 34-35.

309. *Id.*

310. *Id.*

311. *See, e.g., id.* at 23 (“Where the validity of a statute of the state is drawn in question on the ground that it is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, [the U.S. Supreme Court has jurisdiction to review the judgment.]”).

312. *See Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

313. It is not difficult to find opinions authored by Justice Stevens in which he strongly asserts the presence of a federal interest in matters of state sovereignty. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-72 (1996) (reversing the Alabama Supreme Court on a \$2 million punitive damage award as a violation of due process in part due to the federal interest in facilitating interstate commerce through prohibitions on excessive punishment). Justices Ginsburg, Scalia, and Thomas dissented from this opinion arguing that “Since the Constitution does not make that concern any of our business, the Court’s activities in this area are an unjustified incursion into the province of state governments.” *Id.* at 598. In response to Justice

tle for the credibility of his legal analysis in this particular dissent. In addition, his argument directly conflicts with *Blacker*.³¹⁴ Justice Stevens does not address the question as to how his theory can be in accord with *Blacker* and the historical authority on Article II cited within *Blacker*.

The Florida Supreme Court's failure to discuss the limitations under the U.S. Constitution, their insistence on hammering on the "will of the people" language derived from the Florida Constitution, and their reliance on previous judicial doctrine in the context of local elections rather than relying exclusively on arguments of statutory construction doomed them. Even more astonishing is the fact that the majority's opinion in *Gore II* says little to address the issues raised in the U.S. Supreme Court's remand and directions to clarify the legal grounds for its first opinion. Indeed, one almost has to wonder whether the Florida justices in the majority in *Gore II* read the *Blacker* case after the remand issued in *Bush I*. In that case, the Court wrote the following:

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.³¹⁵

While the Court was quoting from a Senate report, it clearly agreed with the language. Just four paragraphs later, Justice Fuller used his own words to affirm the passage:

The question before us is not one of policy but of power, and

Ginsburg's concern that the Supreme Court is the only federal court policing punitive damage awards, Justice Stevens wrote: "[T]his consideration surely does not justify an abdication of our responsibility to enforce constitutional protections . . ." *Id.* at 586 n.41. Perhaps Justice Stevens also fails Professor Dershowitz's "shoe on the other foot" test.

314. Compare *Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting) (arguing that Article II takes legislatures subject to constraints imposed by state constitutions) with *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (stating that the question is one of power, not policy, and the power cannot be modified by state constitutions).

315. *Blacker*, 146 U.S. at 35 (quoting S. REP. NO. 43-495).

while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.³¹⁶

The present case was clearly a situation in which more authority was in fact less authority. While arguably a wrong interpretation of Florida law, if the majority of the Florida Supreme Court were to have confined its opinion to statements involving statutory construction and eliminated all reference to prior cases involving local elections, the will of the people, and the Florida Constitution, it would have strengthened its position. Still, even an attempt to confine the decisions as narrowly as possible to the interpretation of state law would have left large obstacles. The modification of the certification deadline done under the claim of invoking equitable power to fashion an equitable remedy still created a colorable due process claim.³¹⁷ Furthermore, the subsequent stripping of the significance of certification in *Gore II* undermined the Florida court's credibility.³¹⁸ The failure to address significant federal questions, including equal protection, gives the impression that the majority was attempting to duck the issues.³¹⁹

Mr. Gore had no federal claim. If the Florida courts had dismissed his claim for failure to allege fraud and substantial irregularities, the matter would have ended immediately. But by permitting and supporting Mr. Gore's challenge to the manner of counting votes, the standard of counting votes, the kind and origin of the votes that should be counted, and the time for counting votes, a number of federal questions were raised which the U.S. Supreme Court had an obligation to hear.³²⁰

The per curiam and concurring opinions of *Bush II* are well-grounded in controlling legal precedent and reasoned analysis. They are

316. *Id.* at 35-36.

317. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 75-76 (2000) (per curiam).

318. See *Bush v. Gore*, 531 U.S. at 118 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

319. *Cf. Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting) ("I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.").

320. *Bush v. Gore*, 531 U.S. at 111 ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

based on analysis of law, not emotion. While the disposition of the case was consistent with this article's strong public policy argument in favor of accepting an outcome and moving forward absent evidence of fraud, the Court reached that result strictly within the confines of legal analysis. As the concurring opinion asserts, the Florida Supreme Court appeared to so substantially modify the statutory code while justifying the modification on legal authority that was not controlling, that it crossed the line of Article II's express grant to the legislature.³²¹ In addition, as the majority of the Court concluded, the resulting process did not meet minimally acceptable standards of equal protection.³²² That process involved a count ordered by the state, in which some ballots would be examined and others would not, depending on how the machines interpreted them, and depending on where the ballots originated.³²³ Those ballots that were examined would be interpreted under possibly thousands of different standards varying according to the speculative feelings of thousands of individuals at the moment of examination.³²⁴ Justice Breyer suggested that the originally certified results also had equivalent equal protection concerns because their error rate varied by the voting equipment used.³²⁵ The Equal Protection Clause, however, does not guarantee equality, rather, it prevents states from acting in an unequal manner towards its citizens.³²⁶ It should be obvious that there is a substantial distinction between a state legislature allowing local governments to choose their own voting equipment from amongst a set of reasonable alternatives versus a state court mandating that local governments conduct an unequal recount. The former does not violate the Equal Protection Clause, but the latter does.³²⁷

321. *Id.* at 120 (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring). As the Justices stated, [I]n a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. . . . [N]ever before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. . . . For the court to step away from this established practice . . . was to depart from the legislative scheme.

Id. (citations omitted) (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring).

322. *See id.* at 111.

323. *Gore v. Harris*, 772 So. 2d at 1264 n.26 (Wells, C.J., dissenting).

324. *See Bush v. Gore*, 531 U.S. at 106 (per curiam).

325. *Id.* at 147 (Breyer, J., dissenting).

[I]n a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair.

Id. (Breyer, J., dissenting).

326. U.S. CONST. amend. XIV, § 1.

327. *Bush v. Gore*, 531 U.S. at 109 (per curiam). The Court stated:

In short, the fundamental question before the Court was one of power, not policy—the Florida Supreme Court lacked the power to do what it did. Furthermore, the Florida Supreme Court's actions were also contrary to sound public policy.

B. *Public Policy*

Public choice is the application of economic analysis to the study of politics.³²⁸ While the field has been dominated by economists, many major contributions have come from individuals in other fields as well.³²⁹ The field has also received a great deal of interest from philosophers and ethicists.³³⁰ One of the earliest problems addressed in public choice relates to collective preferences.³³¹ Where unanimity is required to take action, action can be said to represent the will of the people.³³² Of course, it is obvious that with large and heterogeneous societies, considerable time would be required to reach decisions and some standard short of unanimity is likely to be optimal.³³³ There is a rich literature dealing with this topic that is readily accessible.³³⁴

Arrow's Impossibility Theorem, briefly discussed earlier, highlights the impossibility of creating a useful social aggregation procedure that satisfies minimal properties (e.g., non-dictatorship). "When possibility proofs appeared, they rested on such improbable conditions that they underlined only the negative implications of Arrow's theorem."³³⁵ This result is widely known within the legal literature.³³⁶ An offshoot of

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

Id.

328. See MUELLER, *supra* note 42, at 1 ("Public choice can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science.").

329. See Mueller, *supra* note 77, at 3.

330. See MACKAY, *supra* note 14, at 3-5.

331. See *id.* at 1.

332. See Mueller, *supra* note 77, at 124.

333. See *id.* at 127 ("With a community of two, the unanimity rule would work fine; but with larger communities and heterogeneous preferences for public goods, considerable time might be required to reach a collective decision. Some fraction of the community falling short of full unanimity is likely to be optimal . . .").

334. See generally PERSPECTIVES ON PUBLIC CHOICE, *supra* note 77; MACKAY, *supra* note 14.

335. Mueller, *supra* note 77, at 5.

336. See, e.g., Block, *supra* note 10, at 979-80 ("The existing legal literature now incorporates extensive analysis of the voting paradox, its implications in a wide range of juridical contexts, and it suggests some answers to the serious questions raised. . . . Citations to Arrow's work on social choice have begun to appear in court opinions."); Richard H. Pildes & Elizabeth S. Anderson,

the literature that is more widely drawn on in law relates to the conditions under which simple majority rule is an optimal procedure. Unfortunately, as one would expect from Arrow's Theorem, when there are more than two choices the conditions under which majority rule produces equilibrium are unreasonably restrictive.³³⁷ The result is that decisions become path dependent—determined by the manner in which they are posed. A significant number of recent papers have focused on path dependence in the law.³³⁸ The fact that preference aggregation schemes cannot exist certainly explains election flip flops better than changes in social attitudes.³³⁹

An important theorem related to majority rule is May's theorem.³⁴⁰ May's theorem demonstrates that if one starts with two constraints, the voting system must be decisive and political equality (one person, one vote) is required, then there is only one system that satisfies the constraints; that system is simple majority rule.³⁴¹ That is not an endorsement of majority rule, however, for two reasons. First, the theorem implies that to impose *any* additional constraint, such as rationality in the choices, there is no system that will satisfy the constraints.³⁴² The constraints are inherently inconsistent. Second, the concept of political equality—one person, one vote—is very weak:

In thinking about political equality, one is always confronted by something like a paradox. The standard problem for political equality is to strike a balance between conflicting views. If *no* deliberate

Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121, 2124-25 (1990); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 985 (1989) ("The paradox is surely one of the best known insights or topics in the social sciences."); Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 297 (1995).

337. See Mueller, *supra* note 77, at 5-6. Professor Mueller states:

But the conditions under which majority rule produces an equilibrium with three or more possible outcomes, or the restriction that there be only two possible outcomes, seem so restrictive that many public choice scholars have not concluded that all problems of preference aggregation can be solved by relying on the simple majority rule to make collective decisions. For all its attractive properties, the majority rule does not throw off the shadow cast by Arrow's theorem.

Id.

338. A LEXIS search on November 30, 2001, for law review articles within the past ten years with "path-dependen!" as a keyword yielded 550 articles. Fourteen articles had the term in the title. In the Spring of 1996, the *Washington University Law Quarterly* published a symposium issue on "Path Dependence and Comparative Corporate Governance." See 74 WASH. U. L.Q. 317, 317 (1996).

339. See Tollison, *supra* note 92, at 340 ("To the extent that one can draw a positive principle from Arrow, it is that democracy should yield capricious and unstable outcomes.")

340. See Douglas W. Rae & Eric Shickler, *Majority Rule*, in PERSPECTIVES ON PUBLIC CHOICE, *supra* note 77, at 163, 167.

341. See *id.* at 167.

342. See *id.* at 167-68.

discrimination is built into the decision process, then either no choice can be effected or such choices as are achieved must be deeply arbitrary. . . . In this primordial sense, any workable decision rule embodies some seed of inequality. Decision itself is otherwise impossible, and the test of decisiveness commits us to this fact.³⁴³

Problems with majority rule have been more extensively investigated than can be surveyed here. Suffice it to say that majority rule raises serious issues about perpetuating political inequality³⁴⁴ and creating coalitions that use government to the disadvantage of society.³⁴⁵ This latter theme was popularized by Buchanan and Tullock, "and in general Buchanan and Tullock have little good to say about the simple majority rule."³⁴⁶ Of course our voting system is not one of majority rule, and elections in which a plurality wins are even more difficult to justify on the basis of their properties.³⁴⁷ Referring to voting systems generally, Professor Levmore wrote: "[I]t is pointless to ask the usual question of whether the law is efficient or fair. The central message of basic collective choice theory is, after all, that there will be some problem with every decisionmaking process."³⁴⁸

A related strand of literature deals with the question of why people vote. From a pure cost-benefit approach, voting is not rational.³⁴⁹ It costs something to vote, but the probability of the vote making a difference cannot reasonably be expected to outweigh even small costs associated with voting.³⁵⁰ Even with the most improbable election, such as the election at issue, where a few hundred votes out of a hundred million determined the election, no single vote changed the outcome. Scholars have concluded that it is futile to attempt to develop a rational model of voting based on influencing outcomes.³⁵¹

Instead, the more promising approach appears to be to view voting as a consumption activity where voters are acting to express their opinions.³⁵² This line of thought leads to three important points. First, if

343. *Id.* at 165.

344. See RIKER, *supra* note 16, at 233-34.

345. See BUCHANAN & TULLOCK, *supra* note 91, at 291-92 ("[I]t is the opportunity to secure differential benefits from collective activity that attracts the political 'profit-seeking' group.").

346. Mueller, *supra* note 77, at 7.

347. See McLEAN, *supra* note 15, at 156 (explaining why plurality voting fails abysmally all desirable criteria for voting systems).

348. Levmore, *supra* note 336, at 1044.

349. John H. Aldrich, *When is it Rational to Vote?*, in PERSPECTIVES ON PUBLIC CHOICE, *supra* note 77, at 373, 373-74 ("Akin to classic free riding, the chances of one vote affecting the outcome are so minuscule that the instrumental value of turning out is essentially zero and hence a rational actor would never vote.").

350. See *id.*

351. See *id.* at 389-90.

352. See *id.* at 390.

voting is a symbolic act of consumption, it is difficult to argue seriously that it results in a determination of the will of the people. This reinforces the idea that elections serve another purpose. Second, since voting is not an attempt to influence outcomes, this undermines any argument that Nader voters would have voted for Gore. It is more likely that Nader voters would have stayed home or written in a protest vote than that they would have voted for Gore or Bush. Third, the majority of people who are qualified to vote but do not can be presumed to feel that the costs of expressing their opinion outweigh the satisfaction of ceremonial voting. None of this supports the “will of the people” construct.

What the public choice literature teaches us is the following. There is no constitutional system for collectively determining social preferences that results in efficient and rational decisions and provides political equality and decisiveness.³⁵³ It might be that we do not impose any significant voter qualification requirements such as competence because our real interest lies solely in the act of making decisions, not in the decisions themselves. Making decisions that enable government to get on to the business of governing is the only possible purpose elections can serve. This, in turn, suggests that adhering to the long-standing, pre-announced rules of the contest is a more important attribute than divining the will of the people.

Legal analysis utilizes numerous theoretical constructs to model the world and analyze problems. The reasonable person, duty of ordinary care, and fiduciary duties are but a few of these useful constructs.³⁵⁴ The will of the people is not a useful construct—not because it does not exist, but because it cannot exist.³⁵⁵ It is a logical impossibility just as a negative temperature in degrees Kelvin is, and therefore it is not constructive to incorporate it in law. If the will of the people were a meaningful concept, the Florida Supreme Court’s view—that the Florida Legislature’s scheme for selecting presidential electors is constrained by their interpretation of Florida’s state constitution—would merely be unconstitutional under the U.S. Constitution’s explicit and unambiguous grant in Article II and the Supremacy Clause. But to subordinate legislative power in this context to this construct makes for unsound public

353. See Levmore, *supra* note 336, at 987-88.

354. See Mark Klock, *Lighthouse or Hidden Reef? Navigating the Fiduciary Duty of Delaware Corporations’ Directors in the Wake of Malone*, 6 STAN. J. L. BUS. & FIN. 1, 13-14 (2000) (describing models of fiduciary duty).

355. See, e.g., ARROW, SOCIAL CHOICE, *supra* note 41, at 59; Pildes & Anderson, *supra* note 336, at 2138-39 (stating that the will of the people lacks meaning); TRIBE, *supra* note 85, § 1-8, at 12 n.6 (noting that Arrow’s theorem suggests that there is no hope of meaningfully constructing majority will).

policy given that the construct makes no sense. A legal decision based on it is certainly not persuasive and, arguably, not authoritative. The will of the people is analogous to a minimum highway speed requirement of forty-five miles per hour combined with a maximum speed limit of thirty miles per hour. Elections do not exist to determine the will of the people. Elections serve as a socially acceptable method of allocating political power in the absence of consensus in order to move forward.

If two football teams both want to receive the ball first at the start of the game, it is pointless to let the team captains talk about who should get the ball first. They flip a coin, not because that is the best way to make the decision, but because there is no best way to make the decision and the need to make a decision and proceed is more important than the actual decision. Of course, a fair decision making process is preferred. Before the flip, the teams could discuss whether it should be two out of three flips or one flip. But after losing the flip in a single-flip contest, it is counter-productive to begin negotiations about how many tosses should occur. In the recent presidential election, the format of the ballots, the instructions given to voters, and the method of tabulation were all known in advance. To allow one party to litigate these issues absent a showing of fraud in the hopes of reaching a better decision is worse than pointless. It gives the losing party an out-of-the-money option and creates a moral hazard problem where it is in the party's interest to maximize political risk and legal uncertainty contrary to the interests of society.

Certain Florida courts should be criticized on three counts. First, for their failure to interpret the legislative scheme in the appropriate context. Second, for their failure to stay within the bounds imposed by the U.S. Constitution. Finally, for their failure to understand that the public interest is hurt, with no offsetting benefits, by permitting the type of litigation that occurred to move forward absent a showing of fraud.

The criticism of the U.S. Supreme Court majority as deciding the case on political ideology, on the other hand, is unconstructive. It is an untestable proposition, and merely unsubstantiated mudslinging. The fact that the more "conservative" Justices' decision worked to the favor of the more "conservative" candidate does not support the causal inference that critics seek to establish.³⁵⁶ Their decision was the best one not

356. There is a certain amount of hypocrisy in the popular media that results in public allegations of partisanship whenever a difficult case ends in the "conservative" result supported by the "conservative" Justices. Cf. Jeff Jacoby, *Slander Is Just Fine When the Left Does It*, BOSTON GLOBE, Dec. 28, 2000, at A15, available at 2000 WL 3357234 (documenting numerous cases of anticonservative hate speech in the media without uproar, e.g., a call for snipers juxtaposed with pictures of Mr. Bush, comparisons between Republicans and Nazis, etc., when seemingly less outrageous speech by conservatives resulted in large outcries and publicity).

because of which candidate benefitted, but because of better legal analysis.

Undoubtedly, there will be talk of making elections more uniform and accurate, but there is a cost. There will always be some margin of error, but that margin of error can always be reduced at a cost. If two candidates are so close that only incredibly expensive technology can discern the difference, perhaps the choice between the two is not that important. Arrow's work suggests that flipping a coin in such cases would be no more arbitrary than counting votes.

Not only are all counts subject to error, but all statutes are subject to interpretation. While I do not subscribe to the view that no statute can be perfectly clear in a given situation, it is also the case that no written rule can be perfectly clear in all situations either.³⁵⁷ This is why litigation occurs with respect to contracts, bond covenants, and the like. Appellate opinions clearly show that litigation is not limited to disputes over facts, but often involves disputes over rules. Rules that were intended to be clear, and for which there were strong economic incentives to make clear, nevertheless end up being litigated. This is why we need a judicial policy of restraint refusing to interpret ambiguous election statutes and reinforcing the presumptive validity of certified election winners absent evidence of fraud. Otherwise, we will have a flood of judicial involvement in elections.³⁵⁸ Public policy arguments suggest that society benefits most from certain results rather than unresolvable deliberation. Instead of doing the best bad job possible in interpreting an ambiguous election statute, the courts should declare such statutes undecipherable and find in favor of the status quo, extinguishing these free out-of-the-money options and the accompanying moral hazard.

It has been established in the literature of ethics, political science, sociology, and public choice that voting does not fulfill the purpose of ranking socially preferred choices. Therefore, the purpose of voting

357. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34-35 (1991) (discussing the fact that corporate contracts necessarily leave some matters open).

358. *Gore v. Harris*, 772 So. 2d 1243, 1264 (Fla. 2000) (Wells, C.J., dissenting). Chief Justice Wells wrote of the majority decision:

[W]e run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters—not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is “the right thing to do.” Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, always has the potential of leading to a crisis with the other branches of government and raises serious separation-of-powers concerns.

Id.

seems most likely to further the goal of effecting a socially acceptable decision about who will govern in order to move on with the business of government. This resolution requires a bright-line rule rather than an invisible marker. What is the bright-line rule? It is not selection of the individual most desired by the people (which might not even be defined). It is not the selection of the person that most registered voters desire, nor is it the selection of the least objectionable person. It is not the selection of the person most voters wish to vote for, nor is it the selection of the person most voters intended to vote for. The rule that we have traditionally utilized in elections is that the individual who wins the election is the candidate who receives more votes than any other candidate, as tabulated by properly functioning voting equipment.

The fact that the Florida legislature was prepared to exercise its plenary power to send electors to Congress, and that Mr. Gore's team was working on a strategy to challenge those electors,³⁵⁹ reaffirms Mr. Gore's lack of credibility when he asserted that his contest was not about winning the presidency, but about the fundamental principle of counting every vote.³⁶⁰ Mr. Gore's politically charged taxonomy of classifying twice counted undervotes as votes which were never counted was designed to enhance his option value. Note, though, that while Mr. Gore repeatedly took the public position that thousands of votes were "never counted," he never made such a representation in legal proceedings because, in fact, every disputed ballot was counted at least twice—³⁶¹ just not the way Mr. Gore wanted them counted.³⁶²

After the election was over, Mr. Gore found himself in a no-lose situation in which he could possibly emerge victorious by creating uncertainty over the question, "which rule is the law?" Mr. Gore proposed a new rule which would require subjective examination of ballots in a few geographic areas which were tabulated as voting for no presidential candidate to infer for whom the voter intended to vote.³⁶³ Mr.

359. See Jonathan Turley, *Commentary: The Scariest Part May Be Yet to Come*, L.A. TIMES, Dec. 8, 2000, at B9, available at 2000 WL 25925903 (reporting on Gore efforts to challenge an alternative slate of electors).

360. See *Counting the Vote: Christopher Comments on Recount in Florida*, N.Y. TIMES, Nov. 12, 2000, § 1, at 23.

361. *Bush v. Gore*, 531 U.S. 98, 121 (2000) (Rehnquist, C.J., Scalia, & Thomas, JJ., concurring) ("[N]o one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision.").

362. See Sawyer & Lambrecht, *supra* note 56 (reporting on a lawyer who voted for Gore who complained, "But the way Gore's lawyers are talking, it's starting to sound like unless you count them the way Gore wants them to be counted, they haven't been counted.").

363. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1226 (Fla. 2000) (*per curiam*) (indicating that Mr. Gore was allowed to intervene on behalf of selected counties seeking to conduct manual recounts and submit returns after the statutory deadline).

Gore also, at least implicitly, supported efforts to allow voters who voted for third party candidates or for “none of the above” to change their vote after the election.³⁶⁴ These are not surprising proposals from an election loser, but they fly in the face of voting’s objective—quick resolution of disagreement over who should have political power. For that reason, proposals to count subjectively, to count differently, to do the election over—should be summarily rejected when they are raised *ex post*.

Mr. Gore could have enhanced his credibility greatly if he had made his arguments when he was free of the moral hazard problem. Prior to the election, Mr. Gore could have publicly stated that he felt butterfly ballots were confusing and ballots that are cast for third party candidates or blanks should be examined to determine intent. He could have publicly stated that if the number of votes given to third party candidates exceeded the difference between the two major candidates, then a revote should take place. He could have publicly stated that since problems exist with punch cards, any ballots counted by the machines as non-votes should be examined to determine voter intent. Since he did not raise these issues before the election, optimal social policies—quick and definitive resolution of political power plus placing the costs of risk on those who create it—demands that he not be permitted to raise them after the election.

V. CONCLUSION

The will of the people is an internally inconsistent concept that cannot exist. The logic of Arrow cannot be broken. It is a fact that no democratic system of voting can be constructed that will result in consistent choices. Democracy is inherently irrational, yet we embrace it. If there is to be an explanation for this it must be that we embrace democracy, not because of the efficiency of the decisions in which it results, but because of the efficiency it provides in achieving decisions. The point of an election is to come quickly to a resolution.³⁶⁵ Permitting a

364. Many argued that the courts had and should have used their broad power to order a new election in Palm Beach County. See David G. Savage & Henry Weinstein, *Decision 2000/ America Waits: Florida Judges Have Power to Upset Elections*, L.A. TIMES, Nov. 10, 2000, at A1, available at 2000 WL 25916569 (reporting on calls for a revote in a special election).

365. Cf. WIS. STAT. ANN. § 5.01(4) (2001) (providing that election ties be settled by drawing lots); Robert E. Pierre, *Where Elections Depend On the Luck of the Draw: In Wis. Communities, Ties Are Settled by Chance*, WASH. POST, Apr. 22, 2002, at A03, available at 2002 WL 19155580.

As evidenced by the 2000 presidential race, disputes in close elections can linger on, cost lots of money and dissolve into nasty finger-pointing arguments. . . . In this spring’s round of county board elections, there were several ties. . . . Each was settled by long-established rules in the Wisconsin election code: The contenders drew names, cut cards, flipped coins or drew straws.

losing candidate to litigate over the rules of the election such as a deadline for counting ballots, the meaning of “error in vote tabulation,” the meaning of “rejection of legal votes,” and the standards employed for counting the votes—after the election has been completed and the votes counted—destroys the underlying social purpose of an election. Furthermore, it creates a moral hazard problem whereby the losing candidate’s incentive is to maximize political and legal uncertainty, uncertainty that can adversely affect other important aspects of society.

Judges are supposed to operate according to law independent of external pressure. No allegations of fraud were made. No allegations that ballots were rejected were made. No allegations that counting equipment malfunctioned were made. The election may have been imperfect, but it was fair. The Florida courts should have dismissed the case for failure to state a claim because there was no basis in Florida law for extending the deadline, and no fraud to warrant the creation of new law. The Florida Supreme Court should not have invoked equitable power to change the election procedure and reverse the trial courts, much less order the peculiar relief it did. While the U.S. Supreme Court ultimately restored the status quo on legal grounds, this never should have gone so far. The election served to highlight technological issues related to vote tabulation and will potentially reduce the chances of another election being decided by less than the margin of error in the near future. Hopefully, more dialogue about the philosophical purpose that voting serves will also foster greater judicial restraint when a similar election contest next occurs.