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The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election

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INTRODUCTION

It was not even 8:00 p.m. in the east when NBC announced that Vice President Al Gore had carried Florida in the 2000 presidential election.[1] Gore's supporters were elated, because it had long been clear that Florida was critical to a Gore victory[2] and yet was sharply divided between Gore and Governor George W. Bush.[3] The euphoria

1. Nancy Gibbs, *Reversal of . . . Fortune*, TIME, Nov. 20, 2000, at 28, 37; James Poniewozik, *TV Makes a Too-Close Call*, TIME, Nov. 20, 2000, at 70, 70; DAVID VON DREHLE, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION 35 (Leonard Downie Jr. et al. eds., 2001) [hereinafter DEADLOCK]. NBC, CBS, CNN, and FOX all called Florida for Gore. *Id.* at 35–36.

2. *See* DEADLOCK, *supra* note 1, at 16. For any not familiar with the electoral college system in the United States, see *infra* notes 119–28 and accompanying text.

3. *See* Richard L. Berke, *Florida Is Pivotal: Long Night of Seesawing Tallies for Governor and Vice President*, N.Y. TIMES, Nov. 8, 2000, at A1. The National Journal,

peaked when the press announced that Gore had carried Pennsylvania and Michigan, the other two "battleground" states where the election was thought to be closest.[4]

In the next two hours, however, Bush appeared on the networks criticizing their prediction of Florida's vote,[5] and around 10:00 p.m., the networks reversed their call for Gore.[6] At 2:16 a.m., the networks began announcing that in fact Bush had carried Florida and won the election.[7] Very shortly thereafter, based on the press announcements, Gore called Bush and conceded the election.[8]

Bush's reaction was gracious, and Gore headed for the Nashville War Memorial to deliver his concession speech.[9] As the motorcade traveled the streets of Nashville, however, the Gore campaign's chief of staff received a call from the campaign's Florida field director reporting that Bush's lead in Florida had been slipping very rapidly, from thousands, to 900, to 200, and as a result, there would be an automatic recount.[10] By cell phone, Gore's campaign chair William Daley told the chief of staff to grab Gore and keep him from going onstage.[11]

A little over an hour later, Gore called Bush back.[12] Gore observed that "things have changed," and the election was now too close to concede.[13] Bush said, "Let me make sure I understand. You're calling me back to retract your concession?," to which Gore responded, "There's no reason to get snippy."[14] When Bush insisted that the networks now had the correct result, and indicated that his brother, Florida Governor Jeb Bush, had the numbers from the Florida website to

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a nonpartisan political organization, had released an electoral college map late in the week preceding the election assigning 269 votes, including Florida's, to Gore, and 248 votes to Governor George W. Bush. *See* Alan Bernstein, *Campaign 2000: Nation Might Have To Wait; Tuesday's Vote Just First Step to Presidency*, HOUSTON CHRON., Nov. 5, 2000, at A1. Only three states—Maine, Arkansas, and Washington, totaling 21 votes—had been left unassigned. *Id.* This meant that if Bush were to arrive at the 270 votes needed, he would not only have to pick up all of the unassigned states but also reverse the prediction in at least one additional state. Florida was one of the states presenting the best possibility of such a reversal. Conversely, had Florida gone to Bush, Gore would have had to win all the unassigned states and reverse a state that had previously been assigned to Bush.

4. Gibbs, *supra* note 1, at 37; Kevin Sack & Frank Bruni, *How Gore Stopped Short on His Way To Concede*, N.Y. TIMES, Nov. 9, 2000, at A1.

5. Berke, *supra* note 3; Gibbs, *supra* note 1, at 37.

6. Poniewozik, *supra* note 1, at 70; DEADLOCK, *supra* note 1, at 39–40.

7. Poniewozik, *supra* note 1, at 70–71; DEADLOCK, *supra* note 1, at 43–44.

8. Gibbs, *supra* note 1, at 39.

9. *Id.*

10. *Id.*; DEADLOCK, *supra* note 1, at 47.

11. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 47.

12. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 49.

13. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 49; Sack & Bruni, *supra* note 4.

14. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 49; Sack & Bruni, *supra* note 4.

prove it, Gore said, "Let me explain it to you. Your younger brother is not the ultimate authority on this."[15] "Well, Mr. Vice President," Bush said, "you need to do what you have to do."[16] By 4:00 a.m., the networks found themselves reversing yet again, acknowledging that the final outcome of the election might not be known for several days.[17]

So began perhaps the most protracted (although not longest)[18] presidential election in the history of the United States. Tens of legal battles would follow, in the courts of Florida and elsewhere, and the outcome would not be known until Gore's *second* concession thirty-six days later, following the United States Supreme Court's decision to end any further counting of ballots.

The extraordinary nature of the events has prompted a vast amount of commentary in the popular and academic media. Alan Dershowitz and Vincent Bugliosi have both written books accusing the majority members of the United States Supreme Court of voting with their robes.[19] Bruce Ackerman has accused the Florida Legislature of attempting a constitutional coup.[20] Richard Posner has insisted that the Supreme Court acted justifiably to avert a national crisis.[21] Erwin Chemerinsky and Cass Sunstein have focused on what the Supreme Court's decision means for political question doctrine[22] and equal protection law.[23] Over 550 law professors signed a statement published in

15. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 49; Sack & Bruni, *supra* note 4.

16. Gibbs, *supra* note 1, at 39; DEADLOCK, *supra* note 1, at 49.

17. Poniewozik, *supra* note 1, at 71.

18. Arthur Schlesinger, Jr., *It's a Mess, But We've Been Through It Before*, TIME, Nov. 20, 2000, at 64, 64 (describing the post-election maneuvers in the presidential contests of 1800, 1824, and 1876, the last of which was resolved only three days before the inauguration of Rutherford B. Hayes); *see also infra* notes 239–51 and accompanying text (describing the 1876 election).

19. ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 12 (2001) ("This book is about the culpability of those justices who hijacked Election 2000 by distorting the law, violating their own expressed principles, and using their robes to bring about a partisan result."); VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT 16–17 (2001) ("[T]he fact remains that on December 12, in direct defiance of the Constitution they swore to uphold, and without any authority at all, the Supreme Court *chose* Bush to be the next President of the United States.").

20. Bruce Ackerman, *Anatomy of a Constitutional Coup*, YALE L. REP., Summer 2001, at 34, 37.

21. Benjamin Wittes, *Maybe the Court Got It Right: A Judge's Defense of the Florida Election Decision*, WASH. POST, Feb. 21, 2001, at A23 (quoting Judge Richard Posner) ("'What exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis?'").

22. Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1105–12 (2001).

23. Cass R. Sunstein, *Order Without Law*, *in* THE VOTE: BUSH, GORE AND THE SUPREME COURT 205, 218–221 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

the New York Times objecting to the Supreme Court's decision to stay the recounts in Florida pending the Court's decision three days later.[24]

Very few of these commentators, however, have provided their readers with the full legal context. It is as though they reached their opinions about the controversy as it was happening, and have since focused on bolstering their opinions (some better than others), but have decided not to provide their readers with the full legal or factual background of the case. This approach has tended to reduce a very complex legal controversy into a series of sound bites to which partisans can turn for dinner party conversation. For those who have litigated complicated controversies before, it is a lot like the talking head who opines on the proper verdict after hearing only the opening statement.

It is easy to see why this has happened. All of us were glued to the television sets, the Internet, and the newspapers. We think we *know* what went on. There was such a crush of information, however, in such a short period of time, that no one merely observing could have obtained all the necessary information, researched the law, and then processed it sufficiently to reach objective and fully informed conclusions. Commentators favoring the Democratic position, for example, seem unaware that David Boies admitted in the first Florida proceeding that a variation in the way counters looked at ballots might well be unconstitutional.[25] Commentators favoring the Republican position do not appear to realize that Florida's electoral votes were never "in jeopardy," as the GOP so often claimed, because Jeb Bush had al-

24. *See* Advertisement, N.Y. TIMES, Jan. 13, 2001, at A7. The statement read:

> By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law[.] We are Professors of Law at 120 American law schools, from every part of our country, of different political beliefs. But we all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were Acting as political proponents for candidate Bush, not as judges. It is Not the Job of a Federal Court to Stop Votes From Being Counted[.] By stopping the recount in the middle, the five justices acted to suppress the facts. Justice Scalia argued that the justices had to interfere even before the Supreme Court heard the Bush team's arguments because the recount might "cast a cloud upon what [Bush] claims to be the legitimacy of his election." In other words, the conservative justices moved to avoid the "threat" that Americans might learn that in the recount, Gore got more votes than Bush. This is presumably "irreparable" harm because if the recount proceeded and the truth once became known, it would never again be possible to completely obscure the facts. But it is not the job of the courts to polish the image of legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges. By taking power from the voters, the Supreme Court has tarnished its own legitimacy. As teachers whose lives have been dedicated to the rule of law, we protest.

Id.

25. *See infra* note 550 and accompanying text.

ready certified the Republican electors to the United States Archivist's office, and the law made it clear that if the contest were not completed, Congress would have to honor that certification.[26] And the 550-plus law professors objecting to the stay (and in particular Scalia's reference to irreparable harm) probably do not know that it was initially *Gore* who argued that reversing a declaration of the winner would constitute irreparable injury.[27]

Yet if one seeks to evaluate the election controversy with anything approaching objectivity, if one really wants to understand the tumble of events that ended with Bush's ascension to the Presidency, then the details *matter*. Fully explored, they show *both* a Florida Supreme Court and a United States Supreme Court engaging in some intellectual dishonesty, but they also show that those courts were faced with very difficult legal questions. They show *both* that there were several reasons that the Supreme Court should not have taken the case, *and* that there was some potential for a constitutional crisis. But most consistently of all, they show that the attorneys arguing the case missed significant portions of the applicable law, failed to reach a full understanding of others, and in the end, never presented the courts with arguments that would enable them to reach the soundest decisions possible.

In short, if there is any overriding explanation for the chain of events that ended with Gore's concession, it may well be the mistakes that were made by otherwise brilliant attorneys and underinformed courts operating under the tightest of time constraints and incredible pressure. This is a less glamorous conclusion, to be sure, than Bugliosi's theory of black-robed "ladies of the night,"[28] or Ackerman's "constitutional coup," or Posner's "national crisis." Practicing lawyers will be reminded, however, how important the less visible aspects of their work are. And the fact that the lawyers did not handle the case well says much about whether the courts' decisions should be attributed to partisanship.

This Article presents the factual and legal history of *Bush v. Gore*,[29] in the detail that is warranted for a case of this magnitude and complexity. Part One sets forth the legal framework within which the case unfolded, acquainting the reader with the breadth of Florida and federal law that governed the controversy. Part Two reviews what happened—the factual and legal developments from the time Gore requested manual counts in four Florida counties through the Supreme Court's decision ending the statewide recount the Florida Supreme Court had ordered—and focuses on the attorneys' arguments at each stage. Part Three then explores how a fuller and more accu-

26. *See infra* notes 272, 277, 743–44 and accompanying text.
27. *See infra* note 472 and accompanying text.
28. BUGLIOSI, *supra* note 19, at 152.
29. 531 U.S. 98 (2000).

rate presentation of the applicable law, particularly by Gore's legal team, might have brought the controversy to a different end. With any luck, the partisan outrage will be replaced with responsible analysis, and the profession will be reminded of what trial lawyers both love and fear about their work. In litigated cases, there are usually two closely matched sides, and "justice" frequently turns on which lawyer better handles the case he or she is given.

PART ONE: THE LAW GOVERNING THE 2000 PRESIDENTIAL ELECTION

The first, uncertified set of election returns reported to the Florida Division of Elections on Wednesday, November 8, 2000, showed that Governor Bush had received 2,909,135 votes to 2,907,351 votes for Gore, a difference of 1784 votes, or three-hundredths of one percent.[30] Under section 102.141(4) of the Florida Code, this tiny margin triggered an automatic recount.[31] If the margin held, all of Florida's

30. Scott Hiaasen & Marc Caputo, *Outcome May Now Hinge on Palm Beach Nonvotes*, AUSTIN AM.-STATESMAN, Nov. 11, 2000, at A1; Richard L. Berke, *Vice-President Clings to Slim Edge in Popular Vote Nationwide*, N.Y. TIMES, Nov. 9, 2000, at A1.

31. The Florida Code provides:

> If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, . . . the board responsible for certifying the results of the vote on such race . . . shall order a recount of the votes cast with respect to such office . . . .

FLA. STAT. ANN. § 102.141(4) (West Supp. 2001). The law does not make it entirely clear what form any such recount is supposed to take: whether it is supposed to involve only re-adding the returns from each precinct, running the ballots through a counting machine again, or some more searching look. The law provides only that "[e]ach canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office . . . appeared on the ballot and determine whether the returns correctly reflect the votes cast." *Id.* Notably, a broad interpretation of this law suggests that the county canvassing boards could have begun looking at ballots by hand as early as the automatic-recount stage. Indeed, the first pleading the Bush team filed in federal district court asserted, and attached statements confirming, that the Gadsden County Canvassing Board had done just that:

> The multiple counting of the returns has raised several issues. For example, in at least one county (Gadsden County), the ballots were not merely recounted but rather "interpreted"—or reinterpreted—by the county's canvassing board. This resulted in additional ballots being counted. This recount calculated a result different from that of the original count, resulting in a net gain of 153 votes in favor of the Democratic presidential ticket. See Exhibit A (Statements of John M. Leace and Edgar E. Stanton).

Complaint for Declaratory and Injunctive Relief ¶ 31, at 7–8 (filed Nov. 10, 2000), Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla.) (No. 00-9009-CIV), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

electors would go to Bush,[32] and Bush's electoral total would rise to 271, one more vote than necessary to win.[33]

With the national election outcome turning on the Florida vote, Gore was faced with the decision whether to let the automatic recount proceed as it would and then accept the outcome, or use Florida law to its fullest in an effort to emerge victorious. Since early on Election Day, there had been reports of problems with the voting: African-Americans who had registered and arrived to vote, only to be told that they were not on the rolls,[34] and Palm Beach County voters complaining of the now infamous "butterfly" ballot, on which Gore was assigned the third punch-hole, even though his name appeared second in the lefthand column.[35] More importantly, the counties in which punch card ballots were being used—counties that tended to be much more heavily Democratic than others—were reporting a very large number of "undervotes," ballots as to which the counting machines registered no selection for President.[36] Based on the turnout, Gore's field workers were insisting that if the undervotes in those heavily Democratic counties were tallied, the election would turn in his favor.[37]

To appreciate the strategic decisions facing the two candidates' teams, and the developments that would follow, one has to understand the complex legal framework in which the case unfolded. The sections that follow will set forth the state election law, and the federal

32. Under Florida law, the votes cast for the various presidential candidates "shall be counted as votes cast for the presidential electors supporting such candidates." FLA. STAT. ANN. § 103.011 (West 1992). The winner statewide receives all of Florida's electoral votes: "The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes." *Id.*

33. *See* Phil Kuntz & David S. Cloud, *The Neverending Election: What Next? If Florida Mess Is Unresolved, Scenarios Include Having Congress Pick the President*, WALL ST. J., Nov. 10, 2000, at B1. Immediately after the election, Florida was not the only state in question. It was believed that Gore had won in Iowa (seven electoral votes) and Wisconsin (eleven votes), but the votes there were very close. *Id.* Moreover, New Mexico (five votes) and Oregon (seven votes) continued to count for several days after the election. *Id.* But barring at least three of these states ultimately going for Bush, Florida was the only state in which he could pick up enough votes to gain a majority.

34. *See* DEADLOCK, *supra* note 1, at 76; *see also* U.S. COMM'N ON CIVIL RIGHTS, EXECUTIVE SUMMARY, *in* VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 2001), http://www.usccr.gov/pubs/vote2000/report/exesum.htm ("During the November 2000 election, Florida's overzealous efforts conducted under the guise of an anti-fraud campaign resulted in the inexcusable and patently unjust removal of disproportionate numbers of African American voters from Florida's voter registration rolls.").

35. DEADLOCK, *supra* note 1, at 65–70.

36. DEADLOCK, *supra* note 1, at 78. Some of these same counties were also reporting a substantial number of "overvotes," or ballots that could not be counted because they reflected two selections for the presidency. *See id.* at 76, 79.

37. DEADLOCK, *supra* note 1, at 78.

constitutional and statutory provisions, that both sides had to take into account.[38]

I. THE FLORIDA LAW GOVERNING PRESIDENTIAL ELECTIONS

A. *Florida's Election System*

Elections in Florida are governed most immediately by the county in which a voter lives. Each county's board of county commissioners is responsible for adopting the method of voting to be used in the county[39] (subject to the approval of the Secretary of State),[40] and the expense of whatever system is adopted is borne by the county.[41] The county commissioners are also responsible for drawing precinct lines.[42]

Under the Florida Constitution, each county elects a supervisor of elections to serve for a four-year term.[43] The supervisor of elections is responsible for designating polling places within each precinct, maintaining the lists of registered voters, and a host of other election-related duties.[44] The supervisor also appoints one or two "election boards" for each precinct, consisting of three inspectors and a clerk, not all of the same party, who conduct the elections at the polls.[45]

When an election is over, the inspectors at each precinct either count the votes, in the case of paper ballots, or run the machines that electronically record the votes.[46] These returns are then submitted to "canvassing boards" in each county, no later than noon of the day following the election.[47] The canvassing boards are each composed of the county's supervisor of elections, a county court judge (who serves as the chair), and the chair of the board of commissioners.[48] The canvassing boards are responsible for reviewing the precinct returns, detecting errors and omissions, and totaling the vote for the county.[49]

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38. So that the reader can effectively be placed in the position of the lawyers handling the controversy, this Part sets forth the law as it existed at the moment the controversy began, without regard to the courts' later decisions or the steps the Florida Legislature has since taken to amend the law. *See, e.g.*, 2001 Fla. Laws ch. 40 (revising various aspects of Florida election law effective Jan. 1, 2002).

39. *See* FLA. STAT. ANN. § 101.29 (West 1982).

40. *See id.* § 101.015(1), (3), (4) (West Supp. 2001).

41. *Id.* § 101.29 (West 1982).

42. *Id.* § 101.001(1) (West Supp. 2001).

43. FLA. CONST. art. VIII, § 1(d).

44. *See* FLA. STAT. ANN. § 101.001(1) (designating polling places); *id.* § 98.015 (maintaining registration lists and other duties).

45. *Id.* § 102.012(1), (2), (4).

46. *Id.* § 102.012(4), (7). Alternatively, the elections supervisor may designate a central counting location, or no more than three regional counting locations, in which event the inspectors deliver the ballots to that location, and they are counted under the direction of the canvassing board. *Id.* § 101.5614(1)(b), (2), (3).

47. *Id.* § 102.141(3).

48. *Id.* § 102.141(1).

49. *Id.* § 102.141(3).

The canvassing boards are also responsible for opening and counting the absentee ballots and adding them to the total drawn from the election board's returns.[50] In the event of an automatic recount, which is required when there is a margin of victory of less than one-half percent,[51] the canvassing boards direct that process.[52]

Florida's Secretary of State is considered the "chief election officer" of the state,[53] and the State Department promulgates rules that govern registration,[54] voting systems,[55] and counting procedures[56] in the state. In a statewide or federal election, the Secretary of State is also responsible for receiving the certified returns from each of the county canvassing boards.[57] The state Elections Canvassing Commission then certifies the returns and declares the winner.[58] The Elections Canvassing Commission is made up of the Secretary of State, the Director of the State Department's Division of Elections, and the Governor.[59]

B. *The Timing of Election Certification Under Florida Law*

The Florida Code directs each canvassing board to "certify" the results of every election. Section 102.151 provides that "[t]he county canvassing board shall make and sign duplicate certificates containing the total number of votes cast for each person nominated or elected, the names of persons for whom such votes were cast, and the number of votes cast for each candidate or nominee."[60] As the reference to the "total" number of votes suggests, the certification cannot occur until the canvassing board has completed its duties and counted all ballots. Although it uses the term "official return," rather than "certi-

50. *Id.* §§ 101.5614(8), 101.68, 102.141(2).

51. *See supra* note 31.

52. FLA. STAT. ANN. § 102.141(4).

53. *Id.* § 97.012.

54. *See, e.g., id.* § 97.052(1) ("The department shall prescribe a uniform statewide voter registration application for use in this state.").

55. *See, e.g., id.* § 101.015(1), (3), (4) (directing the Secretary of State to establish minimum standards for electronic and electromechanical voting systems, rules "to achieve and maintain the maximum degree of correctness, impartiality, and efficiency of the procedures of voting, including . . . counting, tabulating, and recording votes by voting systems used in this state," and minimum standards of security for all voting systems).

56. *See id.* § 101.5614(2)(b).

> If ballots are to be counted at the precincts, such ballots shall be counted pursuant to rules adopted by the Department of State, which rules shall provide safeguards which conform as nearly as practicable to the safeguards provided in the procedures for the counting of votes at a central location.

Id.

57. *Id.* § 102.111(1) ("Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer.").

58. *Id.* §§ 102.111, 102.121 (West 1982 & Supp. 2001).

59. *Id.* § 102.111(1) (West Supp. 2001).

60. *Id.* § 102.151.

fied return," section 101.5614(8) supports this reading: "The return printed by the automatic tabulating equipment, *to which has been added the return of write-in, absentee, and manually counted votes*, shall constitute the official return of the election."[61]

With respect to general elections for federal and state offices, three different sections of the Code exhort the canvassing boards to file the certified returns "immediately" with the State Department.[62] One of those sections includes an express deadline. Section 102.112 states: "Returns must be filed by 5 p.m. on the 7th day following the . . . general election . . . ."[63]

Notwithstanding the clear deadline, the Code is not clear on what the State Department, and in turn the state Elections Canvassing Commission (who is to declare the winner), should do in the event a canvassing board misses the deadline. Section 102.111(1), which was enacted in 1951,[64] states: "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties *shall be* ignored, and the results shown by the returns on file shall be certified."[65] Section 102.112(1), however, seems to contemplate that the State Department could choose to include late returns. That section provides:

> (1) . . . If the returns are not received by the department by the time specified, such returns *may be* ignored and the results on file at that time may be certified by the department.
> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds.[66]

Neither statute says anything, however, about circumstances in which the Elections Canvassing Commission might be compelled to include late returns.[67]

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61. *Id.* § 101.5614(8) (emphasis added).

62. *See id.* §§ 102.111(1), 102.112(1), 102.151.

63. *Id.* § 102.112(1).

64. *See* Fla. Laws ch. 26870, § 6 (1951) (current version at FLA. STAT. ANN. § 102.111).

65. FLA. STAT. ANN. § 102.111(1) (emphasis added).

66. *Id.* § 102.112(1), (2) (emphasis added).

67. Even before the conflict between the mandatory exclusion and the permissive exclusion arose, when only section 102.011—requiring exclusion—was in effect, there were cases in which a candidate sought to force the Elections Canvassing Commission to accept returns submitted after the deadline. These cases address two situations. In the first, returns were submitted late but before the state Canvassing Commission had canvassed the vote. The Florida Supreme Court held that it was the Commission's duty to include the returns, as if they had been submitted on time. State *ex rel.* Bloxham v. Gibbs, 13 Fla. 55, 74 (1871). In the second situation, a county attempted to submit an amended return after the deadline to correct inaccuracies in the original return. The Supreme Court refused to mandamus the Canvassing Commission to reconvene and include the amended return, holding that the statute conferred no such discretion. State *ex rel.* Catts v. Crawford, 73 So. 589, 590 (Fla. 1916).

The discrepancy between the mandatory language of section 102.111(1) and the permissive language of section 102.112(1) is further complicated by the fact that regulations promulgated by Florida's State Department expressly dictate that in a federal election, absentee ballots arriving from overseas must be counted as late as ten days after the election, provided they are postmarked on or before the day of the election. Section 1S-2.013(7) provides:

> With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election *shall be counted if received no later than 10 days from the date of the Federal election* as long as such absentee ballot is otherwise proper.[68]

This regulation exists, even though the Florida *Code* expressly requires that absentee ballots arrive in the county election supervisor's office by election day, and does not exempt overseas ballots: "All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office."[69] Although ordinarily a regulation in conflict with a state statute would not be valid, apparently the State Department and the elections supervisors honor the ten-day rule with respect to overseas ballots because the regulation was promulgated in 1984 to end a federal lawsuit against Florida[70] brought under the Uniformed and Overseas Citizens Absentee Voting Act.[71]

To the extent that the overseas-ballot regulation is honored, it becomes impossible for a county canvassing board to certify the county's returns within the seven-day time frame specified by both sections 102.111 and 102.112. As described above, the canvassing board is required to certify the "total" number of votes in the county.[72] Likewise, a county's "official return" is composed of "[t]he return printed by the automatic tabulating equipment, to which has been added the return of write-in, *absentee*, and manually counted votes."[73] Thus, a canvassing board with outstanding overseas ballots faces two choices that theoretically, at least, both involve violating some law: (1) submit

68. *See* FLA. ADMIN. CODE ANN. r. 1S-2.013(7), 2002 WL 1 FL ADC 1S-2.013 (emphasis added).

69. FLA. STAT. ANN. § 101.67(2).

70. United States v. Florida, No. TCA-80-1055 (N.D. Fla. Aug. 20, 1984) (order dissolving consent decree).

71. 42 U.S.C. §§ 1973cc–1973cc-26 (1976), *repealed by* Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924, 930 (1986) (current version at 42 U.S.C. §§ 1973ff–1973ff-6 (1994)). Notwithstanding Florida election officials' obedience to the State Department regulation, the current federal statutes governing overseas ballots do not include any requirement that states accept overseas absentee ballots arriving ten days after the election.

72. *See supra* notes 60–61 and accompanying text.

73. FLA. STAT. ANN. § 101.5614(8) (emphasis added).

a certified return within seven days that therefore cannot include any overseas ballots arriving between day seven and ten and be in violation of the Code's provisions regarding certification of "all ballots" and "official results"; or (2) wait to certify any return until after the ten days for receiving overseas ballots have passed and be in violation of the seven-day deadline. Judging by her actions in the presidential election, the current Secretary of State, Katherine Harris, believes that a county canvassing board should choose the first option, but that she should accept amended "certified" returns including the overseas ballots after the seven-day deadline.[74]

C. *The Procedures for Challenging Election Results in Florida*

Florida has had statutes allowing a candidate to challenge an election for a very long time.[75] These statutes have received a great deal of legislative attention in recent years, however, primarily because there have been substantial problems with fraud in Florida elections.[76] The Florida Legislature's amendments in 1989,[77] 1995,[78] and 1999[79] seem designed both to provide more of the procedure that should govern election challenges and to expand the right of a candidate to object.[80]

Apart from the section calling for an automatic recount, the Florida Code includes three procedures for challenging election results: a "protest"; a request for a manual recount; and an election "contest." The first two of these procedures—the "protest" and the request for a manual recount—are set forth in the same statute, Florida Code section 102.166. The third procedure, a "contest" proceeding, is described primarily in Florida Code section 102.168.

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74. On November 14, 2000, Secretary Harris announced her intention to certify the result of the election based on the returns already submitted as soon as the overseas ballots could be tabulated and certified. *See infra* note 411 and accompanying text.

75. The statute permitting a "contest" of an election has existed, albeit in different form, since 1845. *See* FLA. STAT. ANN. § 102.168 historical note (West 1982) (tracing statute to 1845 Fla. Laws ch. 38, art. 10, §§ 7, 8); *see also* Gore v. Harris, 772 So. 2d 1243, 1250 n.8 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). Likewise, the "protest" procedure has been in place since 1937. *See* FLA. STAT. ANN. § 102.166 historical note (tracing statute to Laws 1937, ch. 18405, § 9).

76. *See, e.g.*, *In re* Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for City of Miami, Florida, 707 So. 2d 1170, 1173–74 (Fla. Dist. Ct. App. 1998) (holding that legally appropriate remedy was to invalidate all absentee ballots where evidence supported determination that "massive absentee voter fraud" affected electoral process).

77. Voter Protection Act, ch. 89-348, sec. 15, § 102.166, 1989 Fla. Laws ch. 89-348 (current version at FLA. STAT. ANN. § 102.166 (West Supp. 2002)).

78. Act of May 2, 1995, ch. 95-147, sec. 602, § 102.168, 1995 Fla. Laws ch. 95-147 (current version at FLA. STAT. ANN. §§ 102.166, 102.168 (West Supp. 2002)).

79. Act of June 11, 1999, ch. 99-339, 1999 Fla. Laws ch. 99-339 (current version at FLA. STAT. ANN. §§ 102.166–.168, .171 (West Supp. 2002)).

80. *Compare, e.g.*, FLA. STAT. ANN. § 102.168 (West 1982), *with* FLA. STAT. ANN. § 102.168 (West Supp. 2001).

1. Protests and Requests for Manual Recounts Under Section 102.166

During the election controversy, the media, the attorneys, and even the courts blurred the line between a "protest" and a request for a manual recount.[81] There are, however, substantial differences between the two procedures, with respect to who may bring them,[82] when they must be brought,[83] and how Florida's various county canvassing boards are supposed to react to them.[84]

Subsection (1), authorizing the "protest" procedure, provides that "[a]ny candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest."[85] Subsection (2) goes on to state that any protest must be filed with the canvassing board either before the canvassing board certifies the results or within five days after midnight of the election date, whichever is later.[86] The form that a protest must take is provided by section 102.167.[87]

In contrast, subsection (4)(a), authorizing manual recounts, provides that "[a]ny candidate whose name appeared on the ballot, . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested."[88] Such a request for the manual recount has to be filed with the county canvassing board either prior to the canvassing board's certification or within seventy-two hours after midnight of the date the election was held, whichever occurs later.[89]

As this shows, a "protest" can be filed by a voter—the term "elector" as used in the Florida Code means a voter[90]—but a request for a manual recount cannot. Conversely, a political party can request a manual recount, but cannot file a "protest." The procedures are also different in that an eligible party could well have two days more to file a "protest" than that party would have to request a manual recount

81. In its December 8, 2000, decision ordering a statewide manual count of votes, for example, the Florida Supreme Court seemed to refer to Gore's initial request as a "protest." *See* Gore v. Harris, 772 So. 2d 1243, 1252 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

82. *Compare* FLA. STAT. ANN. § 102.166(1) (West Supp. 2001), *with id.* § 102.166(4)(a).

83. *Compare id.* § 102.166(2), *with id.* § 102.166(4)(b).

84. *Compare id.* § 102.166(3), *with id.* § 102.166(4)(c)–(d), (5).

85. *Id.* § 102.166(1).

86. *Id.* § 102.166(2).

87. *Id.* § 102.167.

88. *Id.* § 102.166(4)(a).

89. *Id.* § 102.166(4)(b).

90. *Id.* § 97.021(10) ("'Elector' is synonymous with the word 'voter' or 'qualified elector or voter,' except where the word is used to describe presidential electors.").

(depending on whether the alternative date, the board's certification, occurred outside the five days specified for the protest or the seventy-two hours specified for the recount request). Finally, a person filing a protest must suggest that the returns are "erroneous," although a person or party requesting a manual recount need only state "a reason" for making the request.

It appears that the Florida Legislature also intended that a county canvassing board's responses to a protest and a recount request would be different. The statute is not express on this point, but it seems that subsection (3), following as it does immediately upon the description of the protest procedure, was intended to address what the canvassing board is *required* to do in the event of a protest:

> (3) Before canvassing the returns of the election, the canvassing board *shall*:
> (a) When paper ballots are used, examine the tabulation of the paper ballots cast.
> (b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.
> (c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.[91]

As this section indicates, the canvassing board is required to take action in response to a protest, but the action does not appear to include checking any ballots other than paper ones for votes.[92]

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91. *Id.* § 102.166(3) (emphasis added).

92. As close analysis of this section reveals, and a variety of other sections of the Florida Code will confirm, Florida's election law is not particularly artfully drafted. With all respect to the difficulty of drafting perfect legislation on something as complex as voting procedures, which in Florida differ from county to county, the Code frequently raises as many questions as it answers. This section is such an example, inasmuch as one cannot be certain whether the direction to "examine the 'tabulation' of paper ballots" in subsection (a) means reevaluating who a voter voted for; or what ballots qualify as "paper ballots" subject to the examination; or whether subsections (2) and (3) dealing with voting machines and electronic devices are intended to be mutually exclusive with subsection (1). These questions might be more readily answered if the legislature had defined "tabulation," or even "paper ballots," but, notwithstanding, that there are three different "definitions" sections in the elections title, none of those sections defines either term. *See id.* § 97.021 (definitions for the "code"); *id.* § 101.292 (definitions for use in construing sections 101.292 through 101.295); *id.* § 101.5603 (definitions relating to the Electronic Voting Systems Act). The general definition section, section 97.021, does provide that

> (2) "Ballot" or "official ballot" when used in reference to:
> (b) "Paper ballots" means that printed sheet of paper containing the names of candidates, or a statement of proposed constitutional amendments or

In contrast, a canvassing board's response to a manual-recount request appears to be entirely discretionary, at least as an initial matter. Subsection (4)(c) of section 102.166 states simply that "[t]he county canvassing board *may* authorize a manual recount."[93] The statute does not provide any criteria for deciding when a recount request should be granted and when it should not.

If the canvassing board does decide to act, the procedures that must be followed are quite stringent and detailed. The recount must encompass at least three precincts and at least one percent of the total votes cast, and the board must permit the recount-requesting party to choose the three precincts.[94] Finally, "[i]f the manual recount indicates an error in the vote tabulation[95] which could affect the outcome of the election," the canvassing board "shall" pursue one of three options: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount *all* ballots."[96]

If the last option—a second manual recount, of *all* ballots, not just the one percent—is pursued, the canvassing board is required to appoint "as many counting teams of at least two [voters] as is necessary to manually recount the ballots."[97] Each counting team is required, "when possible," to have members of at least two political parties.[98] During the recount, "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the

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other questions or propositions submitted to the electorate at any election, on which sheet of paper an elector casts his or her vote.

Id. § 97.021(2)(b). However, this tells the reader only which part of a paper ballot to treat as a "ballot," not what ballots are to be considered "paper ballots" in the first place. It is as though the legislature decided that all who might care to be reading the election law would already know what a paper ballot is.

In voting procedure lingo, a "paper ballot" is generally considered to be a sheet on which one marks his or her choice of candidate that is then *hand-counted.* Richard Lacayo, *Is This Any Way To Vote?*, TIME, Nov. 27, 2000, at 54, 54–55. This popular definition is supported by Florida's description of what a "ballot" means when it is used in reference to "[e]lectronic or electromechanical devices:" "a ballot which is voted by the process of punching or marking with a marking device for tabulation by automatic tabulating equipment or data processing equipment," FLA. STAT. ANN. § 97.021(2)(c), but the free mixing of ballot labels and voting *methods* is certain to leave any reader confused.

93. FLA. STAT. ANN. § 102.166(4)(c) (emphasis added).

94. *Id.* § 102.166(4)(d).

95. It bears repeating that the term "tabulation" is not defined by the Florida Code, *see supra* note 92, so it is unclear whether the legislature intended "an error in the vote tabulation" to address any kind of error in how the ballots were counted, or only some kind of operational error by the counting machines, or, in the case of paper ballots, the people counting.

96. FLA. STAT. ANN. § 102.166(5) (emphasis added).

97. *Id.* § 102.166(7)(a).

98. *Id.*

county canvassing board for it to determine the voter's intent."[99] The recount operations must be open to the public.[100]

Importantly, both the protest and manual recount provisions appear to be available with respect to all elections in Florida: section 102.166 does not distinguish between elections for local, state, or federal elections. Subsection (1) permits a protest by "[a]ny candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy."[101] Subsection (4)(a) permits "[a]ny candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot" to file a request for a manual recount.[102]

Because the statute does not distinguish between different types of elections, it likewise does not address whether a candidate for statewide or federal office who protests or seeks a manual recount must do so in every county where the candidate appeared on the ballot. Subsection (1) states that the candidate "shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest."[103] Subsection (4)(a) states that the candidate "may file a written request with the county canvassing board for a manual recount."[104] Nothing further is said with regard to the locations in which protests or requests for manual recounts should be filed.

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99. *Id.* § 102.166(7)(b).

100. *Id.* § 102.166(6).

101. *Id.* § 102.166(1).

102. *Id.* § 102.166(4)(a).

103. *Id.* § 102.166(1). One might interpret the term "appropriate" in the protest subsection to suggest that the protest must be filed in all counties involved in the relevant election. An alternative interpretation is available, however: the word "appropriate" might refer back to the earlier phrase "being erroneous." In other words, the "appropriate" canvassing board is the one in which the protestor believes an error occurred. This would seem the better interpretation because, in contrast to requests for manual recounts, protests may be brought by voters, and it seems unlikely that the legislature would want to allow a voter in one county to claim error in counting by another county. Even so, the statute is not entirely clear on the point.

104. *Id.* § 102.166(4)(a). As with the provision regarding where to file protests, *see supra* note 85 and accompanying text, this language is subject to interpretation. One might argue that the reference to "the" canvassing board suggests that this statute is available only in races that do not extend beyond a single county. That interpretation would conflict, however, with the extremely broad language used to describe who may file a request for a manual recount: "[a]ny candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot." FLA. STAT. ANN. § 102.166(4)(a). This is especially true given the inclusion of political committees who support or oppose *issues*, which seem to contemplate statewide referenda.

2. Contest Proceedings Under Section 102.168

When a candidate invokes Florida's protest and recount-request procedures, those processes are carried out on a decentralized basis. County canvassing boards, and even two-member counting teams in the event a canvassing board decides to manually recount all ballots, review the tabulation of the ballots and ultimately make the decisions as to how the votes are counted. Theoretically, the judiciary is not involved.

The third procedure for challenging an election outcome under Florida law—the "contest" proceeding—is quite different. Section 102.168, entitled "Contest of election," provides that any candidate, voter, or taxpayer, "respectively,"[105] can contest the certification of election of any person (other than a member of the state legislature)[106] in the "circuit court."[107] If the complaint contests a county or local election, the circuit court is the court of that county, but if the election contested involves more than one county, the appropriate circuit court is that in Leon County, the county in which the state capital of Tallahassee is located.[108] The "proper party defendant" is the "canvassing board or election board," and the successful candidate is considered an indispensable party.[109] The complaint must be filed

> within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later.[110]

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105. *Id.* § 102.168(1). The term "respectively" appears in the statute, apparently indicating that if a candidate files a contest, then a voter or taxpayer cannot.

106. Section 102.171 provides that the jurisdiction to hear any contest of the election of a member of either of Florida's legislative houses is "vested in the applicable house," and that house "is the sole judge of the qualifications, elections, and returns of its members." *Id.* § 102.171.

107. *Id.* § 102.168(1).

108. *Id.* § 102.1685 (West 1982).

109. *Id.* § 102.168(4) (West Supp. 2001).

110. *Id.* § 102.168(2). There is an anomaly particularly worth noting about this timing provision. The procedure authorized involves contesting "the certification of election or nomination of any person to office." *Id.* § 102.168(1). In Florida, all elections of federal and state officers are "certified" by the State Elections Canvassing Commission (consisting of the Governor, the Secretary of State, and the Director of the Division of Elections). *See id.* § 102.111.

> Immediately after certification of *any* election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. . . . The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office.

Id. § 102.111(1) (emphasis added). Notwithstanding this fact—that it is the certification of the State Elections Canvassing Commission that is being contested, the deadline for contesting cues off of the actions of "the last county canvassing board

As amended in 1999, section 102.168(3) sets forth with considerable specificity the grounds on which an election contest may be based, which have to be set forth in the complaint:

> (a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.
> (b) Ineligibility of the successful candidate for the nomination or office in dispute.
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.
> (d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.
> (e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.[111]

The statute is considerably less specific about what is to happen after the complaint is filed. The defendant is given ten days after service to answer,[112] but, on the other hand, the contestant is "entitled to an *immediate* hearing."[113] Ultimately, the court to whom the contest is assigned is granted extremely broad discretion, both in hearing the case and in resolving it. The court is expressly authorized to limit the amount of time devoted to testimony, "with a view . . . to the circumstances of the matter and to the proximity of any succeeding primary

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empowered to canvass the returns certifies the results of the election being contested." Theoretically, then, if the State Elections Canvassing Commission did not certify the election until eleven days after the last county canvassing board certified the election results, the contestant would either have to file in anticipation of the statewide certification, before it was entered, or miss the deadline.

This confusion could be explained by assuming that the legislature was focused only on county elections in which the ultimate certification comes from the county canvassing board. The timing provision's very reference to the "last" county canvassing board to certify, however, makes it quite clear that the legislature had statewide, not just countywide, elections in mind. Given this legislative indication that it did intend statewide elections to be covered, its use of the certifications of county canvassing boards as the trigger for the contest deadline, and its identification of county canvassing boards and election boards, *id.* § 102.166(4)—both local entities—as the proper party defendants, it seems quite possible that the legislature intended the contest proceeding to be available to challenge not just the overall result in a statewide election but perhaps just the certification of a single county.

111. *Id.* § 102.168(3).

112. *Id.* § 102.168(6).

113. *Id.* § 102.168(7) (emphasis added).

or other election."[114] The court is also empowered to fashion whatever orders "he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct *any* alleged wrong, and to provide *any* relief appropriate under such circumstances."[115]

Other than directing the judge to consider "the circumstances of the matter" and "the proximity of any succeeding primary or other election," the contest statute does not provide any deadline for resolving the contest.[116] Nor does the statute provide specifically for appeals from the Leon County circuit court's decision.[117]

II. THE FEDERAL LAW GOVERNING PRESIDENTIAL ELECTIONS

If Florida had not had in place the law for requesting manual recounts and challenging election results, Al Gore's quest for the presidency certainly would have ended much sooner.[118] Florida law was not the only consideration, however, for there was a panoply of federal constitutional and statutory provisions governing presidential elections that the lawyers also needed to examine and take into account. This section explores that law in depth, focusing primarily on Article II of the Constitution and Title 3 of the United States Code.

A. *Constitutional Provisions Addressing Presidential Elections*

1. The Electoral College

The President of the United States is not elected by the popular vote of United States citizens, but by obtaining a majority of the votes of the presidential "electors."[119] Under Article II and the Twelfth Amendment to the Constitution, each state is allotted a number of electors equal to the number of senators and representatives it has

114. *Id.*
115. *Id.* § 102.168(8) (emphasis added).
116. *Id.* § 102.168(7).
117. *See id.* § 102.168.
118. Any possibility of a change in the outcome would then have had to rest on challenges based directly on the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, the federal Voting Rights Act, 42 U.S.C. §§ 1973–1973p (1994 & Supp. V 1999), or the Twelfth Amendment, U.S. CONST. amend. XII. There were lawsuits filed invoking such theories. *See, e.g.*, Complaint for Deprivation of Constitutional Rights Under Color of State Law, Dickens v. Florida, No. 4:00cv420-WS (N.D. Fla. filed Dec. 9, 2000) (alleging equal protection violation in treatment of African-American voters); Emergency Amended Complaint and Application for Injunctive and Declaratory Relief at 3–4 (filed Nov. 22, 2000) (alleging that Texas electors could not cast votes for the Bush-Cheney ticket because both Bush and Cheney were residents of Texas, and the Twelfth Amendment requires that electors vote for either a presidential candidate or vice presidential candidate from a state different from their own), Jones v. Bush, 122 F. Supp. 2d 713 (N.D. Tex.) (No. 300-CV2543-D), *aff'd*, 244 F.3d 134 (5th Cir. 2000).
119. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

been given,[120] the latter based on its population.[121] The electors are appointed by whatever method their state legislatures choose to adopt,[122] and, as a group, are commonly referred to as the "electoral college." The electors then meet in their respective states to select the President.[123]

The results of the electoral college voting in each state are sent to Washington, "sealed," to the President of the Senate.[124] When the results from each state are opened, in a joint session of both houses of Congress, any candidate who has received a majority of the electors' votes for President is named to the office.[125] If no candidate has received a majority of the votes, then the House of Representatives must convene immediately to choose the President from the three candidates with the most electoral votes.[126] In this House balloting, the votes are not cast by the representatives individually; each state delegation casts a single vote.[127] A majority of votes is necessary, and

120. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII.

121. U.S. CONST. amend. XIV, § 2. The Twenty-Third Amendment provides that the District of Columbia is allotted a number of electors equal to the number of senators and representatives it would have if it were a state, "but in no event more than the least populous [s]tate." U.S. CONST. amend. XXIII, § 1, cl. 1–2.

122. U.S. CONST. art. II, § 1, cl. 2. Although the procedures vary somewhat from state to state, the appointment of electors in every state follows from the results of a popular election. Most commonly, a state holds a popular election listing on the ballot the names of the various presidential candidates and then asks the party of the winning candidate to provide a list of electors who will cast their votes for that candidate. *See, e.g.*, Office of the Fed. Register: Nat'l Archives & Records Admin., *A Procedural Guide to the Electoral College*, http://www.nara.gov/fedreg/elctcoll/proced.html#states (April 14, 2002). Under this method, state law may or may not bind the electors to vote for the candidate who won the state, but even when the law does not bind the electors, the electors are unlikely to vote for another candidate because of loyalty to the party that named them. *See, e.g.*, Office of the Fed. Register: Nat'l Archives & Records Admin., *U.S. Electoral College: Frequently Asked Questions*, http://www.nara.gov/fedreg/elctcoll/faq.html#wrongvote (April 14, 2002). Some other states actually have their voters select the electors, who are identified on the ballot with a particular candidate. *See, e.g.*, Office of the Fed. Register: Nat'l Archives & Records Admin., *U.S. Electoral College: Frequently Asked Questions*, at http://www.nara.gov/fedreg/elctcoll/faq.html#selection (April 14, 2002).

123. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

124. *Id.*

125. U.S. CONST. amend. XII. The same procedure is followed for the election of the Vice President; the Twelfth Amendment dictates that the presidential electors vote separately for Vice President and send separate results to the Senate with respect to that race. *Id.* ("The Electors . . . shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President . . . ."). This provision for separate balloting for the two offices is the primary respect in which the Twelfth Amendment modified the Constitution. *Compare* U.S. CONST. art. II, § 1, cl. 3, *with* U.S. CONST. amend. XII. For a discussion of the difficulties in the second presidential election that led to the adoption of the amendment, see Ray v. Blair, 343 U.S. 214, 224 n.11 (1952).

126. U.S. CONST. amend. XII.

127. *Id.*

if a majority vote is not reached by the time the outgoing President's term has expired, the Vice President assumes the office.[128]

2. Congress's Limited Role in Regulating Presidential Elections

Although Article II and the Twelfth Amendment detail the manner in which Congress is to count the electoral votes from the states,[129] and speak at length about what Congress must do if the electoral college fails to produce a majority vote for the Presidency,[130] the Constitution otherwise assigns Congress a minimal role in presidential elections. The only other provision addressing Congress is Section 4 of Article II. That section empowers Congress to set the date on which the states appoint electors, what is now thought of as "Election Day," and the subsequent date on which the electors in each state meet to vote,[131] or the date of the "electoral college."[132]

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128. *Id.* As it does for the office of President, the Twelfth Amendment provides that the Vice President must be elected by a majority of electoral votes. *Id.* In the event that there is no majority candidate, then the Senate convenes immediately to select the Vice President from the top *two* candidates (in contrast to the top three candidates eligible for the Presidency in the House election). *Id.* Because the selection is limited to two candidates, and each Senator votes individually, including the outgoing Vice President in the event of a tie, a majority will necessarily be reached. Thus, if no candidate emerges victorious from the House, a Vice President will always be available to serve in the Presidency.

129. *See supra* notes 120–28 and accompanying text.

130. *See supra* notes 126–28 and accompanying text.

131. U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."). Because the Framers chose to use the term "Time" in the first clause, dealing with Election Day, and yet the term "Day" in the second clause, dealing with the date of the electoral college, and then repeated the term "Day" in the third clause, one could conclude that the Constitution requires only that the date of the electoral college be uniform throughout the United States. Whatever ambiguity the provision presents, however, has largely been rendered moot by the fact that Congress has by statute set an election day for appointment of the presidential electors, *see* 3 U.S.C. § 1 (Supp. V 1999), and the Supreme Court's decision in *Foster v. Love*, 522 U.S. 67 (1997). In *Foster*, Louisiana was, in effect, electing its members of Congress in October rather than on the November day specified by Congress for congressional elections, 3 U.S.C. §§ 1, 7, and the Court held that the statute required that all congressional elections take place on the same day throughout the United States. *Foster*, 522 U.S. at 71–72. The same presumably would be true of presidential elections.

This issue took on some importance in the November 2000 election because there were many who believed that Florida should cure the problem with the "butterfly ballot" in Palm Beach County by holding a revote in that county. *See, e.g.*, Complaint for Declaratory Relief, Fladell v. Palm Beach County Canvassing Bd., (Fla. Cir. Ct. filed Nov. 8, 2000) (No. CL-00-10965AN) (seeking revote based on the design of the presidential ballot). Democratic lawyers undoubtedly felt that, in light of *Foster*, the Supreme Court probably would not allow such a revote, on a different day, to take place.

132. Pursuant to this authority, Congress has set the Tuesday after the first Monday in November as "election day," 3 U.S.C. § 1, and the first Monday after the second Tuesday in December as the date of the "electoral college." 3 U.S.C. § 7. In 2000,

3. State Power Over the "Manner" by Which Electors Are Chosen: The "Electoral Appointments" Clause of Article II

Article II of the Constitution empowers Congress to set the dates for Election Day and the electoral college,[133] but the Constitution expressly leaves it to the states to decide on the method by which their own presidential electors will be chosen. Section 1 of Article II reads, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[134]

The Supreme Court has only infrequently addressed this constitutional provision lodging power in the states. During the nation's entire first century, the Court cited the provision only twice, and then only as support for more general arguments about state power[135] and an individual's right to vote.[136] In the last 115 years, the Court has paid somewhat more attention to the provision,[137] but for example, even through the 2000 election, the Court had never labeled the clause. To distinguish it here from the rest of Article II, Clause 2 of Section 1 of Article II will be called the "electoral appointments clause."[138]

The first case in which the Court examined the electoral appointments clause directly was *In re Green*,[139] in 1890. Green was disqualified from voting under Virginia law because he had been convicted of petty larceny.[140] After he voted in an election for both presidential electors and congressional candidates, he was convicted under state law of intentionally casting illegal votes.[141] The federal circuit court for the eastern district of Virginia then granted Green a writ of habeas corpus on the ground that the existence of a federal statute governing the same conduct deprived the state court of jurisdiction.[142]

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this meant that November 7 was Election Day, and December 18 was the date of the electoral college vote.

133. U.S. CONST. art. II, § 1, cl. 3. *See infra* notes 213–30 and accompanying text (discussing statutes enacted pursuant to this power).

134. U.S. CONST. art. II, § 1, cl. 2.

135. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 313–14 (1821) (reciting the provision in the course of recounting Virginia's argument that the Supreme Court could not review state court judgments).

136. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (using the clause to support the idea that voting is not a privilege or immunity of federal citizenship).

137. *See infra* notes 139–207 and accompanying text.

138. The Court has referred instead only to "Article II, section 1, clause 2." For ease of reference here, it will be called the "electoral appointments clause," but the reader should be aware that this is not a term of art beyond the Author's creation.

139. 134 U.S. 377 (1890).

140. *Id.* at 377.

141. *Id.*

142. *Id.* at 378.

The Supreme Court reversed, upholding Green's conviction.[143] The Court declined to decide whether the federal government had exclusive jurisdiction to regulate *congressional* elections,[144] but made it quite clear that the states, rather than the federal government, held the power to regulate *presidential* elections.[145] The Court observed that

> [t]he only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two houses of Congress, and the votes shall then be counted.[146]

According to the Court, Congress had recognized its limited role in presidential elections: it had exercised its power to set dates for the appointment of presidential electors and the vote of the electoral college, but had otherwise "left these matters to the control of the States."[147] The Court left little doubt that the states' power should be broadly construed, closing with a sweeping pronouncement that the states' power was "*unaffected* by anything in the Constitution and laws of the United States."[148]

Two years later, the Court undertook a more specific interpretation of the electoral appointments clause. In *McPherson v. Blacker*,[149] the Michigan Legislature had enacted a statute changing Michigan's method of appointing electors from an at-large system (in which every Michigan citizen voted for all the presidential electors) to a by-district system (in which voters would select only an elector for one of two at-large districts and an elector from their own congressional district).[150] A group nominated to be presidential electors asserted that the change violated the electoral appointments clause and the Fourteenth

143. *See id.* at 380.

144. *See id.* ("The question whether the State has concurrent power with the United States to punish fraudulent voting for representatives in Congress is not presented by the record before us. It may be that it has.") (citations omitted).

145. *See id.*

146. *Id.* at 379 (citing U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII).

147. *See id.* at 380.

148. *Id.* at 380 (dictum) (emphasis added). The Court's statement suggests that the states' exercise of power under the electoral method clause could not be considered subject to the Equal Protection or Due Process Clauses. Inasmuch as there was no issue in the case pertaining to the Constitution, the Court's suggestion that the state's power could not be affected by anything in the Constitution has to be considered a dictum. In any event, it was effectively discredited by the Court's later decision in *Williams v. Rhodes*, 393 U.S. 23 (1968), and subsequent cases. *See infra* notes 183–84 and accompanying text.

149. 146 U.S. 1 (1892).

150. *See id.* at 4–5.

and Fifteenth Amendments.[151] In the plaintiffs' view, the new system violated the electoral appointments clause because the clause called for "the State" to appoint electors, and that language meant that the State must appoint as a single "unit," rather than on a district-by-district basis, because a district-by-district system improperly delegated the appointment to the voters of the various districts.[152] The plaintiffs claimed that the statute violated the Fourteenth and Fifteenth Amendments because the new system deprived them of the right those amendments conferred to vote for *all* of the state's presidential electors.[153]

Before reaching the merits of the plaintiffs' claims,[154] the Court addressed the possibility that the case presented a nonjusticiable political question.[155] According to the Court, the defendants argued

> that all questions connected with the election of a presidential elector are political in their nature; that the [C]ourt has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers,

151. *See id.* at 24. The plaintiffs also attacked the Michigan statute on the ground that the date it set for the electors' vote conflicted with the federal statute setting the date on which the electoral college was to meet. *Id.* at 24, 40–41. The Court acknowledged that there was a conflict between the dates but found the conflict insufficient to invalidate the substantive provisions of the law. *See id.* at 41.

152. *Id.* at 24–25 ("[I]t is argued that the appointment of electors by districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.").

153. *See id.* at 38 (suggesting that the plaintiffs argued that the Fourteenth and Fifteenth Amendments conferred the right to vote in presidential elections as it existed at the time the Amendments were adopted).

154. The Michigan Supreme Court had upheld the law against the plaintiff's constitutional challenges. *See id.* at 23.

155. The political question doctrine requires that federal courts decline to hear claims that are more appropriate for resolution by the political branches—the legislative and executive branches—than the judiciary. The doctrine has its roots in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), when Justice John Marshall wrote that, out of respect for its coordinate branches, the judiciary should not undertake review of acts within the executive branch's discretion. *Id.* at 166 ("[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."). The modern formulation of the doctrine appears in *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker v. Carr*, Justice Brennan surveyed the Court's prior holdings with respect to political questions and concluded that the Court should deem a claim a nonjusticiable political question whenever there was

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 216.

> the legislature in joint convention, and the governor, or, finally, the Congress.[156]

Judging by the curtness of the Court's response, the argument gave the justices little pause. The Court noted simply that "the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution."[157] There was no further analysis of the political question argument, only language suggesting that the Court felt its legitimacy threatened by the very assertion that the question was inappropriate for the judiciary: "we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."[158]

The Court went on to reject the plaintiffs' federal constitutional claims and uphold the Michigan statute. Chief Justice Fuller observed that the Constitution did not confer any rights to elect the president upon the "people" of the states, or the "citizens" of the states, but vested complete power in the state legislatures to choose the method by which their states' presidential electors were appointed.[159] Because this meant that the legislature could actually choose to appoint the electors itself, "it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by [citizen] vote, it must necessarily be by general ticket and not by districts."[160]

As it had done in *In re Green*, the Court emphasized the breadth and exclusiveness of the states' power.[161] The *McPherson* Court, however, went even further than the Court had in *In re Green*. Chief Justice Fuller located the electoral appointment power very specifically in the state legislatures, not only to the exclusion of the federal constitution and federal law, as *In re Green* had done, but also to the exclusion of the state *constitutions*. The Court wrote:

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156. *McPherson*, 146 U.S. at 23.

157. *Id.*

158. *Id.* at 24.

159. *Id.* at 25. The Framers chose to do so, according to Fuller, to "reconcile[ ] [their] contrariety of views" because the members of the Constitutional Convention could not agree on a uniform method, and at least five different methods for electing the president—ranging from direct election by the people (not through the state in any way) to selection by electors appointed by the state legislatures—had been voted down. *Id.* at 28.

160. *Id.* at 25.

161. *See, e.g., id.* at 35.

> Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, *so framed that Congressional and Federal influence might be excluded.*

Id. (emphasis added).

> The clause under consideration does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned *in the absence of any provision in the state constitution in that regard.* Hence the insertion of those words, *while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself.[162]

In other words, if the electoral appointments clause had not included the reference specifically to the legislature, then a state legislature's power of choosing a method for appointing electors would have been subject to its own constitution, but because the Framers included the reference to the "legislature," the legislature's power could not be altered even by the state's constitution.

Thus, as of 1892, the Court had clarified several aspects of the electoral appointments clause. First, individuals did not have any right to vote in presidential elections.[163] Second, the Constitution allowed Congress to set the dates for Election Day and the electoral college, but otherwise conferred upon each state legislature the power to regulate the appointment of presidential electors by its state.[164] Third, the power held by state legislatures was not subject to alteration by the federal constitution, federal law, or even the state's own constitution.[165]

Forty years later, however, when the Court again took up the electoral appointments clause, it began a lengthy shift away from *In re Green*'s and *McPherson*'s sacrosanct view of the states' power under Article II. In *Burroughs v. United States*,[166] the defendants were charged with violating the Federal Corrupt Practices Act, which required them to report contributions they had accepted on behalf of a

162. *Id.* at 25 (emphasis added) (dictum). This statement should be regarded as a dictum. The opinion does not indicate that the plaintiffs ever claimed that the *Michigan* Constitution conferred upon them a right to vote for all (not just some) of the presidential electors that should be regarded as superior to the legislatively dictated, by-district method. Their argument appeared to turn instead upon the language of the electoral appointments clause itself, which refers to the "state's" appointment of electors. Further, because the Court made the statement in the course of emphasizing that "[t]he State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established," and that "[t]he legislative power is the supreme authority except as limited by the constitution of the State," *id.*, it appears that the Court made the statement solely to emphasize the *degree* of error in the plaintiffs' argument. In other words, the Court seemed to be saying only that the state legislature would have had the power to choose this method of appointment even *without* the words, "in such manner as the legislature thereof may direct," and the inclusion of the phrase made that *especially* so. *See id.*

163. *See supra* note 159 and accompanying text.

164. *See supra* notes 145–47 and accompanying text.

165. *See supra* notes 148, 162 and accompanying text.

166. 290 U.S. 534 (1934).

political committee for the purpose of influencing a presidential or vice presidential election in two or more states.[167] The defendants argued that the Act exceeded Congress's power, because the electoral appointments clause conferred on the states exclusive power to regulate the appointment of presidential electors, and Congress's only role was to set the dates for the election and the electoral college.[168] The Supreme Court disagreed:

> So narrow a view of the powers of Congress in respect of the matter is without warrant.
>
> The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.[169]

Given this language, the Court might later have limited federal power to electoral activities spanning two or more states. The Court chose instead to advance further into state territory, with a series of cases subjecting the states' electoral appointment power to a variety of other constitutional provisions.

The first such case was *Ray v. Blair*.[170] In *Ray*, the plaintiff sought to appear on the ballot in Alabama's presidential primary as a Democratic elector.[171] If a person acted as a party elector on the ballot, Alabama law allowed the party itself to dictate the elector's qualifications.[172] The state Democratic Party chair refused to certify the plaintiff as an elector because the plaintiff would not sign a pledge that he would support whomever was eventually nominated by the national party.[173] The plaintiff's mandamus petition asserted that requiring the pledge violated the Twelfth Amendment, which the plaintiff claimed prevented a state from binding electors to any particular presidential choice, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[174]

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167. *Id.* at 540–41 (citing 2 U.S.C. §§ 241–48 (1994)).

168. *See id.* at 544.

169. *Id.* at 544–45.

170. 343 U.S. 214 (1952).

171. *See id.* at 215.

172. *Id.* at 217 & n.2 (quoting 17 ALA. CODE tit. 17, § 347 (1940) (current version at 2001 Ala. Acts 1131)).

173. *Id.* at 215.

174. *Id.* at 215–16; *see id.* at 226 n.14.

The Court upheld the state-sanctioned party rule as a proper exercise of Alabama's power under the electoral appointments clause.[175] In so ruling, however, the Court did not hesitate to consider the merits of the constitutional challenges to the state law. The Court held that the Twelfth Amendment did not require that an elector have discretion on how to vote, but it explored the issue fully.[176] The Court likewise reached the merits of the due process and equal protection claims, rejecting them only because "the requirement of this pledge . . . is reasonably related to a legitimate legislative objective—namely, to protect the party system by protecting the party from a fraudulent invasion by candidates who will not support the party."[177] No mention was made of *In re Green*'s statement that the states' electoral appointment power was "*unaffected by* anything in the Constitution and laws of the United States."[178]

The Court's next decision firmly established that there would be substantial federal oversight of the states' electoral appointments power. In *Williams v. Rhodes*,[179] the Socialist Labor Party and the Ohio American Independent Party (a group without formal party structure organized around the presidential campaign of George Wallace) charged that several provisions of Ohio election law violated the Equal Protection Clause.[180] The law automatically placed on the presidential general election ballot the candidate of any party that had received at least ten percent of the vote in the last gubernatorial election, but required any other party to submit, ninety days before the primary election, a petition signed by more than fifteen percent of the total people who had voted in the previous gubernatorial election.[181]

As Michigan had argued in *McPherson*, Ohio argued in *Williams* that the case presented a political question the Court could not de-

175. *See id.* at 226–27 & n.14, 231.

176. *Id.* at 231. Justice Reed acknowledged that the Framers seemed to have designed the electoral college to be an elite group most qualified to select the best candidate, but the justices found more persuasive the historical practice of electors committing themselves in advance: "[t]his long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary." *Id.* at 229–30. The Court found, alternatively, that even if the Twelfth Amendment required that an elector have complete discretion in voting, it would not have been violated under these circumstances because Alabama law allowed Blair a procedure for becoming an independent elector, *i.e.*, one not associated with the Democratic Party. *Id.* at 228–30 (citing 17 ALA. CODE tit. 17, § 145 (1940) (current version at 2001 Ala. Acts 1131)).

177. *Id.* at 226 n.14.

178. *See In re Green*, 134 U.S. 377, 380 (1890) (dictum) (emphasis added); *see also supra* note 148 and accompanying text.

179. 393 U.S. 23 (1968).

180. *See id.* at 26.

181. *Id.* at 24–26 (citing OHIO REV. CODE ANN. § 3517.01) (Anderson 1953)); *id.* at 52 (noting ninety-day provision).

cide. The Court reacted much the way it had in *McPherson*, dismissing the suggestion without analysis:

> Ohio's claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times. It was rejected by the Court unanimously in 1892 in the case of *McPherson v. Blacker* . . . and more recently it has been squarely rejected in *Baker v. Carr*, . . . and in *Wesberry v. Sanders* . . . . Other cases to the same effect need not now be cited. These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena.[182]

Ohio argued to no avail that its power under the electoral appointments clause was not subject to other constitutional constraints. Justice Black acknowledged that "this section does grant extensive power to the States to pass laws regulating the selection of electors," but observed that every constitutional grant of power, to the States or to Congress, is subject to the other specific provisions of the Constitution.[183] "Obviously," Black wrote, "we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the [Equal Protection Clause]."[184]

Five members of the Court then held that the Ohio election law violated the Equal Protection Clause.[185] The Court found that the Ohio law burdened the rights to vote, and to associate for advancement of their political beliefs, of those who would support a third party.[186] As a result, the law would be subjected to a form of strict scrutiny:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[187]

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182. *Id.* at 28 (citing McPherson v. Blacker, 146 U.S. 1, 23–24 (1892); Baker v. Carr, 369 U.S. 186, 208–37 (1962); Wesberry v. Sanders, 376 U.S. 1, 5–7 (1964)).

183. *Id.* at 28–29.

184. *Id.* at 29.

185. *See id.* at 34. Chief Justice Warren and Justices White and Stewart all wrote dissents, and Justice Harlan concurred in the judgment because he believed the case should be decided under the First Amendment as incorporated through the Fourteenth Amendment's Due Process Clause. *See id.* at 41 (Harlan, J., concurring in result); *id.* at 48 (Stewart, J., dissenting); *id.* at 61 (White, J., dissenting); *id.* at 63 (Warren, C.J., dissenting).

186. *See id.* at 30.

187. *Id.* at 31 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

In the Court's view, none of the interests asserted by Ohio was sufficiently compelling to justify the burden on voters' rights.[188]

Since *Williams v. Rhodes* subjected the states' electoral appointments power to scrutiny under other constitutional provisions, the Court has struck down every state law regulating the appointment of presidential electors that has come before it.[189] This consistency in result, however, belies some confusion—and considerable disagreement—within the Court as to its analytical approach in such cases. In *Williams*, for example, five members of the Court concluded that the law violated the Equal Protection Clause,[190] but Justice Harlan concurred only in the judgment because he believed the case should rest on First Amendment analysis under the Due Process Clause, and held serious doubt whether equal protection doctrine "may properly be applied to adjudicate disputes involving the mere procedure by which the President is selected, as that process is governed by profoundly different principles."[191] Other members of the Court appear to have shared that doubt, because in all four of the presidential election cases that followed *Williams*, the Court relied on the First Amendment and not on the Equal Protection Clause, even when the latter was argued.[192] The Court may simply have decided not to reach any equal

188. *See id.* at 31–33. Ohio asserted its interests in: (1) promoting a two-party system to encourage compromise and political stability; (2) ensuring that the ultimate winner would not be a plurality candidate that did not truly represent the majority of Ohio voters; (3) ensuring that the "disaffected" voters would have a primary in which to choose the best dissenter; and (4) avoiding a confusing ballot situation. *See id.* The Court did not quarrel with several of these interests in the abstract but concluded that the law did not serve them well enough to pass constitutional muster. With respect to the first interest, the Court found that the law did not merely promote a two-party system but granted Republicans and Democrats a monopoly hold; the second interest was valid but still presented too great a burden on the voters' associational rights; the third interest was a "desirable goal," but the law advanced it ineffectively because voters cannot even know whether they are "disaffected" until after the major parties hold primaries and develop platforms, at which point the law makes it too late for the disaffected to respond in primaries; and the fourth interest was not served because Ohio's own history shows that a multitude of groups do not emerge to crowd the ballot even under a markedly less restrictive system, such as requiring the signatures of only one percent of the voters. *See id.* at 32–33.

189. *See* Tashjian v. Republican Party, 479 U.S. 208, 225 (1986); Anderson v. Celebrezze, 460 U.S. 780, 806 (1983); Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 126 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975). The Court has also allowed Congress to set a uniform age of eighteen for voters in federal elections, including that for President, albeit in a decision that did not result in an opinion of the Court or even a plurality opinion. *See* Oregon v. Mitchell, 400 U.S. 112, 124 (1970) (opinion of Black, J.); *id.* at 142 (opinion of Douglas, J.); *id.* at 242 (opinion of Brennan, J.).

190. *See Williams*, 393 U.S. at 31–33.

191. *Id.* at 43 (Harlan, J., concurring in judgment).

192. *See Tashjian*, 479 U.S. at 225; *Anderson*, 460 U.S. at 806; *La Follette*, 450 U.S. at 126; *Cousins*, 419 U.S. at 489–91. It is not as though the Court in these cases indicated that there was something improper about applying the Equal Protection Clause. To the contrary, in at least one case, the Court seemed comfortable enough relying for support on equal protection cases in other election contexts:

protection claim, given its roughly contemporaneous decisions that a violation of the Equal Protection Clause requires discriminatory *intent* by the state,[193] an element not required to show a First Amendment violation, but it never actually explained its shift over to the First Amendment.

Similarly, the Court has been less than steadfast with respect to the standard of review in the presidential election cases. In *Williams v. Rhodes*, the Court unabashedly required that the state show that the law served a "compelling" state interest,[194] suggesting a form of strict scrutiny.[195] The majority did so even though *Ray v. Blair* had applied only a rational basis standard,[196] and in the face of vigorous dissents by Justice Stewart and Chief Justice Warren asserting that considerably more deference was due the states because of the power expressly granted the states by the electoral appointments clause.[197] Justice Stewart argued that "[i]n view of the broad leeway specifically given

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> In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests.

Anderson, 460 U.S. at 787 n.7 (citing *Williams*, 393 U.S. at 23; Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 182–83 (1979)).

193. *See* McCleskey v. Kemp, 481 U.S. 279, 298 (1987); Washington v. Davis, 426 U.S. 229, 238–39 (1976).

194. *Williams*, 393 U.S. at 31.

195. The Court's three-tiered level of scrutiny in equal protection cases is now well established: "strict scrutiny," applied to laws that intentionally classify on the basis of race, national origin, religion, or resident alien status, requires a state to show that the law is "narrowly tailored" to serve a "compelling" state interest; "intermediate scrutiny," applied to laws that intentionally classify on the basis of gender, requires a state to show that the law bears a "substantial relationship" to an "important" state interest; and "rational basis review," applied to most other legal classifications, requires a state to show only that the law is "rationally related" to a "legitimate" state interest. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 638–44 (6th ed. 2000).

196. *See supra* note 177 and accompanying text (quoting Ray v. Blair, 343 U.S. 214, 226 n.14 (rejecting the due process and equal protection claims because "the requirement of this pledge . . . is reasonably related to a legitimate legislative objective")).

197. *See Williams*, 393 U.S. at 48, 60–61 (Stewart, J., dissenting); *id.* at 63, 68 (Warren, C.J., dissenting). Justice Stewart was troubled by the stringency of the standard applied by the Court, *see id.* at 51–55 (Stewart, J., dissenting), and Chief Justice Warren complained that the decision was inconsistent with the deference shown the states in reapportionment and school desegregation cases. In those cases, the Court had typically given the states an opportunity to correct any constitutional defects, had often "tolerated a temporary dilution of voting rights to protect the legitimate interests of the States in fashioning their own election laws," and "ha[d] even counseled abstention where First Amendment rights ha[d] been allegedly infringed by state legislation." *Id.* at 66–67 (Warren, C.J., dissenting) (citing Lucas v. Forty-Fourth Gen.

the States by Art. II, § 1, of the Constitution," the Court should strike the law "'only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.'"[198]

In the two cases that immediately followed *Williams*, the Court continued to require a "compelling" interest from the states.[199] Very soon thereafter, however, the Court unmistakably distanced itself from the strict scrutiny of the previous cases, and adopted a much more malleable balancing test. In *Anderson v. Celebrezze*,[200] the Court wrote:

> [A] court must resolve [a constitutional] challenge [to election laws] by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of these interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[201]

Eliminating any doubt that this standard was intended to be more lenient than the compelling interest standard the Court had previously used, Justice Stevens employed several lower-level scrutiny watchwords[202] in making a decidedly deferential point: "the State's

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Assembly, 377 U.S. 713, 739 (1964); Davis v. Mann, 377 U.S. 678, 692–93 (1964); Harrison v. NAACP, 360 U.S. 167 (1959)).

198. *Id.* at 51 (Stewart, J., dissenting) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)). Chief Justice Warren also believed that the Court did not sufficiently consider that the state was acting pursuant to a power expressly given it by the Constitution:

> The result achieved here is not compatible with . . . our traditional concern, manifested in both the reapportionment and school desegregation cases, for preserving the properly exercised powers of the States in our federal system. Moreover, in none of these analogous areas did we deal with an express constitutional delegation of power to the States. That delegation is unequivocal here.

Id. at 68 (Warren, C.J., dissenting).

199. Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981) (referring to *Cousins*' finding that the state's interest was not compelling and deeming that holding controlling); Cousins v. Wigoda, 419 U.S. 477, 489 (1975) ("[T]he 'subordinating interest of the State must be compelling . . .' to justify the injunction's abridgement of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association." (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958)).

200. 460 U.S. 780 (1983).

201. *Id.* at 789.

202. NOWAK & ROTUNDA, *supra* note 195, § 14.3, at 638–44 (setting forth the three levels of scrutiny and the terms of art associated with each). It is especially worth noting that Justice Stevens is the author of *Anderson v. Celebrezze*, inasmuch as he has on several occasions expressed his disdain for the limiting nature of the Court's

important regulatory interests are generally sufficient to justify *reasonable*, nondiscriminatory restrictions."[203] Three years later, in *Tashjian v. Republican Party*,[204] the Court reiterated the balancing test from *Anderson*,[205] and found the state law unconstitutional on the ground that the state's interests were "insubstantial"[206] and not "legitimate."[207]

Thus, at the time that *Bush v. Gore* arose, the Court's electoral appointments law was in a state of some confusion. There was precedent on the issues from virtually every angle, none of which had been expressly overruled. *In re Green* and *McPherson* stood for a sort of absolute state legislative power under the electoral appointments clause, although *Williams* and the cases that followed had fairly well settled that the Supreme Court would impose at least the federal Constitution on that exercise of power. *Williams* had applied the Equal Protection Clause to state presidential election law, but in later cases the Court had apparently become somewhat skittish about applying the Equal Protection Clause, presumably in light of its discriminatory intent requirement, and had chosen to confine itself to First Amendment analysis. Finally, the Court had set forth competing standards for addressing the states' election laws, suggesting that it was uncertain of the best way to resolve conflicts between the express delegation of power to the states and the remainder of the Constitution.

B. *Federal Statutes Addressing Presidential Elections*

The federal statutes governing presidential elections appear in chapter 1 of Title 3 of the United States Code, the title denominated simply, "The President."[208] Because, as described above, the Constitution assigns Congress a limited role in regulating presidential elections,[209] there are essentially only three categories of such statutes in

three-tiered approach. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting). In *Adarand*, Justice Stevens wrote:

> [I]f the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause.

Id.

203. *Anderson*, 460 U.S. at 788 (emphasis added).
204. 479 U.S. 208 (1986).
205. *Id.* at 214.
206. *Id.* at 225.
207. *See id.* at 219.
208. 3 U.S.C. §§ 1–21 (1994).
209. *See supra* notes 129–32 and accompanying text.

chapter 1: (1) those setting the dates for Election Day and the electoral college;[210] (2) those directing the states how to certify to Congress their chosen electors and the electors' votes;[211] and (3) those governing the process by which Congress counts the electoral votes.[212] These statutes will be addressed below, by category. All of the referenced sections appear in chapter 1 of Title 3.

1. The Dates of Election Day and the Electoral College

Pursuant to its constitutional authority under Article II,[213] Congress has fixed by statute the date on which the states appoint their presidential electors, and the date of the electoral college. Under § 1, each state must appoint its electors on the Tuesday after the first Monday in November in every fourth year.[214] Under § 7, the electors across the country vote on the first Monday after the second Wednesday in December.[215] In 2000, this meant that Election Day was November 7, and December 18 was the date of the electoral college vote.

Two federal statutes provide for unusual contingencies that may transpire between Election Day and the date on which the electoral college is to meet. Under § 2, "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."[216] Under § 4, "[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote."[217] Both of these statutes were enacted in 1845, along with § 1, which establishes federal Election Day.[218] To appreciate the precise meaning of §§ 2 and 4, it is necessary to explore the history behind the 1845 act of which they were a part.

In 1844, several members of Congress had become concerned that many elections—both congressional and presidential—had been

210. *See* 3 U.S.C. §§ 1–2. Section 3 merely codifies the constitutional provision that the number of electors in each state shall be equal to the number of senators and representatives that state is allotted. U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 3.

211. 3 U.S.C. §§ 6, 8–14.

212. 3 U.S.C. §§ 5, 15–18. The three remaining statutes in chapter 1 include two sections addressing events subsequent to the selection of the President and a definitions section. Section 19 describes the line of succession in the event there is a vacancy in the offices of both President and Vice President, *id.* § 19; § 20 describes the evidence necessary to conclude that a President has resigned or refused to serve, *id.* § 20; and § 21 provides that the chapter's references to "states" include the District of Columbia, *id.* § 21.

213. *See* U.S. CONST. art. II, § 1, cl. 4.

214. 3 U.S.C. § 1.

215. *Id.* § 7.

216. *Id.* § 2.

217. *Id.* § 4.

218. *See* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721; *see also* CONG. GLOBE, 28th Cong., 2d Sess. 149 (1845) (final passage in House of Representatives).

tainted by fraud.[219] With respect to presidential elections, many objected particularly to the practice known as "pipe-laying"—*i.e.*, parties arranging for people to vote in one state and then moving them so they could vote in another[220]—a practice that was possible because the states held their elections on different days. To eliminate the practice, Representative Alexander Duncan of Ohio invoked Congress's constitutional power to set the date on which states will appoint their electors, and introduced a bill establishing a uniform federal election day, what eventually would become § 1.[221] Duncan's bill easily passed the House,[222] but the Senate tabled it after several senators voiced fears that the states would have insufficient time to adapt their voting procedures before the 1844 presidential election.[223]

In 1845, convinced that the legislation could pass the House again, and would now present no problem of states having time to change their election procedures, Representative Duncan reintroduced the bill.[224] Duncan was insistent that the bill be taken up immediately, by the Committee of the Whole, rather than referred to committee.[225] A few legislators balked, stating that even after voting for the bill the previous session, they now believed it would benefit from further consideration by a standing committee.[226] Duncan persisted, however, and so several legislators addressed from the floor certain problems that they anticipated and suggested amendments. Representative Elmer suggested the language that ultimately became § 4: allowing states to later appoint electors "who may be prevented by sickness or any other cause from fulfilling the duties of their appointment."[227] And Representative Hale explained why the type of language eventually appearing in § 2—permitting the legislature to act if the people voted and yet "fail[ed] to make a choice"—was necessary. As it was reported in the *Congressional Globe*,

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219. *See, e.g.*, CONG. GLOBE, 28th Cong., 1st Sess. 357–58 (1844) (Rep. Duncan) (identifying a number of congressional elections in which fraud allegedly had occurred); *id.* at 634 (Rep. Hamlin) (referring to "frauds which had heretofore been perpetrated upon the elections").

220. *See, e.g.*, *id.* at 728 (Sen. Atherton) (alleging that "men had been transferred from one part of the Union to another, in order to vote[, a] system which had now received the technical name of *pipe-laying*"); *id.* (Sen. Allen) (referring to "frauds committed by the transfer of voters from the adjoining States to the State of Ohio"); *id.* at 358 (Rep. Duncan) (complaining of "the importation of voters from one State to another, and from one county to another").

221. *See id.* at 170 (introducing "a bill to establish a uniform time for holding the elections of members of the House of Representatives and of the electors of President and Vice President of the United States throughout all the States of this Union").

222. *See id.* at 635 (noting that the results in the House were "yeas 141, nays 34").

223. *See id.* at 727–29.

224. *See* CONG. GLOBE, 28th Cong., 2d Sess. 9 (1845).

225. *See id.*

226. *See id.* (remarks of Reps. Elmer, Barnard, and Hamlin).

227. *Id.* at 14.

> MR. HALE desired to make a suggestion to the gentleman from Ohio [Mr. Duncan], and the other friends of this bill. This bill appeared to him be framed on the idea that the choice of electors would always be perfected in one day; now it appeared to him that the bill was deficient, as it made no provision for an election, if the people should fail to elect on the day designated. *In the State which he had the honor to represent, a majority of all the votes cast was required to elect the electors of President and Vice President of the United States, and it might so happen that no choice might be made.* If such a law had existed in some of the larger States, that would have been the position in which they would have been placed. In the large State of New York, for instance, a majority of all the votes given was not given for the electors, of whom, by the laws of that State, choice was made. He threw out these suggestions for the gentleman of Ohio, that provision might be made for such a contingency.[228]

Representative Duncan then amended the bill to include the provisions that became §§ 2 and 4,[229] and it was that amended version that ultimately passed both houses.[230]

From this history, it is obvious that Congress intended § 4 to allow states to provide for substitute electors in the event an appointed elector becomes ill or otherwise disabled from participating in the electoral college. And § 2 was intended to cover situations in which a state requires a majority vote, but the election does not produce a majority outcome: in those situations, the legislature can provide for a runoff or some other method of appointment. There is no indication that § 2 was designed to address situations where a dispute arises merely over *which candidate* has garnered a majority of the votes.

2. State Certification of the Electors and Their Votes

As soon as possible after Election Day, the state executive is required to certify the electors who have been appointed. Under § 6, it is "the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment," to certify the electors' appointment to the Archivist of the United States and the electors themselves.[231]

After the electoral college votes in mid-December, the electors are to create six certificates of their votes for President and Vice President, and attach to each a copy of the certified list of electors provided

228. *Id.* (emphasis added).

229. *See id.* at 21; *see also id.* at 31 (Rep. Hale acknowledging that the bill had been amended to remedy his concerns regarding states that require majority votes).

230. *See id.* at 35 (House passage); *id.* at 149 (House debate noting Senate passage with a grammatical change); *id.* (final House passage).

231. 3 U.S.C. § 6 (1994).

them by the state executive.[232] Each of these "electoral certificates" is then to be sealed[233] and sent to the President of the Senate, the secretary of state of the state, the Archivist of the United States, and the federal district judge in the district where the electoral college vote took place.[234] In the event the officials in Washington do not receive the certificate by the fourth Wednesday in December, §§ 12 through 14 provide a series of steps by which the federal officials retrieve it from the secretary of state and the federal district judge.[235]

3. The Process for Counting the Electoral Votes

Some of the statutes in chapter 1 survive in virtually their original form from the Act of March 1, 1792.[236] Others date, as described above, from the Act of January 23, 1845.[237] Much of chapter 1, however—in particular, the provisions currently governing the process of counting electoral votes—comes from the Act of February 3, 1887, also known as the Electoral Count Act.[238] Thus, to appreciate the basis of the current law, it is important first to examine the origin of the 1887 Act: the 1876 presidential election.

a. The Current Law's Roots in the 1876 Presidential Election

In the presidential election of 1876, Democratic candidate Samuel Tilden faced Republican candidate Rutherford B. Hayes.[239] The morning after Election Day, most newspapers, and even Hayes himself, were convinced that Tilden had won.[240] The Democratic Party, however, sent two telegrams to the *New York Times*, asking the paper to provide its estimate of the electoral votes for Tilden, specifically in Florida, Louisiana, and South Carolina.[241] This caused the predominantly Republican political writers at the *Times* to focus on the electo-

232. *See id.* § 9.

233. *See id.* § 10.

234. *Id.* § 11. The Secretary of State and the Archivist each receive two copies. One is to be held "subject to the order of the President of the Senate," and the other is to be "preserved . . . for one year and shall be a part of the public records of his office and shall be open to public inspection." *Id.* Interestingly, this law does not state whether the state secretaries of state or the Archivist has an obligation to open the records for public inspection immediately, even before the opening of the electoral certificates on the congressional floor.

235. *See id.* §§ 12–14.

236. Ch. 8, 1 Stat. 239 (1792) (codified as amended at 3 U.S.C. §§ 3, 9, 10, 14).

237. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721; *see also supra* notes 219–30 and accompanying text (describing the Act's legislative history).

238. Electoral Count Act, ch. 90, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5–7, 15–18).

239. ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 129 (1994).

240. *Id.* at 131; *see also* LAWRENCE D. LONGLEY & NEAL R. PEIRCE, The Electoral College Primer 2000, at 28 (1999).

241. HARDAWAY, *supra* note 239, at 131; LONGLEY & PEIRCE, *supra* note 240, at 28–29.

ral votes, and once they did so, they realized that if Hayes carried the three states the Democrats apparently were worried about, Hayes would win the electoral college by a single vote.[242]

The managing editor of the *Times* then contacted the Republican Party chair, and set in motion a campaign to skew the certified results in the Republicans' favor.[243] On the public front, both the *Times* and the Republican Party immediately announced that Hayes had won.[244] Behind the scenes, the certifying election boards—which were in all three states Republican—met in executive session, and began disqualifying just enough votes to produce Republican majorities.[245]

The Democrats responded to the boards' certifications of Republican electors by sending to Washington competing electoral slates.[246] Ultimately, Congress received three slates of electors from Florida, and two slates each from Louisiana, South Carolina, and Oregon.[247] Because neither the Constitution nor any federal law addressed the situation, Congress was at a loss as to how to handle the counting.[248] Eventually, Congress agreed to allow a commission consisting of ten members of Congress—evenly divided between House and Senate, and Republican and Democrat—and five Supreme Court justices—two chosen by Democrats and two chosen by Republicans, the fifth to be mutually agreed upon—to evaluate the electoral submissions.[249] Given the events of 2000, the result can only be described as eerily ironic. The mutually agreed upon justice, who was Republican but thought nonetheless to be objective,[250] cast the tie-breaking vote with respect to all four of the disputed states in favor of the Republican slates.[251]

The ten years following the 1876 election brought a multitude of proposals to prevent a recurrence of the controversy. Some proposed amending the Constitution to provide for direct election of the President.[252] At the other end of the spectrum were proposals to retain the

242. HARDAWAY, *supra* note 239, at 131; *see also* LONGLEY & PEIRCE, *supra* note 240, at 28.

243. HARDAWAY, *supra* note 239, at 131–32.

244. *Id.* at 132.

245. *Id.*; *see also* LONGLEY & PEIRCE, *supra* note 240, at 29.

246. HARDAWAY, *supra* note 239, at 132, 134; *see also* LONGLEY & PEIRCE, *supra* note 240, at 29.

247. HARDAWAY, *supra* note 239, at 132, 134.

248. *See id.* at 133.

249. *Id.* at 134. Under the joint resolution that created the commission, its decisions could be overruled if five senators and congressmen objected and the houses took concurrent action. *Id.* at 133–34.

250. *Id.* at 134; LONGLEY & PEIRCE, *supra* note 240, at 29. The justice eventually named, Joseph Bradley, had struck several provisions of major Republican legislation. HARDAWAY, *supra* note 239, at 134.

251. HARDAWAY, *supra* note 239, at 134; LONGLEY & PEIRCE, *supra* note 240, at 29.

252. *See, e.g.*, H.R.J. Res. 156, 48th Cong. (1884); 15 CONG. REC. 1024 (1884) (describing Rep. Townshend's introduction of H.R.J. Res. 156, "proposing an amend-

electoral college but allow the judiciary to resolve any disputes over which electors should be allowed to vote.[253] In the end, the electoral college remained essentially intact, and Congress remained in charge of counting the electoral votes, but Congress enacted the excruciatingly detailed legislation described below to guide it in resolving disputes over electoral slates.[254]

In evaluating this legislation, and its ultimate prominence in the 2000 election, it bears special note that throughout its consideration, the sponsoring legislators expressed their belief that electoral disputes were for Congress, not the federal courts, to resolve. As early as 1879, when some of the first versions of the legislation were proposed, the House Select Committee on the State of the Law Respecting Ascertainment and Declaration of Result of Election of President and Vice President wrote:

> If both houses must count the votes, it follows that both houses must determine what votes are to be counted. The Constitution declares that "each State shall appoint its electors in such manner as its legislature shall direct," but the questions, Who are the electors appointed? Are they duly qualified? Have they acted according to law? are not answered in the Constitution, and in the absence of any statute, *the determination of such questions belongs of necessity to the tribunal appointed by the Constitution to ascertain and declare the result of the election, to wit, the Congress.*[255]

More importantly, in 1886, in the House report accompanying the bill that ultimately became the law, the Select Committee on the Election of President and Vice President wrote: "The power to determine [what electoral slate is valid] rests with the two houses, and *there is no other constitutional tribunal.* Congress prescribes the details of the

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ment to the Constitution . . . in relation to the election of President and Vice-President, providing for their election by a majority of the voters of the people and the abolition of the electoral college"); *see also* H.R. REP. NO. 46-347, at 1, 2 (1880) (accompanying H.R.J. Res. 223, 46th Cong. (1880)) (describing resolution as providing for people to appoint electors by direct vote and in proportion to the popular vote in each state).

253. *See, e.g.*, H.R. REP. NO. 47-1207, at 7 (1882) (accompanying H. R. 5569) ("[B]eyond the mere enumeration of unchallenged votes, every question arising in a disputed Presidential election requires the interpretation and application of existing law to fact conditions. This power, the Constitution, when it vested the 'judicial power of the United States' in the courts, devolved on the judiciary exclusively.").

254. *See infra* notes 262–81 and accompanying text.

255. H.R. REP. NO. 46-6, at 2 (1879) (emphasis added); *see also* 15 CONG. REC. 5102 (1884) (Rep. Pryor) (examining electoral votes, "the labor of this body becomes authoritative, investigatory, conclusive, and binding upon all parties thereto, being a political forum of the last resort"); 15 CONG. REC. 5079 (1884) (responding to suggestion that judiciary should resolve electoral disputes, "I propose that this question shall be determined by the men who have the constitutional power to determine it, and *by nobody else*") (emphasis added).

trial and what kind of evidence shall be received, and how the *final judgment* shall be rendered."[256]

b. *The Basic Procedure for Counting the Electoral Votes*

Under § 15 of Title 3, Congress must be in session on January 6 after an election, and meet in joint session in the House of Representatives at 1:00 p.m. that day for the opening of the electoral certificates.[257] The President of the Senate (the sitting Vice President) presides, and he opens in alphabetical order by state, "all the certificates and papers purporting to be certificates of the electoral votes." The President of the Senate then hands all those certificates to one of four "tellers,"[258] who read the certificates.[259] After each state certificate is read in this fashion, the President of the Senate calls for objections.[260] To be accepted, any objection must be in writing, state the grounds for objections "clearly and concisely, without argument," and be signed by at least one member of each house.[261]

c. *The Procedure for Handling Objections and Competing Slates of Electors*

In the event of such an objection to an electoral certificate, the two houses immediately part ways to consider the objection, without moving on to the next state's vote.[262] In the sessions that follow, the houses may each debate the objection, but each member may speak to the objection for only five minutes and not more than once.[263] At the end of two hours of debate, the presiding officer is required to "put the main question without further debate."[264]

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256. H.R. REP. NO. 49-1638, at 2 (1886) (emphasis added).

257. 3 U.S.C. § 15 (1994). Notably, Congress has changed the January 6 date, for a single election, three times in recent years. *See* Act of Oct. 11, 1996, Pub. L. No. 104-296, 110 Stat. 3558 (changing the date to January 9, 1997); Act of Nov. 9, 1998, Pub. L. No. 100-646, 102 Stat. 3341 (changing the date to January 4, 1989); Act of Oct. 9, 1984, Pub. L. No. 98-456, 98 Stat. 1748 (changing the date to January 7, 1985).

258. Two tellers are appointed by the Senate and two by the House. *See* 3 U.S.C. § 15.

259. *Id.* § 15. Even the seating is prescribed by statute. *Id.* § 16.

260. *Id.* § 15.

261. *Id.*

262. *Id.*

263. *Id.* § 17.

264. *Id.* When the joint session has broken up to consider an objection, the objection does not necessarily have to be addressed immediately; the law allows either house to recess "not beyond the next calendar day, Sundays excepted, at the hour of 10 o'clock in the forenoon," unless the electoral vote counting has gone more than five days, in which event no recesses are allowed. *See id.* § 16. It is hard to imagine how the electoral vote counting could extend more than five days unless there were objections to several states' electoral votes because the law does not allow any discussion during the electoral vote counting other than questions on a motion by either house to withdraw. *See id.* § 18.

Section 15, the statute governing this objection process, contemplates, as an initial matter, two different situations.[265] The first is a situation in which only one electoral certificate is received from a state, but there is nonetheless a question as to its validity. The second is a situation in which more than one electoral certificate has been received.

In the first situation, in which Congress has received only one electoral certificate meeting the requirements above, § 15 provides:

> no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.[266]

In other words, a certificate submitted by electors who have been recognized and certified by the state executive, as described above,[267] must be treated as valid in its entirety unless both houses of Congress concurrently decide that all or some of the votes recorded on the certificate should not be counted because they were not "regularly given."[268]

In the second situation, in which more than one electoral certificate from a state has been submitted, the guidelines for Congress's decision are markedly more complicated.[269] Indeed, the procedures are

265. *See infra* notes 266–81 and accompanying text.

266. 3 U.S.C. §§ 5, 6.

267. *See supra* note 231 and accompanying text.

268. The statute does not define what a "regularly given" vote is, but the legislative history suggests that Congress was addressing the potential for some irregularity to occur when a state's electors meet to vote, ranging from the state college voting on a date other than the one set by Congress, to an elector having sold his or her vote, to an elector refusing to vote for a candidate to which he or she was bound, to an elector voting for a candidate ineligible to be President. 18 CONG. REC. 52 (1886) (statement of Rep. Adams) ("The title of the electors may be valid, and yet their votes may be invalid, and the words 'regularly given' referred not to the title of the electors themselves, but to the validity of their votes after they have been regularly elected."); *see also* H.R. REP. NO. 47-1207, at 6 (1882) (accompanying earlier bill) (describing elections in which Georgia and Wisconsin electors failed to vote on the day prescribed by law); 15 CONG. REC. 5101 (1884) (remarks of Rep. Pryor on earlier bill) (observing that a vote might be invalid because it is not "free, unbought, undeceived, and cast by one entitled to vote, and for one entitled to receive a vote"). Also unclear from Title 3 is what happens if only one electoral certificate has been received from a state, but the electors named as voting in the certificate have not been certified by the state executive under § 6, or by any other authority under § 5. *See infra* note 275 and accompanying text (describing the potential for a state to set forth a procedure by which the judiciary or some other authority certifies the electors).

269. As an initial matter, the Code does not make clear whether the houses withdraw to consider an objection (or objections) to the first purported certificate, decide that objection, and then return to the joint session only to hear the next certificate from the same state read, and an objection (or objections) made to that one as well. Section 15 provides, in relevant part:

sufficiently complicated that it is necessary to quote the relevant passage from § 15 and identify separately the various clauses that provide Congress its direction. The last two sentences of § 15, with their five clauses identified by bracketed numbers, read as follows:

> [1] If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made . . . ; [2] but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; [3] and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, [4] unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. [5] But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.[270]

> Two tellers . . . shall be handed, as they are opened by the President of the senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they appear from the said certificates . . . . Upon such reading of *any such* certificate or paper, the President of the Senate shall call for objections, if any . . . . When all objections so made to *any* vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision . . . .

3 U.S.C. § 15 (emphasis added). This language unmistakably contemplates that when the houses separate, the houses will take all *objections* to a single certificate with them for debate, but the consistent use of the singular of "certificate" and "paper" makes it seem as though the houses are to consider only one *certificate* at a time. As a practical matter, this might not make much difference, because one might expect that the action on one certificate would effectively resolve the objections to the others, but that outcome certainly is not assured.

270. 3 U.S.C. § 15.

With the clauses so identified, it is relatively easy to see that the statute contemplates three primary scenarios when there are two or more electoral certificates purporting to be the proper certificates from a single state. In the first scenario, addressed by clause [1], one certificate is unquestionably the result of "the determination mentioned in section 5," and Congress is required to accept it, provided the votes reflected in it were "regularly given."[271] In the second scenario, addressed by clause [2], each of two or more state authorities has claimed that it is the tribunal lawfully entitled to make the final determination under § 5 as to who are the rightful electors. In this situation, clause [2] directs each house of Congress to determine which authority is the tribunal "authorized by [the state's] law" to have made the final determination, and if both houses agree on the tribunal, count the votes cast by the electors approved by that tribunal, provided the votes were "regularly given." In the third scenario, addressed by clause [3], either the state has not provided for any final determination of electors that would qualify under § 5, or, for some reason, neither certificate can be considered the product of such a determination. In this situation, clause [3] directs Congress simply to determine which certificate reflects the votes of electors appointed "in accordance with the laws of the state" and count those votes, provided they were "lawfully" cast.[272]

Clauses [2] and [3], by their terms, suggest that the two houses of Congress might disagree in reaching a conclusion under those clauses:[273] both clauses require "concurrent" decisions by both houses,

271. It is important to observe the distinction the statute draws between disputes over who are the proper electors, on the one hand, and whether those electors' votes are lawful, on the other. In the first two clauses, for example, that distinction is reflected within the clause itself by the reference to "regularly given" votes. *Id.*; *see supra* note 268.

272. *See supra* note 270 and accompanying text. While it is clear from the statute's language that Congress intended to draw a distinction between who are the proper electors and which votes have been "lawfully" cast, what is less clear is how Congress should *act* if it decides which certificate reflects the properly appointed electors but believes that a vote or votes in the certificate were somehow not lawfully cast. Undoubtedly, if that problem arose in a situation where the electors were approved under clause [3], the language immediately following clause [3] would apply: "unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State." 3 U.S.C. § 15. Most likely, even though Congress tacked this language on to the very end of the entire sentence and separated it from clause [3] by only a comma, when the other clauses were separated by semi-colons, Congress intended it to apply to decisions under the first two clauses as well. Otherwise, Congress might choose a slate of electors under clauses [1] or [2], but have no direction on how to handle a challenge not to the electors, but to the electors' votes themselves.

273. As described, both clauses expressly require Congress to evaluate state law: clause [2] requires Congress to decide which tribunal is the proper one under state law to make the final determination under § 5, and clause [3] requires Congress to decide which group of electors has been appointed in accordance with state law. *See supra* note 272 and accompanying text.

"acting separately." In the event that both houses do not agree, clause [5] provides the method for breaking the tie. The votes cast by the electors certified by the state executive are to be honored.

Clause [4] addresses a situation in which Congress has decided which group of electors should be approved, but there remains a question as to whether certain of the electors' votes have been "regularly given." In that situation, the statute directs Congress to count the votes in the certificate of the approved electors unless both houses agree that particular votes should not be counted. This is essentially the same way Congress is directed to handle a situation where only one certificate has been received from a state, but there is some challenge to the votes within the certificate, as described above.[274]

Because, as just described, clause [1] of § 15 requires Congress to honor an electoral slate that is the product of a "determination" under § 5, it is critical to understand that section completely. Section 5 reads as follows:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on such day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[275]

If one translates the date references into modern terminology, the statute becomes easier to understand. In short, it means that if a state puts in place prior to Election Day ("the day fixed for the appointment of the electors") a judicial or other method for finally determining any controversy or contest concerning the electors, and a "final determination" is reached by that method at least six days prior to the electoral college ("the time fixed for the meeting of the electors"), then that final determination is "conclusive," and "shall govern in the counting of electoral votes . . . , so far as the ascertainment of the electors of such State is concerned."

At a minimum, this means that if Congress receives votes from competing slates of electors, then it must honor the slate of electors resulting from use of the method the state had adopted prior to Election Day, provided that there was a "final determination" pursuant to that method by six days prior to the meeting of the electoral college. The statute leaves two questions unanswered, however. First, what

274. *See supra* note 268 and accompanying text.
275. 3 U.S.C. § 5.

happens if the state has adopted a method of "final determination," but that method is not *completed* by six days before the electoral college? Second, what does it mean that the product of a final determination "shall be conclusive," especially given that this phrase appears in addition to the phrase, "and shall govern in the counting of the electoral votes"?[276]

With respect to the first question posed by § 5—what happens if the state's method of "final determination" does not reach fruition—§ 15 itself provides the answer. As described above, § 15 contemplates three scenarios: one in which a final determination has indisputably been made, one in which there is a question about which state authority is the proper tribunal to make the "final determination," and one in which, for whatever reason, neither electoral certificate can be considered the result of a § 5 determination. Recall that clause [3] operates as a sort of catch-all provision, broad enough to deal with a state that either has no procedure in place or does not complete its process: "in such case of more than one return or paper purporting to be a return from a State, *if there shall have been no such determination of the question in the State aforesaid*, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State."[277] In effect, Congress is left to evaluate state law itself and decide which electors were appointed more in accordance with that law.

The second question—what it means to say that the product of a "final determination" of electors is "conclusive"—is somewhat more difficult to answer. One interpretation would be that the term "conclusive" is merely synonymous with the phrase that follows it: "and shall govern in the counting of the electoral votes." In other words, the product of a "final determination" bears an irrebuttable presumption of validity in the event two or more electoral certificates are submitted, and § 5 is intended only to address a situation in which there are competing electoral slates. Another interpretation would be that "conclusive" means that the product of a "final determination" is completely insulated from challenge by Congress, at least to the ex-

276. One would of course welcome case law that might help to answer these questions. At the time *Bush v. Gore* arose, however, no court had ever addressed either statute. As a result, one must turn to the traditional sources of statutory interpretation: the statute's relationship to other statutes and any legislative history that is available. *See* Muscarello v. United States, 524 U.S. 125, 132–39 (1998) (examining legislative history and other statutory sections for purpose of determining the meaning of the word "carry" in criminal statute); Bailey v. United States, 516 U.S. 137, 145, 147 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.").

277. 3 U.S.C. § 15.

tent of the electors who cast the votes (as opposed to the issue of whether those votes were "regularly given").[278]

It seems highly likely that the second interpretation is the proper one. Generally one must assume that if Congress chose to include two phrases describing the outcome in the event of a determination under § 5—*i.e.*, "shall be conclusive" and "shall govern in the counting of the electoral votes"—it intended some unique meaning for each phrase.[279]

Moreover, in the final congressional report before the adoption of §§ 5 and 15, Congress made clear its belief that if only one electoral certificate were submitted by a state, then Congress should not question whether the electors were validly appointed. As the House Select Committee on the Election of President and Vice President wrote: "The majority of the committee were of opinion that where there was but a single return from a State the two houses should not have the power to reject the vote of the State."[280] For this reason, the House Committee included an amendment to the provision that ultimately became § 15 (section 4 of Senate Bill 9) that expressly required Congress to honor an electoral certificate that had been certified by the executive when only one certificate had been received from a state.[281] Hence, § 5's reference to the "conclusiveness" of a slate appointed pursuant to a final "judicial" or "other" method most likely embodies the same concept when the electors are certified not by the *executive* of a state, but by its *judiciary*. In other words, when only one electoral certificate has been submitted by a state, and it is certified by the executive, *section 15* requires Congress to accept that slate of electors; and when only one electoral certificate has been submitted by a state, and it is certified not by the executive under § 6, but by the judiciary or other authority pursuant to a § 5 "final determination," then *section 5's* reference to "conclusiveness" requires Congress to accept that slate, whether there are competing slates or only one.

However complex these procedures under §§ 15 and 5 may seem, one fact clearly emerges: Congress thought it critical to establish rules of decision for evaluating electoral certificates but wanted to ensure that in *no* case would a state end up with *no vote at all* in the counting. In the event only one slate of electors, certified by the executive, is submitted, § 15 requires that Congress honor the votes of that slate (at

278. There is no reason to believe that § 5 would insulate an electoral certificate from a challenge based on whether the votes given by the electors were "regularly given." Section 5 itself makes clear that the "final determination" would be conclusive only "so far as the *ascertainment of the electors appointed* by such State is concerned." 3 U.S.C. § 5 (emphasis added).

279. *Bailey*, 516 U.S. at 145 ("'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting.'") (quoting Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994)).

280. H.R. REP. NO. 49-1638, at 1 (1886) (report to accompany S. 9).

281. *See id.*

least to the extent the votes were "regularly given," *i.e.*, were not in some respect illegal *votes*). In the event only one slate of electors, certified by the judiciary or other authority empowered to make a final determination, is submitted, § 5 requires that Congress honor the votes of that slate (subject to the same provision concerning the nature of the votes). In the event that multiple slates of electors, certified by whomever, are submitted, § 15 sets forth a variety of guidelines as to which slate should be chosen and directs Congress to honor any slate on which the houses of Congress can agree but ultimately also includes a tiebreaker: the slate certified by the executive wins.

It is surely safe to imagine that very few attorneys in the country were familiar with all this law at the time the 2000 election controversy arose. There were certainly election law specialists, but one would have been hard pressed to find a *presidential* election law specialist. So when the election ended in a dead heat, the question became which of the two teams' attorneys would become the first to master the law and marshal it to its candidate's advantage. The next Part of this Article—relating the intricacies of the court battles in Florida and the federal courts—is designed to answer that question.

PART TWO: THE RESOLUTION OF THE 2000 PRESIDENTIAL ELECTION

After retracting his concession to Bush in the early morning of November 8, Gore went to bed for the first time in forty-eight hours.[282] At 4:00 a.m., however, most of the significant members of his campaign team met to assemble an initial strategy.[283] Because of reports by Gore political strategists that the election would be very close in twenty states, the Democratic Party's general counsel, Joseph Sandler, and other DNC lawyers had collected summaries of recount laws and procedures from those states prior to the election.[284] Having done so, Sandler told the group assembled on November 8 that the automatic recount meant that they could expect a day or two to be spent canvassing, or formally tallying the votes, and another day or two spent running the ballots back through the counting machines.[285] At that point, Sandler said, the losing candidate could challenge the results.[286] By the end of the day, Gore's top strategists and dozens of volunteers had left Nashville for Florida.[287]

282. Kevin Sack, *In Desperate Florida Fight, Gore's Hard Strategic Calls*, N.Y. TIMES, Dec. 15, 2000, at A1.

283. *Id.*; DEADLOCK, *supra* note 1, at 55–57.

284. Sack, *supra* note 282.

285. DEADLOCK, *supra* note 1, at 56.

286. *Id.*

287. Sack, *supra* note 282; DEADLOCK, *supra* note 1, at 57, 72.

The automatic recount was proceeding, with the press watching every move. The Associated Press had agency reporters in all of Florida's sixty-seven counties and was reporting the results as they were announced by the counties.[288] The trend of the counting seemed to favor Gore,[289] but even more notably, many of the counties were reporting substantially different totals.

In Pinellas County, the automatic recount produced 400 additional votes for Gore.[290] The Pinellas Supervisor of Elections explained that a clerk apparently had overlooked some ballots on election night.[291] In Palm Beach County, the automatic recount produced 859 additional votes, 751 for Gore and 108 votes for Bush.[292] The Palm Beach Elections Supervisor, Theresa LePore, attributed 391 of the newly found votes to a precinct that was not counted because the person originally running the ballots through the card reader had activated the "clear" button rather than the "set" button.[293] LePore was unable to account for the retrieval of the other 468 votes, other than to say that she understood that other counties had also recovered lost votes when they performed the machine recount.[294] Indeed, eventually *fifty-five* of the counties reported different total numbers of votes: forty-four counties reported greater totals, eleven reported lower totals, and only twelve stayed the same.[295]

I. THE REQUESTS FOR MANUAL RECOUNTS IN VOLUSIA, PALM BEACH, BROWARD, AND MIAMI-DADE COUNTIES

A. *The Decision on Where To File: Isolated (Democratic?) Counties or Statewide*

While the automatic recount moved forward, the Gore team turned its attention to what it might do in the event that the margin did not swing in Gore's favor. The lawyers and strategists concluded that any requests for manual counts had to be made within seventy-two hours of the election.[296] Concerned that the seventy-two hours would expire

288. *See* R.W. Apple, Jr., *Democrats Widen Attack—Recount Seems To Erode Bush's Edge*, N.Y. TIMES, Nov. 10, 2000, at A1.

289. *Id.* (referencing an Associated Press survey that found that with sixty-six of sixty-seven counties counted, all but Republican-dominated Seminole County, the margin had been cut to 229 votes).

290. Don Van Natta, Jr., *Democrats Tell of Problems at the Polls Across Florida*, N.Y. TIMES, Nov. 10, 2000, at A26.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Richard Perez-Peña, *One County Is Puzzling over a Mystery Involving 218 Votes*, N.Y. TIMES, Nov. 27, 2000, at A15.

296. Gore's team drew this conclusion apparently in spite of the Florida law's requirement that such requests be filed either prior to the canvassing board's certification or within 72 hours after midnight of the date the election was held, whichever occurs *later*, *see* FLA. STAT. ANN. § 102.166(4)(b) (West Supp. 2001), and the fact that

on Friday, November 10, which was the state's holiday for Veterans' Day, they aimed for a decision by Thursday and began focusing almost immediately on where to file the requests.[297]

Because the Democrats had experienced problems with Volusia and Palm Beach during the voting and subsequent tally, the first counties that came to mind were those.[298] Volusia had experienced serious trouble with its machines on election night, when a computer glitch subtracted 16,000 votes from Gore and from Nader, added 2800 to Bush, and conferred 9888 on the Socialist Workers' Party candidate.[299] In Palm Beach, a variety of events had called the results into question. In the early hours of the morning, when the network calls were going back and forth and the votes from most other counties were in, Palm Beach still had 100,000 votes left to count.[300] Pat Buchanan was reported to have garnered 3407 votes in the staunchly Democratic county, well over three times as many as he received in any other county in Florida,[301] and many claimed that those were votes for Gore that were mistakenly cast due to the "butterfly ballot" design.[302] Palm Beach County had also reported a very large number of "overvotes," in which a ballot reflects more than one selection for a candidate,[303] and "undervotes," in which a ballot reflects no choice at all for a candidate.[304]

With some reticence, Gore Campaign Chair Daley and former Secretary of State Warren Christopher (who had become Gore's spokesperson on Florida)[305] approved filing requests in those two

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the counties could not have *properly* certified the vote without the overseas ballots and before the automatic recount was complete. *See supra* notes 72–74 and accompanying text.

297. DEADLOCK, *supra* note 1, at 77.

298. *Id.* at 78; *see also* Sack, *supra* note 282.

299. Van Natta, Jr., *supra* note 290; DEADLOCK, *supra* note 1, at 42.

300. DEADLOCK, *supra* note 1, at 46.

301. Don Van Natta, Jr. & Dana Canedy, *Florida Democrats Say Ballot's Design Hurt Gore*, N.Y. TIMES, Nov. 9, 2000, at A1. Buchanan's second best showing was in Pinellas County, where his campaign was headquartered. *Id.* In Miami-Dade and Broward Counties, both of which had more votes cast on Election Night, he had received only 561 and 789 votes, respectively. *Id.*

302. *See* Complaint for Declaratory Relief, *supra* note 131; Class Action Complaint for Violation of Civil Rights, Horowitz v. LePore, No. CL-00-10970-AG (Fla. Cir. Ct. filed Nov. 9, 2000); Complaint for Declaratory Judgment, Elkin v. LePore, No. CL-00-10988-AE (Fla. Cir. Ct. filed Nov. 9, 2000); Complaint, Rogers v. Elections Canvassing Comm'n, No. CL-00-10922-AF (Fla. Cir. Ct. filed Nov. 9, 2000); Class Action Complaint for Violation of Civil Rights, Gibbs v. Palm Beach County Canvassing Bd., No. CL-00-11000AH (Fla. Cir. Ct. filed Nov. 9, 2000); Emergency Motion for Injunctive Relief, Miller v. Harris, No. 00-9004-CIV (S.D. Fla. filed Nov. 8, 2000).

303. Van Natta, Jr. & Canedy, *supra* note 301 (reporting Palm Beach County administrator statement that there were 19,000 overvotes).

304. *See* Dexter Filkins, *Local Officials Say System Failed on Election Day*, N.Y. TIMES, Nov. 11, 2000, at A11 (reporting 11,000 undervotes in Palm Beach County).

305. *See* Sack, *supra* note 282. Daley and Carter Eskew, another of Gore's top advisors, had made the decision to ask for Christopher's help without even first alerting Gore. They awoke Christopher at 3:30 a.m. Pacific time on the morning after

counties.[306] Lawyers with the campaign then suggested that Gore also consider asking for recounts in Miami-Dade and Broward Counties.[307] Like Palm Beach County, both Miami-Dade and Broward used punch card ballots and had large numbers of undervotes, and perhaps most importantly, both counties were Democratic strongholds.[308] Daley and Christopher, already concerned about the negative public reaction that Gore was going to receive for prolonging the election, resisted at first.[309] On Thursday, however, the Gore campaign sought manual recounts in all four counties.[310] At that time, the state had not released the official results of the automatic recount,[311] but it was reported that Bush led by 327 votes.[312]

Democratic strategists have said since that they gave little thought to requesting manual recounts in every Florida county.[313] Some members of the team knew from experience that most recounts produce little change, but when the automatic recount began reducing Bush's margin considerably, it seemed that seeking a count of more ballots rather than fewer was likely to produce the biggest net change for Gore.[314] Even so, a statewide request seemed out of the question, for several reasons. First, a statewide hand count had never been done in a presidential race, and Florida law did not have any provision specifically allowing for it.[315] Second, they were already concerned about appearing indiscriminate to the public in requesting a recount in *four* counties; it seemed inconceivable to press for what would inevitably be an even more protracted and burdensome process.[316] Third, they did not have enough legal manpower to cover manual counts all over

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Election Day, and he was on a plane to Nashville within three hours. *Id.*; *see also* DEADLOCK, *supra* note 1, at 79.

306. DEADLOCK, *supra* note 1, at 78.

307. *Id.*

308. *Id.*

309. *Id.* at 78–79; *see also* Sack, *supra* note 282.

310. Apple, Jr., *supra* note 288; *see also* DEADLOCK, *supra* note 1, at 79; David Firestone, *Democrats' Eyes on Recounts and Courts*, N.Y. TIMES, Nov. 11, 2000, at A1.

311. The Florida Division of Elections released numbers on Saturday, November 11, showing that Bush led by 961 votes after the automatic machine recount. NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS 274 (2001).

312. Sack, *supra* note 282.

313. *Id.*

314. DEADLOCK, *supra* note 1, at 77.

315. *Id.*

316. David Barstow & Adam Nagourney, *Gore's Failure To Ask for Manual Statewide Recount May Have Been Critical Mistake*, N.Y. TIMES, Dec. 13, 2000, at A23; Sack, *supra* note 282; *see also* DEADLOCK, *supra* note 1, at 78.

the state.[317] Finally, they were uncertain whether the other counties would produce the best, or even positive, results.[318]

B. *Initial Reactions to the Requests: Secretary of State Harris's Warning, the Canvassing Boards' Approvals, and the Bush Team's Federal Lawsuit*

On Thursday, November 9, the same day Gore filed the requests for manual recounts, Secretary of State Katherine Harris invoked the seven-day certification deadline[319] in sections 102.111 and 102.112.[320] She announced that it was up to the individual counties whether they would conduct manual counts, but if the results were to be included in the final certification, the counties would have to complete the counts by Tuesday, November 14.[321] She stated that her figures would remain unofficial until that date, when all the counties had reported.[322] She added that the winner would not be known until after November 17, because overseas absentee ballots arriving through that date would have to be counted and added to the counties' totals.[323]

The four counties in which the requests for manual recounts were made reacted differently. In Volusia, the county with the fewest ballots cast, the canvassing board quickly agreed to count manually the entire county's ballots, beginning at 8:00 a.m. on Saturday, November 11.[324] The county apparently believed it had authority to count all the ballots, because the manual recount law, section 102.166(4)(d), permitted the canvassing board to manually count *at least* one percent of the ballots.[325] In Palm Beach and Broward Counties, the canvassing

317. Barstow & Nagourney, *supra* note 316; Sack, *supra* note 282; *see also* DEADLOCK, *supra* note 1, at 78.

318. Sack, *supra* note 282 (quoting top Gore aide as saying, "We had to keep our focus on where our biggest return was, and we couldn't stretch our resources.").

319. Apple, Jr., *supra* note 288.

320. *See supra* notes 65–66 and accompanying text.

321. Apple, Jr., *supra* note 288.

322. *Id.*

323. *Id.*

324. Frank Bruni, *G.O.P. Considers Trying for Injunction To Halt Manual Recounts*, N.Y. TIMES, Nov. 11, 2000, at A1.

325. Complaint, McDermott v. Harris, No. CV-00-2700, at 1–3 (Fla. Cir. Ct. filed Nov. 12, 2000); *see also supra* note 94 and accompanying text. The *New York Times* reported that the Volusia County Canvassing Board decided to count the entire county because it had received a request from the Republican Party as well as the Democratic Party. Van Natta, Jr., *supra* note 290. The Volusia County Supervisor of Elections, Deanie Lowe, states that this is not true: the County received a request only from the Democrats and decided to count all of the county simply because there had been the computer error on election night and the board wanted the public to feel completely comfortable with the result. Telephone Interview with Deanie Lowe, Supervisor of Elections, Volusia County, Fla. (Aug. 2, 2001). Further, the complaint cited above and filed by the canvassing board itself states that the canvassing board granted the Democratic request and does not mention any Republican request. Complaint, *supra*, at 2.

boards agreed to count one percent of the ballots,[326] the minimum required by section 102.166(4)(d),[327] beginning on Saturday and Monday mornings, respectively.[328] In Miami-Dade County, the canvassing board agreed only to consider the request on Tuesday morning, November 14.[329]

The counties' decisions on the recount requests prompted the Bush team to act. On Friday, November 10, 2000, the Bush campaign filed, on behalf of Governor Bush and several Florida residents within and outside the counties requested to count, the first lawsuit brought by either campaign.[330] Suing all four canvassing boards that Gore had asked for a manual recount, Bush complained that section 102.166(4), and the actions the canvassing boards had taken in reliance on it, violated the plaintiffs' rights under the Equal Protection Clause, the First Amendment, and the Due Process Clause.[331]

The statute, the plaintiffs asserted, unconstitutionally allowed for manual counts in some counties and not others, provided no standards to guide the counties in deciding whether to undertake a manual recount, and provided no standards to guide the counties as to how they should evaluate the ballots, which in turn allowed for partial indentations to be counted in one county and not another.[332] The voting plaintiffs claimed that the statute and the boards' actions were subject to strict scrutiny, because their "fundamental right to vote" was at issue.[333] The relief sought was expansive: removal of all Florida cases involving the election; an order that the counties cease all manual re-

326. *See* Bruni, *supra* note 324.

327. *See supra* note 94 and accompanying text.

328. Bruni, *supra* note 324.

329. Firestone, *supra* note 310.

330. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 31, ¶ 31, at 7–8. A spate of lawsuits had already been filed by Palm Beach County citizens complaining of the butterfly ballot, and at least one complaint had been filed by an African-American that he had been discriminated against on account of his race because his precinct had required picture identification before he could vote. *See supra* note 302 (listing the original "butterfly" ballot lawsuits); Complaint for Deprivation of Constitutional Rights Under Color of State Law, *supra* note 118 (alleging equal protection violation in treatment at the polls).

331. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 31, ¶¶ 53, 55, 57, 61, 64, at 14–16. Three days later, on November 13, 2000, three voters from Brevard County filed a similar complaint and motion for temporary restraining order in the federal district court for the Middle District of Florida. *See* Plaintiffs' Verified Complaint for Declaratory & Injunctive Relief (Injunctive Relief Sought) (filed Nov. 13, 2000), Touchston v. McDermott, 120 F. Supp. 2d 1055 (M.D. Fla.) (No. 6:00-CV-1510-Orl-28C), *aff'd*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001); Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction (filed Nov. 13, 2000), Touchston v. McDermott, 120 F. Supp. 2d 1055 (M.D. Fla.) (No. 6:00-CV-1510-Orl-28C), *aff'd*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001).

332. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 31, ¶¶ 45–47, at 11–13.

333. *Id.* ¶ 55, at 14.

counts and certify their results at once; an order that the counties not count any overvoted ballots; and a declaration that the "butterfly" ballot was valid.[334] The following day, the Bush campaign followed with a motion for immediate injunctive relief.[335]

By the time Bush filed the federal lawsuit, many of the issues in the controversy were beginning to crystallize. First, what were the legal requirements for undertaking a countywide manual recount? Second, when did the counties have to finish a manual recount? Third, how should the canvassing boards evaluate the ballots in a manual recount? And finally, was there something unconstitutional about manual recounts per se, about conducting them only in certain counties, or about allowing counties to evaluate the ballots differently? The court decisions over the next thirty-two days would resolve these issues in roughly that order.

C. *The Canvassing Boards in Limbo: Whether To Count and How To Count*

As Bush pressed the issue in federal court on Saturday morning, November 11, the Volusia and Palm Beach canvassing boards began their work. Because Volusia County planned to count the entire county, and 184,339 votes had been cast,[336] the county went immediately to the procedure laid out in section 102.166(7),[337] with several teams of counters, each consisting of a Democrat and a Republican, and all disputed ballots reviewed by the canvassing board.[338] By Monday, at 5:30 p.m., the counting teams had finished their work, and all that remained was the canvassing board's review of disputed ballots.[339]

The scene in Palm Beach County was very different. The board there planned to count only the one percent sample described by sec-

334. *Id.* at 16–17.

335. *See* Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law (filed Nov. 11, 2000), Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D.Fla.) (No. 00-9009-CIV-MIDDLEBROOKS), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

336. Somini Sengupta, *Recount Near End, Red Faces Remain*, N.Y. TIMES, Nov. 14, 2000, at A22.

337. *See supra* notes 97–99 and accompanying text.

338. Telephone Interview with Deanie Lowe, Supervisor of Elections, *supra* note 325.

339. Sengupta, *supra* note 336. According to Elections Supervisor Lowe, Volusia's manual count probably went much more quickly and smoothly than the other counties because their voting system was an optical scan system in which voters filled in an oval rather than punched through a card. Telephone Interview with Deanie Lowe, *supra* note 325. Ms. Lowe indicated that much of the change in their numbers was due to situations where voters had marked an "X" over the oval rather than filling it in, or had filled in the oval for a candidate and also written the name of their candidate in, or had filled in the wrong oval and then erased it or written "No" out beside it. *Id.* The machine would have rejected all such ballots, but the canvassing board treated them as votes. *Id.*

tion 102.166(4),[340] approximately 4600 ballots, and then decide whether a full countywide count was warranted.[341] Before the board began looking at ballots Saturday morning, Elections Supervisor Theresa LePore reviewed the County's past practices in manual counting.[342] She related a policy adopted by the County in 1990 that called for counting all ballots on which a chad was punched through to some extent and rejecting all ballots that bore only an indentation.[343] She went on to reveal, however, that the county's practices had not been consistent: in other recounts the board had applied a "three-corner" rule, which counted a ballot only if three corners of the chad were dislodged, and in still others, the board had applied a "sunshine" rule, under which a ballot was counted if light could be seen through the chad next to a candidate's name.[344] The Democrats in the room pressed for a policy broader than all these: counting all indications of a vote, including indentations, even if light could not be seen.[345] The Republicans pressed for the sunshine rule, and that was the rule the board adopted.[346]

As the morning wore on, the attorney representing the Republican Party became convinced that the board was seeing light through the ballots when there was none, and began strenuously and repeatedly objecting to the board's decisions.[347] By the time the board broke for lunch, the board was only halfway through the first precinct, and Gore had a net gain of 11 votes.[348] Judge Charles Burton, the chairman of the board (and a Democrat), left the scene for forty-five minutes, and when he returned, he announced that the sunshine rule was inappropriate given the existence of the 1990 standard.[349] The board's decision to follow the narrower 1990 standard set off the same barrage of objections to every ballot from the Democratic counsel.[350]

When the sample count was completed late Saturday night, the Palm Beach board had found thirty-three additional votes for Gore, fourteen for Bush, and thus a net gain of nineteen for Gore.[351] The board then met for two hours to decide whether to conduct a county-

340. *See supra* note 94 and accompanying text.

341. *See* Don Van Natta, Jr. & Rick Bragg, *Two Camps Clash Vote by Vote, Scrap by Scrap*, N.Y. TIMES, Nov. 12, 2000, at A1.

342. DEADLOCK, *supra* note 1, at 86–87.

343. *Id.* at 87.

344. *Id.* at 87–88.

345. *Id.* at 88.

346. *Id.*

347. *Id.*

348. *Id.*; Van Natta, Jr. & Bragg, *supra* note 341.

349. DEADLOCK, *supra* note 1, at 88. It was later discovered that he had gone to discuss the standard with a lawyer from Katherine Harris's office and two county lawyers. *Id.* at 89.

350. *Id.* at 89; *see also* Van Natta, Jr. & Bragg, *supra* note 341.

351. DEADLOCK, *supra* note 1, at 89.

wide vote.[352] Burton was uncomfortable deciding without first asking the Secretary of State whether a recount was proper, but Commissioner Carol Roberts insisted that the law was clear and pressed for a vote.[353] At 2:00 a.m., LePore joined Roberts for a 2-1 vote to conduct the recount of more than 460,000 ballots.[354]

As had been true in Palm Beach, when the Broward County board convened on Monday to begin its sample recount,[355] the meeting began with a discussion of the standard for evaluating the ballots.[356] The meeting ended, however, quite differently. After the board counted the one percent sample, Gore had gained four votes.[357] The canvassing board, made up of two Democrats, a county judge and a county commissioner, and one Republican,[358] the elections supervisor,[359] voted 2-1 *not* to conduct a full recount.[360] The Democratic county judge explained that he had joined the Republican member to vote against the recount because he had read a newly issued opinion issued by the state's Director of the Elections Division, Clayton Roberts.[361] That opinion stated that manual recounts were warranted only in the event that "the vote tabulation system fails to count properly marked . . . ballots": in effect, only when some sort of machine error had occurred.[362]

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352. *See* Van Natta, Jr. & Bragg, *supra* note 341.

353. DEADLOCK, *supra* note 1, at 89; *see* Van Natta, Jr. & Bragg, *supra* note 341.

354. DEADLOCK, *supra* note 1, at 89.

355. Broward had a total of 587,928 ballots cast. Don Van Natta, Jr., *Fatigue in Florida: Bush's Slim Lead Holds as Rules Change and Challenges Pile Up*, N.Y. TIMES, Nov. 20, 2000, at A1. One percent of this total would be approximately 5900 ballots.

356. Dana Canedy, *No Broad Recount; Appeal Is Planned*, N.Y. TIMES, Nov. 14, 2000, at A22.

357. *Id.*

358. *Id.*

359. Don Van Natta, Jr., *Democrats Seek Wider Standard for Tallies in Two Counties*, N.Y. TIMES, Nov. 21, 2000, at A1.

360. Canedy, *supra* note 356.

361. *Id.*

362. Petition for a Writ of Mandamus, Fla. Democratic Party v. Carroll, No. 00-19324, Exhibit A, at 2 (Fla. Cir. Ct. filed Nov. 14, 2000) (Nov. 13, 2000 Roberts opinion letter); *see also* Canedy, *supra* note 356 (quoting the Roberts opinion). The *Washington Post* has reported that the opinion letter from Roberts was essentially engineered by the Bush campaign. Reportedly, the lawyer for Katherine Harris with whom Palm Beach County Chair Burton had spoken on Saturday, November 11, *see supra* note 349 and accompanying text, had urged him to ask the Secretary of State for an opinion on when manual recounts were warranted, but Burton did not immediately do so. DEADLOCK, *supra* note 1, at 98; *see also* Trial Transcript, 2000 WL 1802941 at 106 (testimony of Judge Burton that Elections Division lawyer encouraged him to ask for opinion), Gore v. Harris, 2000 WL 1790621 (Fla. Cir. Ct. Dec. 4), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). Impatient that Burton's request was not forthcoming, Bush lawyer Frank Jimenez called Clayton Roberts, who told Jimenez that an advisory opinion did not have to be requested by a canvassing board but could be requested by political party. DEADLOCK, *supra* note 1, at 98. Jimenez then had Florida Republican Party Chair Al Cardenas fax over a request. *See id.*; *see also* Petition for a Writ of Mandamus, *supra*, Exhibit A (Nov.

While the Broward County Canvassing Board was conducting its sample recount, the Volusia and Palm Beach County boards grew nervous about whether the full recounts they had decided upon would be honored by Secretary of State Harris. Harris had made quite clear that any manual recounts must be completed and the returns submitted by Tuesday, November 14.[363] On Monday, Volusia County's recount was almost complete, but the board could not be sure that it would finish in time.[364] In Palm Beach, the board had voted only early Sunday morning to conduct the count, and the logistics of counting 467,587 votes were such that the recount would not even begin until 7:00 a.m. on November 14.[365]

Volusia County decided to have the issue resolved by filing suit in circuit court in Leon County, the capital, to enjoin Harris from refusing the returns if they were submitted after 5:00 p.m. on Tuesday, November 14.[366] Palm Beach and both campaigns moved to join the suit.[367] On Monday afternoon, Judge Terry Lewis held a hearing to address the issue.[368]

While there were arguments in the state court addressing the Florida statutes, Judge Donald Middlebrooks heard from the attorneys on Bush's federal case alleging that any manual recounts were unconstitutional.[369] After two hours of argument, Judge Middlebrooks ruled immediately from the bench, following it up later with a written decision.[370] The court denied Bush's motion on the ground that he had failed to establish the prerequisites for an injunction: he had not shown a likelihood of success on the merits, irreparable harm in the absence of an injunction, or that the injunction would serve the public interest.[371]

13, 2000) (Roberts opinion letter referencing Cardenas's request). Harris's personal lawyer, J.M. Stipanovich, then advised Harris and her staff to go home and issue the opinion the next day because it would not look good for them to be seen in their office on Sunday night responding to a Republican Party request. DEADLOCK, *supra* note 1, at 98. On Monday, Roberts issued the opinion, and Cardenas presented it to the Broward County Board for its consideration in deciding whether to undertake a full recount. *See* Petition for a Writ of Mandamus, *supra*, ¶ 14, at 4. The *Post* writers quote Stipanovich as saying, "Katherine kept turning the screw to bring this election in for a landing." DEADLOCK, *supra* note 1, at 99.

363. *See supra* notes 319–21 and accompanying text.

364. *See supra* note 339 and accompanying text.

365. Don Van Natta, Jr. & Rick Bragg, *Voters' Lawsuits Delayed by Recusal*, N.Y. TIMES, Nov. 14, 2000, at A22.

366. Complaint, *supra* note 325, at 3.

367. McDermott v. Harris, No. CV-00-2717 (Fla. Cir. Ct. Nov. 14, 2000) (order granting in part and denying in part motion for temporary injunction).

368. Todd S. Purdum & David Firestone, *U.S. Judge Refuses to Block Hand Recount of Ballots*, N.Y. TIMES, Nov. 14, 2000, at A1.

369. *See* Kevin Sack, *Saying He Doesn't Expect to Be Final Arbiter, Judge Won't Stop Hand Recount*, N.Y. TIMES, Nov. 14, 2000, at A21.

370. *Id.*

371. *See* Siegel v. LePore, 120 F. Supp. 2d 1041, 1052–54 (S.D. Fla.), *aff'd*, 234 F.3d 1163 (11th Cir. 2000). As noted above, on the same day Judge Middlebrooks ruled, a

The court wrote that Supreme Court precedent established a sliding scale approach to First and Fourteenth Amendment challenges to election laws, ranging from strict scrutiny when a state's election laws severely restricted the right to vote, to a rational-basis analysis when state laws imposed reasonable and nondiscriminatory restrictions.[372] Florida's manual recount provision, the court held, was "a 'generally applicable and evenhanded' electoral scheme designed to 'protect the integrity and reliability of the electoral process itself,' the type of state electoral law often upheld in federal legal challenges."[373] It served the important governmental interest of "securing, as near as humanly possible, an accurate and true reflection of the will of the electorate."[374] The fact that the canvassing boards had discretion to conduct the recount did not render it "standardless," as Bush claimed. The boards were allowed by the statute to conduct recounts "to remedy 'an error in the vote tabulation which could affect the outcome of the election,'" and the four challenged canvassing boards had "reported various anomalies in the initial automated count and recount."[375]

As the court characterized it, "[t]he thrust of Plaintiffs' position is that Florida's decentralized county-by-county electoral system can yield disparate tabulating results from county to county": two ballots punched the same way could be treated differently in one of two ways, either because two boards subjectively evaluating the ballot would differ on it, or because one board chose to hand recount and another did not.[376] The court recognized that such discrepancies were possible but did not consider them sufficient to constitute constitutional injury, particularly given that the law afforded both candidates the opportu-

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group of voters brought a similar case in the Middle District of Florida. *See supra* note 331. The judge in that case heard oral argument on the request for injunction on Tuesday, November 14, and, like Judge Middlebrooks, immediately denied the request. Touchston v. McDermott, 120 F. Supp. 2d 1055, 1056 (M.D. Fla.), *aff'd*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001).

372. *See Siegel*, 120 F. Supp. 2d at 1048 & n.4.

373. *Id.* at 1050 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

374. *Id.*

375. *Id.* (quoting FLA. STAT. ANN. § 102.166(5) (West Supp. 2001)). The court seemed to conclude that the counting machines' inability to pick up "imprecise perforations" qualified as the type of tabulation error with which the statute was concerned. In the course of discussing the "tabulation error" basis for manual recounts, the court dropped a footnote:

> One of the main rationales behind a manual recount system is [to] observe whether an imprecise perforation, called a "hanging chad," exists on the physical ballot. If the blunt-tipped voting stylus strikes the ballot imperfectly, the chad, the rectangular perforation designed to be removed from a punch card when punched, can remain appended to the ballot (although it is pushed out), and an automated tabulation will record a blank vote. This problem is particularly associated with counties that still rely on punch card technology. Palm Beach, Broward, and Miami-Dade all use punch card voting systems.

Id. at 1050 n.9.

376. *Id.* at 1051.

nity to request manual recounts.[377] Nor did the court deem the threatened harm to Bush irreparable, because the counties had just begun the process of counting, and Florida law provided for a post-certification contest procedure in which Bush could complain that votes were counted that should not have been.[378] The court concluded that "[t]he mere possibility that . . . the challenged manual recounts will . . . envelop the president-elect in a cloud of illegitimacy does not justify enjoining the current manual recount processes . . . . Nowhere can the public dissemination of truth be more vital than in the election procedures for determining the next presidency."[379]

By Tuesday morning, notwithstanding the federal ruling in its favor on the constitutional challenge, the Palm Beach board continued to have qualms about conducting a countywide manual count. The counting was scheduled to begin at 7:00 a.m., but Judge Lewis had not yet ruled on whether Secretary Harris could reject recount results submitted after 5:00 p.m. that day. Of even more concern, the board had received the night before, by fax, a copy of the Division of Elections opinion that manual recounts were not permitted unless there had been a demonstrated error by the counting machines.[380] This presented an issue different from the one argued before Judge Lewis, whether Harris could accept returns submitted after Tuesday, November 14. The Divisons of Elections opinion raised the issue of whether manual recounts under these circumstances could be valid even if they *were* completed by Harris's seven-day deadline.[381] The board also had to contend with a temporary restraining order, issued two days after the election by a Palm Beach County judge who had been assigned one of the butterfly ballot cases, that prohibited the county from certifying any results.[382]

If the temporary restraining order were not dissolved, and Judge Lewis ruled that Harris could treat 5:00 p.m. as a final deadline, then Palm Beach could end up unable to have any returns at all included in the state's vote. As a result, the Palm Beach board voted to postpone

377. *See id.* at 1051–52 & n.10. The court wrote: "Unless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions and the like), there will be tabulating discrepancies depending on the method of tabulation." *Id.* at 1052; *see also id.* ("While some level of error is inherent to manual tabulation, no method of tabulation is free from error.").

378. *See id.* at 1052–53.

379. *Id.* at 1054.

380. DEADLOCK, *supra* note 1, at 99; Don Van Natta, Jr., *Palm Beach Panel Votes To Proceed on Count*, N.Y. TIMES, Nov. 15, 2000, at A1.

381. Later that day, the board would receive an opinion from Attorney General (and Democrat) Robert A. Butterworth, stating that Roberts's opinion was incorrect. *See* Van Natta, Jr., *supra* note 380; DEADLOCK, *supra* note 1, at 99. The *Washington Post* has reported that the board asked for the opinion at the urging of Butterworth's staff. *See id.* at 100.

382. Rogers v. Elections Canvassing Comm'n, No. CL-00-10992AF (Fla. Cir. Ct. Nov. 9, 2000) (order granting temporary preliminary injunction).

the manual count of the ballots and seek a court order dissolving the temporary injunction and ruling on the Roberts opinion.[383] The board searched frantically to find a judge who would hear the request immediately. Several refused before Palm Beach County Judge Jorge Labarga agreed.[384]

As the Palm Beach board sought its own order,[385] Judge Lewis handed down his decision on Volusia County's motion to enjoin Harris from refusing returns certified after November 14.[386] Judge Lewis refused to force Harris to accept late returns, but he also ordered her to withhold her determination not to accept the results of the recounts until she had considered all "relevant facts and circumstances consistent with the sound exercise of discretion."[387] In Judge Lewis's view, there was nothing to prevent the counties from certifying by 5:00 p.m. their returns from the automatic recount and then amending them later based on the manual recount results, subject to Harris's discretion.[388]

Explaining his decision, Judge Lewis observed that the statutory scheme as a whole attempted to strike a balance between "finality" and "accuracy."[389] On the finality side, he acknowledged the seven-day deadline cited by Harris, but observed that the relevant statute, section 102.112, stated that returns "may" be ignored if not filed within seven days.[390] This, Judge Lewis felt, called for the exercise of discretion on the Secretary's part.[391] On the accuracy side, he noted, the statutes expressly allowed for manual recounts, beginning with a one-percent sample recount and then a full recount, if warranted, as well as protests.[392] Because the deadlines for filing such challenges were set at seventy-two hours and five days, respectively, it was

> easy to imagine a situation where a manual recount could be lawfully authorized, commenced, but not completed within seven days of the election. The Secretary of State responds that the authority to

383. Van Natta, Jr., *supra* note 380.

384. *Id.*; *see also* McDermott v. Harris, No. 00-2700 (Fla. Cir. Ct. Nov. 14, 2000) (order dissolving injunction, requiring certification of returns, permitting manual recounts of returns).

385. Relying on Clayton Roberts's opinion, the Broward County board had decided at this point not to conduct a countywide manual recount. *See supra* notes 360–62 and accompanying text. The Democratic Party went into court in an effort to reverse the Broward County decision. Petition for a Writ of Mandamus, *supra* note 362. The matter became moot, however, when the Broward County board reversed itself and decided to proceed with the countywide count. *See infra* note 406 and accompanying text.

386. McDermott v. Harris, No. CV-00-2717 (Fla. Cir. Ct. Nov. 14, 2000) (order granting in part and denying in part motion for temporary injunction).

387. *Id.* at 3.

388. *Id.*

389. *Id.* at 2.

390. *Id.* at 1, 3.

391. *Id.* at 3.

392. *Id.* at 2.

> authorize a manual recount is subject to the requirement that such recount be done and the results certified no later than the deadline imposed by Section 102.112, Florida Statutes. This would mean, however, that only in sparsely populated counties could a Canvassing Board safely exercise what the Legislature has clearly intended to be an option where the Board has a real question as to the accuracy of a vote.[393]

Judge Lewis also observed that, due to the consent decree with the federal government concerning overseas ballots, the county canvassing boards could not even report their *final* returns until November 17, three days *after* the deadline Harris was seeking to impose.[394]

In light of the balance the legislature intended to strike, Judge Lewis concluded, Harris could require the counties to submit certified returns by 5:00 p.m. on Tuesday, but should exercise her discretion in determining whether to accept amendments to those returns based on manual recounts authorized by the statute.[395] And to declare ahead of time that one would accept no amendments other than those necessitated by an act of God was an abuse of that discretion.[396]

Notably, Judge Lewis did not address the issue raised by the Division of Elections opinion, whether there was any authority to conduct manual recounts in the absence of an error by the counting machines. Judge Lewis also did not address the conflict between section 102.111, which states that the secretary "shall" ignore late returns, and section 102.112, which says the Secretary "may" ignore late returns.[397] He relied entirely on the latter.[398] He did so because "[t]he Secretary of State acknowledges that Section 102.112, rather than Section 102.111, Florida Statutes, prevails as to the question of the [sic] whether the Department has any discretion in whether to ignore late filed results."[399]

Judge Labarga, hearing Palm Beach County's case, ruled the same way.[400] Judge Labarga directed Palm Beach to file certified returns by 5:00 p.m., but stated that the Secretary should, for the reasons stated in Judge Lewis's order, exercise her discretion in considering amended returns submitted by the county after conducting a manual recount.[401] On the issue of the recount's validity, Labarga ruled simply, without explanation, that the board had the discretion to decide whether to

393. *Id.*
394. *See id.* at 3.
395. *Id.* at 4.
396. *Id.* at 3.
397. *See supra* notes 64–74 and accompanying text (discussing the conflict).
398. *See* McDermott v. Harris, No. CV-00-2717 (Fla. Cir. Ct. Nov. 14, 2000) (order granting in part and denying in part motion for temporary injunction).
399. *Id.* at 2 n.1.
400. McDermott v. Harris, No. 00-2700 (Fla. Cir. Ct. Nov. 14, 2000) (order dissolving injunction, requiring certification of returns, and permitting manual recount).
401. *Id.*

conduct one.[402] Labarga also dissolved the temporary injunction entered in the butterfly ballot case.[403]

Although both the lower federal court and the state courts had not disapproved of the manual recounts, neither had they specifically approved of them or required the Secretary to accept their results. Judge Lewis's order had left open the possibility that Secretary Harris could still reject the results of any manual recount completed after November 14. Unhappy with this aspect of his order, Volusia County appealed to the First District Court of Appeal, and asked that the appellate court certify the case to the Florida Supreme Court.[404] As an intervenor in the case before Judge Lewis, Palm Beach County joined that appeal.[405]

With the appeal by Volusia and Palm Beach Counties pending, the Broward County board voted, 2-1, to "reconsider" its earlier decision: the Democratic judge who had earlier voted against a countywide count changed his vote with no explanation.[406] The Palm Beach board voted to submit the results of the automatic recount by 5:00 p.m., but proceed to the manual recount in the hope of amending the board's return after Tuesday.[407] The Volusia board kept on task and actually completed its countywide manual recount in time to include it in the return it filed at 4:55 p.m.[408] In Miami-Dade, the board undertook the one-percent recount, but then voted 2-1 against taking the manual count countywide.[409]

Invoking the discretion permitted her by Judge Lewis's order, Secretary Harris announced at 7:40 p.m. on Tuesday that any county anticipating the submission of amended returns based on manual recounts must submit by 2:00 p.m. Wednesday, November 15, an explanation of the reasons she should accept such amended returns.[410] Harris warned that unless she determined, in the exercise of her discretion, that the facts and circumstances warranted accepting the amendments, she would follow the Elections Canvassing Commission's "usual and normal practice" of certifying the results turned in on Tuesday, await the counties' reports on overseas ballots and certify

402. *Id.*

403. *See id.*

404. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1226 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

405. *Id.*

406. Dana Canedy, *A County Reconsiders a Hand Count*, N.Y. TIMES, Nov. 15, 2000, at A22.

407. Van Natta, Jr., *supra* note 380.

408. Todd S. Purdum, *Bush Lead at 300: G.O.P. Official Demands Written Justification for Further Tallies*, N.Y. TIMES, Nov. 15, 2000, at A1. In the final tally, Gore had a net gain of 98 votes. *Id.*

409. *Id.*; DEADLOCK, *supra* note 1, at 126. At the end of the one-percent recount in Miami-Dade, Gore had a net gain of 6 votes. *Id.*

410. Purdum, *supra* note 408; *see also* DEADLOCK, *supra* note 1, at 104–05.

them when they arrived, and then declare the winner.[411] She also reported that with all sixty-seven counties reporting, George W. Bush led by 300 votes.[412]

The next day, Wednesday, November 15, Palm Beach, Broward and Miami-Dade Counties all submitted requests to be allowed to amend their Tuesday returns.[413] Harris responded quickly, announcing that "[t]he reasons given in the requests are insufficient to warrant waiver of the unambiguous filing deadline imposed by the Florida Legislature," and that she was certifying the results—reflecting Bush's 300-vote lead—submitted by the counties on Tuesday.[414] If her public persona radiated certainty, however, Harris's actions were more ambiguous. Even as she made the public announcement, she filed an emergency petition with the Florida Supreme Court against the circuit court judges and canvassing boards in all three counties, asking the court to decide whether the recounts were legal, to enjoin the canvassing boards from proceeding with manual recounts until it resolved the issue, and to direct the local circuit courts that all election issues were to be heard in the circuit court for Leon County, the capital.[415] The Florida Supreme Court issued a one-paragraph order the same day, denying her petition without prejudice to her right to raise the issue in the trial courts.[416]

The canvassing boards were now in serious limbo. There were two issues requiring immediate resolution. First, were the countywide manual recounts unauthorized because a machine breakdown had not been involved? The canvassing boards had Judge Labarga's decision stating that the recounts were proper, but Labarga had not fully addressed the authorization issue, and, in the meantime, the boards had received conflicting advice from two different state agencies.[417] Second, even if the counts were authorized, would Harris be compelled to accept them? The boards had Judge Lewis's decision that Harris should give fair consideration to the counties' recounts, but he had left the decision to her discretion, and she had announced that she was exercising that discretion against the results.

The lawyer for the Palm Beach County Canvassing Board realized that because the board now had in hand two conflicting opinions from

411. Purdum, *supra* note 408.

412. *Id.*

413. Richard L. Berke, *Republicans Reject Offer That Two Sides Accept a Count by Hand*, N.Y. TIMES, Nov. 16, 2000, at A1.

414. *Id.*

415. Emergency Petition for Extraordinary Relief at 10–11 (filed Nov. 15, 2000), Harris v. Circuit Judges of the 11th, 15th, and 17th Judicial Circuits of Fla., 2000 WL 1702529 (Fla. 2000) (No. SC00-2345).

416. Harris v. Circuit Judges of the 11th, 15th, and 17th Judicial Circuits of Fla., 2000 WL 1702529 (Fla. 2000) (No. SC00-2345) (order denying Harris's petition without prejudice).

417. *See supra* notes 361–62, 381, 402 and accompanying text.

state agencies, he could invoke an unusual procedural mechanism to get at least the issue of the recounts' validity immediately before the Florida Supreme Court.[418] On Thursday, the board filed an emergency petition for an extraordinary writ directed to state officers, which invoked the Florida Supreme Court's original jurisdiction.[419] By that afternoon, the Florida Supreme Court had issued an "interim" order allowing the recounts to continue, on the authority of the trial courts' decisions.[420] The court said simply: "there is no legal impediment to the recounts continuing. Thus, Petitioners are authorized to proceed with the manual recount."[421]

The Florida Supreme Court ruling, however, still did not guarantee that Harris would have to accept the results of the recounts. To resolve this issue, the boards returned to Judge Lewis, asking him to rule that Harris had abused her discretion again, in refusing to allow the counties to amend their returns to include the results of authorized manual recounts.[422] Judge Lewis disagreed, and refused to enter the injunction.[423]

The Democratic Party and Gore appealed Judge Lewis's ruling to the district court of appeals, asking that the intermediate appellate court certify the case to the Florida Supreme Court.[424] The district court of appeals passed the case on, along with the earlier appeal by Volusia County.[425] The supreme court accepted jurisdiction and consolidated the two appeals with Palm Beach County's petition for an extraordinary writ.[426] The court then issued an order enjoining Harris from certifying the results of the election.[427] Neither Gore nor the party had asked specifically for such an order: the court acted on its own motion.[428] The parties were directed to file briefs over the week-

418. DEADLOCK, *supra* note 1, at 99–100.

419. Emergency Petition for Extraordinary Writ, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. SC00-2346), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

420. Palm Beach County Canvassing Bd. v. Harris, No. SC00-2346 (Fla. Nov. 16, 2000) (interim order allowing recounts to continue).

421. *Id.* at 1.

422. Emergency Motion of Democratic Party of Florida and Vice President Al Gore To Compel Compliance with and for Enforcement of Injunction, McDermott v. Harris, No. 00-2700 (Fla. Cir. Ct. filed Nov. 16, 2000).

423. McDermott v. Harris, No. 00-2700 (Fla. Cir. Ct. Nov. 17, 2000) (order denying emergency motion to compel compliance with and for enforcement of injunction).

424. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

425. *Id.*

426. *See id.*; Palm Beach County Canvassing Bd. v. Harris, No. SC00-2346 (Fla. Nov. 17, 2000) (order accepting jurisdiction, setting oral argument, and setting briefing schedule).

427. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (stay order).

428. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1227; *see also* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000) (stay order).

end, and the case was set for oral argument on Monday, November 20.[429]

By sua sponte enjoining Harris's certification, the Florida Supreme Court certainly suggested that it would react favorably to the recounts and require Harris to accept them. Further, it appeared as though the federal courts were content to let the Florida courts handle the controversy. On the same day the Florida court issued the stay, the Eleventh Circuit Court of Appeals, sitting en banc, denied the Bush campaign's request for injunction pending appeal of the district court decision rejecting Bush's constitutional claims.[430] The Eleventh Circuit did not reach the merits of Bush's constitutional claims, or even the likelihood of Bush's success on the merits, but denied the injunction because the state proceedings were "not in any way inadequate to preserve for ultimate review in the United States Supreme Court any federal questions arising out of [the state court decisions]."[431] In light of these developments, the Miami-Dade canvassing board voted to reverse its earlier decision and begin a manual recount of the entire county, some 654,000 ballots.[432]

The supreme court case, however, did not mean that all of the manual recount issues would be finally resolved. There remained the issue of what type of marks on the ballots could be considered votes. As described above, before they manually counted a single ballot, both the Palm Beach and Broward County boards had held extensive discussions of what kind of marks would constitute a vote,[433] and the Palm Beach board had actually narrowed its approach—from application of the "sunshine rule" to a "hanging chad" rule—in the middle of its sample recount.[434] As a result, the Florida Democratic Party had gone into court on Tuesday, November 14, seeking orders prohibiting the Palm Beach[435] and Broward[436] boards from per se excluding any ballot on which a chad was not dislodged and directing the boards to

429. Palm Beach County Canvassing Bd. v. Harris, No. SC00-2346 (Fla. Nov. 17, 2000) (order accepting jurisdiction, setting oral argument, and setting briefing schedule).

430. *See* Touchston v. McDermott, 234 F.3d 1130, 1132 (11th Cir. 2000) (denying injunction pending appeal of Middle District of Florida case); Siegel v. LePore, 234 F.3d 1162, 1163 (11th Cir. 2000) (denying injunction pending appeal of Southern District of Florida case for the reasons set forth in *Touchston*).

431. *Touchston*, 234 F.3d at 1133.

432. *See* Todd Purdum, *A Monday Hearing: Manual Count Goes on in a Day of Confusion and Court Rulings*, N.Y. TIMES, Nov. 18, 2000, at A1; Rick Bragg, *Counting Goes On, and On, With None of the Big Gains Sought by Democrats*, N.Y. TIMES, Nov. 19, 2000, at A35.

433. *See supra* notes 342–46, 355–56 and accompanying text.

434. *See supra* notes 343–49 and accompanying text.

435. *See* First Amended Complaint for Declaratory Judgment and Petition for Writ of Mandamus, Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL 00-11078AB (Fla. Cir. Ct. filed Nov. 14, 2000).

436. Motion for Declaratory Judgment, Fla. Democratic Party v. Carroll, No. 00-19324 (Fla. Cir. Ct. filed Nov. 17, 2000).

consider ballots on which the chad was merely indented (the so-called "dimpled" ballots). Both courts ruled that the boards could not automatically discount ballots with dimpled chads but should consider from the "totality of the circumstances" whether the voter's intent could be fairly and satisfactorily ascertained.[437] In response to these orders, the counties allowed the counting *teams* to count ballots on which at least two corners were dislodged, but had the counters separate out for the *boards'* consideration any ballots that had only one corner torn or were merely dimpled.[438]

Further, even as the Florida Supreme Court was set to resolve at least two of the issues involved in the manual recounts, two huge controversies unrelated to the recounts emerged. First, on Friday, November 17, a well-known Democratic lawyer in Seminole County filed suit alleging that the Seminole County Elections Supervisor had permitted local Republican officials to correct absentee ballot applications, in violation of Florida law requiring that those applications be completed by the voter himself.[439] Second, the counties began counting the absentee ballots from overseas on Friday and discarded hundreds without opening them because the boards concluded they had various defects under Florida law: no date, no postmark, a postmark after Election Day, the absence of any ballot request form, the voter's failure to be registered, or the voter's having voted elsewhere.[440]

437. *See* Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL-00-11078-AB (Fla. Cir. Ct. Nov. 15, 2000) (declaratory order dissolving injunction); Petitioner Broward County Canvassing Board's and Broward County Supervisor of Election's Initial Brief on the Merits at 1–2, 8 & n.1 (filed Nov. 18, 2000) (referencing court's oral ruling), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. SC00-2346), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

438. *See* Bragg, *supra* note 432; Dana Canedy & David Gonzalez, *Judge Leaves Chads, Dimpled or Otherwise, to Discretion of Recount Team*, N.Y. TIMES, Nov. 18, 2000, at A15.

439. Complaint and Contest of Election (filed Nov. 17, 2000), Jacobs v. Seminole County Canvassing Bd., 773 So. 2d 519 (Fla. 2000) (No. 00-CA-2203-16-L); Michael Moss, *G.O.P.'s Help for Absentees in a County Is in Court, Too*, N.Y. TIMES, Nov. 18, 2000, at A1. Ultimately, this lawsuit was moved to Leon County, along with another almost identical suit from Martin County, and tried on December 6 and 7, 2000. Jacobs v. Seminole County Canvassing Bd., No. 00-2816, 2000 WL 1793429, slip op. at *1 (Fla. Cir. Ct. Dec. 8) (final order), *aff'd*, 773 So. 2d 519 (Fla. 2000); Taylor v. Martin County Canvassing Bd., No. 00-2850, slip op. at *1 (Fla. Cir. Ct. Dec. 8) (final judgment for defendants), *aff'd*, 773 So. 2d 517 (Fla. 2000). Both suits ended in judgments for the canvassing boards, and those judgments were affirmed by the Florida Supreme Court. Jacobs v. Seminole County Canvassing Bd., slip op. at *6 (Fla. Cir. Ct. Dec. 8) (final order), *aff'd*, 773 So. 2d 519 (Fla. 2000); *Taylor*, slip op. at *9. Because this Article focuses primarily on the cases that directly ended Gore's quest for the Presidency, the developments in these absentee ballots cases will not be covered in detail. For a good discussion of the cases and the Democratic Party's connection to them behind the scenes, see DEADLOCK, *supra* note 1, at 175–78.

440. *See* Richard Pérez-Peña, *Floridians Abroad Are Counted, or Not, As Counties Interpret "Rules" Differently*, N.Y. TIMES, Nov. 18, 2000, at A11 [hereinafter Pérez-Peña, *Floridians Abroad*]; Richard Pérez-Peña, *Military Ballots Merit a Review, Lie-*

Of the overseas ballots that were counted, a vast majority went to Bush. The Division of Elections reported that Bush gained 1380 votes, or sixty-four percent of the overseas ballots, and Gore gained only 750 votes.[441] So Bush went into the Florida Supreme Court arguments on Monday nursing a lead of 930 votes,[442] 630 more than the total Harris had reported on Tuesday, November 14.[443]

II. THE FLORIDA SUPREME COURT PROCEEDING ON MANUAL RECOUNTS AND CERTIFICATION

When the Florida Supreme Court ruled on the appeal by Gore and the county canvassing boards, on the following Tuesday, November

berman Says, N.Y. TIMES, Nov. 20, 2000, at A1 [hereinafter Pérez-Peña, *Military Ballots*]; Richard Pérez-Peña, *Bush Files Suit To Restore Rejected Military Ballots*, N.Y. TIMES, Nov. 23, 2000, at A36. The counties initially threw out 1420 overseas ballots, or thirty-nine percent of the total. *See* Pérez-Peña, *Military Ballots*, *supra*. In counties that had voted Democratic, the average percentage of discarded ballots was sixty percent; in counties that had voted Republican, the average percentage discarded was twenty-nine percent. Richard Pérez-Peña, *Absentee Ballots: G.O.P. and Democrats Trading Accusations on Military Votes*, N.Y. TIMES, Nov. 19, 2000, at A1 [hereinafter Pérez-Peña, *Absentee Ballots*]. Notably, Secretary of State Harris had instructed the counties during the week after the election that they should not discard overseas ballots bearing no postmark or a late postmark as long as they were signed and dated by Election Day. Pérez-Peña, *Floridians Abroad*, *supra*; *see also supra* note 68–70 and accompanying text (quoting the regulation and indicating that Harris was correct on the regulatory language, apart from the issue of whether a regulation in conflict with a state statute could be honored). A few counties, including Leon and Miami-Dade, openly defied these instructions in the belief that Harris had misinterpreted state law and simply wanted more overseas ballots counted because they were likely to favor Bush. Pérez-Peña, *Floridians Abroad*, *supra*. Republicans were outraged by the counties' actions, claimed that they were the product of a concerted effort by Democrats to disenfranchise the military, and released an internal memo from the Gore campaign instructing field workers on how to challenge the overseas ballots. Pérez-Peña, *Absentee Ballots*, *supra*; DEADLOCK, *supra* note 1, at 126–27. The Democrats publicly denied that they had undertaken any systematic campaign to disqualify military ballots, Pérez-Peña, *Absentee Ballots*, *supra*, but senior Gore aides later told the *Washington Post* that the memo on challenging overseas ballots had been circulated at "the highest levels" of the campaign in the fear that Bush would gain 700–2000 more votes from them. DEADLOCK, *supra* note 1, at 130. The public relations debacle caused vice presidential candidate Lieberman to call publicly for the canvassing boards to reconsider their disqualification of the ballots, much to the shock and dismay of the Democratic workers on the ground. *Id.* at 130–32. In addition, the Bush campaign filed a lawsuit against thirteen county canvassing boards, and dismissed it only after asserting that several of the canvassing boards had agreed to go back and include many of the overseas ballots. Notice of Voluntary Dismissal, Bush v. Bay County Canvassing Bd., No. 00-2799 (Fla. Cir. Ct. filed Nov. 25, 2000); *see also* DEADLOCK, *supra* note 1, at 250 (attributing 176 Bush votes to overseas ballots that were in the final tally but could have been disqualified under Florida law). Because this Article focuses primarily on the cases that directly ended Gore's quest for the Presidency, the legal developments with the overseas ballots will not be covered in detail.

441. David Firestone, *Both Sides Await Court Hearing Tomorrow on Florida Dispute*, N.Y. TIMES, Nov. 19, 2000, at A1.

442. *Id.*

443. *See supra* note 412 and accompanying text.

21,[444] it certainly did not end the election controversy. Indeed, by the time that Florida decision was argued before the United States Supreme Court, some legal commentators insisted that more recent events had rendered the case moot.[445] Few momentous historical events, however, turn out to be unconnected to the events that precede them, and the end of the 2000 presidential election was no exception. For even though the rulings in the later contest proceeding were the most immediate cause of Gore's concession, it was the arguments, admissions, concessions, and rulings in the first proceeding based on the recount requests that framed the issues in the second.[446] Moreover, the nature of the parties' arguments in the first Florida Supreme Court proceeding reveals a great deal about the strategy each side had adopted. For these reasons, the parties' arguments, as well as the Florida Supreme Court's rulings, will be described below in detail.

A. *The Parties' Briefs*

In their brief to the Florida Supreme Court, Gore and the Florida Democratic Party attacked both of Judge Lewis's most significant holdings: that the Secretary of State had discretion to reject the results of manual recounts submitted after seven days and that she had not abused that discretion in rejecting the counties' requests to amend their initial returns with those results.[447] With respect to Lewis's decision that the Secretary had discretion to exclude the manual recount results, Gore argued that it violated both the "statutory structure" and the "public policy" of Florida.[448] With respect to the Secretary's exercise of her discretion, even assuming she had any, Gore argued that she abused that discretion by rejecting the recount results even before

444. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

445. *See, e.g.*, David G. Savage & Henry Weinstein, *Role Reversals in Filings with High Court*, L.A. TIMES, Nov. 28, 2000, at A28 (quoting University of Utah Professor Michael McConnell) ("'I don't think there is a live controversy left for the Supreme Court. My guess is, they will dismiss it as moot as soon as the process has played out.'"); Gaylord Shaw, *U.S. Supreme Court Says No to TV: C-SPAN Loses Bid to Air Friday Hearing*, NEWSDAY (N.Y.), Nov. 28, 2000, at A50 ("Some legal experts raised the possibility that the high court could declare the case moot."); Reynolds Holding, *Justices May Be More Concerned with Reasserting Role of Judiciary*, S.F. CHRON., Nov. 30, 2000, at A3 (noting that legal experts say Gore still has right to contest, which might render case moot). *But see* John Yoo, *The Right Moment for Judicial Power*, N.Y. TIMES, Nov. 25, 2000, at A19 (editorial) ("If the court rules in favor of Mr. Bush, then manual recounts will be excluded from the final tally, the state's electoral votes will go to Mr. Bush and the election will be over.").

446. *See infra* notes 1480–94, 1510–27 and accompanying text.

447. Joint Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party at 39–58 (filed Nov. 18, 2000), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. 00-2346), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

448. *Id.* at 40–41.

they arrived, by applying the wrong legal standard in her decision, and by rejecting the results under the circumstances that had arisen.[449]

Gore asserted that the legislature never intended that section 102.112 operate to exclude the results of manual recounts conducted under section 102.166.[450] Applying the seven-day deadline to exclude manual recounts would make "no sense," according to Gore, because section 102.166 allowed requests for recounts to be made at any point "prior to certification," and the legislature would not have extended the request deadline for a time-consuming recount all the way up to the seven-day certification deadline itself, if it had meant for the certification deadline to apply to recounts.[451] This was especially true given that the recount statute had two phases: an initial one-percent sample recount and then, possibly, a countywide recount thereafter.[452] In Gore's view, "the Legislature surely knew that, where large counties are concerned, it may be *inevitable* that it will take more than a week for a manual recount to be requested, authorized, and completed."[453] Further, the canvassing boards were permitted to undertake recounts only when they concluded that there was "an error in the vote tabulation which could affect the outcome of the election,"[454] and the legislature could not possibly have wanted the statewide results certified knowing from at least one canvassing board's finding that there might be an error that could affect the outcome.[455]

Thus, Gore argued, the only logical reading of sections 102.112 and 102.166 was that "all manually recounted votes be tabulated and that certification be delayed pending the completion of a manual recount that was requested on a timely basis."[456] The return deadlines in sections 102.111 and 102.112 were "meant to apply in the ordinary case when a recount is not proceeding; read in context, these provisions appear intended only to penalize unreasonably dilatory county canvassing boards and not to disenfranchise the voters in such jurisdictions."[457] Section 102.111 itself called for the Elections Canvassing Commission to certify the "'official results'" of the election, and the only other Code reference to "'official'" results defined the "official return" as "[t]he return printed by the automatic tabulating equipment, *to which has been added the return of* write-in, absentee, and *manually counted votes.*"[458]

449. *See id.* at 49–59.
450. *Id.* at 42–45.
451. *Id.* at 42–43.
452. *See id.*
453. *Id.* at 42.
454. *See* FLA. STAT. ANN. § 102.166(5) (West Supp. 2001).
455. *See* Joint Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party, *supra* note 447, at 43.
456. *Id.*
457. *Id.* at 44.
458. *Id.* at 45 (alteration in original) (quoting FLA. STAT. ANN. §§ 101.5614(8), 102.111).

Gore also complained that Judge Lewis's decision to afford the Secretary discretion to exclude the results of manual recounts was "shockingly inconsistent" with the public policy of Florida and "the essential purpose of the State's election laws: effectuating the will of the electorate."[459] Gore relied on two Florida Supreme Court cases eschewing "'unyielding adherence to statutory scripture,'" and "'hypertechnical compliance with statutes'" when resolving voting and election disputes.[460] He argued that "even the literal terms of a statute must yield when necessary to effectuate the electorate's will," and to allow the Secretary to exclude manually recounted votes for "the convenience of a quick certification" violated that principle.[461]

Anticipating Bush's argument that the Secretary of State had discretion to exclude the manual recount results because a voter or candidate would still have the opportunity to raise the issue in a contest proceeding, Gore responded that votes added during a manual recount are valid votes that should be counted in the first place.[462] Leaving the resolution to a contest proceeding would place "a substantial burden on voters or candidates who want those votes to count: they must initiate suit and pay a filing fee, and also face the possibility of delay while the other candidate claims to be the victor."[463] Further, any results that would meet the standard for determining whether a manual recount should take place under section 102.166 ("an error in the vote tabulation which could affect the outcome of the election"), would surely also meet the standard for setting aside a certification during a contest proceeding under section 102.168 ("rejection of a number of legal votes sufficient to change or place in doubt the result of the election"), and the legislature could not have intended to allow for a certification it knew would immediately be invalidated during a contest.[464]

Finally, Gore challenged Lewis's decision that the Secretary did not abuse the discretion he granted her.[465] According to Gore, the Secretary herself had stated that waiving the deadline was inappropriate "'[w]here there is nothing "more than a mere possibility that the outcome of the election would have been effected [sic],"'" and yet had rejected the manual recount results before she even knew how many votes they revealed.[466] The fact that she did so suggested her ulterior belief that "the county canvassing boards should not have initiated

459. *Id.*

460. *Id.* at 46 (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975); State *ex rel.* Chappell v. Martinez, 536 So. 2d 1007, 1008 (Fla. 1998)).

461. *Id.* at 46–47.

462. *See id.* at 47.

463. *Id.*

464. *Id.* at 47–48 (quoting FLA. STAT. ANN. §§ 102.166(5), 102.168(3)(c) (West Supp. 2001)).

465. *Id.* at 49–58.

466. *Id.* at 50 (quoting *id.* app. 5, ex. H) (alteration in original).

manual recounts in the first place," a decision committed to the canvassing boards and not to her.[467] Further, the Secretary's standard for deciding whether she would waive the deadline—only if there was a reasonable probability that the outcome of the election did not reflect the will of the people—was borrowed from contest cases under section 102.168 that were applicable only to courts, not elected officials, and was far too "stringent" to be applied to manual recounts.[468] Gore argued that the Secretary should have asked only whether the counties properly found "an error in the vote tabulation which could affect the outcome of the election," and if she had truly considered the counties' submissions, she would have concluded that the counties had.[469]

In closing, Gore implored the court to issue an order directing the Secretary of State and the Elections Canvassing Commission not to declare the winner until they had received the results of the manual recounts.[470] There was, he said, "an overwhelming interest in ensuring that every vote is counted."[471] There was also another interest, Gore said, in a paragraph that simply cannot be paraphrased to do it justice. The passage must be quoted in full here due to the irony it reflects in the full story of the presidential election and the way it was ultimately resolved by five members of the Supreme Court. Gore's brief stated:

> There is a similarly weighty interest in *avoiding uncertainty or confusion regarding the identity of our President-elect.* It is critical that the Election Canvassing Commission's decision be made on the basis of the most accurate vote count possible, in order to eliminate the possibility that the identity of the winner will change—or *even be called into question*—by the outcome of the manual recounts. Not just within our country, but all around the world, that confusion

467. *Id.* at 51.

468. *Id.* at 52–54. Gore's argument on this point—that the contest standard was too stringent for application to manual recounts—was odd, inasmuch as he had just finished arguing that the legislative standard for setting aside a certification during a contest proceeding was as easy to meet as the standard for proceeding with a manual recount. *See supra* note 464 and accompanying text. Gore might have explained this inconsistency by pointing out to the court that the cases on which the Secretary had relied were additionally inapplicable because they predated the newer, more lenient standard set forth in 102.168. *See* Gore v. Harris, 772 So. 2d 1243, 1255–56 (Fla.) (rejecting lower court's reliance on a 1982 case and explaining that the legislature had amended the contest procedure in 1999 to relax considerably the plaintiff's burden of proof), *rev'd sub nom. on other grounds*, Bush v. Gore, 531 U.S. 98 (2000). One might conclude that he did not explain, and tolerated the inconsistency in his own argument, because he remained uncertain whom would be certified, and wanted to preserve the ability to argue for a lenient standard if he was not certified and had to contest, but a more stringent standard in the event he ended up as the certified winner and was defending in a contest.

469. Joint Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party, *supra* note 447, at 56.

470. *Id.* at 59.

471. *Id.*

> would likely generate considerable instability that, in turn, would produce *irreparable injury*.[472]

In his brief to the Florida Supreme Court, Bush argued that the court had no basis on which to enjoin the Secretary's certification.[473] Bush contended that any delay in certifying would violate the text, statutory structure, and intent of Florida's election laws.[474] He argued that not only had Secretary Harris "faithfully implemented the legislative design," but it also would have been *unlawful* for her to extend the deadline to accept the results of manual recounts.[475] Gore was not entitled to any injunction of certification, Bush said, because Gore had not established that he would suffer irreparable harm or that the balance of equities favored him.[476]

Bush asserted that neither the Secretary of State nor the courts had any authority to extend certification beyond the seven-day deadline set forth in section 102.112.[477] He noted that Gore had raised no reason to believe that the statute violated either the Florida Constitution or the United States Constitution.[478] Bush claimed that by asking the court to require Harris to accept the results of manual recounts, Gore was asking the court to rewrite the statute's "plain directive that late-filed returns 'may be ignored' to read instead that the Secretary '*may not* ignore' late-filed returns if the county board is conducting a manual recount."[479] In Bush's view, the legislature "expressly contemplated" that there would be manual recounts, and that they might present logistical difficulties, but chose nonetheless to require counties to complete such recounts within seven days.[480]

Bush argued that it "defie[d] common sense" to conclude that the legislature knew there would be manual recounts, but "silently excepted" them from the normal statutory deadline, and left no deadline at all to apply.[481] The fact that the deadline was a full seven days from the election supported this conclusion, because manual recounts are the only time-consuming method of tallying votes that could take that long.[482] The statute governing the manual recount also made it clear

472. *Id.* (emphasis added). These words sound remarkably like the words Justice Scalia would later use to justify the stay that effectively ended Gore's case. *See infra* note 1216 and accompanying text.

473. Answer Brief of Intervenor/Respondent George W. Bush at 7–46 (filed Nov. 19, 2000), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. SC00-2346), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

474. *Id.* at 7–21.

475. *Id.* at 21 (emphasis omitted); *id.* at 21–44.

476. *Id.* at 44–46.

477. *Id.* at 7–8.

478. *Id.* at 8.

479. *Id.*

480. *Id.* at 9.

481. *Id.*

482. *Id.* at 9–10.

that the counties were supposed to find a way to complete them within seven days.[483] Section 102.166 provides that "'[t]he county canvassing board *shall* appoint as many counting teams of at least two electors as is *necessary* to manually recount the ballots.'"[484] If the county decided to conduct a manual recount, and then "violate[d] *both* its statutory duty to file returns within seven days and its duty to appoint enough counting teams to meet the deadline, the legislature certainly did not expect, much less require, the Secretary to ignore this dual violation."[485]

Bush acknowledged that holding the counties to the seven-day deadline placed a more substantial burden on the larger counties, who would have more votes to recount manually.[486] He argued, however, that the larger counties also have more staff, resources and money with which to get a manual count done.[487] Further, there was not "a scintilla of evidence that any of the three counties at issue . . . were *unable* to meet the Tuesday deadline—as Volusia County did."[488]

Responding to the timing argument raised by Gore—that the statute allowed for recount requests until right before certification, a time when they would be logistically impossible if the seven-day deadline applied—Bush pointed out that the canvassing boards had no "duty" to conduct a manual recount, and the requester no "right" to have one conducted.[489] Under section 102.166(4)(c), the canvassing board's decision to conduct a manual recount was entirely discretionary.[490] The legislature merely granted the canvassing boards a "conditional option" to conduct a manual recount if it could be completed within seven days, and in exercising their discretion, they would need to take their timeliness into account.[491] Bush emphasized that the deadline provision in section 102.112 and the recount procedure in section

483. *Id.* at 11.

484. *Id.* (alteration in original) (quoting FLA. STAT. ANN. § 102.166(7)(a) (West Supp. 2001)).

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.* at 12.

490. *Id.* Bush was certainly correct in suggesting that the initial one percent manual recount was entirely discretionary, *see* FLA. STAT. ANN. § 102.166(4)(c) (West Supp. 2001), but the situation with respect to a countywide recount is somewhat more complicated. As described above, once a county decides to undertake a sample recount and discovers that there is an error in the vote tabulation that could affect the outcome of the election, it is then *required* to pursue one of three paths, two of which would seem appropriate to a machine breakdown, and the last one of which, the manual recount, would seem appropriate to an undetermined reason for the error. *See supra* notes 95–96 and accompanying text (describing the provisions of section 102.166(5) in detail).

491. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 12.

102.166 were enacted "simultaneously," making it extremely unlikely that there actually was a conflict between the two, as Gore claimed.[492]

The flaw in Gore's public policy argument, Bush argued, was its insistence that the legislature regarded manual recounts as the preferred method of tallying votes.[493] According to Bush, "[t]he legislature did not provide the slightest hint that whatever improved accuracy might be obtained in a manual recount overrides the values of finality and uniformity created by an evenhanded deadline."[494] If that had been what the legislature intended, then it would not have made manual recounts discretionary, and it would have provided for them statewide, rather than on a county-by-county basis.[495] Indeed, when the legislature addressed what was required to happen when a margin was one-half percent or less, it chose an automatic, statewide, machine recount.[496]

To underscore this point, Bush compared the Florida Legislature's interest in a firm deadline to the Framers' interests in finality and uniformity.[497] It is those interests, Bush claimed, that explain "why Congress, pursuant to explicit constitutional authorization, Article II, Section 1, U.S. Constitution, established a mandatory deadline of December 18 for Florida and other states electors to meet, on pain of excluding all presidential votes from the State."[498] For the Florida Legislature to have acted likewise was hardly irrational, Bush insisted, particularly given that the consequences of not accepting amendments to already certified returns are "far less severe than [the consequences to a state] for missing the electoral college deadline."[499]

Bush noted pointedly that even Gore acknowledged that the recounts must conclude at some point "prior to the Inauguration itself," and thus was asking the court on "'public policy'" grounds to substitute a judicially-created deadline for the one set by the legislature.[500] Yet even if the court granted such a "revision," Bush argued, the re-

492. *Id.* (citing Act of July 5, 1989, ch. 89-338, sec. 30, § 102.112, 1989 Fla. Laws ch. 89-338 (current version at FLA. STAT. ANN. § 102.112 (West Supp. 2002)); Voter Protection Act, ch. 89-348, sec. 15, § 102.166, 1989 Fla. Laws ch. 89-348 (current version at FLA. STAT. ANN. § 102.166 (West Supp. 2002))). Bush's use of the word "simultaneously" was an interesting choice because, although they were enacted in the same year, the provisions derived from two different session laws.

493. *Id.* at 14.

494. *Id.*

495. *Id.*

496. *Id.* In fact, as addressed above, the "automatic recount" statute does not make entirely clear that the canvassing board should recount by machine rather than by hand: it seems to leave even that decision to the discretion of the county canvassing boards. On the other hand, it certainly does not dictate manual recounting. *See supra* note 31.

497. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 16.

498. *Id.* (emphasis omitted) (citing 3 U.S.C. § 7 (1994)).

499. *Id.*

500. *Id.* at 17.

sult would not be the "accurate statewide compilation of votes" upon which Gore's public policy argument claimed to be founded.[501] The machine methodology of which Gore complained was used in over ninety percent of Florida's counties, and yet Gore had requested recounts in only four, Democratic, counties.[502]

Turning from the validity of enjoining the certification to the specifics of Harris's actions, Bush asserted that the court had no reason to question her decisions.[503] The court had traditionally shown great deference to elections officials in their implementation and interpretation of the election laws, Bush said, and at the same time had counseled elections officials to adhere strictly to the law.[504] Given that Harris had done just that—interpreted and applied the law strictly to require that manual recounts be completed within seven days, as the legislature intended—and had engaged in reasoned decision-making, the court could not possibly find she had abused her discretion.[505] Bush argued that the Secretary had considered all of the facts and circumstances involved in the counties' requests for a waiver, but was provided no evidence to suggest that the three counties could not have completed manual recounts by the seventh day if they had acted with diligence.[506]

Indeed, Bush went so far as to say that the Secretary would have acted *unlawfully* if she had accepted the "untimely" manual recounts.[507] Bush pointed out that section 102.111 required the Elections Canvassing Commission to certify the results of a statewide election as soon as the official results from all counties were compiled, and stated, in contrast to section 102.112, that county returns not received by 5:00 p.m. on the seventh day "shall" be ignored. Bush then related a history of proposed and rejected amendments to section 102.111 that in his view demonstrated that the legislature intended 102.112, with its permissive language, to be the statute governing the county canvassing boards, and 102.111, with its mandatory language, to be the statute governing the Secretary and the Elections Canvassing Commission.[508]

At the end of this argument that the Secretary was legally bound *not* to accept the counties' submission of manual recount results after seven days—thirty-five pages into his argument and four pages before

501. *Id.* at 18 (emphasis omitted).
502. *Id.* at 18–19.
503. *Id.* at 21–37.
504. *Id.* at 22–24.
505. *Id.* at 24–29.
506. *Id.* at 29.
507. *Id.* at 37–44.
508. *Id.* at 39–42. Bush's reliance on section 102.111 before the Florida Supreme Court conflicted with his earlier admission in the trial court that section 102.112 was the governing statute. *See supra* note 399 and accompanying text.

the brief ended—Bush raised the issue of federal § 5.[509] Bush claimed that § 5 required states to select their electors "'by laws enacted prior to' election day."[510] Bush insisted that the court would violate this law if it utilized its equitable power "to disregard both the deadline and the Secretary's exercise of reasoned discretion."[511] Bush also touched briefly—in one and a half paragraphs—on the constitutional arguments that had been argued and rejected in federal court.[512] Accepting the recounts, Bush said, would violate the Due Process and Equal Protection Clauses, and the First Amendment, because the recount statute "authorize[s] county boards to engage in arbitrary and unequal counting of votes, and result in the disparate treatment of Florida voters based solely on where within the state they happen to reside."[513]

509. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 42; *supra* notes 275–81 and accompanying text (examining the provisions of § 5).

510. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 42 (quoting 3 U.S.C. § 5 (1994) (emphasis omitted)).

511. *Id.* at 43. Bush's characterization of § 5—that it *required* a state to do anything—and his argument based on it, was demonstrably false. Even though there were no cases interpreting § 5 at the time, the language of the statute simply is not susceptible to the interpretation that it requires a state to appoint electors using law in place on Election Day. As described above, the statute merely advises states on what they might do to insulate their electors from challenge in Congress in the event they pass laws providing for the *judiciary*, rather than the executive, to resolve presidential election controversies and certify the electors. *See supra* notes 275–81 and accompanying text (examining the provisions of § 5). There is absolutely nothing in the statute to suggest, for example, that a state could not hold an election on Election Day, realize that there were controversies arising out of it, pass a law *subsequent* to Election Day dictating how the controversy would be resolved, and then have the controversy resolved that very way. That would not be *illegal*: it would simply risk that the state's electors could face a challenge on the floor of Congress. Thus, it would have been much more truthful if Bush had argued that federal law requires states to utilize law existing on Election Day *if they wished to ensure that any judicially-approved electors could not be challenged*, but that is not what he represented.

512. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 43–44; *see also supra* notes 331–35, 372–77 and accompanying text (describing the constitutional arguments Bush made and the district court's rulings on them).

513. Answer Brief of Intervenor/Respondent George W. Bush, *supra* note 473, at 43. It is unclear whether Bush intended also to make an argument based on the electoral appointments clause in Article II. The clause was mentioned only once, in a footnote dropped after an argument based on federal § 5. *See id.* at 43 n.15. And it seemed to be invoked only to support the idea that § 5 honored state law because the Constitution conferred on the states the power to establish the method of appointing electors. The footnote reads:

> Indeed, by operation of the Supremacy Clause, Article VI, U.S. Constitution, federal law incorporates by reference whatever processes a state establishes by law for choosing electors. The United States Constitution provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen, Article II, Section I U.S. Constitution and Congress has provided in federal law that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November in an election year." Congress has further provided that if a State "has failed to make a choice on the day prescribed by law," it falls to the legislature of the State to determine how the electors will

Finally, Bush opposed Gore's request for an injunction on the ground that Gore had not shown that he would suffer irreparable harm or that an injunction would serve the public interest.[514] Gore had an adequate remedy at law, Bush argued, because he could file a contest action after the certification, and the certification provided "an adequate and therefore exclusive avenue for relief if Petitioners are correct that the Secretary of State was legally bound to accept late-filed returns."[515] Further, an injunction would not serve the public interest because "[i]t would be highly inequitable to keep the State and Nation on hold to finish a manual recount when the responsible officials failed expeditiously even to begin the process."[516]

Apart from Bush's almost passing complaint that the counties' "arbitrary and unequal" methods of counting votes violated the Constitution, neither Gore's initial brief nor Bush's brief asked the court to address the way in which the counties were deciding what constituted a vote. Broward County, however, directly confronted the issue.[517] In its initial brief, Broward advised the court that it had adopted a "fixed standard" of two detached corners to determine the intent of each voter.[518] The lower court, however, had regarded this standard as "too restrictive," and had directed the county to consider the "totality" of each ballot in deciding whether to count it as a vote.[519] Broward thus sought "specific direction from this Court as to the validity of the two-corner rule."[520]

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be appointed. 3 U.S.C. § 2. In the present case, the day prescribed by law was Tuesday, November 7, and the state of Florida held an election on that day *subject to the procedures, including reporting procedures and deadlines, established by state law.* It follows, therefore under the relevant federal statutes and the Supremacy Clause that all actors at the state level—including judges—are bound to respect the choices made by the Florida legislature as to the process of selecting the state's presidential electors. It would therefore violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature's* judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors.

Id. (punctuation errors in original).

514. *Id.* at 45–46.

515. *Id.* at 45.

516. *Id.* at 45–46.

517. Petitioner Broward County Canvassing Board's and Broward County Supervisor of Election's Initial Brief on the Merits at 8 (filed Nov. 18, 2000), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. SC00-2346), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

518. *Id.* at 7. Broward notified the court in its reply brief the next day that the board had voted, 3-0, based on the lower court's holding, to review each ballot for whether the "totality of the circumstances" suggested the voter intended to vote. Petitioner Broward County Canvassing Board's Reply Brief at 1 (filed Nov. 19, 2000), *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1220.

519. Petitioner Broward County Canvassing Board's and Broward County Supervisor of Election's Initial Brief on the Merits, *supra* note 517, at 8.

520. *Id.*

In Gore's reply brief, filed the next day, he agreed with Broward County that the court should address the standard for deciding when a ballot reflected a vote.[521] In light of the "unique and extraordinary circumstances of the current Presidential election recount, the expedited time frame in which the issue must be addressed, and the fundamental public interest in resolving this matter equitably," Gore urged the court to invoke its "broad authority under the Florida Constitution" and direct the counties to apply an "objective intent standard."[522] Gore's brief did not actually define what it meant by an "objective intent standard," but it did argue that detachment of the chad should not be required, and it cited a number of cases from other states purportedly suggesting that any mark that might be evidence of intent should be considered.[523]

Gore also responded to Bush's claim, however briefly it was presented, that permitting the recounts would violate the Due Process and Equal Protection Clauses.[524] There was no equal protection claim based on "vote dilution," Gore said, because "the vote of a citizen of one county is not 'diluted' by a process which ensures that all properly cast votes in another county are actually included in the total vote count."[525] Nor was the discretion given to canvassing boards "arbitrary and capricious," in violation of the Due Process Clause, because the recount statute included procedures to guard against officials' exercise of partisanship, and there was the "intent of the voter" standard to guide the decision-making.[526] In fact, Gore argued, it would violate the Equal Protection and Due Process Clauses to refuse to accept the manual recounts and thereby disenfranchise thousands due to machine error and, under Bush's theory, the dereliction of canvassing boards over whom the voters had no control.[527]

B. *The Oral Argument*

When the case was argued orally on Monday, November 20, the networks broadcast it live.[528] An attorney representing the Florida Attorney General, an attorney representing the Palm Beach County

521. Answer Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party at v–x (filed Nov. 19, 2000), *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1220.

522. *Id.* at v–vi.

523. *See id.* at vii–viii (citing Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996); Duffy v. Mortenson, 497 N.W.2d 437, 439 (S.D. 1993); Hickel v. Thomas, 588 P.2d 273, 274 (Alaska 1978); Fischer v. Stout, 741 P.2d 217, 221 (Alaska 1987); Escalante v. City of Hermosa Beach, 241 Cal. Rptr. 199 (1987); Wright v. Gettinger, 428 N.E.2d 1212, 1225 (Ind. 1981)).

524. *Id.* at xxii–xxv.

525. *Id.* at xxii.

526. *Id.* at xxii–xxiii.

527. *Id.* at xxiv–xxv.

528. Todd S. Purdum, *No Decision Issued: Lawyers for Both Sides Answer Skeptical and Pointed Questions*, N.Y. TIMES, Nov. 21, 2000, at A1; DEADLOCK, *supra* note 1, at

Canvassing Board, an attorney representing the Broward County Canvassing Board, and David Boies, the attorney representing Gore and the Democratic Party, argued that the court should require the Secretary to delay certification until after the manual recounts were complete.[529] Opposing any injunction were Joseph Klock, who was representing Secretary Harris and the Elections Canvassing Commission; Michael Carvin and Barry Richard, who split up their time representing Bush;[530] and an attorney representing a voter.[531]

Boies began his remarks with a clear and concise argument that the legislature never intended the seven-day deadline in sections 102.111 or 102.112 even to apply to the results of manual recounts.[532] As Gore had argued in his brief,[533] Boies insisted that the seven-day deadline applied only to initial returns, because the legislature had to be aware that large counties could not complete a manual recount in seven days, and had drawn a distinction in section 101.5614 between results and "official results," the latter of which was defined to include results of manual recounts.[534] Later in the argument, however, Boies accepted an alternative formulation that could resolve the argument in Gore's favor. Boies said the court might find that the seven-day deadline applied, but that the Secretary nonetheless could not exercise her discretion to exclude the later results of manual recounts conducted pursuant to section 102.166.[535]

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112. The Washington Post has reported that the argument was watched by more people than any appellate hearing ever. *Id.*

529. See Transcript of Oral Argument at 1–16, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (No. SC00-2346) (unofficial transcript), *available at* http://www.wfsu.org/gavel2gavel/transcript/00.2346.htm, *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000). The Florida Supreme Court's website advises visitors that they can obtain oral argument transcripts and documents at the Florida State University website, but the transcript of the *Palm Beach County Canvassing Board v. Harris* argument expressly advises readers that it is unofficial. Indeed, the transcript contains many errors that can be detected by watching the videotape of the argument available at the same website. For that reason, this Article will provide page citations to the transcript, but any quotations from the argument offered here will reflect that transcript only to the extent it has been corrected by the Author's viewing of the videotape.

530. Interestingly, although they were representing clients aligned with the Republican Party, Joseph Klock and Barry Richard both consider themselves Democrats. DEADLOCK, *supra* note 1, at 97, 60.

531. *See* Transcript of Oral Argument, *supra* note 529, at 16–41.

532. *See id.* at 10–11.

533. *See supra* notes 450–58 and accompanying text.

534. *See* Transcript of Oral Argument, *supra* note 529, at 10–12.

535. *See id.* at 13. As it turned out, this would be a critical moment in the controversy, because the Florida Supreme Court ultimately adopted this alternative formulation and based its decision to limit the Secretary's discretion on the Florida Constitution rather than anything in the statutes themselves. *See infra* notes 621–29 and accompanying text. And that aspect of the Florida court's ruling—the court's reliance on the Constitution—is precisely what convinced the United States Supreme Court that the case presented a constitutional question under the electoral appointments clause. *See infra* notes 996–97 and accompanying text.

During the presentations of several of those supporting an injunction, the court asked repeatedly about the time frame in which the case had to be resolved, when it was that Florida's votes would be put "in jeopardy."[536] The attorney for Florida's attorney general responded that he "understood" that December 12 was the date, but that there were "constitutional law professors here" who could address that point.[537] The attorney representing the Palm Beach canvassing board likewise deferred,[538] and so the question fell to David Boies, arguing for Gore. Boies agreed with Chief Justice Wells's suggestion that extending certification out too far would risk eliminating the contest proceeding from the statutory scheme, because federal § 5 said that "all of the controversies and contests in the state have to be finally determined by [December 12]."[539] For that reason, Boies suggested that the court "tell the county boards that you have got this amount of time to complete your recount, and at that point, those votes are . . . subject to being contested by Governor Bush or Vice President Gore . . . in a time frame that allows everything to be completed by December 12."[540]

When the court asked Boies how it might determine a date by which the recounts must be completed, and whether it should just "reach up, from some inspiration, and put it down on paper," Boies could respond only that the court would have to apply "a lot of judgment."[541] Later in the argument Boies suggested that the court work back from December 12, and determine how much time would "realistically" be needed for a contest proceeding. Still later, during his rebuttal (when his opponents would be unable to address the suggestion), Boies proposed that the court tell the counties that they

536. Transcript of Oral Argument, *supra* note 529, at 4 (questioning the date by which all proceedings must be complete); *see also id.* at 2, 7–8, 11, 15, 18, 28.

537. *Id.* at 4.

538. *See id.* at 8.

539. *Id.* at 11. There is no question that, even though Bush had been flatly incorrect on the point in his brief, *see supra* note 511, Boies accepted his suggestion that not completing the contest proceeding would jeopardize Florida's participation in the electoral college. During his rebuttal, he encouraged the court to set a date by which the recounts must be completed that would "be such that passing that date endangers the ability of certifying and finalizing any contest that may result, *so that the votes of Florida are not in peril.*" Transcript of Oral Argument, *supra* note 529, at 44–45 (emphasis added).

540. Transcript of Oral Argument, *supra* note 529, at 11–12. Strangely, at the end of this very same colloquy, Boies also suggested that the contest could proceed until December 18. He said:

> So I think it is clearly within the power of this court to say in order to meet the date of December 12, you have got to have all of your votes manually counted that are going to be included in this initial certification by a particular date, and then the contest, if there is one, takes place between that date and December 18.

Id. at 12. It is hard to know whether this inconsistency reflected ambivalence on Boies's part or just a slip of the tongue.

541. *Id.* at 12.

had seven days, which "would certainly [leave] enough time . . . to complete a contest."[542]

The court also questioned the attorney representing Broward County, and David Boies, on Broward's request that the court provide the counties with a standard for counting the ballots.[543] After the attorney for Broward noted that the board had begun with the "two-corner" rule and had then changed to a "totality of the ballot" approach,[544] the court asked whether there was something unusual about "changing the rules in the middle of the game."[545] The attorney responded that there was not, that the board's decision had "evolv[ed]" in response to various court rulings, and "[t]he important thing is that we do what's right in the end."[546]

The court asked Boies where it would find the case law from which it might determine the standard.[547] Boies responded that the court find it "partly from Florida law," but also from the law of other states that have dealt with these very same questions.[548] The court asked Boies whether he would contend that any mark on the ballot would be evidence of intent and should be counted as such, and Boies responded affirmatively, claiming that cases from Massachusetts and Illinois, and the Texas statute, all held that markings on the ballot could be enough.[549] The court then addressed the need for uniformity, in a passage that must be quoted for what it reveals about the proceedings that followed:

> Q. Is the uniformity of how these manual recounts are conducted essential to the integrity of the process or, also, to the constitutionality of the statute?
> A. Your honor, I think it is important to the integrity of the process. *I think if you had very wide variations, you could raise constitutional problems.*[550]

With this admission, the court asked Boies why it would not likewise violate the Constitution to allow manual recounts in some counties but not all. Boies responded that Bush could have requested manual recounts wherever he had wanted to, and that, in fact, the numbers

542. *Id.* at 12–13, 45.
543. *See id.* at 8–10 (Broward County attorney); *id.* at 13–15 (Boies).
544. *Id.* at 8–9; *see also supra* notes 437–38 and accompanying text.
545. *See* Transcript of Oral Argument, *supra* note 529, at 10.
546. *Id.*
547. *Id.* at 13–14.
548. *Id.* at 14.
549. *Id.*
550. *Id.* (emphasis added) This was the very basis on which the United States Supreme Court would effectively end the election controversy three weeks later. Seven justices would agree that the Florida Supreme Court's decision directing a statewide search for "the intent of the voter" in the undervotes allowed for such disparate treatment of ballots that it violated the equal protection clause, and five would hold that there was insufficient time before December 12 to cure the constitutional flaw. *See infra* notes 1426–44 and accompanying text.

the Secretary already had certified had the results of manual recounts within them.[551] Boies added, however, that it was within the court's "equitable power" to open up a "window of opportunity" in which both sides could request recounts in additional counties, and that while Gore was not asking for such a remedy, he would accept it.[552]

It was clear from the presentations of those opposing the injunction that they had decided to focus on the threat that extending the recounts would present to any contest proceeding that might follow.[553] Joseph Klock, representing the Secretary, complained that extending the recounts would shorten the time in which Governor Bush could challenge what he regarded as the improper treatment of the overseas ballots.[554] He argued that Gore was improperly "trying to conduct a contest" prior to that phase not for legal reasons, but for "political reasons."[555] This was clear, he said, because the court in the contest proceeding could order the same kind of recounts that Gore was now seeking prior to the contest.[556] Michael Carvin, representing Bush, agreed that the method of determining whether there were votes rejected that should not have been would be the same whether the votes were addressed by recounts conducted within the seven days or within the contest proceeding.[557]

The court, however, appeared much more interested in how the legislature could have expected recounts to be completed in seven days, particularly in large counties, at the same time it gave a party seven days in which to request that a recount begin.[558] Klock insisted that there was no record evidence that a recount could not be completed in that time frame.[559] When pressed for proof that the legislature did not simply miss that problem, but instead contemplated the logistical difficulties large counties would face, Klock offered only a somewhat flip response, reflecting the Republican position that the counties' delay accounted for the problem: "I am sure that [the legislature] probably didn't consider the fact that someone would commence a recounting, whenever they felt like doing it."[560] When the court asked why the

551. *See* Transcript of Oral Argument, *supra* note 529, at 14.

552. *Id.* at 15.

553. All four attorneys focused on this point. Klock opened his presentation speaking of the need to allow for the contest proceeding. *See id.* at 17. Carvin opened along the same lines, and returned to it. *See id.* at 27, 29, 32, 34. The attorney representing the voter spent a great deal of time describing why the contest proceeding would be a much better solution than extending the manual recounts in selected counties. *See id.* at 39–40.

554. *Id.* at 17.

555. *Id.* at 23.

556. *See id.* at 26.

557. *See id.* at 35.

558. *See id.* at 21–22, 27–28, 31, 36 (questioning the interrelationship between the recount request deadline and the return deadline).

559. *Id.* at 21.

560. *Id.* at 22.

legislature would have allowed a party the entire seven days even to request that a recount begin, if it intended the recount to be finished within the same seven days, Klock suggested that the statute left the counties to consider the timing of the request: "[T]hat is the same basic rule that I had in high school, with term papers. You can start the term paper the night before, if you want to, but it is unlikely that you'll be able to turn it in the next day when it's due."[561] A justice then suggested that, at least for the requesting party, that would make the right to a recount illusory, and Klock changed the subject to the fact that Gore had requested recounts in only three counties.[562] In the rapid-fire questioning, Klock evidently forgot the arguments the briefs had made about the fact that there was no such thing as a "right" to a recount; the fact that the statute required "as many counting teams . . . as is *necessary*" to count the votes; the fact that the recount provisions and the seven-day deadline were passed in the same legislative session; and the legislature's need to balance finality with permitting manual recounts.[563]

The lawyers representing Bush did not fare much better. Michael Carvin did make the point relatively early in his presentation that there was no "right" to a recount,[564] and later in the argument he mentioned, albeit almost in passing, the statutory requirement that the counties appoint as many counting teams as were "necessary" to perform the recount.[565] In the middle of his argument, however, he hit on what appeared to be a sore spot with the court: the fact that the Republicans had brought a constitutional challenge in federal court rather than allowing the state supreme court to address the constitutional issues. When the court suggested that a uniform seven-day deadline might be inappropriate because the voting methods in each county were not uniform throughout the state and the punch card balloting in south Florida had created the problem, Carvin shifted, nearly muttering, to the lack of uniformity in *counting*, and a heated exchange took place:

> Q. So there is not uniformity, even within the state, as to the type of voting machine that is used or the procedures that are used in each county?

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561. *Id.*

562. *See id.* Klock responded:

> You have the seven-day period within which to handle all of the counting of the votes, the initial counting, and have an automatic recount, and if there is going to be a manual recount, but I think another important thing to note is we are not talking about a manual recount on a statewide basis. It is three selected counties.

Id.

563. *See supra* notes 481–99 and accompanying text.

564. Transcript of Oral Argument, *supra* note 529, at 28.

565. *See id.* at 31.

A. We have complained about the ad hoc nature of the way in which votes are tallied in differential counties. That is a problem.

Q. You say you have complained about it. Where has that been complained about?

A. I'm sorry. In federal court, Your Honor, and I am not trying to introduce that here.

Q. Let me ask you that question. Is there a constitutional attack on this statute being made?

A. Well, we don't think you need [to] reach the question but yes.

Q. Is that because you are requesting the federal court to reach it, and you don't think that the state court has it, within its jurisdiction, to decide whether a statute is being constitutionally applied?

A. Oh, no. Clearly the state courts have that power. I'm simply making the point that there is a much simpler basis for deciding this case than going all the way to the U.S. Constitution, which is state law clearly prohibits the relief the petitioners are requesting, because state law makes it quite clear that they have no right to ignore the mandatory statutory deadline imposed upon them by state law. They seek to rewrite the statute, create a scheme that serves their personal problems or conveniences, but in doing so, they posit a hypothetical that cannot be found in the statute.[566]

As this passage indicates, the court behaved as though it were unclear whether it was being asked to address any claims based on federal law or the Constitution. Bush had argued at the very end of his brief that permitting the recounting to continue would violate § 5 and Article II of the Constitution because it would constitute a rewriting of the legislature's prescribed method for appointing electors.[567] He had also claimed briefly that the recounts were unconstitutional because they were being conducted only in selected counties, because the counties were arbitrarily deciding what votes were, and because the counties were using different standards in deciding what a vote was.[568] Further, at the oral argument, Barry Richard made what could be characterized as a reference to federal § 5 and Article II (although he did not expressly cite them).[569]

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566. *Id.* at 28.

567. *See supra* notes 509–11 and accompanying text.

568. *See supra* notes 512–13 and accompanying text.

569. *See* Transcript of Oral Argument, *supra* note 529, at 36. When asked whether or not manual recounts could continue even after the Secretary had certified the returns, Richard said:

[T]he recounts must stop, if the seven-day cutoff occurs, unless the Secretary of State, in the exercise of the discretion that the Florida Legislature has given her, determines that there is rational reason for them to continue. It is the job of the Secretary of State. It has been reposed in her by the Legislature and two constitutions. The United States Constitution and the Florida Constitution, in unusually explicit language, have delegated that decision, not to the State of Florida, not to the courts of the State of Florida, but to the legislature of the State of Florida, and the legislature of the State of Florida has reposed that authority in the Secretary of State. Now, in order

Yet Bush's attorneys otherwise seemed reticent to press the constitutional claims. In the passage above, Carvin stated that a constitutional attack was being made on the statute, but he also stated that the court did not need to reach the issue and that he was "not trying to introduce" the constitutional issue of the counties' proceeding in an ad hoc manner.[570] Still later, when the court questioned why Bush had not requested recounts in other counties, Carvin responded that the process was "inherently flawed and unconstitutional,"[571] but did not make clear at all whether Bush was asking for such a *ruling*, and essentially refused to say whether Bush would accept an opportunity to obtain recounts in counties other than the four the Democrats had selected.[572] The only other mention of any constitutional issues came

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for us to do anything else, this Court would have to disregard the most fundamental principles of separation of powers and . . . step into the shoes of both the legislative and executive branches to rewrite these statutes . . . .

Id.

570. *See supra* text accompanying note 566.

571. Transcript of Oral Argument, *supra* note 529, at 30.

572. *See id.* at 29–30. When the court asked why it was not necessary for the county boards to complete any recounts prior to the contest proceeding, so that the court in the contest proceeding would know what was in the recounts, *id.* at 29, Carvin changed the subject, complained that the recounts were being conducted only in selected counties, and faced intense questioning about Bush's position concerning manual recounts:

A. If you were doing a recount in a municipal proceeding, I don't think anyone would take seriously the notion that, well, we have had some problems with our machine, so that what we are going to do is recount, in three of the 67 precincts here, and then we will know who the winner is. No. Obviously you have to recount or apply the same standards, throughout all 67 precincts, so you can come to a judgment as to who indeed is the winner.

Q. Was [a recount] requested in the other 64 counties?

A. No. Notwithstanding their devotion to the manual recount as the only means of assessing voter intent and counting all votes, the Democrats did not request all 67.

Q. Was there something that prevented your client from requesting recounts in the other counties?

A. Yes. They believe that the process is inherently flawed and unconstitutional, but moreover, it doesn't matter if they requested it, because—

Q. Are you asking us to resolve that issue? So even if we said that everyone has a chance for a window period, to request a recount, in whatever other counties are in question, are you saying it is the position of—you're representing Governor Bush?

A. Yes, I am.

Q. The position of Governor Bush that he would not go along with wanting recounts in the other counties, because the process is flawed?

A. No, your honor. I think we should follow the process that is set out in the statute.

Q. But I am asking that question. Is what you are saying that recounts weren't requested, because there was a belief that the process was flawed?

A. Right.

. . . .

Q. And isn't that the exact same process that has been represented to us, as the statutes reveal in Texas law, for this exact process to take place where

during the exchange with Boies quoted above,[573] and during the argument of the voter, who claimed that it violated the Equal Protection Clause when the voters in some counties had their ballots reviewed for votes that were not counted and the voters in other counties did not.[574]

The picture that emerges is that the attorneys for both sides were somewhat blinded by what were their most immediate goals. At the time, the ultimate goal for Gore had to be delaying the certification. He surely could not afford to have Bush officially declared the winner, even if a contest proceeding might reverse that result, because of the powerful psychological effect that would have on the public and members of his party. Further, if a myriad of issues had arisen with respect to the manual recount statute, a similar number of unsettled issues could be expected to arise in the contest proceeding, conducted under a statute that had been substantially amended in 1999. And there was no assurance that a single court hearing his contest would take a view to the ballots that was as favorable as the one he was already receiving at least in Broward. It made a great deal more sense to try to find the votes immediately, in the hope that it would be Bush trying to upend the result.

As a result, Gore's team focused intently on state law and the state courts. In doing so, however, they demonstrated a serious unfamiliarity with the electoral appointments clause—and the extraordinarily restrictive view of that clause taken by the Court in *McPherson v. Blacker*[575]—by repeatedly making arguments based on "public policy"[576] and the Florida Constitution,[577] and encouraging the court to exercise "broad[ly]" its "equitable" power.[578] Further, the Gore lawyers permitted Bush to mischaracterize the statute as "requiring" that the states resolve contests by December 12,[579] never considering that they might need the time between December 12 and December 18 to turn the vote around, and setting up Bush's appeal to the Supreme

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there's manual recounts, and that those are preferred over the . . . machine recount?

A. I really don't know what Texas law is. I know, in Florida, though, there is no preference for manual recounts over machine recounts.

Id. at 29–31. Eventually, the court and Carvin spent so much time on exchanges like these that very little time was left for Carvin's co-counsel, Barry Richard. *Compare id.* at 27–35 (Carvin's presentation), *with id.* at 35–37 (Richard's presentation). *See also id.* at 36 ("Mr. Chief Justice: Does Governor Bush have five more minutes for Mr. Richard?").

573. *See supra* notes 550–52 and accompanying text.

574. Transcript of Oral Argument, *supra* note 529, at 39.

575. *See supra* notes 161–62 and accompanying text.

576. *See supra* notes 448, 459–61 and accompanying text.

577. *See supra* notes 459–61, 522, 535 and accompanying text.

578. *See supra* notes 522, 552 and accompanying text.

579. *See supra* notes 510–11, 539–40 and accompanying text.

Court on a "federal" law issue that really never was.[580] Finally, the Gore team appears not to have developed any unified strategy on, or lent enough credence to, the constitutional claims that Bush was pressing. Boies actually agreed that variations in applying the "intent of the voter" standard could create an equal protection problem[581] at the same time other lawyers defending the recounts were advancing (and at least one federal court had accepted) several arguments to the contrary.[582]

Conversely, the ultimate goal for the Bush team had to be protecting his lead and reaching certification. Just as Gore must have feared the psychological impact on the public of Bush being declared the winner, Bush must have felt that the controversy would be all but over if Gore had to bring a contest action to have any chance of gaining the lead. And just as Gore's attorneys had, Bush's attorneys focused so intently on their goal that they rendered their efforts harder. During the oral argument, for example, the lawyers lost sight of several solid arguments that they had included in their briefs and came across as more frustrated than persuasive.[583] On several occasions, Michael Carvin raised constitutional arguments, even though it was clearly the Bush strategy to mention the constitution in the brief—so as to avoid any argument that the claims had been waived—but not actually provoke a constitutional analysis by the Florida court.[584] More importantly, Bush's lawyers painted the post-certification contest proceeding as the procedure that would answer all of the questions that had been raised about uncounted votes.[585] Consequently, once the results finally were certified and Bush was declared the winner,

580. *See infra* notes 678, 999–1001 and accompanying text. Once Bush was certified the winner, Gore's acquiescence in the notion of a December 12 "deadline" made more sense, because at that point, any slate of electors judicially approved between December 13 and 18 would be on tenuous ground in Congress. After all, missing December 12 would cause Gore to lose the presumption available under § 5, and even if the Senate might approve a slate judicially approved after December 12, the Republican-controlled House would not, and any competing slate would have the edge under the tiebreaker provision because it presumably would be certified either by the Elections Canvassing Commission or by Governor Jeb Bush. Thus, it did no real harm to their case to push December 12 as a "deadline" in the hope that the false "deadline" would keep the courts moving. At this stage, however—pre-certification—there was no reason to accept Bush's mischaracterization of § 5, because Gore had not yet been reduced to winning only through the courts.

581. *See supra* note 550 and accompanying text.

582. *See supra* notes 376–77 and accompanying text (describing the district court's decision in *Siegel v. LePore* rejecting Bush's constitutional challenge to the varying standards for evaluating ballots).

583. *See supra* notes 481–99 and accompanying text. In particular, the argument that section 166 required the counties to appoint "as many counting teams . . . *as is necessary*" to complete the recount was a very difficult point to respond to: what could "as necessary" mean, if not "as necessary" to complete the recount within seven days?

584. *See infra* notes 652–56 and accompanying text.

585. *See supra* notes 556–57 and accompanying text.

Gore could claim the right to an open-ended, searching contest procedure and portray the Republicans as having approved of that approach.

C. *The Court's Decision:* Palm Beach County Canvassing Board v. Harris I

Shortly before 10:00 p.m. of the day after the oral argument, on Tuesday, November 21, 2000,[586] the Florida Supreme Court issued its unanimous decision in *Palm Beach County Canvassing Board v. Harris*.[587] The court characterized the case as involving two issues: "Under what circumstances may a [county canvassing board] authorize a countywide manual recount pursuant to section 102.166(5)," and "must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?"[588] On the first issue, the court held that section 102.166 allowed counties to conduct countywide manual recounts based on finding in the sample count any error in the tabulation of votes that could affect the outcome, regardless of whether the error was attributable to a machine or software malfunction.[589] On the second issue, the court held that "the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited" to situations where the timing would preclude the ability to bring a contest action under section 102.168 or prevent Florida from participating in the federal electoral process.[590] The court wrote: "[T]o allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The *constitution* eschews punishment by proxy."[591]

The court concluded that it must set a deadline for the recounts to be reported to the Secretary "in order to allow the maximum time for contests pursuant to section 102.168."[592] The court directed the Secretary to accept amended certifications from the counties until 5:00 p.m. on Sunday, November 26, or, if the Secretary's office was not open that day, until 9:00 a.m. on Monday, November 27.[593] The court left its interim stay in effect until that time, and ordered the Secretary to

586. *See* Todd S. Purdum & David Firestone, *Florida Court Backs Hand Recounts and Orders Vote Deadline of Monday*, N.Y. TIMES, Nov. 22, 2000, at A1.

587. 772 So. 2d 1220 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

588. *Id.* at 1228.

589. *See id.* at 1229–30.

590. *Id.* at 1237, 1239 (citing 3 U.S.C. §§ 1–10 (1994)).

591. *Id.* at 1240 (emphasis added).

592. *Id.*

593. *Id.*

accept the counties' amended returns.[594] The court stated that it "must invoke [its] equitable powers . . . to fashion a remedy" allowing a "fair and expeditious" resolution, "[b]ecause of the unique circumstances and extraordinary importance of the present case," and "because of [its] reluctance to rewrite the Florida Election Code."[595]

Before it announced its holding, or proceeded to a discussion of the Election Code, the court introduced what it labeled its "Guiding Principles."[596] In this opening portion of the opinion, the court relied on a twenty-five-year-old case for the proposition that "the will of the people, not a hypertechnical reliance upon statutory provisions" must be its "guiding principle."[597] According to the court, "[o]ur federal and state constitutions guarantee the right of the people to take an active part in the process of [the] government, which for most of our citizens means participation via the election process."[598] The court wrote: "This fundamental principle, and our traditional rules of statutory construction, guide our decision today."[599]

Explaining its holding on the first issue—that section 102.166 allowed countywide manual recounts in the absence of machine or software error—the court focused on the language of the statute. The court noted that the legislature permitted manual recounts whenever a canvassing board found an "error in the vote tabulation" that could affect the outcome, and yet elsewhere in the same section used the terms "vote tabulating system" and "automatic tabulating equipment" to refer to the machines.[600] The court concluded that the legislature must have intended "vote tabulation" and "vote tabulation system" to mean two different things, and thus a recount was authorized even when there were not problems with the machines.[601]

On the second issue—whether the Secretary could exercise her discretion to reject amended returns resulting from manual recounts that were submitted after seven days—the court focused initially on the two "deadline" statutes, sections 102.111 and 102.112, and on the manual recount statute, section 102.166.[602] These three statutes, the court concluded, presented two conflicts. First, section 102.166 conflicted with both certification deadlines because it allowed a party to

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594. *See id.*
595. *Id.*
596. *See id.* at 1227.
597. *Id.* at 1227–28 (citing Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)).
598. *Id.* at 1228 (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)).
599. *Id.*
600. *Id.* at 1229 (quoting FLA. STAT. ANN. § 102.166(5) (West Supp. 2001)); *see also supra* note 96 and accompanying text (setting forth section 102.166(5) in full).
601. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1229. The court found additional support for its conclusion in section 101.5614(5), which directed that no vote should be declared invalid if the canvassing board—not a machine—found a clear indication of the voter's intent. *See id.* (quoting FLA. STAT. ANN. § 101.5614(5) (West Supp. 2001)).
602. *See id.* at 1231–36.

request a recount at any time up until certification, yet "logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county."[603] Second, the deadline statutes, section 102.111 and 102.112, were themselves in conflict, because the former stated that late returns "shall" be ignored, and the latter stated that the returns "may" be ignored.[604]

After noting these conflicts, the court embarked on an analysis of legislative intent, what it called the "polestar that guides a court's inquiry."[605] The court acknowledged that legislative intent ordinarily must be drawn from the plain language of the Code.[606] The ambiguity created by the conflicts, however, required the court to apply the "traditional rules of statutory construction."[607]

The court found that the traditional rule that a specific statute controls over a general statute militated in favor of the permissive language of section 102.112, because 102.112 referred to the "deadline" and "penalties" for late returns in its title and text, and section 102.111 dealt more generally with the duties of the Elections Canvassing Commission, only "tangentially" including the mandate to ignore late returns.[608] A second rule, that a later enactment governs over an earlier one, also supported the permissive language of section 102.112, because section 102.112 was enacted in 1989, whereas section 102.111 was enacted in 1951.[609] A third rule—that a statutory provision not be interpreted to render another provision meaningless or absurd—called for section 102.112 to be applied.[610] The court's observation on this point was that section 102.112 provides for board members to be fined when returns are submitted late, but if section 102.111's mandatory exclusion rule applied, the board would simply never submit the returns—and therefore avoid any fines—because the board would know the returns would not be accepted in any event.[611] In

603. *Id.* at 1232–33.

604. *See id.* at 1233; *see also supra* notes 64–74 and accompanying text (discussing sections 102.111 and 102.112).

605. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1234.

606. *See id.*

607. *Id.*

608. *Id.* at 1234 (citing State *ex rel.* Johnson v. Vizzini, 227 So. 2d 205, 207 (Fla. 1969)).

609. *See id.* (citing McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994)).

610. *See id.* (citing Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995)).

611. *See id.* at 1234–35. The premise of the court's analysis here can only be described as bizarre. To reach the conclusion that applying 102.111 would render the fine provision in 102.112 absurd, the court assumed that board members could not be fined if, instead of submitting returns late, they abdicated *entirely* their obligation to file any returns. Section 102.112 provides, however, that "[t]he department shall fine each board member $200 for each day such returns are late." FLA. STAT. ANN. § 102.112(2) (West Supp. 2001). Nothing about this language suggests that a board could *avoid* fines by submitting no returns. A much more natural conclusion would be that the fines would simply keep growing, which in turn would be a powerful incentive for a board to submit returns late, even if they were *not* going to be included.

contrast, if section 102.112's permissive language applied, the fact that the returns might be included would provide an incentive for the members to submit the returns even if they would suffer the fine.[612]

The final rule the court cited requires that related statutory provisions be read as a "cohesive whole," construed as much as possible "in harmony with [one] another."[613] It would violate this rule, the court found, to apply the mandatory language of section 102.111 to exclude manual recounts under section 102.166, in situations where a recount request is filed six days after the election, and the board, "through no fault of its own," is unable to submit the returns by the seventh day.[614] The court wrote that if the mandatory provision in section 102.111 were applied, "the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code."[615]

Further, the mandatory language of section 102.111 was enacted at a time when all absentee ballots were required to arrive by Election Day.[616] The consent decree with the federal government changed that practice, however, and required that overseas ballots be counted through the tenth day after the election.[617] Applying the permissive language of section 102.112, the court implied, would allow the deadline and the practice of counting overseas ballots to coexist.[618]

The court concluded that the legislature intended counties to submit certified returns by 5:00 p.m. on the seventh day after the election, but that section 102.112, rather than section 102.111, governed with respect to the Secretary's authority to accept returns submitted thereafter.[619] Thus, "[i]f a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme."[620] The court acknowledged that this conclusion—that the Code did not *require* the Secretary to ignore returns filed after seven days, but left the decision to her discretion—did not answer the question the petitioners had raised, whether it was proper for her to exclude the results of their ongoing recounts. As the last sentence in this section of the

612. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1235.

613. *Id.* at 1235 (citing Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)).

614. *Id.*

615. *Id.*

616. *See id.*; *see also supra* note 69 and accompanying text (discussing statutory requirement that absentee ballots be received by Election Day).

617. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1235; *see also supra* notes 68–74 and accompanying text (discussing the federal lawsuit and the regulation the Secretary of State adopted in response thereto).

618. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1235–36.

619. *See id.* at 1236.

620. *Id.*

opinion (which was entitled "Legislative Intent"[621]), the court wrote: "To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels."[622]

The next section of the opinion was entitled "The Right To Vote."[623] The court began by describing the special significance of the Declaration of Rights in the Florida Constitution, noting that "[c]ourts must attend with special vigilance whenever the Declaration of Rights is in issue."[624] The right to vote, the court said, was "the preeminent right contained in the Declaration of Rights,"[625] and so "[t]echnical statutory requirements must not be exalted over the substance of this right."[626]

The "preeminent," constitutional nature of the right to vote was such that the court concluded that it must limit the Secretary's authority to ignore amended returns to situations where the timing would either preclude an eligible party from contesting the certification under section 102.168 or prevent Florida from participating in the federal electoral process.[627] The court explained that the purpose of the deadline statutes was to punish dilatory board members, and while the fine provision served that purpose, allowing returns to be ignored would not.[628] That remedy for late returns would penalize only the voters, by effectively disenfranchising them, and would be "unreasonable, unnecessary, and violate[ ] longstanding law."[629]

The court asserted that "allowing the . . . recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day

621. *Id.* at 1234.
622. *Id.* at 1236.
623. *Id.*
624. *Id.*
625. *Id.*
626. *Id.* at 1237 (citing Boardman v. Esteva, 323 So. 2d 259, 269 (Fla. 1975)).
627. *See id.* at 1237. It is quite plain from a close reading of the opinion that the Florida Supreme Court based its decision to limit the Secretary's authority to exclude returns filed after seven days on the Florida Constitution. The holding that the Secretary's authority was limited appears in the section of the court's opinion entitled, "The Right To Vote," which deals entirely with the suffrage rights of Florida citizens, *see id.* at 1236–38, and, even more telling, the court all but said it was basing its conclusion on the Florida Constitution: "Based on the foregoing," and the immediate foregoing was the constitutional discussion described, "we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion." *Id.* at 1237. Whether or not the court could have reached the same conclusion employing a pure statutory interpretation analysis is debatable, and of course, became the significant issue in the subsequent Supreme Court proceeding and the Florida court's response on remand. *See infra* notes 980–92, 996–97, 1407–14 and accompanying text.
628. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1237.
629. *Id.* at 1237–38.

deadline, [was] consistent . . . with the statutory scheme"[630] and with the Supreme Court's decision in *Roudebush v. Hartke*,[631] in which the Court deemed a recount "'an integral part of Indiana's electoral [scheme] . . . within the ambit of the broad powers delegated to the States by Art. I, § 4.'"[632] If this comment was not enough to demonstrate that the Florida Supreme Court squarely approved of manual recounts, the text that followed left no doubt. The court wrote, "an accurate vote count is one of the essential foundations of our democracy," and followed with two paragraphs from an Illinois Supreme Court case, *Pullen v. Mulligan*,[633] that the Florida court described as "particularly apt":

> "The purpose of our election laws is to obtain a correct expression of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from [the] ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law . . . .
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disenfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect."[634]

Although the Florida Supreme Court explained its conclusions on the two issues it identified at the beginning of its opinion—under what circumstances a canvassing board could authorize a countywide manual recount and whether the Secretary and Commission must accept such recounts after the seven-day deadline[635]—the court did not offer any explanation of how it arrived at the November 26 deadline for the counties to complete the recounts.[636] Nor did the court address the constitutionality of the manual recounts or the statute authorizing them. On this point, the court simply dropped a footnote: "Neither

630. *Id.* at 1238.

631. 405 U.S. 15 (1972).

632. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1238 (quoting *Roudebush*, 405 U.S. at 25).

633. 561 N.E.2d 585 (Ill. 1990).

634. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1238 (quoting *Pullen*, 561 N.E.2d at 611 (citations omitted)).

635. *See supra* note 588 and accompanying text.

636. *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1240. The court said that the date was set "in order to allow maximum time for contests pursuant to section 102.168," *id.*, but offered nothing further to explain how the date was computed, such as estimates by the counties as to how long the recounts would take or assessments of the various stages of a contest proceeding.

party has raised an issue on appeal as to the constitutionality of Florida's election laws."[637]

III. THE EMERGENCE OF FEDERAL LAW: THE INVOLVEMENT OF THE STATE LEGISLATURE AND THE UNITED STATES SUPREME COURT

Given what there might have been, there was comparatively little talk of federal law during the Florida Supreme Court proceeding. The parties' failure to focus the court on federal law, however, should not be taken to suggest that it was irrelevant or extraneous to their approach to the controversy. To the contrary, when one looks back on the Republicans' statements in the press, the manner in which they treated the federal issues before the Florida Supreme Court, and the way the federal issues assumed great prominence immediately *after* the Florida Supreme Court's decision was handed down, it seems quite clear that the Republicans built federal law into their strategy from very early on, with great success.

The first aspect of the Republicans' federal strategy was to challenge the recounts on traditional constitutional grounds. As described above, they sought an injunction in federal court on Friday, November 10, only four days after the election, alleging that the manual recount statute and the recounts being conducted violated the Equal Protection and Due Process Clauses and the First Amendment.[638] After losing in the district court, they appealed to the Eleventh Circuit.[639] Thus, when the Florida Supreme Court handed down its decision in *Harris*, the constitutional case sat pending before the Eleventh Circuit, and the Republicans moved to expedite its consideration.[640]

The second aspect of the Republicans' federal strategy—to take full advantage of the federal statutes governing the counting of electoral votes—emerged quietly the week before the Florida Supreme Court proceeding. On Wednesday, November 15, Representative Tom DeLay of Texas distributed to Republican members of Congress a mem-

637. *See id.* at 1228 n.10. This statement by the Florida court simply was not true. The Republicans had buried the constitutional issues in their brief, *see supra* notes 512–13 and accompanying text, and Michael Carvin had stated during the argument that he thought the court could find for Bush without ever reaching the constitutional issues, *see supra* note 566 and accompanying text, but Bush clearly had raised the issue.

638. *See supra* notes 330–35 and accompanying text.

639. *See* Siegel v. LePore, 234 F.3d 1163, 1170 (11th Cir. 2000).

640. *See id.* at 1171. The Eleventh Circuit had denied the Bush team an injunction pending appeal of the district court's decision but had expressly refrained from issuing any opinion on the merits. *See* Touchston v. McDermott, 234 F.3d 1130, 1133 (11th Cir. 2000) (denying injunction pending appeal of Middle District of Florida case); Siegel v. LePore, 234 F.3d 1162, 1163 (11th Cir. 2000) (denying injunction pending appeal of Southern District of Florida case for the reasons set forth in *Touchston*).

orandum outlining Congress's role in tallying the electoral votes.[641] The memorandum focused on the Electoral Count Act of February 3, 1887,[642] *i.e.*, the act containing federal §§ 5 and 15.[643] The memorandum observed that the House and Senate could reject a state's electors if they found fault with the process by which they were appointed.[644] On reflection, the Congressional Democrats' response proves very telling, and it illustrates how far behind on federal law the Democrats were falling. House Speaker Richard Gephardt asked the Parliamentarian to provide the Democrats with any research given to the Republicans, and Rep. David Price, a North Carolina Democrat, introduced a resolution to ask the Archivist to provide Congress with information on Electoral College preparations.[645]

Four days later, on Saturday, November 18, the Republicans invoked the federal statutes again. The briefing in the Florida Supreme Court was not even complete, and yet Republican state legislators began speaking publicly about supplanting any electoral slate arrived at through judicial proceedings with their own legislatively-appointed slate.[646] The incoming speaker of the Republican-dominated Florida House,[647] Representative Tom Feeney, said, "If the courts don't allow the executive branch to do their [sic] duty, then at some point we would have to review our constitutional responsibilities. . . . At this point, we're just watching and waiting."[648] It was not entirely clear to what "*constitutional* responsibilities" Feeney was referring, but he was reported to be relying on 3 U.S.C. § 2,[649] which, as discussed above,[650] provides: "Whenever any State has held an election for the purpose of appointing electors, and has failed to make a choice on the day pre-

641. Alison Mitchell, *G.O.P. Begins Jockeying in House on Fate of Election*, N.Y. TIMES, Nov. 16, 2000, at A29; Eric Pianin & Juliet Eilperin, *An Angry GOP on Hill Would Confront Gore If He Won*, WASH. POST, Nov. 20, 2000, at A8 ("House Majority Whip Tom DeLay (R-Tex.) has circulated a staff memorandum to congressional Republicans pointing out that the House and Senate can reject a state's electoral votes if they decide that the votes are tainted.").

642. *See* Mitchell, *supra* note 641.

643. *See supra* notes 257–81 and accompanying text (discussing §§ 5 and 15).

644. Mitchell, *supra* note 641; *see also* David Rogers, *Hastert-Gephardt Meeting Aims To Avert Gridlock in a Closely Divided Congress*, WALL ST. J., Nov. 16, 2000, at A18 ("It requires only one member of the House and one from the Senate to raise objections to electors, and some House Republicans from Florida have already suggested that they might pursue this course if Vice President Al Gore is awarded the state's 25 electoral votes.").

645. Mitchell, *supra* note 641.

646. *See* Somini Sengupta & Dexter Filkins, *Republican Lawmakers Think They Have an Ace in the Hole*, N.Y. TIMES, Nov. 19, 2000, at A43.

647. The Florida House was made up of seventy-seven Republicans and forty-three Democrats, and the Florida Senate was made up of twenty-five Republicans and fifteen Democrats. David Barstow & Somini Sengupta, *Florida Legislators Consider Options To Aid Bush*, N.Y. TIMES, Nov. 23, 2000, at A1.

648. Sengupta & Filkins, *supra* note 646.

649. *Id.*

650. *See supra* notes 216, 228–30 and accompanying text.

scribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature thereof may direct."[651]

Of course, even as the Republicans were beginning to rely on the federal law in the media, they were saying very little about the federal law to the Florida court. Bush's brief included a short argument based on federal § 5, but it was buried on page forty-two.[652] When the case was argued orally, Michael Carvin, arguing first for Bush, invoked neither the electoral appointments clause nor § 5, and Barry Richard made what can only be described as an oblique reference to federal restraints on the state judiciary.[653] Nowhere was there any mention of the United States Supreme Court's decision in *McPherson v. Blacker*, which had suggested the primacy of state legislative enactments over state constitutions and, at least arguably by its strong language, over equitable relief granted by the courts.[654]

What seems obvious now is that the Republican attorneys arguing the Florida case made a very deliberate choice to mention the electoral appointments clause and federal § 5 just enough times to avoid any claim that the issues had not been raised, but not often or vigorously enough that the Florida court would pay them any heed. Plainly, the Republicans had become familiar with the federal statutes governing the electoral college: Tom DeLay had issued a memorandum on them and Florida legislators were invoking them even before Bush's brief was filed or the case was argued, and the attorneys knew enough about them to include them in the Florida brief.[655] The attorneys' hope would have been that the Florida court would do itself in, by straying so far from the legislative enactment to rule in Gore's favor that Bush could argue it committed reversible error.[656]

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651. 3 U.S.C. § 2 (1994).

652. *See supra* notes 509–11 and accompanying text.

653. *See supra* note 569 and accompanying text.

654. *See supra* notes 161–62 and accompanying text.

655. *See supra* notes 509–11 and accompanying text. With this said, it does not appear that even Bush's lawyers were at this point fully versed in the law on the electoral appointments clause or federal § 5. As will be discussed below, when they later briefed and argued the electoral appointments clause issue in the United States Supreme Court, Bush's lawyers did not quote the fateful language from *McPherson* stating that a state court reviewing a dispute over presidential electors could not rely on the state's *constitution*. *See infra* notes 939–42, 963–64, 975–76 and accompanying text. Further, when Theodore Olson was questioned by Justice Scalia on the precise relationship between federal §§ 5 and 15, it was clear that he did not understand the relationship well enough to talk about it, and when asked whether § 15 predated the *McPherson* case, Olson said he did not know. *See infra* notes 970–71 and accompanying text.

656. Since the case ended, at least one of Bush's lawyers has indicated that this was their plan. As Irv Terrell has described it, "The whole Bush strategy was to build a record in state court and then get the Supreme Court of the United States to reverse it. Our desire was to get to the [U.S. Supreme Court] with another unbelievable decision from the Florida Supreme Court." Richard T. Cooper, *A Different Florida Vote, In Hindsight: Gore, Bush Teams Made Quick Decisions in Critical Moments in the Recount Battle*, L.A. TIMES, Dec. 24, 2000, at A1.

Whether the omission in the briefs and the oral argument was deliberate or not, it certainly seems that by the next day, when the Florida Supreme Court handed down its decision, the Republicans had developed a game plan based on the electoral appointments clause and federal §§ 2, 5, and 15. First, they would argue that the electoral appointments clause, as well as federal § 5, required that the judiciary adhere strictly to the legislative enactments governing the appointment of electors. Second, they would seize upon the Florida Supreme Court's decision to enjoin the certification and any other aspect of the decision they could find, to claim that the judicial outcome was a change in the law violating the electoral appointments clause and depriving any judicially-approved electoral slate of the presumption of correctness afforded by federal § 5. Third, they would have the Florida Legislature invoke federal § 2 to appoint a slate of electors to square off in Congress with any slate of Gore electors the judiciary might approve. And finally, if it came down to competing slates in Congress, they could count on at least the Republican-controlled House of Representatives,[657] to accept the claim that the judiciary had

657. At the time the Republicans' reliance on the federal electoral statutes emerged, the Republicans remained in control of the House of Representatives. *See* David Rogers & Jim VandeHei, *Democrats Cut into GOP Majorities in Congress*, WALL ST. J., Nov. 8, 2000, at A28. It was unclear, however, whether the Senate would be under Republican control when the electoral votes were counted, because the race between Democrat Maria Cantwell and incumbent Republican Senator Slade Gorton in Washington required both counting all of the absentee ballots and a recount to be decided, and the lead changed several times. *See* Karen Hucks, *Gorton's Lead Widens: Margin Remains Very Slim*, TACOMA NEWS-TRIBUNE, Nov. 17, 2000, at A14 ("The three-term Republican incumbent was 11,458 votes ahead of Cantwell, a former Democratic state lawmaker and one-term congresswoman . . . [with] 2.3 million ballots counted."); Paul Leavitt, *Three Races Still Not Officially Called*, USA TODAY, Nov. 21, 2000, at 9A ("In the only undecided Senate race, incumbent Republican Sen. Slade Gorton of Washington state leads Democrat Maria Cantwell by 1,182 votes with 99% of the ballots counted."); Elaine S. Povich, *Democrat Wins Washington State — by 2,259*, NEWSDAY, Dec. 2, 2000, at A35 (noting that Cantwell "bested Gorton by 2,259 votes"); Seattle Times Staff, *Cantwell: I Will Be a Senator for All Washington*, SEATTLE TIMES, Dec. 2, 2000, at A1 (providing that after a statewide recount was completed, "[Cantwell] gained 276 votes, expanding her winning margin to 2,229 votes of the more than 2.5 million cast"). If Cantwell won, the 100 Senate seats would be split 50-50. Terence Samuel, *It Looks Like Gridlock as Usual: Can Lawmakers Ever Stop Bickering and Get Back to Business?*, U.S. NEWS & WORLD REP., Nov. 20, 2000, at 44 ("[S]hould Democrat Maria Cantwell prevail in an undecided race against incumbent Republican Slade Gorton in Washington State, the Democrats would get the 50 slots [Senate Minority Leader] Daschle's been coveting."). And at the time the electoral votes would be counted, the President of the Senate, who could cast the tiebreaking vote, would be the still-sitting Vice President Gore. *See supra* notes 257–58 and accompanying text (describing the opening and counting of the electoral votes under § 15). On the other hand, even if the House supported one slate of electors and the Senate supported another, the tiebreaker rule under § 15 would support whichever slate had been certified by the executive of the state, which would most likely be Governor Jeb Bush, the Republican candidate's brother. *See supra* notes 270, 272 and accompanying text (describing § 15's provisions for handling a disagree-

not properly applied Florida law, and to reject, under federal § 15, any judicially-approved electors for Gore.

This strategy became clear immediately after the Florida Supreme Court's decision. Although the court's decision surely did not surprise the Bush campaign,[658] former Secretary of State James Baker, acting as Bush's spokesperson, emotionally denounced the ruling, complaining that same night that the court had changed the rules in the middle of the game and warning, "one should not now be surprised if the Florida Legislature seeks to affirm the original rules."[659] Florida Governor Jeb Bush, who had previously assumed a low profile because of his relationship to the candidate, chimed in: "[The Florida legislators] clearly have a responsibility under certain circumstances, or they at least have the right granted to them by the Constitution. I mean, it's pretty clear that the Legislature has a role in this, should it get to that. I hope it doesn't."[660] Republican state legislators followed as if on cue, announcing their plans to either call a special session to consider appointing electors themselves, or go into federal court, to ensure that "the Legislature write[s] the laws of this state."[661]

The next day, the emphasis on federal law became even stronger. The House Majority Leader, Representative Dick Armey of Texas, stated flatly that the Florida Legislature had a "duty to step in and restore honesty and the rule of law," and one House Republican openly threatened to challenge Florida's electors if, as a result of the Florida court decision, they represented Gore.[662] Florida legislators began speaking of holding a special session the following week to appoint electors for Bush.[663] Again the Democratic response was weak at best. Laurence Tribe made clear that Gore would challenge such action by the Florida Legislature in federal court, but Florida Democrats apparently told reporters that they could "do little more than slow the Republican [legislators] through a guerilla campaign of procedural harassment."[664] Beyond Tribe's reaction, the Democrats did

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ment between the two houses of Congress on which of two competing electoral slates should be recognized).

658. The *Washington Post* has reported that a "knowledgeable source close to the Florida high court" had alerted the Bush team prior to the oral argument on Monday morning that the court had already decided the case, that an opinion was already circulating among the justices, and that six of the seven justices had already approved of it. DEADLOCK, *supra* note 1, at 111. According to the *Post*, the source revealed that the court was going to rule in Gore's favor and extend the deadline by five days. *Id.* That is, of course, exactly what the court did. *See supra* notes 586–93 and accompanying text.

659. Frank Bruni, *Bush Camp, Outraged, Vows To Seek Recourse to Ruling*, N.Y. TIMES, Nov. 22, 2000, at A1.

660. *Id.*

661. *Id.* (quoting Republican state senator from Orlando Daniel Webster).

662. Alison Mitchell, *G.O.P. Expresses Rancor over Ruling: Lawmaker Threatens To Challenge Electors*, N.Y. TIMES, Nov. 23, 2000, at A33.

663. Barstow & Sengupta, *supra* note 647.

664. *Id.*

not offer the media, or anyone else, any meaningful, substantive discussion of the federal law.[665]

Simultaneously, Bush petitioned the United States Supreme Court for writs of certiorari from both the Florida court's decision and the Eleventh Circuit's decision declining to enjoin the manual recounts pending Bush's appeal.[666] The petition addressing the Florida court's decision presented three questions: (1) whether "post-election" limits on executive discretion or "post-election" judicial standards for tallying votes violated federal § 5 or the Due Process Clause; (2) whether the state court's decision, because it could not be reconciled with state statutes, violated the electoral appointments clause, and (3) whether the use of "arbitrary, standardless, and selective recounts" violate the Due Process and Equal Protection Clauses and the First Amendment.[667] The petition challenging the Eleventh Circuit's decision raised only the third question.[668]

Bush's decision to petition the Supreme Court to review the Florida court's decision was greeted with great skepticism. The vast majority of legal commentators voiced the opinion that there was no federal question properly presented.[669] Laurence Tribe, who had appeared

665. Indeed, even Tribe's response suggested that either he had not yet delved into the law on the electoral appointments clause and discovered the restrictive language of *McPherson v. Blacker*, or at least he did not appreciate the view the United States Supreme Court would take of the case. The *New York Times* quoted Tribe as saying,

> An attempt by the State Legislature to act like a court, whether clothed in the garb of legislation or not, would be rejected by federal and state courts at this point. The very essence of judicial power is to interpret the laws to make them consistent with one another, and ultimately *consistent with state constitutional principles.*

Id. (emphasis added). This reference to the legitimacy of the court's reliance on the state constitution strongly suggests that as of this point in the controversy, Tribe still believed the Florida Supreme Court had the power to superimpose state constitutional principles on the state legislative method.

666. *See* Petition for a Writ of Certiorari, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. SC00-836); Petition for a Writ of Certiorari, Siegel v. LePore, 531 U.S. 1005 (2000) (No. SC00-837).

667. Petition for a Writ of Certiorari, *Palm Beach County Canvassing Bd.*, *supra* note 666, at i.

668. *See* Petition for a Writ of Certiorari, *Siegel*, *supra* note 666.

669. *See, e.g.*, Linda Deutsch, *Bush Appeals to U.S. Supreme Court*, ASSOCIATED PRESS, Nov. 22, 2000, 2000 WL 29581165 ("Most legal experts said it was unlikely the U.S. Supreme Court would intervene in a state case without compelling evidence of a federal issue."); Nancy Gibbs, *Bush's Contested Lead: Now it Goes to the Courts as Gore Challenges Sunday Night's Florida Certification*, TIME, Dec. 4, 2000, at 31, 32 ("[T]he United States Supreme Court surprised just about every legal scholar on the planet [when it] said it would hear the Bush petition. . . ."); Michelle Mittelstadt, *Justices Sidestep Divisive Decision: United States Supreme Court's Unanimous Move Called "A Good Way Out" by Law Experts*, DALLAS MORNING NEWS, Dec. 5, 2000, at 15A (reporting Georgetown University law professor Mark Tushnet's "surprise" that the Supreme Court agreed to hear Bush's case); Jeffrey Rosen, *Florida's Justices Went Too Far*, N.Y. TIMES, Nov. 23, 2000, at A43 (editorial by associate professor of law at George Washington University School of Law) ("the justices . . . have no business second-guessing a state court on the interpretation of state law"); Roger Cossack,

for Gore in the federal district court, seemed unconcerned: "This appeal will not be hard in the least to defend, because the federal questions are frivolous."[670]

Two days later, however—the Friday after Thanksgiving—the Court granted Bush's petition on the Florida case, agreeing to hear the first two questions he had raised in the Florida case, those involving the electoral appointments clause and § 5, as well as a third raised by the Court itself: "What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?"[671] The Court denied without prejudice Bush's petition from the Eleventh Circuit ruling, which left the equal protection, due process and First Amendment challenges to the recounts pending before that court.[672] The Court directed the parties to file briefs on Tuesday, November 28, and Thursday, November 30, and scheduled the oral argument for Friday, December 1.[673]

Had the commentators and the Democrats been more fully prepared on federal law, they would not have been so shocked by the Supreme Court's decision to take the case, at least to the extent of reviewing the question implicating the electoral appointments clause.[674] For whether or not Bush was *correct* when he argued that

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Roger Cossack on What—and When—the Courts Might Rule (Nov. 23, 2000), *at* http:\\www.cnn.com/2000/ALLPOLITICS/stories/11/23/cossack.debrief/ (copy on file with the Texas Wesleyan Law Review) ("I don't think [the likelihood that the Supreme Court will grant the request from Gov. George W. Bush is] strong. You have to have a federal question in order for the U.S. Supreme Court to accept the case."); Jessica Reaves, *The Legal Road Map: What's Going on in Courts from Tallahassee to Washington* (Nov. 27, 2000), *at* http://www.cnn.com/2000/ALLPOLITICS/stories/11/27/united.tm/index.html (copy on file with the Texas Wesleyan Law Review) ("Many legal analysts snickered at the Bush team's attempt to push the case toward the Supreme Court, pointing out there was little in the GOP challenge to recommend it to a federal court.").

670. Todd S. Purdum, *In Blow to Gore, Recount Halts in Miami-Dade: Palm Beach Is Given Discretion on Ballots*, N.Y. TIMES, Nov. 23, 2000, at A1.

671. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004, 1005 (2000).

672. *See* Siegel v. LePore, 531 U.S. 1005, 1005 (2000).

673. *See Bush*, 531 U.S. at 1005.

674. It appears that many members of the profession were willing to jump in and render definitive opinions about the case even though those lawyers were previously unaware of the detailed law on the electoral college and had never studied the electoral appointments clause. *Cf.* Linda Greenhouse, *The Supreme Court: While Justices May Not Settle the Dispute Yet, They Could Settle Key Questions*, N.Y. TIMES, Dec. 1, 2000, at A30 ("most of the lawyers in the case will concede in their candid moments that they had never heard of [§ 5] until a few weeks ago . . . ."). On November 21, for example, just before the Florida Supreme Court handed down its decision, Stephen Gillers, Vice Dean and Professor of Legal and Judicial Ethics at New York University School of Law, penned an editorial for the *New York Times* entitled "The Court Should Boldly Take Charge." Dean Gillers wrote:

> The [Florida] court should set a timetable for the resolution of all election challenges before the Electoral College meets on Dec. 18. The timetable must have accelerated procedures for asserting claims and filing appeals. The court should also provide guidance on issues now before lower courts—whether a pregnant chad is a vote, which absentee ballots count, whether it

the Florida court violated the electoral appointments clause by allegedly "rewriting" the Florida Code, the case raised a legitimate, colorable federal question. By its language, *McPherson v. Blacker* had conferred extraordinary power upon state legislatures, exclusive of state constitutions,[675] and the Florida Supreme Court very clearly had relied on the Florida Constitution—not just the Florida Code—to limit the Secretary of State's discretion to reject the results of manual recounts.[676] Indeed, Gore had *asked* the Florida court to rely on the Florida Constitution, and, for that matter, public policy.[677]

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was proper for Republican workers to complete absentee ballot applications, and what remedy, if any, there should be for [voter] confusion over the Palm Beach butterfly ballot. Because United States Supreme Court review of these issues is remote, the State Supreme Court's answers to them now will hasten the end of the story.

Stephen Gillers, *The Court Should Boldly Take Charge*, N.Y. TIMES, Nov. 21, 2000, at A25. It is hard to imagine how Dean Gillers could have suggested such a sweeping decision by the Florida Supreme Court if he was familiar with *McPherson v. Blacker*'s restrictive approach to the electoral appointments clause. Indeed, Gillers's own suggestion would have made United States Supreme Court review *anything but* "remote." Similarly, Jeffrey Rosen, an Associate Professor of Law at George Washington University School of Law, wrote an editorial for the *Times* in which he did not appear to be very well-versed in the governing law. Purportedly describing Bush's petition in the Supreme Court, Professor Rosen wrote:

> Bush also charged that the Florida Supreme Court violated federal law, which allows the state legislature to direct the "manner" in which electors shall be appointed whenever a state fails to choose them on the day prescribed by law. But the federal law is unclear on this point. Another section of the same law suggests that state judges have the final word about electoral disputes that are resolved before Dec. 12 and that the legislature can only intervene thereafter.

Rosen, *supra* note 669. This passage is simply rife with mischaracterization. First, it is true that federal law "allows state legislatures to direct the manner in which electors are chosen whenever a state fails to choose them" on Election Day. As set forth above, that is what federal § 2 provides. *See supra* notes 216, 228–30 and accompanying text. Yet Bush never claimed, as Rosen suggests, that § 2 was the federal law the Florida court violated; Bush claimed that the court violated § 5. *See supra* notes 666–68 and accompanying text. Second, *no* section of any federal law says, as Rosen claimed, that state judges have the final word about federal electoral disputes; all that federal law provides is that states can provide for a method of judicial resolution if they wish. *See* 3 U.S.C. § 5 (Supp. V 1999)). Further, that provision is in federal § 5, not in "another section of the same law," which would, by Professor Rosen's initial reference, be § 2. Finally, there is absolutely nothing in federal law that says anything about the legislature intervening only after December 12. One can make an *assumption*, if one does nothing more than read the statutes, that § 2, which allows for legislative action after Election Day, was intended by Congress to take effect only if a judicial resolution contemplated by § 5 was not completed by December 12. But the law certainly does not say that. *See* 3 U.S.C. §§ 2, 5. Further, even that *assumption* would be wrong, inasmuch as Congress enacted § 2 a full forty-two years before there was a § 5, for a completely different reason. *See supra* notes 228–30 and accompanying text.

675. *See supra* note 162 and accompanying text.

676. *See supra* notes 591, 622–29 and accompanying text.

677. *See supra* notes 448, 459–61, 522 and accompanying text.

With that said, Bush's claim of error based on federal § 5 *was* frivolous. Bush claimed that the Florida court violated § 5 by not applying the law as it stood on Election Day, but in reality, § 5 did not *require* anything of any state entity. It simply defined a circumstance in which Congress would afford a presumption of validity to a judicially-approved slate of electors.[678] Hence, there was no way the Florida court could have *violated* it in any sense appropriate for the judiciary. The only consequence of not meeting § 5's conditions was the possibility that Congress (not the United States Supreme Court) could refuse to accept a judicially-approved electoral slate.

Gore's attorneys, however, bore some responsibility for the confusion. Bush had affirmatively mischaracterized § 5 in the Florida court,[679] and Gore, apparently devoting little attention to federal law, had allowed the mischaracterization to go unchecked. Had Gore's team acted earlier to enlighten the state court on the real meaning of § 5, the law likely would never have achieved the prominence it ultimately did.

IV. THE SECRETARY OF STATE'S CERTIFICATION

By the time the Florida Supreme Court handed down its decision on the night of Tuesday, November 21, three counties were immersed in countywide manual recounts. Broward County had begun counting its 588,007 ballots on Wednesday, November 15;[680] Palm Beach County had begun counting its 462,657 ballots on Thursday, November 16;[681] and Miami-Dade had begun its counting process on Sunday, November 19, by beginning to run all of the 653,963 ballots through the counting machines to separate out the undervotes.[682] (As described above, Volusia County succeeded in completing its recount of ballots five minutes before Katherine Harris's 5:00 p.m. deadline on Tuesday, November 14.[683])

The effect of the Florida court's decision on the recounting in Broward and Palm Beach was very favorable to Gore, in two respects. First, and most obviously, the decision required the Secretary of State to accept the results of the recounts if they were submitted by November 26. Just as importantly, however, the court's citation of the Illinois case, *Pullen v. Mulligan*—with its language stating that ballots could be counted as votes even when the chads did not completely dis-

678. *See supra* notes 265–81 and accompanying text.

679. *See supra* note 511 and accompanying text.

680. Thomas C. Tobin, *Amid Wrangling, Broward Begins Recount*, ST. PETERSBURG TIMES, Nov. 16, 2000, at 9A.

681. Rick Bragg, *At Long Last, Army of Volunteers Gets Its Orders To Begin Recount*, N.Y. TIMES, Nov. 17, 2000, at A29.

682. Don Van Natta, Jr., *Fatigue in Florida: Bush's Slim Lead Holds as Rules Change and Challenges Pile Up*, N.Y. TIMES, Nov. 20, 2000, at A1.

683. *See supra* note 408 and accompanying text.

lodge[684]—enabled the Gore team to challenge what it saw as Palm Beach County's overly exclusionary approach to dimpled chads. Indeed, within twenty-four hours of the Florida Supreme Court's decision, the Florida Democratic Party had a decision by Judge Labarga directing Palm Beach not to per se exclude any ballot, even a ballot that was merely dimpled, and citing the Florida Supreme Court's decision to that effect.[685] In Miami-Dade, however, the Florida court's decision would ultimately prove devastating to Gore.

Immediately after the Miami-Dade board had voted to conduct a countywide recount, officials there had estimated that beginning on Monday, November 20, utilizing twenty-five two-person teams,[686] it would take them two weeks, including every day other than Thanksgiving, to complete the recount.[687] Elections Supervisor David Leahy[688] decided that the board would run the ballots through the counting machines precinct by precinct to cull the undervoted ballots, and then review the undervoted ballots first.[689] Leahy considered this the most efficient process because it would allow the board to evaluate the undervoted (and most likely to be controversial) ballots while the counting teams recounted the ballots that did not register as undervotes and created piles of ballots on which the counters could not agree for the canvassing board to review.[690]

The board developed a process by which it would evaluate the ballots. Leahy would look at the ballot, pronounce it a vote or not, and then the other board members (and the observers) would evaluate it

684. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1238 (Fla.) (quoting Pullen v. Mulligan, 561 N.E.2d 585, 611 (Ill. 1990) ("These voters should not be disenfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot." (citations omitted))), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

685. Fla. Democratic Party v. Palm Beach County Canvassing Bd., No. CL-00-11078AB (Fla. Cir. Ct. Nov. 22, 2000) (order on plaintiff's emergency motion to clarify declaratory order of November 15, 2000).

686. Elections Supervisor David Leahy has explained that the board planned on only twenty-five counting teams because the nature of the process was such that it would do no good to bring in more teams. DEADLOCK, *supra* note 1, at 137. The law, after all, required the canvassing board to resolve any disagreements over whether a ballot should be counted, *see* FLA. STAT. ANN. § 102.166(7)(b) (West Supp. 2001), and a three-member board could only progress through so many ballots at a time.

687. *See* Bragg, *supra* note 432. The Elections Supervisor personally set an earlier goal of December 1, *see* DEADLOCK, *supra* note 1, at 137, so presumably the public announcement was intended to be a conservative estimate.

688. David Leahy and another member of the board, Judge Myriam Lehr, were non-partisan, the latter a registered independent. DEADLOCK, *supra* note 1, at 125; Dexter Filkins & Dana Canedy, *Protest Influenced Miami-Dade's Decision To Stop Recount*, N.Y. TIMES, Nov. 24, 2000, at A41. The third member and chair of the board, Judge Lawrence King, was a Democrat. DEADLOCK, *supra* note 1, at 125; Filkins & Canedy, *supra*.

689. Van Natta, Jr., *supra* note 355; DEADLOCK, *supra* note 1, at 138.

690. Van Natta, Jr., *supra* note 355; DEADLOCK, *supra* note 1, at 137.

and vote.[691] A court reporter would record the ballot number, and the observers would make objections to how various of the ballots were counted.[692] Using this process, the board was able to count about a ballot a minute, or sixty an hour.[693] By Tuesday night, November 21, 139 precincts had been counted manually, and Leahy thought the board might actually be able to finish by December 1.[694]

That same night, however, the Florida Supreme Court set a deadline of November 26. At 8:00 a.m. the next morning, Leahy told the board members that they had three options: (1) try to find more counting teams, and count twenty-four hours a day for four straight days, but have insufficient time to resolve all of the disputed ballots; (2) stop the process, or (3) send the counting teams home, and focus as a board only on the 10,750 undervotes, on the theory that the machines could properly count the others.[695] According to Leahy, if they could speed up to five ballots a minute, the board could have all the undervoted ballots counted in thirty-six hours of work.[696]

The board decided on the third option, counting only the undervotes.[697] Unfortunately, the board members also decided that they could save time in counting the undervotes if they moved up one floor, to the "Tabulating Room," to receive the undervotes as soon as the tabulating machines separated them.[698] Because the Tabulating Room had only limited access, this infuriated many observers and the press alike, and, outside the elections supervisor's office, some thirty to forty Republican protesters began shouting, "Stop the count! Stop the fraud!"[699] Several people reported being punched or kicked when the protesters tried to rush the doors,[700] and a Democratic Party lawyer had to be escorted by police to safety when someone wrongfully accused him of stealing a ballot.[701]

Inside the Tabulating Room, the board could hear the commotion, but they continued.[702] It soon became clear, however, that they were not going to be able to evaluate the ballots at the rate of five per minute.[703] So the board members abandoned the process and went to their respective offices to meet individually with the county attorney

691. DEADLOCK, *supra* note 1, at 137.
692. *Id.*
693. *Id.*
694. *Id.* Gore, at that time, had a net gain of 157 votes. *Id.*
695. *Id.* at 138. Leahy proposed that when the board decided an undervoted ballot constituted a vote, the board would create a fully punched duplicate for that card and, in the end, run the whole lot—all 653,963—back through the machines. *See id.*
696. *Id.*
697. *See id.*
698. *Id.*
699. *Id.* at 138–39.
700. Filkins & Canedy, *supra* note 688.
701. DEADLOCK, *supra* note 1, at 139–40; Filkins & Canedy, *supra* note 688.
702. DEADLOCK, *supra* note 1, at 139.
703. *Id.* at 140.

about the possibility of getting an extension from the Florida Supreme Court.[704] When they reconvened at 1:30 p.m. in the public meeting room, they explained that there simply was not enough time to accomplish the counting properly, and they voted unanimously to end the process.[705] David Leahy has since said that he was less concerned about the protesters than he was the press's perception that the process was not being conducted openly and fairly, joined with the fact that the deadline was going to be virtually impossible to meet.[706]

Gore appealed immediately to the district court of appeals to force the Miami board to resume counting, arguing that once a canvassing board deemed that a recount should be conducted, it was obligated to complete it. The court of appeals apparently agreed that the board should have completed the count, but it refused to mandamus the board to continue counting given the board's representation that it could not finish the counting by the Florida Supreme Court's November 26 deadline.[707] A unanimous Florida Supreme Court likewise refused to intervene.[708]

With Miami-Dade out of the picture, Gore's recount hopes came down to Broward and Palm Beach. In Broward, Gore's recount strategy worked as planned. The Republicans attempted to raise the tension level by seating former presidential candidate and Senator Bob Dole at the Broward board's table while they counted the disputed ballots,[709] but in the end, the board finished a day early, and Gore had a net gain of 567 votes.[710]

The counting in Palm Beach, however, went decidedly against Gore. After breaking for Thanksgiving, the board had nearly 10,000

704. *Id.* at 142. The board members were concerned that any closed group meeting with the county attorney would be seen as violating Florida's open meeting law. *Id.*

705. *Id.* at 142–43.

706. *Id.* at 141; Filkins & Canedy, *supra* note 688. The protesters on the scene were, for the most part, "young congressional staffers and other volunteers from Washington" whom the Republican Party had flown and bussed into the state. DEADLOCK, *supra* note 1, at 139. The networks broadcast footage of their rushing the doors of the election office shouting, and Democrats spoke often and angrily about the "mob" having shut down the Miami-Dade count. *Id.* at 140.

707. Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd., 773 So. 2d 1179, 1180 (Fla. Dist. Ct. App. 2000). The district court of appeals wrote: "The results of th[e] sample recount showed 'an error in the vote tabulation which could effect the outcome of the election[,]' thus triggering the Canvassing Board's mandatory obligation to recount all of the ballots in the county." *Id.* (quoting FLA. STAT. ANN. § 102.166(5) (West Supp. 2001)). Under the circumstances of the deadline, however, nothing could be done: "'[m]andamus will not lie to compel the performance of an act that is futile or impossible to perform.'" *Id.* (quoting Agency for Health Care Admin. v. Mount Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. Dist. Ct. App. 1997)).

708. *See* Gore v. Miami-Dade Canvassing Bd., No. 00-2370 (Fla. Nov. 23, 2000).

709. Lynette Holloway, *Gore Gains in Broward: Count Reaches Midpoint*, N.Y. TIMES, Nov. 25, 2000, at A12.

710. DEADLOCK, *supra* note 1, at 136; David Firestone, *Bush's Lead Is Halved in Unofficial Tally as Broward Finishes*, N.Y. TIMES, Nov. 26, 2000, at A1.

disputed ballots to evaluate in the three days remaining before the November 26 deadline.[711] Approximately 2000 ballots were reviewed on Friday, but the board made it through only 900 on Saturday.[712] Worse yet for Gore, the Palm Beach board did not often count dimpled ballots as votes.[713] Not only did this mean that Gore did not pick up a lot of votes, but the observers for Gore felt compelled to object every time a "dimple for Gore" was not counted, and that in turn led to Republican counterobjections that "dimples for Bush" were not counted, so the process bogged down.[714] On Friday morning, the dispute had become so pointed that the Palm Beach board granted a Democratic request to put on witnesses as to why the board was proceeding in the wrong fashion.[715]

By Sunday afternoon, November 26—after working all night[716]—the Palm Beach board recognized that it might well not finish.[717] Board Chairman Charles Burton faxed a letter to Secretary of State Harris asking for an extension until 9:00 a.m. the next morning,[718] the alternative deadline the Florida Supreme Court had allowed in the event the Secretary's office was not open on Sunday.[719] Harris faxed back a letter denying any extension.[720]

At about 4:25 p.m., it became clear that the board would fall short of completing the recount by 5:00 p.m., so the board stopped counting and prepared to fax the Secretary partial results.[721] The fax machine jammed, but eventually the fax confirmation showed that it went through just before 5:00 p.m.[722] With about 800 to 1000 disputed ballots left to examine, Palm Beach County's manual recount reflected a net gain for Gore of 192 votes.[723] Not knowing whether the results

711. *See* Firestone, *supra* note 710.

712. *Id.*

713. *See* Trial Transcript, *supra* note 362, at 71 (Gore expert testifying that Palm Beach recovered votes from eight percent of the ballots initially not counted and Broward recovered votes from twenty-six percent of the ballots initially not counted); DEADLOCK, *supra* note 1, at 147 (noting that Broward found votes on approximately twenty to twenty-five percent of the undervotes, but Palm Beach found votes on only about five percent).

714. DEADLOCK, *supra* note 1, at 146.

715. *See* Trial Transcript, *supra* note 362, at 102–03 (Palm Beach Canvassing Board Chair Judge Charles Burton testifying about the hearing on November 24).

716. *See* Don Van Natta, Jr. & Rick Bragg, *Palm Beach Count Rejected by State: County Canvassing Board Says Move Is a "Slap in the Face,"* N.Y. TIMES, Nov. 27, 2000, at A1 (board members worked thirty-four hours straight from Saturday to Sunday afternoon).

717. DEADLOCK, *supra* note 1, at 147.

718. Van Natta, Jr. & Bragg, *supra* note 716; DEADLOCK, *supra* note 1, at 147.

719. *See supra* note 593 and accompanying text.

720. Van Natta, Jr. & Bragg, *supra* note 716; DEADLOCK, *supra* note 1, at 147.

721. DEADLOCK, *supra* note 1, at 147–48; Todd S. Purdum, *Margin Put at 537: Decisive Electoral Votes—"A Lot of Work to Do" Bush Says*, N.Y. TIMES, Nov. 27, 2000, at A1.

722. DEADLOCK, *supra* note 1, at 148; Van Natta, Jr. & Bragg, *supra* note 716.

723. Purdum, *supra* note 721; Van Natta, Jr. & Bragg, *supra* note 716.

would be included, the board members resumed counting.[724] When they had finished looking at every last ballot, at around 7:00 p.m., Gore had a net gain of only 174 votes.[725]

As it happened, neither number mattered. The Secretary notified Palm Beach that she would not include the partial result or any late result.[726] Ironically, she justified her decision by citing the very portion of section 102.166 on which the counties had relied to conduct the manual recounts in the first place.[727] Subsection (5) of section 102.166 authorizes the county canvassing board to "[m]anually recount *all* ballots,"[728] *i.e.*, not the vast majority of them.

Right before 7:30 p.m. that night, Secretary of State Harris appeared with the other two members of the Elections Canvassing Commission at the Florida Capitol.[729] She announced that the Commission had certified the results of the statewide vote, and that Bush had won Florida's 25 electors by 2,912,790 votes to 2,912,253 votes, a margin of 537.[730] She and the other members of the Commission then began signing multiple copies of the certified results.[731] The next step was to have the Governor sign the certificate of ascertainment, pursuant to federal § 6.[732]

For the Bush team, this was more than a ceremonial moment. Gore's attorneys had already announced their intention to contest the certification.[733] If Gore did bring a contest action, and somehow the contest ended in his favor prior to six days before the electoral college met, Bush still had an out. At least until the United States Supreme Court told him he could not, Bush could claim that the judicial result favoring Gore, in allowing the recounts and denying the Secretary discretion to enforce the law as written, had strayed so far from the legislatively dictated method of appointing electors as to violate the electoral appointments clause[734] and lose the presumption of validity

724. Van Natta, Jr. & Bragg, *supra* note 716; DEADLOCK, *supra* note 1, at 148.

725. DEADLOCK, *supra* note 1, at 148. This is the number reported by the *Washington Post*, months after the election controversy ended, but no one was very sure what this number was for quite some time after the board completed its manual recount. During the contest proceeding, Gore's lawyers claimed the number was a net gain of 215 votes, the Chair of the Palm Beach board testified that he was not certain because he had not seen the final tally, *see* Trial Transcript, *supra* note 362, at 106, and Bush's lawyers claimed that the net gain for Gore was 183 votes, *id.* at 259.

726. Purdum, *supra* note 721; DEADLOCK, *supra* note 1, at 148.

727. *See* Purdum, *supra* note 721.

728. FLA. STAT. ANN. § 102.166(5)(c) (West Supp. 2001) (emphasis added).

729. Purdum, *supra* note 721; DEADLOCK, *supra* note 1, at 152.

730. DEADLOCK, *supra* note 1, at 152.

731. *Id.* at 153.

732. *See supra* note 231 and accompanying text.

733. *See* Firestone, *supra* note 710 (quoting David Boies saying that Gore will contest the results "regardless of how the overall statewide votes are").

734. *See infra* notes 939–42 and accompanying text (relating Bush's arguments on the electoral appointments clause).

under federal § 5.[735] Indeed, depending on how aggressively the Florida courts behaved in the contest proceeding, Bush might have additional claims that the judiciary had acted unconstitutionally and in "violation" of § 5. For these arguments to work, however, there had to be a certificate of ascertainment in Washington to compete with any Gore might obtain from the judicial proceeding.[736] And in that case, if Congress ended up divided on which slate should be recognized, the certificate submitted by the slate of electors certified by the state executive would, under § 15, win by default.[737]

Recognizing this, aides to the Governor picked up the official documents Sunday night, immediately after they were signed, and drove them straight to Jeb Bush.[738] Once Jeb Bush had signed the certificate of ascertainment,[739] the law required that it be sent to the Archivist by registered mail.[740] It was Sunday, however. No post offices were open, and the Bush team was very fearful that Gore might subpoena the certificate before it got in the mail.[741] After considering some extreme measures, like driving the certificate into Georgia or flying to Washington to avoid the subpoena power of the Florida courts, Bush's counsel decided to give the certificate to a staff member so unrelated to the dispute that Gore's lawyers would never think of serving her with a subpoena.[742] The next day, the certificate went off to Washington by registered mail.[743] When it

735. *See infra* notes 927–30 and accompanying text (relating Bush's arguments on § 5).

736. *See supra* notes 266–68 and accompanying text (noting that Congress is required to accept a slate of electors' return if it is the only one submitted from a state).

737. *See supra* notes 270, 272–73 and accompanying text; *see also* DEADLOCK, *supra* note 1, at 153 (describing the Bush camp's awareness that which slate bore the Governor's signature could be critical).

738. DEADLOCK, *supra* note 1, at 154; *see also* David Barstow & Somini Sengupta, *Jeb Bush Is Said To Be Willing To Sign Bill Ensuring Republican Victory in Florida*, N.Y. TIMES, Nov. 28, 2000, at A25.

739. It bears special note that simply by signing the certificate of ascertainment, Jeb Bush committed to the position that the Florida Supreme Court's decision was invalid and that because of its invalidity, there could no longer be a judicial resolution of the controversy that would qualify as a final determination under § 5. The federal statute under which Jeb Bush submitted the certificate states that it is "the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State *by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment*," to certify the electors' appointment to the Archivist of the United States. 3 U.S.C. § 6 (1994) (emphasis added). Thus, by submitting the certificate of ascertainment before any contest proceeding authorized by Florida law—the ordinary method of "final ascertainment"—had even been brought, Bush was in effect stating that there was no possibility of any legitimate contest proceeding.

740. *See supra* note 231 and accompanying text; *see also infra* note 743.

741. DEADLOCK, *supra* note 1, at 153–54.

742. *Id.* at 154.

743. *Id.* The story behind the registered mailing of the certificate of ascertainment is a hilarious illustration of how seemingly minor, logistical details in the practice of law can have huge consequences. Under the federal electoral statutes, the certificate

arrived, the certificates from only two other states had been submitted.[744]

Under federal law, the fact that Jeb Bush actually signed and sent to Washington a certificate of ascertainment naming electors for Bush bears a great deal of significance to evaluating the events that followed. The reader will recall that, beginning on Saturday, November 18, Florida state legislators began speaking of calling a special session in which they would name the electors themselves.[745] During the following week, after the Florida Supreme Court ruled, these voices became louder, and Jeb Bush actually joined the call.[746] The legislators claimed the right to do so under 3 U.S.C. § 2, and insisted that they had a "constitutional responsibility" to act to prevent Florida from being excluded altogether from the electoral college.[747]

Once Jeb Bush acted, however, and certified to Washington the Election Day results, the legislators' reliance on § 2 became so farfetched as to be frivolous. Section 2 provides that "[w]henever any State has held an election for the purpose of choosing electors, and has *failed to make a choice on the day subscribed by law*, the electors may be appointed on a subsequent day in such a manner as the legislature of such State shall direct."[748] Thus, Florida's legislators were claiming the right to arrogate to themselves the power to appoint that they had previously given the citizens of Florida, on the ground that the state had "held an election," but had "failed to make a choice" on Election Day. Even before Bush signed the certificate of ascertainment, it was a real stretch for the legislature to claim that the ongoing controversy could qualify as the "fail[ure] to make a choice," because the legislative history clearly showed that the statute was intended to cover only situations where state law required a majority winner and an election had failed to produce one.[749] One might have tolerated the argument, however, because no results had been certified, there was no case law interpreting § 2, and the situation had not come up before. But *after* Bush signed the certificate, it was absurd for the Republican legislators to continue relying on § 2, because the gover-

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of ascertainment must be sent to Washington by registered mail. 3 U.S.C. § 6. The staff member to whom the certificate was given, however, apparently did not know this, presumably because she was so far removed from the lawyers who were handling the controversy. So the next morning, after she had taken the certificate to the post office, one of Bush's lawyers asked her if everything had gone smoothly, and she told the lawyer that in fact, a nice postal official had advised her that sending the package by Express Mail would be even better than by registered mail. The lawyers rushed over to the post office and had to beg postal officials to let them retrieve the package and relabel it. DEADLOCK, *supra* note 1, at 154.

744. Barstow & Sengupta, *supra* note 738.

745. *See supra* notes 646–49 and accompanying text.

746. *See supra* notes 660–61, 663 and accompanying text.

747. *See supra* notes 648–51 and accompanying text.

748. 3 U.S.C. § 2 (emphasis added).

749. *See supra* notes 216, 219–30 and accompanying text.

nor of their state and the leader of their own party had actually *certified* that the "choice" had been made.

Likewise, as of the moment that the certificate of ascertainment arrived in Washington, the legislators' insistence that they had a "constitutional responsibility" to prevent Florida from being shut out of the electoral college was nothing short of misinformation. Florida's electoral college vote was no longer in any kind of "jeopardy," at least in the sense of Florida not being represented at all. The certificate itself authorized electors for Bush to vote in the electoral college on December 18 and transmit an electoral certificate to the Senate.[750] And under § 15, if only one electoral certificate is received from a state, Congress is *required* to honor the votes of the electors submitting that certificate.[751] The only thing that can happen then is that certain votes in the certificate can be challenged as not "regularly given"—perhaps on the ground of fraud in the voting, or an ineligible elector, or an elector violating an oath to vote for the candidate represented during the election—but the slate of electors itself cannot be challenged.[752]

The Democratic Party, however, was left utterly flatfooted. The Democrats should have been clarifying that the "failure to make a choice" language in § 2 could not possibly be interpreted to address a situation where a court was simply resolving precisely *which* choice had been made. To do so, they could have pointed out that Congress never intended § 2 to be triggered just because state courts authorized under § 5 to act had not yet finished their task, because § 2 was enacted forty-two years before § 5 ever came into *being*. Further, the legislative history conclusively showed that § 2 was aimed only at allowing legislatures to create a method for addressing elections that did not produce a majority winner, which was *not* the problem with the 2000 election. And with respect to the legislators' preposterous claim that they had a "constitutional duty" to act to somehow protect Florida, the Democrats could have quashed that notion even more quickly, simply by pointing to the *language* of § 15—which actually seems to contemplate a situation in which a contest authorized by § 5 is not complete—and by acknowledging that the certificate of ascertainment already submitted would ensure Florida's participation if the contest proceeding were not completed.[753]

750. No one ever made the Republican electors a party to any lawsuit such that they could be ordered not to vote on December 18.

751. *See supra* note 266–68 and accompanying text.

752. *See supra* notes 267–68 and accompanying text.

753. *See supra* notes 277, 743, 747 and accompanying text. It is possible that the team litigating on behalf of Gore did not want to emphasize publicly that the Bush-signed certificate would be controlling if the contest action did not finish, because that would (1) forfeit a later option of somehow contesting the validity of the electors appointed pursuant to the certificate of ascertainment, and (2) give the court hearing the contest action comfort in allowing the contest proceeding to move more slowly. Moreover, the Gore team might have concluded that it was actually to its benefit to allow the Florida legislature to appear so undemocratic and power-hungry. Those

Instead, the Florida Democratic Party and Gore's lawyers responded with very little substance. It strongly appears that, for whatever reason, no one had spent enough time reading §§ 2, 5, and 15, and delving into their legislative history, to realize that—or at least to articulate how—the Republicans were seriously misrepresenting the law.

V. THE CONTEST TRIAL IN LEON COUNTY

A. *Gore's Five Claims*

By Thanksgiving, November 23—three days before the Elections Canvassing Commission declared George W. Bush the winner of Florida's electoral votes, but the day after Miami-Dade stopped counting—Gore's prospects for picking up enough votes in the manual recounts appeared dim enough that his lawyers announced publicly that they planned to file a contest action in Leon County on Monday.[754] Over the next few days, Gore's lawyers made quite clear that the contest would include the undervotes that were never examined in Miami-Dade, as well as a decision by the Nassau County Canvassing Board to amend its certification by discarding the tally from the automatic recount and returning to its tally from the evening of Election Day, a decision that cost Gore fifty-one votes.[755] The lawyers did not say, however, whether they would include in any contest action a claim related to the absentee ballot applications in Seminole and Martin Counties, a decision with which they apparently were still wrestling.[756]

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assessments, however, would have been dangerous in the longer view. For if Gore had won the contest action, the court might have been able to order Governor Bush to amend the original certificate of ascertainment, and if the Gore team had acted to *prevent* the Florida legislature from sending a slate, there would have been no slate competing with the amended court-appointed slate for Gore.

754. *See* David Barstow & Michael Cooper, *As Odds Lengthen, Democrats Plan for Legal Challenge*, N.Y. TIMES, Nov. 24, 2000, at A1; Richard L. Berke, *Endgame Strategy: Gore Aids Talk of New Legal Fight, But Some Allies Are Uneasy*, N.Y. TIMES, Nov. 24, 2000, at A1.

755. David Firestone & David Barstow, *Florida Legislature Plans To Enter Legal Fray, Backing Bush's Suit*, N.Y. TIMES, Nov. 25, 2000, at A1. Gore lawyer David Boies asserted that the Nassau County board acted completely without justification, going so far as to say: "If I can't win that argument, I'm going to give up the practice of law." *Id.*

756. DEADLOCK, *supra* note 1, at 159–61. Reportedly, David Boies argued for a simple case, focusing primarily on undervotes, the "easiest, cleanest contest points." *Id.* at 160. William Daley and Warren Christopher, Gore's public spokesmen, agreed, largely because trying to have the Seminole and Martin absentee ballots thrown out would conflict with Gore's continuing message that he wanted every vote counted. *Id.* Ron Klain, the lawyer coordinating the Florida litigation, *see id.* at 55, advanced a different view. Klain thought it might be beneficial to include both the undervote claims and the absentee ballot claims because Bush would not be able to insist on the strict letter of the law, the voting instructions, with respect to the undervotes, and yet argue for a lenient approach ignoring the legal technicalities, with respect to the absentee ballot applications. *Id.* at 160–61.

When Gore filed his complaint contesting the election results on Monday, November 27, shortly after noon,[757] he did not include any claim based on the absentee ballot applications.[758] The complaint instead challenged the certification on five grounds relating to the manual recounts: (1) the failure to include in the certified results approximately 215 net votes resulting from Palm Beach County's completed manual recount; (2) the failure to include in the certified results approximately 160 net votes resulting from Miami-Dade County's partial recount; (3) the failure to include approximately 800 net votes the Palm Beach board should have identified on approximately 4000 ballots with indentations; (4) the failure to include approximately 600 net votes from approximately 9000 ballots that the Miami-Dade board never reviewed; and (5) the exclusion of 50 net votes for Gore resulting from Nassau County's automatic recount.[759] Gore asked the court to order an immediate hearing on the claims, enjoin the Elections Canvassing Commission from declaring the winner,[760] and order the Commission to amend its certification to name Gore the winner.[761] In accompanying documents, Gore asked the court to shorten the defendants' response time,[762] to hold an emergency hearing that same day,[763] to place the disputed ballots in the registry of the court,[764] and to appoint special masters who would begin counting the Miami-Dade and Palm Beach ballots immediately.[765]

757. Complaint To Contest Election (filed Nov. 27, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

758. According to the *Washington Post*'s staff, Gore himself made the ultimate decision not to include any claim based on the absentee ballot applications or participate directly in the actions that were already pending, but to allow his team to work behind the scenes to get those plaintiffs sufficient funds and top-level lawyers. DEADLOCK, *supra* note 1, at 161, 176–78.

759. *See* Complaint To Contest Election, *supra* note 757, at 3–4.

760. This request for relief was moot when the Complaint was filed, because the Commission had declared Bush the winner the night before. *See supra* note 730 and accompanying text.

761. *See* Complaint To Contest Election, *supra* note 757, at 21–22.

762. Emergency Motion To Shorten Time and Request for an Emergency Hearing at 1 (filed Nov. 27, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

763. *Id.* at 3.

764. Motion To Place Disputed Miami-Dade Ballots in the Registry of the Court at 1 (filed Nov. 27, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000); Motion to Place Disputed Palm Beach Ballots in the Registry of the Court at 1 (filed Nov. 27, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

765. *See* Plaintiffs' Motion To Count the Ballots from Miami-Dade County at 1 (filed Nov. 27, 2000), 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000); Motion To Appoint Special Master for the Limited Function of Immediate Counting of Palm Beach Ballots to Allow Expedited Disposition of this Matter at 1 (filed Nov. 27, 2000), Gore v.

B. *The Pretrial Proceedings*

To the Gore team's dismay, the court's computer assigned the case to Judge N. Sanders Sauls.[766] Judge Sauls was a Democrat, but a very conservative one who had been appointed to the Leon County bench by a Republican governor.[767] Judge Sauls's reversal rate was substantial,[768] and in many cases the appellate courts had found him unreasonably strict in his enforcement of case management orders.[769] Further, if there was an extent to which the Florida Supreme Court could be seen as supporting Gore, Judge Sauls would be the last Leon County judge to show deference to the court's leaning in that respect. Only two years earlier the supreme court had unanimously demoted him from his position as chief judge, citing "the continuing disruption in the administration of justice" under his leadership.[770] So from the moment the case was assigned, Gore's lawyers felt they were facing a double burden. It would be not only difficult to get Judge Sauls to move the case in an unconventionally quick manner,[771] but critical to do so because he was likely to rule against them on the merits, and so they would have to get to the Florida Supreme Court to have any chance.[772]

To some extent, Gore's concern over Judge Sauls's willingness to expedite the proceeding was not borne out. The judge set an initial

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Harris, 2000 WL 1770257 (Fla. Cir. Ct.) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

766. DEADLOCK, *supra* note 1, at 165.

767. *See* David Firestone, *Florida Judge Is Asked To Declare Gore the Winner*, N.Y. TIMES, Nov. 28, 2000, at A1; David Barstow & Somini Sengupta, *Judge Who Rebuffed Gore Had Run-Ins with Justices*, N.Y. TIMES, Dec. 8, 2000, at A1; DEADLOCK, *supra* note 1, at 165.

768. *See* Barstow & Sengupta, *supra* note 767.

769. *See, e.g.*, Bandy v. Sheffield, 751 So. 2d 164, 164 (Fla. Dist. Ct. App. 2000) ("The lower court should not have dismissed the appellant's mandamus petition without clarifying what additional filings were needed to comport with the case management order, and without then giving the appellant a reasonable amount of time within which to comply."); Tooma v. Moore, 743 So. 2d 1189, 1189 (Fla. Dist. Ct. App. 1999) ("[I]t is an abuse of discretion to dismiss a petition for failing to comply with the requirements of section 57.085 without first affording to the party an opportunity to correct the deficiencies."); Gosman v. Moore, 745 So. 2d 416, 416 (Fla. Dist. Ct. App. 1999) (holding that the trial court should not have dismissed prisoner's mandamus petition for failure to comply with case management order when prisoner filed certificate substantially in compliance with order).

770. Barstow & Sengupta, *supra* note 767. The incident that reportedly precipitated the Florida court's action was Judge Sauls's decision to dismiss a court administrator for insubordination. *Id.* The administrator had complained when Judge Sauls ignored a search committee's recommendation on filling a court family law position and hired instead a woman who had less experience but came recommended by a friend of Judge Sauls. *See id.* According to one former Supreme Court justice who voted to demote Judge Sauls, the incident was only one of a number of instances in which the judge had acted in a highly autocratic manner. *See id.*

771. Barstow & Sengupta, *supra* note 767 (quoting Gore lawyer Dexter Douglass).

772. DEADLOCK, *supra* note 1, at 165–66 (quoting Gore lawyers David Boies and Mark Steinberg).

hearing less than four hours after the complaint was filed,[773] in which he required the defendants to answer the complaint three days later, by Thursday, November 30. Over the next few days, he ordered Miami-Dade and Palm Beach to transport all of their ballots to Tallahassee by Friday, December 1,[774] and he set the case down for a trial beginning Saturday, December 2.[775] Even so, the one thing Judge Sauls would not do—and it was Gore's most important request[776]—was begin counting the ballots. Although Gore argued that, in light of the need to finish the case by December 12, refusing to count was tantamount to denying his claim, Judge Sauls took the position that Gore should first prove on Saturday whether he was entitled to have the court look at the ballots.[777] Gore immediately appealed the judge's ruling to the District Court of Appeals,[778] with a request to pass the case to the Florida Supreme Court,[779] but the intermediate appellate court denied the appeal on the ground that Gore lacked a written order,[780] and the Florida Supreme Court declined to intervene.[781]

In the meantime, Bush's lawyers injected several issues with the potential to delay the case's resolution. In a motion to dismiss, Bush argued that Gore's contest action was untimely and improperly failed to name the Bush electors as parties to the suit.[782] In a letter to the court, Bush's lawyers suggested that they would be issuing subpoenas for all of the ballots from Broward, Volusia and Pinellas Counties, on the ground that dimpled ballots from those counties were illegally

773. *See* Firestone, *supra* note 767.

774. Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Nov. 29, 2000) (order requiring the delivery of certain ballots from Palm Beach and Miami-Dade Counties).

775. *See* David Firestone, *Hearing Is Scheduled for Saturday Despite Demands of Gore Lawyers*, N.Y. TIMES, Nov. 29, 2000, at A1.

776. *See generally* Emergency Motion To Commence Counting of Votes in Miami-Dade and Palm Beach Counties Pursuant to Beckstrom and Request for Immediate Hearing (filed Nov. 29, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

777. Firestone, *supra* note 775.

778. Plaintiffs' Notice of Appeal (filed Nov. 29, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2802), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

779. Appellants' Suggestion That District Court of Appeals Certify the Trial Court's Order as Requiring Immediate Resolution by the Florida Supreme Court at 1 (filed Nov. 29, 2000), Gore v. Harris, 2000 WL 1770382 (Fla. Dist. Ct. App. Dec. 1) (No. 1D00-4688), *dismissed*, 779 So. 2d 270 (Fla. 2000).

780. Gore v. Harris, 2000 WL 1770382 (Fla. Dist. Ct. App. Dec. 1) (order dismissing appeal of trial court oral ruling due to lack of jurisdiction), *dismissed*, 779 So. 2d 270 (Fla. 2000).

781. *See* Gore v. Harris, 779 So. 2d 270 (Fla. 2000).

782. Motion and Memorandum in Support of Defendants George W. Bush and Dick Cheney's Motion To Dismiss for Lack of Subject Matter Jurisdiction, Failure To Name Indispensable Parties, and Failure To State a Claim at 4–5 (filed Nov. 30, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

counted as votes.[783] On Thursday, two days before the trial, Bush submitted a witness list naming over ninety-seven potential witnesses.[784]

C. *The Contest Trial*

As it turned out, the trial was completed by Sunday night, only six days after the action had been filed.[785] Gore put into evidence all of the undervoted ballots from Miami-Dade and the disputed ballots from Palm Beach County, as well as a number of other documents,[786] but called only two witnesses.[787] Bush called only eight witnesses,[788] and the intervenors only four.[789] Because there were five defendants and three sets of intervenors, there were nearly as many opening statements and closings as there were witnesses.[790]

Gore's lawyers used their case primarily to establish three points: (1) that many legal votes went unrecognized by the counting machines because either voter error or defects in the machines caused incomplete punches on the ballots; (2) that these incomplete punches would have appeared more frequently on the left side of the ballots, *i.e.*, in the presidential race, than on the remainder of the ballot; and (3) that it should be possible to "recover" legal votes from approximately twenty to twenty-five percent of the undervoted ballots, a percentage markedly higher than the percentage recovered by the Palm Beach County board.[791] The first point (and to a certain extent, the third) seemed aimed to persuade the court to count the undervotes in Miami-Dade that had never been reviewed. The second and third points appeared designed to convince the court that Palm Beach had been too restrictive in its approach by refusing to count ballots that

783. David Firestone, *Bush's Lawyers Attack Suit by Gore To Challenge Vote*, N.Y. TIMES, Dec. 1, 2000, at A1; *see also* Subpoena for Production from Non-Party Pursuant to Rule 1.351(a) (filed Dec. 1, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

784. *See* Witness List (filed Nov. 30, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). Bush's list included by name every member of the relevant canvassing boards and a slew of observers, as well as a variety of experts. *See id.* Gore had filed a witness list on Tuesday naming only two witnesses. List of Proposed Witnesses and Exhibits at 1 (filed Nov. 28, 2000), Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4) (No. 00-2808), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

785. *See generally* Trial Transcript, *supra* note 362, at 289.

786. *See id.* at 17–19.

787. *See id.* at 19 (Kendall Brace); *id.* at 66 (Nicholas Hengartner).

788. *See id.* at 146 (John Ahmann); *id.* at 174 (William Rohloff); *id.* at 176 (Thomas Spencer); *id.* at 191 (Thomas Spargo); *id.* at 204 (Mark Lampkin); *id.* at 214 (Shirley King).

789. *See id.* at 232 (Matt Butler); *id.* at 233 (Keith Temple); *id.* at 233 (Teresa Cruce); *id.* at 235 (Jeanette Seymour).

790. *See id.* at 3–17 (opening statements); *id.* at 241–89 (closing arguments).

791. *See infra* text accompanying notes 793–98, 801–09.

had so-called "rogue" indentations, *i.e.*, ballots that had indentations only in the holes for the presidential race and complete punches elsewhere.[792]

To make this case, Gore first called Kendall Brace, the president of a firm that advised state and local governments on election administration.[793] Mr. Brace explained how the type of punch card machines in Miami-Dade and Palm Beach Counties worked,[794] and identified four circumstances that might lead to a ballot with indentations, or hanging chads, rather than clean punches.[795] According to Mr. Brace, an indentation, or dimple, might occur if the voter placed the ballot on top of the machine rather than in its "throat"; or if there was a severe buildup of chads in the box underneath the ballot because the machine had not regularly been cleaned; or if the rubber strips under the punch card had become so brittle that they could not allow the voter to punch all the way through; or if the voter inserted the voting stylus at an angle.[796] Mr. Brace also testified that when he examined some of the machines in use in Palm Beach, he noticed that there was more extensive wear on the left-hand side of the machines' templates than on the right.[797] This was important, in Mr. Brace's view, because it suggested that the left side of the machines were getting heavier use, and thus the buildup of chads and the rubber hardening were more likely to be occurring on the left side of the machine, where the votes in the presidential race would be cast.[798]

Bush's lawyers were fairly successful in challenging Mr. Brace's testimony. In response to Bush's objections, the judge would not permit Brace to testify about what election officials in Miami-Dade told him about their maintenance of the voting machines, nor would the judge allow Brace to opine as to problems with the particular machines in question.[799] On cross-examination, Bush's lawyers established that Brace had essentially no scientific basis for claiming that more frequent use of the left side of the voting machine causes the rubber

792. To make out his claim involving Nassau County, Gore's lawyers submitted a stipulation reached with Nassau's lawyers. *See* Trial Transcript, *supra* note 362, at 89.

793. *Id.* at 19.

794. *See id.* at 24–25.

795. *Id.* at 33–34.

796. *Id.*

797. *See id.* at 28, 30. Bush's lawyers objected frequently throughout Mr. Brace's testimony, particularly when Mr. Brace spoke of problems that arise with punch card machines, on the ground that he was not a mechanical engineer and was basing his testimony on hearsay. *See, e.g.*, *id.* at 25–27. At one point during the cross-examination, the court required Bush lawyer Phillip Beck to rephrase his question because he had become especially snide. *See id.* at 47. Mr. Beck had asked: "because of the more frequent use, which you think happens, it's your opinion, as a political science major, that that causes the rubber to get harder on the left-hand column than it does on the rest of the ballot; isn't that right?" *Id.*

798. *Id.* at 30, 34–35.

799. *See id.* at 27, 30.

strips on that side to harden more quickly, and that Brace had no knowledge of the type of rubber used in the Florida machines.[800]

On Mr. Brace's redirect examination, however, the Gore team happened upon a rather dramatic piece of evidence. One of the machines actually used in Palm Beach County was brought into the courtroom, and Brace set it up as it would appear at the polls.[801] Even as Brace was pulling it out of the box, chads began spilling out,[802] and when Brace removed the compartment into which the punched chads are supposed to fall, it was filled to the brim with chads.[803]

Gore then called Nicholas Hengartner, a statistics professor from Yale.[804] Professor Hengartner testified that he had compared the number of undervotes in Florida counties with punch card voting to the number of undervotes in Florida counties with optical scan voting, and found that there were five times as many undervotes in the punch card counties.[805] Professor Hengartner further testified that the disparity was so great that it was extremely unlikely to have occurred by chance, so he undertook to determine if demographic variables such as income or ethnicity might explain it, but found that they did not.[806]

With respect to the manual recounts, Professor Hengartner made two additional points. First, although the Broward County board had found votes on twenty-six percent of the undervoted ballots that it reviewed, and the Miami-Dade board had found votes on twenty-two percent of the undervoted ballots it had reviewed, the Palm Beach board had found votes on only eight percent of the undervoted ballots it reviewed.[807] Second, of the votes the Broward board identified for the first time during the manual recount, the percentages for each candidate roughly mirrored the percentages found during the machine count, but were actually more favorable to Bush.[808] Specifically, the distribution of votes in Broward before the manual recount was thirty-one percent for Bush and sixty-nine percent for Gore, and yet the distribution of votes identified for the first time during the recount was thrity-four percent for Bush and sixty-six percent for Gore.[809] This was plainly intended to show that the canvassing boards—or at least Broward's—had not shown partisan favoritism in reviewing the ballots.

On cross-examination of Professor Hengartner, Bush's lawyers did not focus extensively on the analysis he offered. Instead, they called

800. *See id.* at 48–49.
801. *See id.* at 60–61.
802. *Id.* at 60.
803. *Id.* at 61.
804. *Id.* at 66–67.
805. *See id.* at 69–70.
806. *See id.* at 69–70.
807. *See id.* at 71.
808. *See id.* at 72.
809. *Id.*

his credibility into question, by confronting him with an affidavit that had previously been filed as a proffer in Leon County and in the Florida Supreme Court.[810] In the affidavit, Hengartner had stated that he had evaluated the votes cast statewide in 1998, and found that in Palm Beach County, fewer votes were tallied in the Senate race, which appeared in the first, left-hand column, than in the governor's race in the second column or the comptrollers' race in the fifth column.[811] Hengartner stated in the affidavit that this phenomenon, which was unique to Palm Beach and one other punch card county, suggested that Palm Beach County's punch card reader was not recording all the votes in the left-hand column.[812] On cross, however, Bush's lawyers presented the 1998 Palm Beach County ballot and showed that Hengartner's premise was false, because the governor's race was itself in the left-hand column.[813] Hengartner was forced to admit that he had never personally examined the 1998 Palm Beach County ballot prior to executing the affidavit, and that his conclusion was a mistake.[814]

During Bush's case-in-chief, his lawyers also aimed to make three points: (1) that all three canvassing boards had acted reasonably in their approach to the requested recounts; (2) that citizens intending to vote do not merely dimple their ballots; and (3) that Miami-Dade's ballots had been so mishandled that any count by the court would necessarily be inaccurate.[815] The first point corresponded to Bush's insistence throughout the proceeding that the court had no authority to act unless it first found that the canvassing boards had abused their discretion.[816] The second point was designed to respond substantively to Gore's claims that there were legal votes not counted, and the third point was intended to stop the court from counting the Miami-Dade ballots even if the judge otherwise found Gore's evidence compelling.

Bush called as his first witness Palm Beach County Canvassing Board Chair Judge Charles Burton.[817] Judge Burton described the board's decision-making process with respect to the manual recounts. The judge testified that with the one percent recount, the members had begun by using the board's 1990 policy, had switched to the "sunshine rule," and had then switched back to the 1990 policy, and that with the full recount, they had tried to follow Judge Labarga's decision directing that each ballot should be evaluated for the intent of the voter without any rules of per se exclusion.[818] During the full recount,

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810. *See id.* at 81.
811. *See id.* at 85–86.
812. *Id.* at 86.
813. *See id.* at 87.
814. *See id.* at 86–87.
815. *See infra* text accompanying notes 817–35, 843–63.
816. *See* Trial Transcript, *supra* note 362, at 8 (opening statement by counsel for Bush); *id.* at 252 (closing argument by counsel for Bush).
817. *See id.* at 90.
818. *See id.* at 91–94.

Judge Burton said, the board (as opposed to the counting teams) reviewed what he believed to be 14,500 ballots.[819] Many of these, he said, had no marks on them whatsoever, and no one objected to deeming them unvoted, but the vast majority had some form of indentation on them, including some "barely discernable impressions."[820] To decide whether to count these indentations, the board would look for a pattern of indentations or pinholes, and then count the ballot as a vote only if that pattern emerged.[821] Judge Burton explained that the board members took this approach because they generally assumed that the voters had read the instructions and knew how to vote if they wanted to, but at the same time, they saw so many ballots with patterns of indentations rather than clean punches that he came to believe many voters were indeed marking the ballot with the card outside the throat of the machine.[822]

Bush then called two witnesses to refute the testimony of Gore's witnesses. Richard Grossman, a chemist with forty years of experience in the rubber and plastics industry, testified that the natural-synthetic blend of rubber used in the majority of the voting machines[823] would not harden over time, as Brace had suggested, unless it were subject to temperatures of 140 degrees Fahrenheit or struck repeatedly at the rate of at least once per second.[824] Laurentius Marais, a statistician and applied mathematician, testified that Hengartner had improperly lumped all the punch card counties together. According to Mr. Marais, there was nearly as much statistically significant difference *among* the punch card counties as Hengartner had found when he lumped all the punch card counties together and compared them to all the optical scan counties lumped together. This suggested that something other than flawed counting had caused the undervote dis-

819. *Id.* at 95.

820. *Id.* at 95–96.

821. *See id.* at 97, 100.

822. *See id.* at 96, 99–100. At the end of Judge Burton's testimony, Judge Sauls "salute[d]" him as a "great American," and suggested that if he "hadn't been tied up in board hearings or Court," the Palm Beach board might have met the 5:00 p.m. deadline on November 26. *Id.* at 108–09. These remarks by Judge Sauls were telling because they followed Judge Burton's testimony that he had been called to testify before Judge Labarga on November 22 when the Democrats had complained that the board was not following Judge Labarga's initial order, *id.* at 101, and that the board had interrupted the recount on November 24 to allow the Democrats to put on witnesses suggesting the board was being too restrictive, *id.* at 102–03.

823. Gore had established during Mr. Brace's testimony that Miami-Dade and Palm Beach used Votomatic machines and that Palm Beach also used some machines known as the Pollstar. *See id.* at 29–30. The court permitted Mr. Grossman to testify about the rubber blend used in the Votomatic machine because he had conducted impact tests on that blend, but sustained Gore's objection to any testimony concerning the effect of impact on the rubber in the Pollstar machine because Grossman had not personally tested that type of rubber. *See id.* at 114–16.

824. *See id.* at 113–14.

parity.[825] Mr. Marais also testified that studies had shown that a method of voting itself—or a difficult ballot, such as the butterfly ballot used in Palm Beach—can cause people who might otherwise vote not to do so.[826] In Mr. Marais's view, Hengartner's failure to acknowledge and study this phenomenon rendered his association analysis flawed.[827]

If these two witnesses were somewhat effective in damaging Gore's case, Bush's next witness most assuredly was not. John Ahmann was an engineer who had spent many years developing and reworking various models of the Votomatic punch card machine used in Miami-Dade and Palm Beach Counties.[828] Early on in his direct examination, he described for the court how the machine worked, and identified a number of ways other than by voting in which a ballot might become indented or scratched.[829] He also testified to his "serious[ ] doubt" that anyone intending to punch a chad through would be unable to do so.[830]

As Ahmann's testimony progressed, however, it actually began to favor Gore's case. First, Ahmann testified unequivocally that it was "simple" to distinguish an indentation made by a voting stylus from an indentation from some other cause. Second, just as Kendall Brace had done, Ahmann identified a number of circumstances in which a person intending to vote might create a ballot that the machine counter would not read. Even though he was on direct examination by Bush's lawyers, Ahmann confirmed from his personal experience at voting sites that voters often fail to follow the instructions about inserting the card into the machine, and leave patterns of hanging chads or indentations.[831] Ahmann also testified that it was possible, even when following the instructions, for a voter to punch through but not completely dislodge the chad.[832] Indeed, Ahmann acknowledged that one might see patterns of mere indentations from voters "so feeble that they consistently apply just barely enough pressure to form a dimple, but not enough to knock the chads out."[833] Finally, when asked whether it is was possible for chads to build up underneath the ballot to the point that they would keep someone from punching through, Ahmann said, "definitely,"[834] although he went on to sup-

825. *Id.* at 126.
826. *See id.* at 127–30.
827. *See id.* at 130–31.
828. *Id.* at 147–48.
829. *See id.* at 149–53.
830. *Id.* at 154.
831. *Id.* at 154–55.
832. *Id.* at 157.
833. *Id.* at 155.
834. *Id.* at 158.

pose that it would take eight to ten years of buildup, with very frequent elections, for that to happen.[835]

With the benefit of hindsight, it seems very odd that Bush's own lawyers would have brought forth all this evidence from Ahmann. Presumably, the lawyers' primary purpose was to support the "pattern" approach that the Palm Beach board had taken to the ballots: *i.e.*, counting indentations as votes only when a pattern of such indentations was present. Yet in trying to keep the court from reassessing the 3300 disputed Palm Beach ballots, Bush provided ample evidence that there must be undetected votes within the 9000 Miami-Dade ballots that had never been evaluated: votes from people who had not followed the instructions on inserting the ballot, votes from people who had followed the instructions on inserting the ballot but had nonetheless left hanging chads, and, most poignant of all, votes from people who were simply too feeble to consistently push the chads through. Perhaps even more importantly, Bush actually brought forth testimony from the machine's developer that it was "simple" to tell which indentations were made from a voting stylus and which were not, suggesting that the "intent of the voter" standard was not nearly as difficult to apply as the Republicans had claimed.

An even stronger moment for Gore, however, came on Mr. Ahmann's cross-examination. Ahmann flatly admitted, without qualification, that "any voter [can] go to the polling place, and intend to vote for a candidate, and leave a hanging chad, a swinging chad, or an indentation."[836] Ahmann also admitted that the ballot manufacturers specifically contemplated handling when they designed the ballot paper, and thus designed it so that chads would not easily be loosened or fall out from basic handling.[837] Then, in the most dramatic development of all, Gore's lawyer referred Ahmann to patent applications Ahmann had previously filed for improvements to the type of machines used by Miami-Dade and Palm Beach. In one such application, Ahmann had stated that the accumulation of punched chads could interfere with the punching process and cause serious counting errors to occur.[838] In another application, Ahmann had applied to patent a new flexible stylus, and explained that the flexible stylus was an improvement because the old, rigid one—which was still in use by Miami-Dade in the 2000 election—would not completely punch the card if people approached the punch hole at an angle.[839] As if all these admissions were not enough, Gore's lawyers got Ahmann to admit that in very close elections, a hand recount of the ballots should be under-

835. *Id.* at 159–60.
836. *Id.* at 162.
837. *Id.* at 164.
838. *See id.* at 167.
839. *See id.* at 168–69.

taken.[840] Bush's attorneys then conducted no redirect examination.[841] Indeed, they would not even shake the hand Ahmann extended as he passed by their table.[842]

Bush next called William Rohloff, a registered voter from Broward County.[843] Mr. Rohloff testified that he had gone to the polls uncertain how he would vote in the presidential race, and so he began the process at the back of the ballot and moved forward.[844] When he finally came to the presidential race, Mr. Rohloff said, he placed the stylus beside one candidate's name and pushed down, but then decided not to vote and drew the stylus back.[845] He did not know whether he had "dimpled" the ballot, but he was sure that he did not want a vote for that candidate attributed to him.[846]

Bush's next three witnesses were all Republican lawyers who had observed the events in Miami-Dade at different stages of the recount process.[847] The first lawyer, Thomas Spencer, testified that he was familiar with Miami-Dade's precinct system from his electoral law experience, and that the only precincts Miami-Dade officials had ever counted were those that were predominantly Democratic.[848] Mr. Spencer also testified that he was present on November 22 when the Miami-Dade board had ended the recount, and that the board had done so because there was insufficient time left to complete the recount properly.[849] At the end of Spencer's testimony, Judge Sauls asked whether he had observed what standard the Miami-Dade board members were using to determine whether to count a ballot, and whether the votes typically were unanimous.[850] Mr. Spencer responded that it appeared to be three different standards—one looking for any indentations whatsoever, one looking for light coming through and patterns, and one looking for some separation of the chad—and that most votes were 2-1.[851]

The second lawyer, Thomas Spargo, testified that during Miami-Dade's efforts to cull the undervoted ballots from the others by running the ballots through the counters, he observed that at least 1,000 new pieces of chad were generated.[852] Mr. Spargo also claimed that there were several occasions on which the counting teams simply

840. *Id.* at 168.
841. *See id.* at 173.
842. *Gore v. Harris Trial* (CNN television broadcast, Dec. 3, 2000) (Author's observation of televised proceedings).
843. Trial Transcript, *supra* note 362, at 174.
844. *See id.*
845. *Id.*
846. *Id.*
847. *See id.* at 176, 191, 204.
848. *See id.* at 177–83.
849. *See id.* at 183.
850. *Id.* at 189–90.
851. *See id.* at 189–90.
852. *Id.* at 193.

counted a dimpled ballot as a vote, and refused to transfer the ballot to the board for review even though there had been a Republican objection.[853]

The third lawyer, Mark Lampkin, testified that he had observed Miami-Dade officials readying the ballots for transport to Tallahassee.[854] During this process, Mr. Lampkin said, the officials would open the envelopes of previously identified undervoted ballots for each precinct and count them, but in many instances the number of undervoted ballots in the envelope would not jibe with the number of undervotes recorded for that precinct on election night.[855] To remedy this situation, Mr. Lampkin testified, either David Leahy and his assistant would examine the ballots and make a call as to whether a given ballot actually should be deemed an undervote, or the officials would run the ballot through the counter again to see if it should be deemed an undervote.[856] According to Mr. Lampkin, this extensive handling caused a number of chads to dislodge from the ballots. He testified that he observed several occasions on which a counting table had been free of chads, but after the handling to determine the number of undervotes, anywhere from one to four chads had appeared on the table.[857]

Bush's final witness was Shirley King, the elections supervisor for Nassau County.[858] Ms. King testified that on Wednesday, November 8, she had conducted the automatic recount of Nassau County's ballots and certified those results to the Secretary of State.[859] Very soon thereafter, however, she realized that a mistake had been made, because the total number of votes cast had decreased by 218 from the election night returns.[860] Ms. King believed that she knew how the mistake had occurred: when the ballots were boxed, some of the red-striped presidential ballots had been placed in the box upside-down, and therefore did not get identified and pulled when the automatic recount was done.[861] Ms. King was unable to confirm that cause of

853. *See id.* at 199. The trial became quite heated when, during Mr. Spargo's cross-examination, Gore lawyer Kendall Coffey asked Mr. Spargo if he had invoked the Fifth Amendment nineteen times the last time he had testified in an election law matter. *Id.* at 199. Bush's lawyers objected immediately, and Judge Sauls took the lawyers into chambers. *Id.* at 199–200. Mr. Coffey revealed that he had information that, ten or eleven years earlier, Mr. Spargo had been investigated by the Commission of Government Integrity of the State of New York, had invoked the Fifth Amendment nineteen times, and had been cited for contempt for failing to answer questions. *See id.* at 200. Judge Sauls then sustained the objection and threatened Coffey with contempt if he raised the incident again. *See id.*

854. *Id.* at 204.

855. *See id.* at 205–07.

856. *See id.* at 208–09.

857. *Id.* at 209.

858. *Id.* at 214.

859. *See id.* at 215–16.

860. *See id.* at 216–17.

861. *See id.*

the discrepancy, however, because the ballots had been sealed, and she was unable to get permission to open them.[862] When she called the Elections Division, Ms. King testified, they advised her to convene a meeting of the canvassing board to address it, and after she did so, the canvassing board voted unanimously to return to the election night totals.[863]

As this summary suggests, there were, by the end of the trial, few critical facts on which the parties differed. Bush's own witnesses, Judge Burton and John Ahmann—in addition to Gore's—had made it quite clear that there were intended votes that the punch card machines, for a variety of reasons, would not have picked up. And no one disputed the factual accounts offered by the canvassing board representatives, Judge Burton and Ms. King. Indeed, by the time the evidence closed, the only significant factual issue had to do with the rubber on the left-hand side of the machines, and whether it could have deteriorated enough that a voter might dimple his vote in the presidential race but no others.

What the parties continued to differ strenuously on was the *law*, and this was very obvious from their closings. Of course, what made the closings odd was that the tables had turned. This time it would be the Democrats urging the courts to follow the letter of the statutory language, and the Republicans arguing for an interpretation that reflected sound public policy.

David Boies, representing Gore, hung very closely to the language of section 102.168. The statute, Boies argued, did not say anything about the court reviewing all ballots cast in a race, but only those ballots that the plaintiff had contested.[864] Nor did the statute anywhere suggest that the canvassing boards' actions were reviewable only under an abuse of discretion standard.[865] To the contrary, Boies claimed, both the statute and a long line of Florida cases made it clear that courts were to conduct a de novo review of contested ballots to determine whether they reflected an intent to vote.[866] Nor did the statute limit the court's review to cases involving something other than voter error.[867] As recently as the 1999 case of *Beckstrom v. Volu-*

862. *See id.* at 217–18.

863. *See id.* at 218–19. With the close of Bush's case, the intervenors presented four witnesses. Two testified that they had voted for Bush, but because they lived in Collier County and Duval County, they could not be sure that their votes had been counted. *See id.* at 232–33. A third testified that she had voted in Bay County, in the Panhandle, but that she was concerned because she had heard the networks call the election for Gore before the polls in her county had closed. *See id.* at 233–34. A fourth testified that she lived in Santa Rosa County and had been on the way to the polls when she decided not to vote because the election had already been called. *See id.* at 235–36.

864. *See id.* at 243, 284.

865. *See id.* at 245, 285.

866. *See id.* at 244.

867. *See id.* at 245.

sia County Canvassing Board,[868] Boies noted, the Florida Supreme Court had approved the inclusion of votes that had not been read because of voter error.[869] Under the statute, Boies argued, all Gore had to do was identify legal votes rejected that were sufficient to place the outcome in doubt, and Gore had done that, both by the testimony at trial and the ballots in evidence that awaited counting by the court.[870]

Barry Richard, representing Bush, took a markedly different tack, focusing on the legislative intent rather than the language of the statute. Richard relied heavily, almost exclusively, on the argument that the court must apply an abuse of discretion standard to the canvassing boards' counts. Richard argued that the legislature could not possibly have intended to give the canvassing boards discretion to recount the ballots in section 102.166, and then allow a court under section 102.168 simply to begin that counting process all over again applying a de novo standard.[871] And if an abuse of discretion standard were applied, Richard insisted, the evidence showed that the canvassing boards had acted reasonably. Miami-Dade's board had not abused its discretion, Richard argued, because it was reasonable to conclude that it could not count the ballots properly in the amount of time the Florida Supreme Court had allowed, and because the board had initially concluded that there was insufficient evidence to conclude that the election result would be changed.[872] Nassau County had not abused its discretion, because the board made a rational decision, in light of the circumstances, that the initial count was the correct one.[873] Finally, Palm Beach County had not abused its discretion in evaluating the ballots, according to Richard, because federal § 5 required the board to apply the law in effect at the time of the election—*i.e.*, the 1990 policy—and the standard the board ultimately did employ was a standard even more favorable to Gore that Gore himself had gone to Judge Labarga to get, and, at the time, accepted.[874]

Conspicuously absent from the closing arguments of both parties was *any* reference to the constitutional issues that had been raised in the federal proceeding: the claim that it would violate the Equal Protection Clause to count some counties and not others, or to approach the ballots differently from one county to the next. Boies certainly did not mention the Constitution. He responded to the issue of a statewide count only by saying that the contest statute did not allow for

868. 707 So. 2d 720 (Fla. 1998).

869. Trial Transcript, *supra* note 362, at 245.

870. *See id.* at 244, 247, 250–51, 283–84.

871. *See id.* at 251–52.

872. *See id.* at 255–56.

873. *See id.* at 256–57.

874. *See id.* at 257, 260. With respect to the votes that Palm Beach found that were not included in the certification, Richard argued only that the court had no authority to override the Supreme Court's deadline. *See id.* at 259.

such an approach.[875] Neither did Barry Richard invoke the Constitution. In fact, Richard's argument sounded very much as though Bush was abandoning any equal protection claims. At one point in his argument, for example, Richard stated: "There's probably thousands of voters in the sixty-seven counties that were never manually recounted that aren't going to be counted either, and that's the way it is, because we have laws, and we must abide by them."[876] More importantly, Richard made no suggestion that the "intent of the voter" standard set forth in the statutes and referred to by the supreme court was insufficiently specific or subject to varying interpretations. Indeed, in his effort to defend the Palm Beach board's evaluation of the ballots, Richard stated that Palm Beach had done "*exactly* what . . . the Florida Supreme Court . . . says you should do," and what "any rational judgment of a human being suggests you should do."[877] Implicit in this statement was the concept that the "intent of the voter" standard provided sufficient direction for a county canvassing board to evaluate ballots in a rational, predictable, and non-arbitrary way.

The Elections Canvassing Commission and the intervenors did suggest that failing to count statewide, and the difficulty of evaluating the ballots for intent, presented legal problems. Joseph Klock, representing the Commission, did not invoke the Constitution,[878] but claimed that if the court undertook to count the ballots, it would be impossible to decide whether a vote was intended: "if you follow through what they want and you go to Palm Beach County, do you use the Burton test? And then when you go to Dade County, are you supposed to try to figure out the combination of the Judge Lehr, Judge King, and David Leahy test?"[879] The intervenors all complained of the unfairness in manually counting the votes of some counties but not others,[880] and one of them argued expressly that to do so would unconstitutionally dilute the votes of the citizens of other counties.[881]

D. *The Trial Court's Ruling for Bush*

Less than eighteen hours after the closing arguments ended,[882] on Monday, December 4, Judge Sauls ruled against Gore. Reading his

875. *See id.* at 243, 284.

876. *Id.* at 259. It should be noted that Richard was *not* expressly addressing the constitutional claim at this point, but rather was bolstering his argument that the Court was not required to include the votes Palm Beach had identified. *See id.*

877. *Id.* at 258 (emphasis added).

878. *See id.* at 261–67.

879. *Id.* at 264.

880. *See id.* at 269–75.

881. *See id.* at 273–74.

882. *See* Ruling Transcript at 1, Gore v. Harris, 2000 WL 1790621 (Fla. Cir. Ct. Dec. 4) (No. 00-2808) (proceeding commenced at 4:30 p.m.), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000); Trial Transcript, *supra* note 362, at 289 (hearing concluded at 11:18 p.m.).

ruling from the bench, Judge Sauls denied all five of Gore's claims and directed that final judgment be entered for the defendants.[883]

With respect to the 9000 ballots Gore asked be counted in Miami-Dade County, the judge cited a 1932 Florida Supreme Court case[884] to the effect that the court could not order a recount until the plaintiff had established a legal basis upon which the court might do so.[885] And the plaintiff in a contest proceeding, Judge Sauls held, was required to show that "but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner."[886] In the court's view, Gore had not carried that burden with "credible statistical evidence" or "other competent substantial evidence."[887] The court acknowledged that "the record shows voter error, and/or, less than total accuracy, in regard to the punch card voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years," but held that "these balloting and counting problems cannot support or effect any recounting necessity with respect to Dade County, absent the establishment of a reasonable probability that the statewide election result would be different, which has not been established in this case."[888] The court also concluded that the Miami-Dade board did not abuse its discretion in any of its recount decisions.[889]

With respect to the 3300 ballots that the Palm Beach board had reviewed, but not counted as votes, Judge Sauls held that the canvassing board's action could be reviewed only under an abuse of discretion standard.[890] The opinions Gore cited to the contrary, the court held, predated the "modern statutory election system" conferring broad discretion upon the canvassing boards, and the Palm Beach board had not abused that discretion.[891] Rather, the board had acted in full compliance with the order of the local state court, and Gore was estopped from challenging the counting standard the board had applied (presumably because Gore had sought that standard and had not appealed Judge Labarga's order).[892]

In the course of this discussion, Judge Sauls noted that when the Palm Beach board changed its counting standard from the 1990 policy to that directed by the state court, the Palm Beach board might have

883. *See* Ruling Transcript, *supra* note 882, at 6, 13.
884. State *ex rel.* Millinor v. Smith, 144 So. 333 (Fla. 1932).
885. *See* Ruling Transcript, *supra* note 882, at 8.
886. *Id.* at 9 (citing Smith v. Tynes, 412 So. 2d 925, 926 (Fla. Dist. Ct. App. 1982)).
887. *Id.*
888. *Id.* at 10.
889. *Id.*
890. *See id.*
891. *Id.* at 10–11.
892. *See id.* at 11.

created a situation in violation of federal § 5.[893] Judge Sauls also asserted that if the court were to utilize any different counting standard in the contest action, the benefit provided to voters in the recounted counties would create a "two-tiered" system that could violate the United States and Florida Constitutions.[894] Indeed, Judge Sauls considered it his "duty to warn that the final certified total . . . includes figures generated from this two-tier system of differing behavior by official Canvassing Boards."[895]

With respect to the undervoted ballots in Miami-Dade that had already been reviewed, and which Gore had alleged resulted in a net gain of approximately 160 votes, the court held that there was no authority under Florida law to certify an incomplete manual recount of a portion of a county.[896] With respect to the votes Palm Beach had identified that were rejected by the Canvassing Commission, the court held that it had no authority to include returns submitted past the Florida Supreme Court's deadline.[897] And with respect to the fifty-one votes Gore lost when the Nassau County board amended its certification to return to the election night totals, the court held that the Nassau board did not abuse its discretion.[898]

Finally, Judge Sauls held that Gore's complaint was improper under section 102.168 because it did not place in issue *all* of the ballots in *all* of the counties where the alleged counting problems would have taken place.[899] Judge Sauls indicated that he agreed with Judge Klein's dissent in *Fladell v. Labarga*,[900] a district court of appeals decision certifying the challenge to the butterfly ballot to the Florida Supreme Court,[901] in which Klein had written that if there was to be a revote based on the flawed ballot, it would have to be held statewide, because the presidential election was a statewide race.[902] In Judge Sauls's view, Gore likewise should have challenged the statewide result, at least in every county where punch card voting might have caused inaccuracy in the result.[903]

893. *See id.* At the time of Judge Sauls's ruling, this change in the standard had had no legal consequence because it had occurred during the full recount, and the results of that recount were never incorporated into the final certification because the board did not complete the full recount until after 5:00 p.m. on November 26. *See supra* notes 721–26 and accompanying text (describing Harris's rejection of Palm Beach count); *supra* note 818 and accompanying text (discussing Judge Burton's testimony).

894. Ruling Transcript, *supra* note 882, at 11–12.

895. *Id.* at 12.

896. *See id.* at 6–7.

897. *See id.* at 7–8.

898. *See id.* at 8.

899. *See id.* at 9.

900. 775 So. 2d 987 (Fla. Dist. Ct. App. 2000).

901. *See id.*

902. *See id.* at 988–89 (Klein, J., dissenting).

903. *See* Ruling Transcript, *supra* note 882, at 12–13.

VI. THE UNITED STATES SUPREME COURT PROCEEDING ON MANUAL RECOUNTS AND CERTIFICATION: *BUSH V. PALM BEACH COUNTY CANVASSING BOARD*

During the same week that teams of lawyers for Gore and Bush were squaring off in front of Judge Sauls in the contest action, separate legal teams were handling the proceeding in the United States Supreme Court.[904] The Supreme Court had agreed to consider three questions arising out of the Florida court's decision that Secretary of State Harris was required to accept the results of manual recounts through November 26, two questions raised by Bush and a third identified by the Court itself: (1) whether the court's "post-election" limits on executive discretion and standards for tallying votes violated federal § 5 or the Due Process Clause; (2) whether the state court's decision violated the electoral appointments clause, because the decision could not be reconciled with state statutes; and (3) what the consequences would be if the Court found that the Florida court's decision did not comply with federal § 5.[905]

A. *The Justiciability Question Raised by the Florida Legislature*

In briefing these issues, neither Bush nor Gore questioned the Court's jurisdiction to hear the case or the controversy's justiciability. The Florida Legislature, however, filed an amicus brief the day before the litigants' briefs were due, urging the Court to find Bush's claims nonjusticiable.[906] The legislature contended that the case presented a political question, to be determined in the first instance by the Florida Legislature, and then by Congress, in the event competing electoral certificates were submitted.[907]

The legislature based its argument on federal § 2, which, as described above, provides that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on

904. In the contest proceeding before Judge Sauls, David Boies was the lead lawyer representing Gore, and Barry Richard was the lead lawyer representing Bush. *See supra* notes 864–74 and accompanying text (discussing closing arguments delivered by Boies and Richard). In the Supreme Court proceeding, Professor Laurence Tribe of Harvard Law School was the counsel of record for Gore, and Theodore Olson was the counsel of record for Bush. Brief of Respondents Al Gore, Jr., and Florida Democratic Party at 1 (filed Nov. 28, 2000), Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. SC00-836); Brief for Petitioner at 1 (filed Nov. 28, 2000), Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. SC00-836).

905. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004, 1005 (2000).

906. Brief of the Florida Senate and House of Representatives as *Amici Curiae* in Support of Neither Party (filed Nov. 27, 2000), Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836) [hereinafter Brief of the Florida Senate and House of Representatives].

907. *See id.* at 14 ("The Court should rule that Questions 1 and 2 are not justiciable because their resolution lies in the hands of the Florida Legislature or, if it does not act, the Congress.").

a subsequent day in such a manner as the legislature of such State may direct."[908] According to the Florida Legislature, § 2 and § 5 were both enacted as part of the 1887 Electoral Count Act,[909] and so Congress intended § 2's reference to a state's "failure to make a choice" to refer to a state's failure to resolve an election controversy in compliance with § 5.[910] When so understood, the legislature argued, § 2 made clear that it should be the Florida Legislature who should decide whether § 5 had been violated.[911] Alternatively, in the event that the Florida Legislature decided not to invoke § 2, Congress had the power to make the decision concerning compliance with § 5 under the counting procedures laid out in § 15.[912] In either event, the legislature argued, the Court should not decide the question, because it "would put this Court in the uncomfortable position of seeking to enjoin how Congress exercises its constitutional counting authority and how the state legislatures exercise their constitutional appointment authority."[913]

Bush and Gore responded to this argument in different ways. Rather predictably (given that the legislature was poised to appoint a Republican slate of electors), Bush agreed with the legislature's characterization of § 2 as conferring on the legislature the power to act in the event the Florida courts "violated" § 5.[914] Bush did not agree, however, that the Court was precluded from acting simply because the Florida Legislature could act to override the decision of the Florida courts. Bush pointed out that in *McPherson v. Blacker*, the Court had rejected the idea that disputes regarding the appointment of electors were nonjusticiable.[915]

Gore did not particularly oppose the legislature's claim that the case presented a political question, at least to the extent that the legis-

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908. 3 U.S.C. § 2 (Supp. V 1999).

909. *See* Brief of the Florida Senate and House of Representatives, *supra* note 906, at 5 ("Sections 2 and 5 . . . were enacted as part of the Electoral Count Act of 1887.").

910. *See id.* at 3 ("If a State's election 'has failed to make a choice' that is timely and conforms with pre-existing law [as required by § 5], then 3 U.S.C. § 2 recognizes that appointment of Electors by the State Legislature is proper.").

911. *See id.* at 5–6.

> Being enacted in a period between this 1892 opinion [in *McPherson*] and the 1874 Senate Report quoted above, the Electoral Count Act of 1887 surely reflected the contemporaneous constitutional understanding that State Legislatures had exclusive authority over their appointment power, and did not mean [by § 5] to abrogate it.

Id.

912. *See id.* at 7 ("Such questions should be determined by the State Legislature or, if it fails to act by December 18 when the Electors cast their votes, by Congress when it counts those electoral votes on January 6, 2000.") (incorrect date in original).

913. *Id.*

914. *See* Brief for Petitioner, *supra* note 904, at 34–35.

915. *Id.* at 35 (citing McPherson v. Blacker, 146 U.S. 1, 23 (1892)).

lature argued that the question was more appropriate for Congress.[916] Gore vehemently disagreed, however, with the legislature's theory that § 2 allowed *it* to decide whether there had been compliance with § 5, and appoint its own post-election slate of electors if it felt there had not been.[917] Gore emphasized that the legislature had no basis whatsoever on which to conclude that § 2's reference to when a state has "failed to make a choice" addressed non-compliance with § 5,[918] and revealed the extraordinary factual error on which the legislature's theory was based: § 2 was *not* enacted contemporaneously with § 5, but *four decades* before, "most probably" to deal only with situations where a candidate did not receive a required majority of the votes.[919] Gore also argued that it might well violate the Supremacy Clause for the Florida Legislature to appoint electors in December, because Congress was empowered to set the date for the election, it had set the November 7 date, and the date had passed.[920] Gore did not argue any of § 2's legislative history, however, which made it quite clear that the section was not aimed at the situation arising in the 2000 election, but only at situations where a state requires a majority winner, and no such winner emerges.[921]

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916. *See* Reply Brief of Respondents Al Gore, Jr. and Florida Democratic Party, at 12 n.9 (filed Nov. 30, 2000), Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. SC00-836). It appears that Gore did not want to take a position on the political question doctrine, perhaps because he was concerned that if he ultimately achieved a favorable judicial outcome, and Congress chose not to afford that outcome conclusive effect under § 5, he might want to come before the Supreme Court and invoke the statute (or at least have available the threat of doing so). *See id.* Gore wrote:

> Should the State of Florida appoint electors to whom petitioner objects, and should there then be some dispute about who the lawful electors from the State of Florida are, or whether the votes cast for the state of Florida in the electoral college are lawful, 3 U.S.C. § 5 *might conceivably* be invoked.

Id. (emphasis added). Thus, rather than urge the Court to treat the § 5 issue as a political question, Gore argued that any § 5 analysis was "premature" unless and until Congress invoked the statute while the votes were being counted. *See id.* ("It would plainly be premature for this Court to address compliance with Section 5, because no one in Congress has purported to rely on its provisions in determining whether the votes of electors from Florida shall be counted.").

917. *See id.* at 13.

918. *See id.*

919. *Id.*; *see also supra* notes 216, 219–30 and accompanying text (citing the public law by which § 2 was enacted and describing the legislative history behind it). If many of the issues in the case were debatable, this was not one of them; the lawyers arguing the legislature's position were simply factually *wrong*. And it defies imagination that Charles Fried, the legislature's counsel of record—and the *Solicitor of the United States* from 1985–1989—would make such an egregious and critical error in a brief before the United States Supreme Court. No matter what the time constraints, this is just not the type of fact at which one *guesses*.

920. *See* Reply Brief of Respondents Al Gore, Jr. and Florida Democratic Party, *supra* note 916, at 14.

921. *See supra* notes 219–30 and accompanying text.

The parties' debate on this issue illuminates how complex the case had become, both strategically and doctrinally. As a strategic matter, the legislature's participation in the Supreme Court proceeding was surely intended to provide Bush with a back-up plan. For if the Court was uncomfortable finding for Bush on the merits, then it could still avoid ruling against him by deeming the issue a political question. That ruling would have been a "no-lose" situation for Bush, inasmuch as it would free up the Republican-dominated House to reject any judicially-approved slate for Gore without fear of later Court review, which in turn would be enough to ensure that a slate approved by Bush's brother as Governor would win. Conversely, Gore had essentially nothing to gain by arguing that the case presented a political question. Not only might such a ruling work as the legislature hoped it would, but even suggesting that the Supreme Court should avoid the question could have disastrous public relations consequences. Gore might well be seen as once again selecting his forums. The theme would be that having achieved a favorable ruling from the overwhelmingly Democratic Florida Supreme Court, he then tried to avoid review by the Republican-dominated court of last resort.

Likewise, as a doctrinal matter—notwithstanding the legislature's simplistic, factually erroneous analysis—the political question issue was a very difficult one. Considering each of the attributes of a political question case identified in the landmark case of *Baker v. Carr*,[922] a number of them militated in favor of finding a political question.[923] On the other hand, the Court had previously been quite willing to address disputes concerning state procedures for appointing electors, summarily dismissing political question arguments not just in *McPherson v. Blacker*,[924] but also more recently in *Williams v. Rhodes*.[925] Moreover, the Court had on several occasions drawn a distinction between *interpreting the scope* of a constitutional provision, which does not violate the political question doctrine, and *applying* a constitutional provision committed to another branch, which would violate

922. *See supra* note 155 (quoting the passage from *Baker* setting forth the characteristics of political question cases).

923. It could have been argued that: (1) the Constitution had committed the issue of resolving electoral disputes to Congress, by conferring upon it in Article II and the Twelfth Amendment the power to count the votes; (2) there were no judicially discoverable standards for deciding whether the Florida Court's decision should be deemed "interpretation" of the law or "modification" of it; (3) deciding what constituted interpretation and what constituted modification was actually a policy determination; (4) resolving the dispute demonstrated a lack of respect for Congress inasmuch as it had indicated by enacting §§ 5 and 15 that it believed it should resolve electoral disputes; and (5) there was certainly the potential for embarrassment of the country from "multifarious pronouncements" from different branches if the Court was prepared to second-guess Congress's decision under § 15.

924. *See supra* notes 156–58 and accompanying text.

925. *See supra* note 182 and accompanying text.

the doctrine.[926] The Court might have drawn a similar distinction with respect to reviewing the Florida court's decision: *i.e.*, asserted that it was simply interpreting the meaning of Article II rather than interfering with Congress's ability to count or reject electoral votes.

Of course, in light of the strategic considerations, neither Bush nor Gore fully briefed the political question issue, and the Court was left free to draw its own conclusions on justiciability guided only by a wholly inadequate, factually false brief filed by the Florida Legislature and Gore's limited response.

B. *The Briefing on the Merits*

On the merits, addressing the first question, Bush argued that § 5 required that the dispute concerning the manual recounts be resolved employing the law as enacted prior to Election Day,[927] and yet the Florida court had changed the law as it stood at that time.[928] Bush complained specifically that the court had altered two aspects of existing Florida law: the court had changed the seven-day statutory deadline for submitting the results of manual recounts into a twenty-one-day deadline (which also had the effect of changing the time available for prosecuting and defending a contest action),[929] and the court had transformed the Secretary's complete discretion to reject returns submitted after the seventh day into a discretion limited to two circumstances not set forth in the Florida Code.[930]

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926. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 19 (1972) ("Which candidate is entitled to be seated in the Senate [under the Senate's constitutional power to judge the qualifications of its members] is, to be sure, a nonjusticiable political question," but "whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power, under Art. I, § 4, to prescribe the times, places, and manner of holding elections" is justiciable); Powell v. McCormack, 395 U.S. 486, 548–49 (1969) (holding that whether congressman should be found qualified to be seated, under House's constitutional power to judge the qualifications of its members, is a nonjusticiable political question, but the meaning of the term "qualifications" as used in the Constitution is justiciable).

927. *See* Brief for Petitioner, *supra* note 904, at 17–19; *id.* at 17 ("[A]ny judicial determination of a controversy regarding electors based on a new, post-election rule of state law would fail to satisfy the requirements of § 5.").

928. *See id.* at 19–29; *id.* at 22 ("[T]he Supreme Court of Florida has authorized a 180-degree departure from the established legal requirements set forth by the Florida legislature that were in place on November 7.").

929. *See id.* at 22 ("[T]he new rule of law announced by the decision below changes the effective deadline for submission of election returns from November 14 until November 26 . . . , nearly tripling the statutory seven-day protest period and certification deadline mandated by the Florida Legislature.").

930. *See id.* at 22–23. Bush wrote:

> In the face of this clear and preexisting legislative directive [in sections 102.111 and 102.112], the Supreme Court of Florida has concluded retroactively that the Elections Canvassing Commission shall *not* and may *not* ignore late-filed returns, but . . . *shall* include late returns based on selective manual recounts in individual counties.

Id. (emphasis in original).

Bush also argued—in his reply brief—that the Florida court's decision violated the Due Process Clause.[931] The thrust of his claim appeared to be that votes that would not have been legal under rules in place on Election Day were now being counted because the Florida court's extension of the deadline had the effect of allowing "selective, subjective, standardless and shifting methods of manual vote recounting."[932] Bush suggested that this violated the Due Process Clause's "concern for fundamental fairness and adequate notice,"[933] but did not otherwise set forth the nature of the claim.[934]

Responding to the third question—the Court's own inquiry regarding the consequences of a finding that the decision did not comply with § 5—Bush described the answer as "obvious": the Court should vacate the Florida court's decision.[935] According to Bush, vacating the decision would restore the Election Canvassing Commissions' statutory authority to act in accordance with the deadlines in the law as of November 7, and ensure that electoral college votes from Florida could be considered "conclusive" when they were announced on the floor of Congress.[936] It would also "forestall an impending constitutional crisis," by making clear to the Florida courts as they handled the contest proceeding that they could not exercise their "'equitable powers' to alter existing statutory standards[,]"[937] and thus reducing

931. *See* Reply Brief for Petitioner, at 18–19 (filed Nov. 30, 2000), Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. SC00-836).

932. *Id.* at 19 (citing Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995)).

933. *Id.* at 18.

934. The first heading devoted to any due process argument appeared in Bush's reply brief, and the entire section was a single paragraph long. *See id.* at 18–19. Bush had mentioned due process, and his concern that "dimpled" ballots were being counted, in his opening brief, but this discussion appeared at the end of a section devoted to arguing the "policy" behind § 5 and seemed aimed solely at supporting his claim that § 5 prohibited "retroactive rulemaking." *See* Brief for Petitioner, *supra* note 904, at 28. For example, Bush wrote:

> [T]he constantly changing and county-to-county variations in the recount protocols and standards, including consideration by some counties during the manual recount of simple indentations known as "dimples" as legally cast votes, clearly marks another departure from prior practice as of November 7, and thus reflects another post-election change in procedures that is inconsistent with §5.

Id. at 25.

935. Brief for Petitioner, *supra* note 904, at 29.

936. *See id.* at 29–30. Bush acknowledged that he had already been certified the winner but argued that vacating the Florida court's decision would nonetheless have a significant effect on the contest proceeding then being pursued by Gore. *See id.* at 32. As an example, Bush claimed that the 567 votes Gore had netted from Broward County's manual recount would not be included in the certified total and therefore would not carry the presumption of validity afforded to certified votes by Florida law. *Id.* at 32–33 (quoting Boardman v. Esteva, 323 So. 2d 259, 268 (Fla. 1975) ("[R]eturns certified by election officials are presumed to be correct.")).

937. *Id.* at 34.

the likelihood that the Florida Legislature would have to name its own slate of electors under federal § 2.[938]

On the second question, Bush asked the Court to nullify the Florida court's decision because it constituted a usurpation of authority from the legislature in violation of the electoral appointments clause in Article II.[939] In Bush's view, the electoral appointments clause vested in the Florida Legislature exclusive authority to fix the method of appointing electors,[940] and the Florida court had failed to respect that authority by ignoring and materially changing the statutory scheme.[941] The court's "dismissive" attitude toward the legislature's authority was clear, according to Bush, by its references to avoiding "hypertechnical reliance" on the election statutes in favor of the state constitutional right to vote, a right that Florida citizens do not even hold in presidential elections.[942]

With respect to § 5, Gore took issue with every aspect of Bush's argument: § 5's applicability, its meaning, and its application to the Florida court's decision. To Bush's claim that § 5 required the Florida court to apply the law as it existed prior to Election Day, Gore responded that § 5 did not *require* anything of the states, but merely provided an option states may exercise to ensure that their electoral votes cannot be challenged when they are counted on the floor of Congress.[943] To Bush's claim that § 5 required that every detail of state electoral law prior to Election Day be followed precisely, Gore responded that Bush was misrepresenting the very language of § 5. Gore observed that the law that the section directed be enacted "prior to" Election Day was merely the law identifying which state institution was to resolve election controversies.[944] Finally, to Bush's claim that the Florida court "changed" the pre-existing law, Gore responded that the Florida court did nothing more than engage in "garden-variety" statutory interpretation.[945]

Responding to Bush's argument based on the electoral appointments clause, Gore asserted that the Court could not properly consider any such argument, on the ground that it had not been pressed

938. *Id.* at 35. Bush sided firmly with the Florida Legislature in asserting that § 2 empowered the legislature to step in if "its pre-election statutory scheme [were] subverted." *Id.* at 34–35. At no point did he advise the Court that his brother had already taken the step of sending a certificate of ascertainment to Washington naming Florida's electors for Bush. *See supra* notes 743, 748–52 and accompanying text (discussing the frivolousness of the Florida Legislature's claim in light of Jeb Bush's action).

939. *See* Brief for Petitioner, *supra* note 904, at 36–50.

940. *See id.* at 37–43.

941. *See id.* at 43–48.

942. *See id.* at 45, 47–48 (citing McPherson v. Blacker, 146 U.S. 1 (1892)).

943. *See* Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 22–31.

944. *See id.* at 31–34.

945. *See id.* at 13–21.

or passed on by the Florida court.[946] Gore noted that there "appear[s] to be an exception" to the rule that the Court should not consider a constitutional issue not raised below, when a state court renders a construction of a state statute in a way that violates the Constitution and could not have been anticipated.[947] Bush could not claim that exception, however, because he could have anticipated the Florida court's ruling, inasmuch as the court ruled as Gore had asked it to, and in fact, Bush *did* anticipate having a "change in the law" complaint because he had invoked federal § 5 before the Florida court.[948]

Substantively, Gore argued that the Florida court's decision did not reflect any departure from the "Manner" of appointing electors that the Florida Legislature had adopted. In Gore's view, the legislature set forth the "manner" of appointing electors in the Florida Election Code, and then placed that Code within the statutory jurisdiction of the Florida Supreme Court.[949] To the extent that it fell to the Florida court to interpret the Code under this system, that interpretation could not be a violation of the electoral appointments clause, because the clause "neither displaces the state judiciary nor forbids it from performing its traditional function under state law of construing statutes to fill gaps, clarify ambiguities and harmonize inconsistencies."[950] Section 5, Gore said, was evidence that Congress shared this perspective, because § 5 expressly contemplates that a state judiciary may be the branch to resolve election controversies.[951]

"More fundamentally," Gore wrote, Bush was wrong to conclude that the reference to the state "legislature" in the electoral appoint-

946. *See id.* at 34 (citing Yee v. City of Escondido, 503 U.S. 519, 533 (1992)). Gore noted that Bush referred to Article II only once during the entire Florida Supreme Court proceeding, in a footnote doing nothing more than describing the source of state authority to decide how presidential electors would be chosen. *See id.* at 35 n.21. For the full text of the footnote, see *supra* note 513.

947. *See* Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 34 n.20 (quoting Herndon v. Georgia, 295 U.S. 441, 443–44 (1935)).

948. *Id.* at 34 n.20.

949. *See id.* at 35; *see also* Reply Brief of Respondents Al Gore, Jr. and Florida Democratic Party, *supra* note 916, at 16. In support of this characterization, Gore cited both statutory and state constitutional provisions empowering the courts to review "general laws" such as the Florida Election Code. *See id.* (citing FLA. CONST. art. V, §§ 1, 3, 4, 5; FLA. STAT. ANN. § 20.02(1) (West 1998)). Gore further argued that the Florida Legislature consciously chose to delegate the power to resolve presidential election disputes to the courts, because the legislature expressly removed that power from the courts when disputes arose over the election of *state* legislators. *See id.* (quoting FLA. STAT. ANN. § 102.171 (West Supp. 2001) ("The jurisdiction to hear any contest of the election of a member to either house of the Legislature is *vested in the applicable house* . . . .") (emphasis added)).

950. Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 35.

951. *See id.* ("3 U.S.C. § 5 provides strong evidence that Congress itself recognized the propriety of state judicial review regarding the appointment of electors [for it] offers a safe harbor to states that use 'judicial or other methods or procedures' to resolve controversies concerning electors.").

ments clause vested in that branch an exclusive authority to set forth the law concerning presidential elections.[952] Gore cited several Supreme Court cases interpreting and applying Article 1, Section 4, which, like the electoral appointments clause, confers power on state "legislatures" to regulate the time, place, and manner of congressional elections.[953] Because the Court had held in those cases that a governor, the public, and state courts could participate in regulating congressional elections, Gore argued, there was likewise no cause to prohibit judicial review in presidential elections.[954]

For the Court to decide otherwise, and conclude that the electoral appointments clause either displaced state judiciaries or limited their decision-making processes, would violate what Gore described as "the fundamental principle that the federal Constitution takes the arrangement of state governmental branches as it finds them."[955] Gore cited a number of state cases in which state supreme courts had interpreted election laws in the context of presidential elections,[956] and a like number of state attorney general opinions,[957] and warned that Bush's reading of the electoral appointments clause would call all of these into question. "Petitioner's understanding of Article II," Gore wrote, "would place federal courts in the business of selecting which, if any, of these state court decisions are permissible."[958]

Finally, Gore denied that the Florida court's decision violated the Due Process Clause.[959] Gore observed that Bush had failed to make any due process argument before the Florida court, with the exception of a single paragraph complaining about the recount standards some of the counties were using, and noted that the Court had specifically declined to hear that issue when it rejected Bush's petition for certio-

952. *See id.* at 36 ("More fundamentally, as this Court has repeatedly held, a grant of lawmaking power to the 'legislature' of a State imposes no requirement that only the legislature itself make the law.").

953. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

954. Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 36–37 (citing Growe v. Emison, 507 U.S. 25, 34 (1993) (holding that state courts could redraw congressional districts); Smiley v. Holm, 285 U.S. 355, 368 (1932) (allowing governor to veto congressional reapportionment law); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (allowing citizens to reject law regulating congressional elections by state constitutionally-authorized referendum)).

955. *Id.* at 43.

956. *Id.* at 39 n.28.

957. *Id.* at 41 n.30. Gore also pointed out that if the Court decided that the legislature's authority was truly exclusive, then Florida's own Secretary of State acted unconstitutionally when she directed the counties to accept and count overseas ballots arriving after the election, inasmuch as that practice "rests only on an administrative role" and actually conflicts with a Florida statute. *Id.* at 36 n.22.

958. *Id.* at 41.

959. *Id.* at 45–50.

rari in the federal case.[960] Moreover, to the extent that Bush was making some other type of due process claim[961]—perhaps a substantive due process claim that the Florida court had retroactively changed the law—Gore argued that Bush could not establish any of the elements of such a claim: that the decision constituted a "retroactive change," that Bush had a cognizable liberty or property interest, or that the Florida court's decision was arbitrary.[962]

As this summary indicates, Gore and Bush spent most of their briefs discussing the meaning of federal § 5, the appropriate role of the judiciary under the electoral appointments clause in Article II, and whether the Florida court could be deemed to have "changed" the election law set forth by the Florida Legislature. Conspicuously missing from the briefs on both sides was any recognition of the passage from *McPherson* that had suggested that a legislature acting under the electoral appointments clause in Article II could not be limited by a state's own constitution.[963] Notwithstanding that with this passage from *McPherson* backing it, Bush's argument on the electoral appointments clause would have been *much* stronger than any argument he could have made with respect to § 5, he placed it behind his discussion of § 5, twenty-one pages into his argument. Further, even when Bush did come around to arguing the electoral appointments clause, his thrust was simply that the Florida court had usurped power from the legislature, and he used the Florida court's reliance on the Florida Constitution simply as evidence of usurpation, *not* as an independent basis for finding a violation of the clause.[964] It was as though his lawyers had missed the significance of the passage in *McPherson*.

960. *See id.* at 45; *see also supra* notes 667–68 and accompanying text (describing the petition for certiorari in the federal case).

961. Gore could fairly say that he did not know the due process theory on which Bush was proceeding because Bush did not articulate any such theory until his reply brief. *See supra* note 931–34 and accompanying text. The expedited briefing schedule in the case placed Gore at a decided disadvantage in this regard. Although petitioner's and respondent's brief deadlines are ordinarily staggered to allow the respondent to address the arguments raised in the petitioner's brief, the Supreme Court had ordered both parties to file briefs on Tuesday, November 28 and Thursday, November 30. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004, 1005 (2000). As a result, in writing his initial brief, Gore had only Bush's petition for certiorari to go on, and in writing his reply brief, Gore had only Bush's initial brief to go on, and neither of those documents filed by Bush discussed the Due Process Clause in any way independent of § 5. *See* Brief for Petitioner, *supra* note 904, at 17–19; Petition for a Writ of Certiorari, Bush v. Palm Beach County Canvassing Bd., *supra* note 666, at 17–18. Thus, by the time Bush did set forth the nature of his due process claim, in his reply brief, Gore had no mechanism by which he could respond in writing.

962. *See* Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 46.

963. *See supra* note 162 and accompanying text.

964. Bush did quote a passage from *McPherson* stating that the power to establish the method of appointing electors lay with the legislature, and "cannot be taken from them or modified by their State constitutions." *See* Brief for Petitioner, *supra* note 904, at 47 (quoting McPherson v. Blacker, 146 U.S. 1, 35 (1892) (internal quotation

Gore, likewise, did not mention the passage from *McPherson*. From Gore's perspective, of course, this would make sense, because even if his attorneys were well aware of the danger *McPherson* posed, the passage was so unfavorable to Gore's position that the attorneys would never want to be the ones to raise it. One is therefore left to wonder whether, after three weeks of litigation, Gore had finally discovered the constitutional law that would later help to do him in.

Two aspects of the Gore briefs suggest that they had. First, Gore's brief went to great pains to alter the Article II agenda, characterizing Bush's argument as one concerning the proper role of the judiciary, not one concerning the *sources of authority* on which a state court could rely.[965] Second, Gore's statement of the case was very careful in its description of the Florida court's decision, never admitting that the Florida court had "relied on" the Florida Constitution, but describing the decision as one merely "guided by" and made "in light of" the state constitution.[966]

C. *The Oral Argument*

During the oral argument, it quickly became clear that a majority of the justices were skeptical of Bush's argument based on § 5. Justices O'Connor and Kennedy seemed to agree with Gore that § 5 did not set forth any requirement of the states such that it was capable of being "violated." Justice O'Connor suggested that compliance with

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marks omitted), without acknowledging that the passage was a quotation). That passage, however, was not a statement from the Court, but only a quote from a Senate report that the *McPherson* Court had cited, a fact that Bush acknowledged in his reply brief. *See* Reply Brief for Petitioner, *supra* note 931, at 9 n.5 ("Petitioner notes that a citation to *McPherson* in the opening brief (at 47) inadvertently omitted the fact that the Court was quoting, with approval, from an 1874 Senate Report on the subject of the Electoral College."). Moreover, because the quote appeared in a portion of *McPherson* devoted to recounting how the framers had rejected electing the President by popular vote, it did not sweep nearly as broadly as the passage ten pages earlier in *McPherson*, which suggested that a state constitution could not be the source of "*any* attempt to circumscribe the legislative power" in regulating the appointment of electors. *McPherson*, 146 U.S. at 25 (emphasis added).

965. *See* Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *supra* note 904, at 35–45 (defending the judiciary's role in making election law); *id.* at 41 (characterizing Bush's Article II claim as one "that the Florida Supreme Court may not interpret electoral statutes"); *id.* at 45 ("[T]he state judiciary's traditional role in interpretation does not disappear under [the electoral appointments clause].").

966. *Id.* at 7 ("The court reached this result by applying familiar principles of statutory construction to resolve the textual ambiguities and gaps in the Florida Election Code, *guided by* an appreciation of the importance of the right to vote under Florida's constitution and laws.") (emphasis added); *id.* at 10 ("Having determined that the Secretary was permitted to accept returns filed after the deadline, and *in light of* the importance of the right to vote under the Florida Constitution, . . . the court also determined the scope of the Secretary's discretion to 'ignore' returns submitted after the seven-day period.") (emphasis added); *see also id.* at 15 ("[The Florida court] concluded, *in light of* the state constitution and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was limited.") (emphasis added).

§ 5 was only "a factor that the Congress can look at in resolving [an electoral college] dispute," and stated that she did not "quite understand how [the section] would be independently enforceable" by the Court.[967] Justice Kennedy followed, in effect suggesting to Olson that if he could argue that the Florida court had *relied* on § 5 and misinterpreted it, then there might be a federal question, but otherwise not.[968] Olson did not pick up on Justice Kennedy's suggestion, however (at least not until his rebuttal), and in fact stated flatly that the Florida court did not undertake to rely on or interpret § 5.

> QUESTION: But what is there in the opinion of the Supreme Court of Florida that indicates that it relied on this Federal statute in the reasoning for its decision and in its judgment?
>
> MR. OLSON: Well, I think *the fact is that it did not* . . . .
>
> QUESTION: Well, we are looking for a Federal issue, and I thought that you might have argued that the Secretary of State was instructed by the [s]upreme [c]ourt not to jeopardize the state's chances and then cited 3 U.S.C. Sections 1 through 10. And so if the, if the state supreme court relied on a Federal issue or a Federal background principle and got it wrong, then you can be here.
>
> MR. OLSON: Well, I certainly agree that it mentioned those provisions. I'm simply saying that it blew past the important provisions of Section 5 . . . .[969]

Chief Justice Rehnquist and Justice Souter seemed especially concerned that even if the Florida court's decision did not comply with § 5, the Court should not be the one to address such noncompliance because, under § 15, it was Congress's job to do so. Yet at several points during this questioning, it became clear that Bush's attorneys had spent so much time focusing on their "change in the rules" argu-

967. Oral Argument Transcript at 4, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000) (No. SC00-836). The citations provided here are from the official transcript available from the United States Supreme Court. However, because the official transcript does not identify the justices who asked particular questions, those justices have been identified from a review of the oral argument tape, *at* http://oyez.nwu.edu/cases/cases.cgi?case_id=827&command=show.

968. *See* Oral Argument Transcript, *supra* note 967, at 5–6.

969. *Id.* at 5–6 (emphasis added). By the time Olson arrived at the podium for his rebuttal, he had obviously decided that Justice Kennedy's theory was better than the one he had invoked in his original argument, and so Olson then characterized the Florida court's decision quite differently:

> It also seems to me quite evident in response to what Justice Kennedy was asking earlier, that there was concern about the Federal statutory provision, the language to which I think Justice Kennedy was referring is on page 32-A of the appendix to the petition from the court's decision, and there is a footnote there that does refer to 3 U.S.C. 1 through 10, which of course includes section 5 . . . . The court was assuming, it seems to me, that it did not, was not conflict—the decision that it was rendering was not going to cause a conflict with the Federal statutory scheme, and it was, we submit, in error in that regard.

See id. at 74.

ment that they were not prepared to address the relationship between § 5 and § 15, or the possibility that the application of § 5 was a political question that the Court should not address. When both Chief Justice Rehnquist and Justice Souter noted that § 15 provided for *Congress* to apply § 5, which in turn could be read as precluding judicial review of § 5 compliance (at least before Congress had addressed the issue), Olson simply could not provide a comprehensible reason why that was not so.[970] Justice Scalia attempted to help Olson out by asking whether § 15 predated the Court's decision in *McPherson*—

970. *See id.* at 8–9 (questioning by Chief Justice Rehnquist); *id.* at 20–22 (questioning by Justice Souter). Olson appeared to be unable to follow the justices' reasoning because his only response was to keep talking about how the Florida court had changed the law and invoking the historical context in which § 5 was enacted. These are the relevant passages:

> QUESTION [by Chief Justice Rehnquist]: Mr. Olson, do you think that Congress when it passed 3 U.S. Code, intended that there would be any judicial involvement? I mean, it seems to me it can just as easily be read as a direction to Congress, saying what we are gong to do when these electoral votes are presented to us for counting.
>
> MR. OLSON: I think that it was intend—directed to Congress, but it seems to me that in the context in which it was adopted and the promise that it afforded, that the conclusive effect would be given to the state selection of electors, that is a somewhat empty remedy and it doesn't accomplish Congress' objectives if it cannot be enforced when an agency of the state government steps in as the Florida Supreme Court did here and overturn the plan by which the Florida legislature carefully set forth a program so that disputes could be resolved . . . .

See id. at 8–9.

> QUESTION [by Justice Souter]: All right. Mr. Olson, let's assume that [the Florida Supreme Court changed the law], for the sake of argument . . . . . In Section 15, it sets out in fact an elaborate set of contingencies about what the Congress is supposed to do and can do if there is a dispute as to whether a given set of procedures in the state have conformed to Section 5 . . . .
>
> It looks to me at this stage of the game, the statute has committed the determination of the issues that you raise and the consequences to follow from them to the Congress. Why should the Court, why should the Federal judiciary be interfering in what seems to be a very carefully thought out scheme for determining what happens if you are right?
>
> MR. OLSON: Because I submit that that writes Section 5 essentially out of existence if an agency of state government, if a state legislature—
>
> QUESTION [by Justice Souter]: No. It doesn't write it out of existence. It provides in Section 15 what happens if the state agency does what you say it did.
>
> MR. OLSON: If the state agency, if the state legislature empowered by Article II of the Constitution, does what it is invited to do by Section 5, and then another agency of state government, in this case the state supreme court, comes along and upsets that scheme, yes, you have ultimate resort to the resolution of the dispute under Section 15 of Title 3, but that's precisely—
>
> QUESTION [by Justice Souter]: Well, you say you have the ultimate resort. But that begs the question, that seems to be precisely the resort that Congress has provided.
>
> MR. OLSON: Well, I'm not making myself clear, I think, is that the importance of Section 5 was to invite the state to do things that would avoid

which also dealt with electoral college issues and which the Court had decided did not present a nonjusticiable political question. The question was plainly aimed at an argument that if the *McPherson* Court knew of § 15 but nonetheless reached the electoral college issue, then the current Court should do likewise. Olson, however, not only failed to grasp the significance of the question, but admitted that he did not know when § 15 was enacted.[971]

Finally, three of the justices seemed unwilling to hold that the Florida court had "changed the law." Justice Stevens asked Olson whether it was "not arguable, at least, that all they did was fill gaps that had not been addressed before."[972] Justice Breyer suggested that all the court had done was engage in the rather routine exercise of deciding when a state official has reasonably exercised his or her discretion.[973] And Justice Ginsburg focused on the "conflict" the Florida court described between the seven-day deadline and the fact that one could ask for a manual recount, even in a very populous county, up to the seventh day, questioning whether the court's action had merely "reconcile[d]" the conflicting provisions.[974]

Even in the face of this skepticism about his § 5 argument, it was not Olson, but Justice Scalia, who turned Olson's argument to the electoral appointments clause. After Olson agreed that the Florida court had recited four canons of statutory construction, but had not been "reasonable" in applying them, Justice Scalia corrected Olson's characterization, insisting that in the portion of the opinion where the Florida court had limited the Secretary's discretion, it had based its holding squarely on the state constitution.

> MR. OLSON: They recited four canons of statutory construction, Justice Stevens, but when they said they use those construction—canons of statutory construction to say that the words may and shall mean shall not, that is not a reasonable exercise of statutory construction. I think what the—it's relatively obvious that what the su-

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the chaos and the conflict and the controversy and the unsettled situation that this country faced in 1876, and—.

Id. at 20–22.

971. *See id.* at 22. Justice Scalia interrupted Olson's efforts to answer Justice Souter and asked: "Mr. Olson, did Section 15 exist when McPherson was decided?" *Id.* Olson responded: "I don't know, Justice Scalia. I don't know the answer to that, when it was adopted. I can't recall whether it was a part of the 1887 electoral count statute or not." *Id.* Under the time constraints, it ordinarily would not be so surprising that a lawyer might not know when a statute was enacted. The lack of preparation is more shocking, however, when one realizes that the two statutes were enacted at the same time, and that § 15 refers expressly to § 5, and that this was a lawyer who was vehemently urging the Court to consider the legislative intent and historical context behind § 5.

972. *Id.* at 9.

973. *See id.* at 12 ("Isn't the law of Florida like as in most states, and in the Federal government, that when an official has discretion, may accept or may not accept, that has to be exercised within the limits of reason?").

974. *Id.* at 13.

> preme court did is exactly what Article—Section 5 of Article [sic] III intends not to happen. Change the rules.
>
> QUESTION [by Justice Scalia]: I don't read their opinion that way, Mr. Olson. It seems to me that the portion of their opinion dealing with statutory construction ends with a conclusion that the Secretary has discretion. The portion of the opinion employing the canons of construction does not place any limits upon the Secretary's discretion.
>
> MR. OLSON: Well, yes, I agree with that up to a point, but then it says that she must accept these returns that are after the deadline.
>
> QUESTION [by Justice Scalia]: That was not on the basis of any canons of statutory construction. That was on the basis of the state's constitution.
>
> MR. OLSON: That's right, but so there was both going on . . . .[975]

From this passage, it was quite clear where Scalia was going: he was prepared to hold that the Florida court had violated the electoral appointments clause by relying on the state's constitution, based on the passage in *McPherson* suggesting that state legislatures could not be limited by state constitutions. It was equally clear that Scalia was prepared to do so even though *Bush's own lawyers* were not relying on such an argument, and appeared not to know that it existed.

Indeed, Olson once again did not catch on. Rather than immediately affirm Scalia's point, and launch headlong into how the Florida decision violated the principle set forth in *McPherson*, Olson actually asserted that the Florida court relied on *both* statutory construction and the state constitution, thus providing the basis for a remand for clarification. Olson apparently was so unfamiliar with *McPherson* that he actually *resisted* pinning the decision on the state constitution, as if the Court would be more likely to *uphold* the Florida court's decision if it found that the court relied on the state's constitution than if it found that the court's decision was simply an unreasonable exercise of statutory construction. Moments later, when Laurence Tribe began to argue for Gore, it must have become quite clear to Olson how mistaken he had been.[976]

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975. *Id.* at 17–18.

976. In fact, just as he had done with his § 5 argument, *see supra* note 969 and accompanying text, Olson altered his position between his opening and rebuttal arguments. Having earlier placed no emphasis whatsoever on the fact that the Florida court relied on the state constitution, Olson was a convert by the time he reached his rebuttal:

> It seems to me that it's very difficult to read the Florida Supreme Court decision as saying anything else other than the Florida Constitution in their view, in that court's view, is trumping everything else. The second paragraph of the conclusion says because the right to vote is the preeminent right in the declaration of rights of the Florida Constitution and so forth, this opinion is full of language—

Oral Argument Transcript, *supra* note 967, at 72.

The Court began by questioning Tribe on his assertion that § 5 presented a question for Congress, not the Court. Chief Justice Rehnquist asked Tribe whether § 5 could ever be addressed by the Court, perhaps after Congress had acted. Tribe indicated that he favored the conclusion that the question was nonjusticiable, but hedged: "No, I don't think so, Mr. Chief Justice, it's just that I don't trust my own imagination to have exhausted all possibilities."[977] Justice Kennedy pushed further, invoking the Florida Legislature's threat to intervene, and Tribe's own assertion that the legislature would be acting unconstitutionally if it did so, to suggest the importance of the Court's involvement.[978] Tribe did not back down. He continued to argue that, at least initially, Congress was the proper institution to address § 5, and he insisted that the validity of the legislature's threat was not properly before the Court.[979]

With that, the Court's focus on § 5 essentially ended. The Court spent virtually the entire remainder of Tribe's time debating the issue raised by *McPherson*, but not even mentioned in Bush's brief or Olson's remarks: whether the Florida court had unconstitutionally relied on the Florida Constitution when it limited the Secretary's decision.[980] And it quickly became obvious that the justices were not of one mind as to *McPherson*'s application.

As soon as Chief Justice Rehnquist raised the *McPherson* issue, Tribe argued that the Florida court did not use the state constitution as an independent basis for its decision, but only as a "tiebreaker" or "a way of shedding light" on the statutory provisions that were in conflict.[981] Chief Justice Scalia, however, refused to accept Tribe's characterization, and launched into an extended discussion of the way the Florida decision was organized and written, pointing out that the first portion of the decision involved statutory interpretation but the portion addressing the Secretary's discretion did not.[982] At one point

977. Oral Argument Transcript, *supra* note 967, at 47.

978. *See id.* at 48–49 (Justice Kennedy) ("[M]y point is that [the legislature's threat] puts hydraulic pressure on your nonjusticiability argument and makes it a very, very important argument and a critical argument in this case.").

979. *See id.* at 48–49. Those who would take a cynical view of the Court's decision-making processes—arguing that the majority, which in the end included Rehnquist and Kennedy, merely found a way to anoint their chosen candidate—might well see some support for their view in this line of questioning. The theory would be that Rehnquist and Kennedy knew they were in a win-win situation for Bush on justiciability. If Tribe conceded justiciability, it would be hard to criticize the Court's taking action to resolve the case. Better yet, if Tribe committed Gore to nonjusticiability, that would prevent Gore from going to court if he won the contest action but Congress refused to recognize it as a § 5 determination, and instead recognized Jeb Bush's initial certification or the Florida Legislature's slate of electors.

980. *See id.* at 52–72. There was a short return to § 5 later in the argument, in response to a question by Justice Kennedy, but Justice O'Connor quickly brought the discussion back to the electoral appointments clause. *See id.* at 63–65.

981. *See id.* at 54.

982. *See id.* at 54–56.

during the sparring, Scalia insisted that the Florida court had decided that the manual recounts should be accepted and simply could not reconcile that decision with the statutory scheme.

> QUESTION [by Justice Scalia]: Professor Tribe, I would feel much better about the resolution if you could give me one sentence in the opinion that supports the second of these supposed alternative readings, that supports the proposition that the Florida Supreme Court was using the constitutional right to vote provisions as an interpretive tool to determine what the statute meant. I can't find a single sentence for that.
>
> MR. TRIBE: Justice Scalia, I can do a little better than find a sentence. The entire structure of that part of the opinion, as Justice Stevens points out, would be incoherent if the constitution was decisive. That is the highest law in Florida. Why bother with all the rest if that is anything more than an interpretive guide.
>
> QUESTION [by Justice Scalia]: You would bother with it because having decided very clearly what the statute requires and finding no way to get around the firm dates set, you say the reason it's bad is because of the state constitution. That's how it's written.[983]

Facing Scalia's heated resistance to his interpretation of the Florida court's opinion as one of statutory interpretation, Tribe shifted his argument to justifying the court's action even in the event that it *did* rely on the state constitution. Tribe argued that *McPherson* explicitly stated that a legislature could, if it wished to, delegate its full electoral appointment power to the judiciary.[984] That being so, Tribe posited, a legislature could certainly delegate to the judiciary *less* than the full power of appointing electors: the power to exercise its ordinary role in adjudicating electoral disputes, which would include looking to the state constitution.[985] Interpreting the legislature's action in Florida this way was especially appropriate, Tribe claimed, because the Florida Legislature had expressly removed the judiciary's power to review the legislature's *own* elections, but had taken no action to remove judicial review from *presidential* elections. Further, the legislature could not have objected to the constitutional law the court applied because, in Florida, the legislature itself repromulgates the constitution every few years.[986]

Few of the justices seemed particularly persuaded by Tribe's less-than-full delegation argument, but several jumped in nonetheless to offer alternatives that might avoid *McPherson*. Justice Breyer suggested that the court's discussion of the state's constitution should be considered no different from relying on Blackstone, and should not be deemed to violate *McPherson*, unless the Florida court consciously

983. *See id.* at 61.
984. *See id.* at 56.
985. *See id.*
986. *See id.* at 56, 67.

chose to contravene the legislature's choices.[987] Justice Stevens made a related point, noting that the Florida court had discussed the Florida Constitution but had also mentioned earlier Florida cases, an Illinois case, and a federal case.[988] And Justice Souter suggested that the decision could be read as applying the principle of "constitutional doubt," under which a court honors a statute but interprets it in such a way as to avoid any potential constitutional violation.[989] To support this approach, Souter pointed out that even in the portion of the opinion where the Florida court had discussed the state constitution, it had also stated that the Secretary's exercise of her discretion conflicted with the statutory provision that would allow recounts to begin as late as the sixth day after the election.[990]

In the end, however, it was Justice Ginsburg who offered the middle course that would allow for Gore's escape from *McPherson*. During Olson's argument, Justice Ginsburg had objected strenuously to what she took as Bush's attack on the Florida court's integrity, and had repeatedly invoked the principle that federal courts should read state court decisions in the light most favorable to upholding them.[991] So when Justice Souter brought out that the Florida court had invoked *both* the state constitution and the statutory conflict, Ginsburg suggested that the justices give the court the benefit of the doubt and remand the case for clarification as to the court's ground.[992] Three days later, that is what the Court did.

D. *The Supreme Court's Decision*

On Monday, December 4, the Supreme Court issued its decision in *Bush v. Palm Beach County Canvassing Board*.[993] In a unanimous, per curiam opinion, the Court declined to review the federal questions raised by Bush, but nonetheless vacated the Florida court's judgment and remanded the case for further proceedings.[994] The Court ex-

987. *See id.* at 58.
988. *See id.* at 59–60.
989. *See id.* at 56–57.
990. *See id.* at 60.
991. *See, e.g., id.* at 15 ("I do not know of any case where we have impugned a state supreme court the way you are doing in this case. . . . [I]n case after case, we have said we owe the highest respect to what the state says, [the] state supreme court says, is the state's law."); *id.* at 18 ("[W]ould you agree that when we read a state court decision, we should read it in the light most favorable to the integrity of the state supreme court[?]").
992. *See id.* at 60. Justice Ginsburg stated:

> They said that [that they were bothered by the statutory conflict] twice, and I think that's critical if you add to that that we read a decision of a state court in the light most favorable to that court and not in the light least favorable. I suppose there would be a possibility for this Court to remand for clarification . . . .

Id.
993. 531 U.S. 70 (2000).
994. *See id.* at 78.

plained that it could not reach the merits of Bush's claims because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority" under the electoral appointments clause, and was "also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5."[995] The Court made no mention of Bush's due process claim.

With respect to the electoral appointments clause issue, the Court certainly identified the issue for the Florida Supreme Court, but spoke in indefinite terms. The Court quoted the passage from *McPherson* suggesting that a state legislature's power could not be limited by a state's constitution.[996] Then it quoted two passages from the Florida court's decision that "may be read to indicate that [the Florida court] construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"[997] At the same time, the Court acknowledged that *McPherson* did not raise "the same question [P]etitioner raises here."[998]

With respect to § 5, the Court was somewhat more forthcoming. After quoting the statute, the Court wrote that § 5 "contains a principle of federal law that would assure finality of [a] State's determination if made pursuant to a state law in effect before the election."[999] Thus, a legislative desire to take advantage of that finality "would counsel against any construction of the Election Code that Congress might deem to be a change in the law."[1000] The Court did not go further, however, and explain what it expected of the Florida court in this regard: whether the Florida court should *assume* that the legislature hoped to satisfy § 5 or should explore that possibility as a matter of legislative intent. The Court noted only that the Florida court had not made clear what role § 5 played in its decision.[1001]

The Supreme Court's decision was regarded in many quarters as a setback for Gore.[1002] That was true only to the extent that it was not a pure Gore victory: *i.e.*, a ruling that the Florida court did *not* violate the electoral appointments clause or § 5. In reality, under the circumstances, it was perhaps the best outcome Gore could have hoped for.

995. *Id.* at 78.

996. *See id.* at 76 (quoting McPherson v. Blacker, 146 U.S. 1, 25 (1892)).

997. *Id.* at 77 (quoting *McPherson*, 146 U.S. at 25).

998. *Id.* at 76.

999. *Id.* at 78.

1000. *Id.* at 77–78.

1001. *Id.* at 78.

1002. *See, e.g.*, Gil Klein, *Two Strikes Against Gore: U.S. and State Courts Deliver Setback in Florida*, RICHMOND TIMES-DISPATCH, Dec. 5, 2000, at A1 ("Vice President Al Gore's presidential hopes suffered two legal blows yesterday as both the U.S. Supreme Court and a Florida court ruled against his bid to wrest the state's 25 electoral votes from Texas Gov. George W. Bush.").

First, notwithstanding the claims of some that the case was moot by the time it was argued,[1003] a straight victory for Bush would have seriously complicated the contest proceeding. It would have erased the 567-vote gain Gore had picked up from Broward County.[1004] It would also have weakened Gore's claims to the 350 or so votes identified by the Palm Beach and Miami-Dade canvassing boards. To "re-find" these 900-plus votes, Gore would have had to rely on a truly de novo review in the contest action by a judge who had already made clear his reluctance to look at the ballots.[1005]

Second, had the Court adopted the Florida Legislature's position, and decided that the case presented a political question, Gore might not have been safe even if he had achieved a victory in the contest action before December 12. With the Supreme Court out of the picture, unwilling to hear the case, House Republicans would have been free to deprive a Gore slate of the conclusiveness afforded by § 5, on the ground that they, like Bush, believed that the courts had not followed the law as it existed on Election Day. And even if the Senate did not agree, § 15's tiebreaker provision would have required that Congress honor the slate certified back on November 26 by Bush's brother Jeb.[1006]

1003. *See supra* note 445 and accompanying text.

1004. *See supra* note 710 and accompanying text.

1005. *See supra* notes 759, 777 and accompanying text (describing Gore's claims to the votes identified in Palm Beach and Miami-Dade Counties, and Judge Sauls's decision to make Gore prove his entitlement to have the ballots reviewed). The one thing that a Bush victory would not have done, contrary to the claims of some, was render Gore's contest action untimely. Under Florida law, the deadline for bringing a contest action was "within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested." FLA. STAT. ANN. § 102.168(2) (West Supp. 2001). Even assuming that the Supreme Court fully overturned the Florida Supreme Court, and restored the status quo as of November 14, the last county certification would have occurred on November 18, due to the regulation requiring acceptance of overseas ballots. *See supra* notes 68–74 and accompanying text. Ten days from that date would have been November 28, and yet Gore's contest action was filed on November 27.

1006. It is possible that a Florida court finding for Gore in the contest action could have ordered Jeb Bush to amend his earlier certificate of ascertainment and instead certify a Democratic slate of electors. This would have placed the Florida executive and the Florida judiciary squarely at odds. Jeb Bush would have had to choose between defying an order of his state's highest court or obeying the order but certifying a slate of electors he believed were appointed in violation of Florida law. Had he chosen to defy the courts, the only slate before Congress that would have been certified by the state executive would have been the slate he certified on November 26, and even if the Senate disagreed with the House on the application of § 5, the Senate would have been bound by the tiebreaker provision of § 15 to accept the executive-certified Bush slate. *See supra* notes 272–73 and accompanying text. It is worth noting, in this regard, that Jeb Bush is reported to have said that "no judicial power exist[ed]" to compel him to certify a Gore slate of electors. DAVID A. KAPLAN, THE ACCIDENTAL PRESIDENT: HOW 413 LAWYERS, 9 SUPREME COURT JUSTICES AND 5,963,110 (GIVE OR TAKE A FEW) FLORIDIANS LANDED GEORGE W. BUSH IN THE WHITE HOUSE 230 (2001). Had Jeb Bush chosen to comply with the court's decision under protest, there truly might have been the "constitutional crisis" about which

Third, and most importantly, the undeniable truth was that the Florida court really *had* relied on the Florida Constitution, and it was Gore who had led it to do so. Gore had expressly urged the Florida court to invoke the Florida Constitution, and even public policy, to disapprove of the Secretary's decision. Given that fact, and given the organization of the Florida court's opinion, the Supreme Court was more than generous to deem it "unclear" whether the Florida court had relied on the Florida Constitution. And by placing the decision back in the hands of the Florida court, the Supreme Court actually gave the court the opportunity to correct the *McPherson* error.[1007]

With that said, and even to the extent that the Supreme Court's decision allowed Gore to dodge a bullet, the ambiguity in the Supreme Court's decision concerning *McPherson* would ultimately play a decisive role in Gore's loss. The Supreme Court left the distinct impression that it would not hesitate to invoke *McPherson*, and find a violation of the electoral appointments clause, if the Florida courts subsequently deviated in any way from the Florida Legislature's statutory scheme for resolving election controversies. Thus, the Florida courts thenceforth could not risk invoking the Florida Constitution, and they would be treading on very dangerous ground if they did not follow the letter of the Florida Election Code. This in turn would make it very difficult to "repair" the open-ended "intent of the voter" standard that had already led different canvassing boards to evaluate ballots using different standards.[1008]

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some have spoken. The House presumably would still have challenged the Gore slate, and the Senate the Bush slate. And the tiebreaker provision would not necessarily have solved the problem because the House could contend that only Jeb Bush's initial certification was valid because he had improperly been forced to recertify by the same court that had violated § 5. If the two houses had deadlocked on this issue, there is simply no telling how it might have been resolved.

1007. On the same day the Supreme Court's decision came down, the Florida Supreme Court issued an order stating that the parties would be allowed to file supplemental briefs addressing implementation of the Supreme Court's mandate through 3:00 p.m. *the next day*, December 5. *See* Palm Beach County Canvassing Bd. v. Harris, No. SC00-2346 (Fla. Dec. 4, 2000) (order setting period during which court would accept supplemental briefs from the parties). Gore then filed a short, simple brief, encouraging the court to reinstate its original order with an explanation that its decision was not founded on the state constitution and was intended to honor § 5. Appellants'/Petitioners' Brief on Remand (filed Dec. 5, 2000), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000) (No. SC00-2346). Bush filed a rather lengthy brief arguing that the Florida court clearly had relied improperly on the state constitution and violated § 5, and encouraging the court to put the entire controversy to rest by affirming the trial court's decision upholding the Secretary's exercise of discretion. Supplemental Brief of George W. Bush (filed Dec. 5, 2000), Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000) (No. SC00-2346). The court did not issue its decision on remand until Monday, December 11, after Justice O'Connor had complained during the nationally broadcast oral argument that the Florida court had not responded. *See infra* notes 1371, 1398 and accompanying text.

1008. The reader will recall that the open-ended nature of the "intent of the voter" standard had enabled Gore to go into court whenever a canvassing board had applied

VII. THE ELEVENTH CIRCUIT RULING ON THE FEDERAL CLAIMS

When Bush initially petitioned the Supreme Court for certiorari, he asked the Court to hold that Florida's manual recount statute and the manual recounts that had already been conducted violated the Equal Protection Clause and the Due Process Clause. He presented these claims to the Court both in his petition from the Eleventh Circuit's decisions in *Siegel v. LePore*, and as question three of his petition from the Florida Supreme Court's decision.[1009] The procedural posture of neither case, however, lent the claims to Supreme Court review.[1010] The Eleventh Circuit had not yet addressed the merits of the claims, and had not even decided whether it would affirm the district court's decision to deny Bush an injunction. The only decision that the Eleventh Circuit had made was to deny Bush an emergency injunction pending the consideration of his appeal.[1011] Similarly, the Florida Supreme Court had never addressed the merits of the claims. That court had rendered a final judgment with respect to the recounts, but had stated in its opinion that Bush had failed to raise any constitutional challenge.[1012]

So it was surely not terribly disappointing to Bush when the Supreme Court declined to consider his equal protection and due process challenges to the recounts.[1013] He had lost nothing. He had alerted the Supreme Court to the issues, could still litigate them before the Eleventh Circuit, and, because the Court had denied his

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a per se rule of excluding certain types of ballots. *See supra* notes 435–37, 685 and accompanying text. In each instance, the courts told the canvassing boards that the "intent of the voter" should be judged by the totality of the circumstances and that per se exclusion rules were not compatible with such an approach. *See supra* notes 437, 685 and accompanying text. The courts' decisions, however, did not result in uniform approaches by the canvassing boards. According to the testimony at the contest trial, the Palm Beach Board did cease its per se exclusion of dimpled ballots, but it also adopted what was effectively a rule that a dimpled ballot could not be counted as bearing a vote if the only dimple appearing was in the presidential race. *See supra* note 821 and accompanying text. In Miami-Dade, on the other hand, the board announced no rule more specific than the intent of the voter, and the members appeared (to one GOP witness) to be applying their own individual, and different, criteria for counting a ballot. *See supra* notes 850–51 and accompanying text.

1009. *See* Petition for a Writ of Certiorari, Siegel v. LePore, *supra* note 666; Petition for a Writ of Certiorari, Bush v. Palm Beach County Canvassing Bd., *supra* note 666, at i.

1010. *See, e.g.*, United States v. Williams, 504 U.S. 36, 41 (1992) (holding that Court could not consider issues that had not been passed on by a court below); Stevens v. Dep't of Treasury, 500 U.S. 1, 8 (1991) (same).

1011. *See* Siegel v. LePore, 234 F.3d 1162, 1163 (11th Cir. 2000) (denying emergency petition for injunction pending appeal on grounds recited in the related case of *Touchston v. McDermott*, 234 F.3d 1130 (11th Cir. 2000)).

1012. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228 n.10 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) ("Neither party has raised . . . an issue on appeal [as to] the constitutionality of Florida's election laws.").

1013. *See* Siegel v. LePore, 531 U.S. 1005, 1005 (2000); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000).

Siegel petition "without prejudice,"[1014] could return to the Court in the event the Eleventh Circuit's final decision went against him.

A. *The Eleventh Circuit's Ruling: No Irreparable Harm, No Decision on the Merits*

As it happened, the Eleventh Circuit acted almost immediately after the Supreme Court's first decision was handed down. On Wednesday, December 6, only two days after the Supreme Court's decision, the Eleventh Circuit, sitting en banc, affirmed the district court's decision denying Bush an injunction.[1015] The court's opinion, however, did not address the merits of Bush's claims.[1016] Because the case had come before it on the denial of a preliminary injunction, the court held that, irrespective of the merits, it must consider the district court's holding that Bush had not shown that he would suffer irreparable injury in the absence of an injunction.[1017] And in the view of the majority, that holding was clearly correct: "Because Plaintiffs still have not shown irreparable injury, *let alone* that the district court clearly abused its discretion in finding no irreparable injury on the record then before it, the denial of the preliminary injunction must be affirmed on that basis alone."[1018]

1014. *Siegel*, 531 U.S. at 1005.

1015. *Siegel*, 234 F.3d at 1179. Before addressing the district court's decision, the court went through a lengthy analysis of its subject-matter jurisdiction and various abstention doctrines. In the course of that discussion, the court concluded that its jurisdiction was not barred by the *Rooker-Feldman* doctrine, *see id.* at 1172 (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 415–16 (1923)), that abstention was not warranted under the *Burford* doctrine, *see id.* at 1173 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)), and that abstention was not required under the *Pullman* doctrine, *see id.* at 1174 (citing R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941)).

1016. *See id.* at 1179 ("The Court does not at this time decide the merits of Plaintiffs' constitutional arguments.").

1017. *See id.* at 1176 ("Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.") (citing Snook v. Trust Co. of Ga. Bank of Savannah, 909 F.2d 480, 486 (11th Cir. 1990); Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990); Flowers Indus. v. FTC, 849 F.2d 551, 552 (11th Cir. 1988); United States v. Lambert, 695 F.2d 536, 540 (11th Cir. 1983)). The court recognized that the Supreme Court's decision in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 755–56 (1986), allowed appellate courts to decide the merits of a case in connection with reviewing the denial of a preliminary injunction when "'a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.'" *Siegel*, 234 F.3d at 1171 n.4 (quoting *Thornburgh*, 476 U.S. at 757). The court nonetheless declined to apply *Thornburgh* as an independent basis for reaching the merits, because the factual record was "largely incomplete and vigorously disputed." *Id.*

1018. *Id.* at 1175–76 (emphasis added) (citing Carillon Importers, Ltd. v. Frank Pesce Int'l Group, Ltd., 112 F.3d 1125, 1126 (11th Cir. 1997); Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 740 F.2d 892, 893 (11th Cir. 1984); Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1354 (11th Cir. 1982)).

The court provided a number of reasons why it could not conclude that Bush was suffering, or stood to suffer, irreparable injury. First, Bush had been certified as the winner of the election.[1019] Second, even if manual recounts were to resume, it was "wholly speculative as to whether the results of those recounts may eventually place Vice President Gore ahead."[1020] Third, it was also "speculative" as to whether any court might order such recounts, because the trial court hearing the contest action had denied Gore's claims, and the United States Supreme Court had vacated the Florida Supreme Court's decision.[1021] Finally, the court could not agree that Bush would suffer irreparable injury if recounts were allowed to proceed, Gore were named the winner, and then the recounts ultimately were overturned:

> The candidate Plaintiffs contend that if the manual recounts are allowed to proceed, simply rejecting the results of those recounts after the conclusion of this case will not repair the damage to the legitimacy of the Bush Presidency caused by "broadcasting" the flawed results of a recount that put Vice President Gore ahead. But the pertinent manual recounts have already been concluded, and the results from those recounts widely publicized. Moreover, we reject the contention that merely counting ballots gives rise to cognizable injury.[1022]

B. *The Separate Opinions on the Constitutional Merits*

Importantly, notwithstanding the *court's* decision not to reach the merits, several of the additional opinions in the case did reach the merits, and they revealed a significant rift among the judges on the constitutionality of the recounts. Eight of the twelve appellate judges joined the court's opinion,[1023] but four dissented and filed separate opinions.[1024] Three of these dissents were quite lengthy, and each reached the merits, concluding that the district court should have en-

1019. *See id.* at 1177.
1020. *Id.*
1021. *Id.*
1022. *Id.*
1023. *See id.* at 1168 (indicating that Chief Judge Lanier Anderson and Judges J.L. Edmondson, Emmett Cox, Susan Black, Rosemary Barkett, Frank Hull, Stanley Marcus, and Charles Wilson joined the majority opinion).
1024. *See id.* at 1190 (Tjoflat, J., dissenting, for the reasons expressed in his dissent in the companion case of Touchston v. McDermott, 234 F.3d 1133, 1134–58 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001)); *id.* (Birch, J., dissenting); *id.* at 1193 (Dubina, J., dissenting); *id.* at 1194 (Carnes, J., dissenting). The dissenters in the two cases before the Eleventh Circuit took different approaches to filing their dissents. Judge Carnes filed his dissent in the *Siegel* case, and in the *Touchston* case referenced his dissent in *Siegel*. *Compare id.* (Carnes, J., dissenting), *with Touchston*, 234 F.3d at 1161 (Carnes, J., dissenting). Judges Birch and Dubina filed duplicate dissents in *Siegel* and *Touchston*. *Compare Siegel*, 234 F.3d at 1190 (Birch, J., dissenting), *and id.* at 1193 (Dubina, J., dissenting), *with Touchston*, 234 F.3d at 1158 (Birch, J., dissenting), *and id.* at 1161 (Dubina, J., dissenting). Judge Tjoflat filed his dissent in *Touchston*, and in the *Siegel* case referenced his dissent in *Touchston*. *Compare Touchston*,

joined the manual recounts because they were in various respects unconstitutional.[1025] And the fact that the dissents reached the merits triggered a specially concurring opinion by Chief Judge Lanier Anderson, in which he explained in detail why he believed the recounts *were* constitutional.[1026]

Judge Carnes's dissent, joined by three others, focused on the fact that the recounts had been, and might yet be, conducted in selected counties.[1027] Citing the Democrats' original requests for recounts and a variety of their court filings, Judge Carnes pointed out that the Democrats' "unwavering refrain" had been that "punch card systems necessarily and invariably undercount votes which can only be recaptured and considered by manual recounts."[1028] Thus, the problem identified by the Democrats was common to all twenty-four Florida counties using punch-card systems,[1029] yet the Democrats had requested recounts only in three.[1030] To the extent that only those requests were granted (or stood to be granted) by the state, this meant that, under the Democrats' *own* theory of punch card undercounting, "thousands of similarly situated Florida citizens who intended to vote for President were thwarted in their efforts by defective technology, perhaps combined with a bit of personal carelessness, and whether their intended votes count has been made to depend solely upon the county in which they live."[1031] In Judge Carnes's view, this situation could not be squared with the Supreme Court's equal protection analysis in *Reynolds v.*

234 F.3d at 1134 (Tjoflat, J., dissenting), *with Siegel*, 234 F.3d at 1190 (Tjoflat, J., dissenting).

1025. *See Siegel*, 234 F.3d at 1190 (Birch, J., dissenting); *id.* at 1194 (Carnes, J., dissenting); *Touchston*, 234 F.3d at 1134 (Tjoflat, J., dissenting).

1026. *See Siegel*, 234 F.3d at 1179 (Anderson, C.J., concurring specially) ("Although I agree that judicial restraint cautions against the court's addressing constitutional issues unless necessary, it does not seem inappropriate for me in light of the extensive dissents, to discuss my own views about the likelihood of success on the merits of Plaintiffs' constitutional issues.").

1027. *See id.* at 1194 (Carnes, J., dissenting).

1028. *Id.* at 1196; *id.* at 1196–97 (recounting the Democrats' position before the Florida Supreme Court and the United States Supreme Court); *id.* at 1201 (citing the reasons given by the Democrats in the original requests).

1029. *See id.* at 1198 (naming the twenty-four punch-card voting counties); *id.* at 1201 ("The problem with machine tabulating of punch card ballots is common to counties that use the punch card system.").

1030. *See id.* at 1202.

1031. *Id.* at 1198–99.

Sims[1032] and *Moore v. Ogilvie*,[1033] both of which prohibited vote dilution on the basis of residence.[1034]

Judge Carnes found unpersuasive the Democrats' argument that there could be no equal protection violation because it was not the state's action, but only Bush's decision not to seek recounts, that caused the recounts to occur in only three of the punch-card counties. The judge noted that the statutory scheme itself discriminated against rural, less populated counties, because one of section 102.166's criteria for granting a manual recount was whether there has been an error "'which could affect the outcome,'" and the likelihood of an outcome-affecting error is markedly reduced in a county where there are fewer total votes.[1035] Further, to the extent that in requesting recounts in only a few counties, the Florida Democratic Party was acting pursuant to authority given it by the state, Judge Carnes thought the Party itself should be seen as a state actor.[1036] And whether the Republican Party did or did not request recounts was essentially irrelevant, because the constitutional rights that selected recounts violated were those of the voters, not Bush.[1037]

Judge Birch's dissent, joined by two others, focused on "the lack of standards or guiding principles in the Florida manual recount stat-

1032. 377 U.S. 533 (1964). In *Reynolds*, the Court disapproved three different apportionment schemes for seats in the Alabama legislature on the ground that they unconstitutionally diluted the votes of Alabama's urban voters. *See id.* at 568–70.

1033. 394 U.S. 814 (1969). In *Moore v. Ogilvie*, the Court disapproved an Illinois law that required a political party seeking access to the ballot to submit a petition with at least 200 signatures from residents of at least fifty counties on the ground that it unconstitutionally diluted the votes of urban voters. *See id.* at 819. This effectively made it impossible for a political party to gain access even if it had the support of the 93.4% of the electorate living in forty-nine Illinois counties, while a party that had the support of only 6.6% of the electorate, a portion spread over fifty rural counties, could gain access. *See id.*

1034. *See Siegel*, 234 F.3d at 1199–1200 (Carnes, J., dissenting).

1035. *Id.* at 1204 (quoting FLA. STAT. ANN. § 102.166(5) (West Supp. 2001)).

1036. *See id.* at 1205 ("When a political party uses state machinery and exercises prerogatives it is given under state law to influence the counting or alter the effect of votes, it is a state actor subject to the same constitutional constraints that protect the citizens from the state and its officials.") (citing Terry v. Adams, 345 U.S. 461, 481 (1953)).

1037. *See id.* at 1209–10 ("There is no loophole in the Constitution that permits what would otherwise be an unconstitutional action to occur simply because a third party could have, but did not, prevent it from occurring."). Carnes also rejected the Democrats' assertion that recounts in selected counties could not violate the Equal Protection Clause when the state allowed different counties to use different voting systems, which necessarily brought with them varying rates of error. *See id.* at 1211–12. Carnes concluded that the two situations—a state allowing variances in voting accuracy and a state allowing variances in *correcting* inaccuracies—were not at all analogous, because "[t]here is no reason to believe that any county would . . . choose for itself a voting system with a high rate of error in order to disadvantage its citizens compared to those of other counties," while "[t]here is every reason to believe that political parties or candidates will selectively choose the counties in which to initiate the process of manual recounts based upon how those counties voted and their population." *Id.* at 1212.

ute."[1038] According to Judge Birch, the Florida Legislature had "abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recounts would be conducted fairly, accurately, and uniformly."[1039] This left "[t]he well-intended and responsible county canvassing boards across the state" to "discern the voter's intent without any objective statutory instructions to accomplish that laudable goal."[1040] The standardless nature of the review, combined with the fact that it was to be conducted by canvassing boards elected in partisan voting, unconstitutionally abridged the "voters' constitutional right to vote."[1041]

Judge Tjoflat's dissent, joined by two others,[1042] argued that the recounts approved by the Florida Supreme Court reflected four different constitutional violations.[1043] First, by allowing the canvassing boards to count ballots that had not been read by the counting machines, the Florida Supreme Court had changed the definition of a "vote" from what it had meant before the election, a "fundamentally unfair" approach in violation of the due process clause.[1044] Judge Tjoflat acknowledged that the Florida Code did not define a "vote,"[1045] but concluded based on "past practice, interpretations of state officials prior to *Harris*, and the legislative history" that "votes" prior to the election were those that were cast in such a way as to be readable by the machines.[1046] Second, the manual counting of ballots

1038. *Id.* at 1191 (Birch, J., dissenting).

1039. *Id.*

1040. *Id.*

1041. *Id.* At no point in his dissent did Judge Birch identify the specific provision of the Constitution he believed the manual recounts violated. By his reference to "an abridgement to the voters' constitutional right to vote," *id.*, and his reference to that right as "fundamental," it appears he was invoking the Due Process Clause of the Fourteenth Amendment, the provision most commonly associated with "fundamental rights," but one cannot be certain, because there is also a "fundamental rights" strand of doctrine associated with the Equal Protection Clause, *see id.* at 1192. NOWAK & ROTUNDA, *supra* note 195, § 11.5, at 426 ("If a law substantially impairs the exercise of a fundamental right by all persons the law will be reviewed under the due process clause. If the law restricts the exercise of a fundamental constitutional right by only a class of individuals, the law will be reviewed under the equal protection clause.").

1042. Judges Birch and Dubina joined Judge Tjoflat's dissent in toto. Touchston v. McDermott, 234 F.3d 1133, 1134 (11th Cir.) (Tjoflat, J., dissenting), *cert. denied*, 531 U.S. 1061 (2000). Judge Carnes joined only Part V of Judge Tjoflat's dissent, *id.*, which was the portion of the dissent addressing irreparable injury rather than the merits, *see id.* at 1155–58.

1043. *See id.* at 1145–55.

1044. *Id.* at 1145–49 (citing Roe v. Alabama, 68 F.3d 404, 407–08 (11th Cir. 1995); Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995)).

1045. *See id.* at 1141 ("Perhaps the most important part of the statutory system left open to interpretation is what constitutes a valid vote.").

1046. *Id.* at 1149. Under the "machine model" in place before the election, "voters were required to indicate their voting intent unequivocally by marking their ballots in such a way that the vote tabulating machine, with its pre-programmed evaluation standard, could read it." *Id.* at 1141. The "past practice" to which Judge Tjoflat referred was the counties' regular certification of only machine-read votes, without any

only from selected counties unconstitutionally burdened the rights of voters outside those counties to have their votes counted, in violation of the Equal Protection Clause.[1047] Third, the Florida Supreme Court's action in approving manual recounts in counties purposefully selected by Democrats for the extent of their Democratic party affiliation was discriminatory state action in violation of the Equal Protection Clause.[1048] Fourth, by allowing "dimpled" votes to be counted in some Florida counties and not others, the Florida Supreme Court burdened the fundamental right of association of those voters whose ballots were not reviewed, and had set forth no compelling reason for doing so.[1049]

Chief Judge Anderson responded to these dissents by emphasizing the standard of review appropriate to state election law. Judge Anderson acknowledged that states may not exercise their power under the electoral appointments clause in a way that violates other constitutional provisions.[1050] He went on to observe, however, that the Supreme Court had adopted a relatively deferential view when addressing state election laws, on the ground that it would be impossi-

effort to discern voter intent from ballots that had not been counted. *Id.* at 1147. According to Judge Tjoflat, if a "vote" was something more than a mark which could be read by a machine, "then the election officials in each county should have examined all undervoted ballots on the night of the election. That they did not do so is evidence that either the Florida Supreme Court changed the election law or that county election officials were shirking their duties." *Id.* The "interpretations of state officials," *id.* at 1149, to which Judge Tjoflat referred were three advisory opinion letters issued after the election but before the Florida Supreme Court's opinion by the State Department's Division of Elections. In each, the Division of Elections stated that a machine's inability to read an improperly punched ballot was not an "'error in the vote tabulation'" that would justify a recount under section 102.166. *See id.* at 1147. Judge Tjoflat noted that the Florida Attorney General had disagreed with the Division of Elections, *id.* at 1147–48, but seemed to rely on the fact that the Secretary of State is the state's chief election officer, *id.* at 1147. The "legislative history" to which Judge Tjoflat referred was a purported committee statement on the Voter Protection Act of 1989, of which the manual recount provision was a part. According to Judge Tjoflat, the statement "indicated that [the legislation] was enacted, in part, in response to a problem in a prior election in which 'an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.'" *Id.* at 1148 (quoting Response of Katherine Harris, Florida Secretary of State, Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, to Petition for Writ of Certiorari at 13 n.10, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000) (No. SC00-836)). Surprisingly, Judge Tjoflat offered no citation for this assertion other than footnote 10 of Secretary Harris's *brief* responding to Bush's petition for certiorari in the United States Supreme Court. *See id.*

1047. *Id.* at 1151.

1048. *Id.* at 1152–54.

1049. *Id.* at 1154–55.

1050. *See* Siegel v. LePore, 234 F.3d 1163, 1180 (11th Cir. 2000) (Anderson, C.J., concurring specially) (citing Anderson v. Celebrezze, 460 U.S. 780, 794 n.18 (1983); Williams v. Rhodes, 393 U.S. 23, 29 (1968); Duncan v. Poythress, 657 F.2d 691, 699 (5th Cir. Unit B 1981)).

ble for a state to regulate elections without placing some burden on a citizen's right to vote.[1051] Quoting *Anderson v. Celebrezze*,[1052] Judge Anderson asserted that "a state's interest in conducting an orderly and fair election is 'generally sufficient to justify reasonable, nondiscriminatory restrictions.'"[1053] It was only when a state placed a "'severe restriction[ ]'" on the right to vote—a burden rising to the level of "'patent and fundamental unfairness'"—that its law should be deemed unconstitutional.[1054] With this set forth as his governing framework, Chief Judge Anderson proceeded to analyze what he identified as Bush's equal protection and substantive due process claims.

According to Judge Anderson, Bush's equal protection claim "boiled down" to the idea that voters in counties not being manually recounted had a lesser certainty of having their votes counted, because the machine counters in their counties might have missed their votes just as the counters in the manually counted counties had missed votes.[1055] This possibility—what Judge Anderson called "the mere availability of manual recounts in some counties, but not in others"—did not, in his view, constitute an inequitable burden on the voters in the counties without manual recounts.[1056] To decide that it did create such a burden "would lead to the untenable position that the method of casting and counting votes would have to be identical in all states and in every county of the state."[1057]

Judge Anderson acknowledged the plaintiffs' argument that it was not just *any* manual recounting that was the problem, but the potential for partisan influence inherent in Florida's system: specifically, the ability of one party to select only counties highly favorable to it and the lack of statutory standards to guide the counting itself.[1058] These aspects of Florida's system, however, were not enough to persuade Judge Anderson that the burden on the plaintiffs was severe, because several aspects of the system guarded against partisanship in manual counting. First, it was not as though the parties had a right to any

1051. *See id.* at 1180 ("[T]he Supreme Court has recognized that a state's regulations governing the electoral process will inevitably impact, in a manner that may burden or restrict, its citizens' exercise of their right to vote."); *id.* at 1181 (referring to the Court's "deference to state regulation of elections").

1052. 460 U.S. 780 (1983). For a discussion of *Anderson v. Celebrezze*, see *supra* notes 200–03 and accompanying text.

1053. *Siegel*, 234 F.3d at 1180 (Anderson, C.J., concurring specially) (quoting *Anderson*, 460 U.S. at 788)).

1054. *Id.* at 1180 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)); *id.* at 1181 (quoting Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995)).

1055. *Id.* at 1181–82.

1056. *Id.* at 1182, 1185.

1057. *Id.* at 1182; *see also id.* at 1185.

1058. *See id.* at 1182–83 ("The Plaintiffs attempt to bolster their treat-every-ballot-alike argument by suggesting that partisan influences have tainted the operation of Florida's manual recount procedures in this case.").

manual recount; the decision was in the hands of three-member canvassing boards, none of whom could be an active participant in either candidate's campaign.[1059] Second, the canvassing boards' discretion was not "standardless," as the Republicans had claimed, but was instead guided by the statutory purpose of determining the intent of the voter and correcting errors that could affect the outcome of the election.[1060] Third, the manual recounts were open to the public.[1061] Fourth, the canvassing boards' decisions were not absolute, but were subject to judicial review.[1062] Finally, manual recounts were available to both parties, and in this case itself, Bush had received sufficient notice of recounts requested by Gore to have requested recounts of his own.[1063]

Having thus determined that the plaintiffs failed to establish the "severe burden" that would warrant strict scrutiny, Judge Anderson went on to decide that Florida's provision for recounts was sufficiently reasonable and non-discriminatory to pass constitutional muster under the Equal Protection Clause. In Judge Anderson's view, utilizing manual recounts as a "supplement" to machine counting was a valid way to serve Florida's strong interest in ensuring an accurate vote.[1064] Conducting the recounts on a decentralized basis, with each county deciding whether a recount was warranted, was a valid delegation of the state's power under the electoral appointments clause, following precisely "the same pattern of federalism reflected in the Constitution itself."[1065] Further, "[a] statewide requirement would impose a very significant administrative burden, and an often unnecessary one, as there are innumerable circumstances in which a manual recount would be warranted only in a single county."[1066]

1059. *Id.* at 1183 (citing FLA. STAT. ANN. § 102.141 (West Supp. 2001)).

1060. *Id.* (citing FLA. STAT. ANN. § 102.166(5) (West Supp. 2001)).

1061. *Id.* (citing FLA. STAT. ANN. § 286.011(1) (West Supp. 2001)).

1062. *Id.* (citing Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508 (Fla. Dist. Ct. App. 1992)).

1063. *See id.* at 1183 & n.6 (citing FLA. STAT. ANN. § 102.166(4)(a) (West Supp. 2001)). Judge Anderson also observed that the plaintiffs had not brought forth evidence that the system had actually operated in a partisan manner. The plaintiffs argued on appeal that the canvassing board members had a "strong personal interest in the outcome," but Judge Anderson wrote that "such a vague allegation of possible manipulative or discriminatory motive does not rise to the level of severity required to merit strict scrutiny of the Plaintiffs' equal protection claims." *Id.* at 1183–84. Presumably, the Eleventh Circuit's record did not include the evidence brought out during the contest trial that, at least in Broward County, Bush had actually gained a higher percentage of the manually recounted votes than the percentage he had received from the machine-counted votes, suggesting that at least that board had not approached the ballots in a partisan manner. *See supra* notes 808–09 and accompanying text.

1064. *Siegel*, 234 F.3d at 1184 (Anderson, C.J., concurring specially).

1065. *Id.*

1066. *Id.*

Judge Anderson concluded his discussion of Bush's equal protection claim by rebutting the dissenters' reliance on the strict scrutiny the Supreme Court had applied in *Reynolds v. Sims* and *Moore v. Ogilvie*.[1067] Those "one-person, one-vote" cases were inapposite, Judge Anderson argued, because they involved voting systems that "arbitrarily and systematically" weighted votes based on the voters' geographic location.[1068] In Florida, Judge Anderson said, it was not as though the ballots in the recounted counties were receiving greater weight, because the recounts did not weigh the votes in any way. The recounts merely verified the count, and there was "no automatic, inevitable, or systematic granting of greater weight to the choices of any voter or class of voter."[1069]

Turning to what he characterized as Bush's substantive due process claim—the allegation that the counties were using different standards to evaluate the ballots and were even changing their own standards midway through the counting—Judge Anderson was similarly deferential to the state. His opinion focused almost entirely on Eleventh Circuit precedent distinguishing claims that elections were "fundamentally unfair," which were constitutionally cognizable, and "garden-variety" election disputes, which were not.[1070] Bush's claims fell into the latter category, Judge Anderson claimed, because the canvassing boards had followed the statutory scheme for conducting the recounts, and even if there were differences in applying that standard among the boards or by a single board, "the Plaintiffs have not alleged that any board has departed from a good-faith attempt to determine the voters' intent," as the statutes required.[1071] Further, in contrast to previous situations in which state officials unconstitutionally changed their procedures or past practices,[1072] there was no plausible claim in

1067. *See id.* at 1185 (citing Moore v. Ogilvie, 394 U.S. 814, 819 (1969); Reynolds v. Sims, 377 U.S. 533, 563 (1964)); *see also supra* notes 1032–33 and accompanying text (discussing the dissenters' arguments based on these cases).

1068. *Siegel*, 234 F.3d at 1185 (Anderson, C.J., concurring specially).

1069. *Id.*

1070. *Id.* at 1186–89 (citing Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986); Roe v. Alabama, 43 F.3d 574, 581 (11th Cir. 1995)). Judge Anderson also cited a variety of cases from other circuits reaching similar conclusions. *See id.* at 1187 (citing Gold v. Feinberg, 101 F.3d 796, 802 (2d Cir. 1996); Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986); Gamza v. Aguirre, 619 F.2d 449, 454 (5th Cir. 1980); Hennings v. Grafton, 523 F.2d 861, 864–65 (7th Cir. 1975); Pettengill v. Putnam County R-1 Sch. Dist., 472 F.2d 121, 123 (8th Cir. 1973); Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970)).

1071. *Id.* at 1188.

1072. Judge Anderson's focus was very much on *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), in which the Eleventh Circuit *had* found fundamental unfairness, and applied substantive due process to invalidate a post-election change in election practices. *See Siegel*, 234 F.3d at 1187–88 (Anderson, C.J., concurring specially). In *Roe*, Alabama election officials had decided to count a number of ballots that did not meet the technical requirements of Alabama's absentee balloting statute, in violation of both the statute itself and past practice. *See Roe*, 43 F.3d at 578. The plaintiffs complained that there were many voters who relied to their detriment on the require-

Florida that voters relied to their detriment on the procedures in place prior to the election. It could not reasonably be argued that voters in uncounted counties chose to mark their ballots in ways that could not be read by the machines on the thought that similar markings in other counties would *also* not be read.[1073]

Finally, Judge Anderson found no error in the district court's conclusion that the plaintiffs had shown no purposeful, systematic discrimination.[1074] On this point, he again recited the safeguards provided in the manual recount statute—the public nature of the counting, the requirement that the counting teams include one member from each party, and the availability of judicial review in a contest proceeding—as well as the fact that Republican and Democratic observers were present.[1075] And he noted the district court's finding that "'no evidence has been demonstrated that these recounts have generated erroneous tabulations.'"[1076]

C. *The Significance of the Eleventh Circuit's Action*

In an ordinary case, the concurring and dissenting opinions of members of the court would be worth noting only in an academic sense. The additional opinions in *Siegel* were remarkable, however, for a variety of reasons.

First, the additional opinions reflected the first time prior to the Supreme Court's *final* hearing on the election controversy (after it had stayed any further counting and effectively ended the election), that *any* court had engaged in a meaningful debate over the constitutionality of what was going on in Florida. One of the district courts hearing the constitutional challenges had issued a substantial opinion discussing the constitutional merits,[1077] but that opinion had fully supported Gore's position, and that decision had been rendered in a matter of hours,[1078] without the three weeks the judges on the Eleventh

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ments for voting set forth in the statute. In other words, many did not vote because they would have had to send in an affidavit either notarized or witnessed by two people, but they might well have voted had they known the statute was not going to be enforced. *See id.* at 580–81.

1073. *See Siegel*, 234 F.3d at 1188.

1074. *Id.*

1075. *Id.* at 1188–89 & n.13.

1076. *Id.* at 1189 (quoting Siegel v. LePore, 120 F. Supp. 2d 1041, 1053 (S.D. Fla.), *aff'd*, 234 F.3d 1163 (11th Cir. 2000)).

1077. *See* Siegel v. LePore, 120 F. Supp. 2d 1041, 1047–54 (S.D. Fla.), *aff'd*, 234 F.3d 1163 (11th Cir. 2000); *supra* notes 372–79 and accompanying text (reviewing the district court's holding). The other district court adopted the reasoning of the *Siegel* court and simply added a few points focusing on the lack of evidence. Touchston v. McDermott, 120 F. Supp. 2d 1055, 1058–60 (M.D. Fla.), *aff'd*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001). In a moment of candor, the *Touchston* court admitted that "the late filing of this action has resulted in an Order perhaps too brief to give the issues raised therein the dignity they deserve." *Id.* at 1056.

1078. *See supra* notes 369–70 and accompanying text.

Circuit had taken to research and contemplate the law.[1079] Judge Sauls had alluded to the Equal Protection Clause, but he had not really attempted any meaningful analysis.[1080] The Florida Supreme Court had remained completely silent on constitutionality in its first opinion, claiming disingenuously that the issue had not been raised.[1081] And the United States Supreme Court, having denied certiorari in *Siegel v. LePore*, addressed the constitutional issues neither in its *Bush v. Palm Beach County Canvassing Board* decision nor in the oral argument leading up to that decision. Indeed, the Eleventh Circuit seemed keenly aware of the unusual role it was playing. Judge Birch wrote:

> I would hope that a careful and thoughtful review of the opinions of my brothers and sisters would dispel any suggestion that their views on the important issues before us are anything but the result of days of careful study and thoughtful analysis—because these opinions are nothing less . . . .
>
> . . . I am confident that we have given these matters the attention they justly deserve and trust that, at least, we have laid the groundwork for an informed decision by the justices of the United States Supreme Court should they exercise their judgment to hear this case. It is my hope that they do. We have done our best so that they can do their best.[1082]

Second, whatever has been suggested since about the merits of the Supreme Court's decision on Bush's equal protection claim[1083]—which was, after all, 7-2[1084]—the Eleventh Circuit's additional opinions are a powerful testament to the fact that, on the law as it existed at the time, the legal call was a close one, with plenty of room for argument. The Eleventh Circuit dissenters focused squarely on the

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1079. *See Siegel*, 234 F.3d at 1192–93 (Birch, J., dissenting). In an unusually revealing passage clearly aimed at the lay public, Judge Birch explained the process by which the Eleventh Circuit had proceeded:

> Aware of the importance of these cases and the urgency attendant to the issues presented, we decided to take these disputes *en banc*—that is, before the entire court of twelve judges. Moreover, utilizing a procedure that we normally employ in death penalty cases, we arranged through the clerks of the district courts involved to have copies of all filings there "lodged" (i.e., copies provided) with us contemporaneously. Hence, we have been able to review and study the progress of the factual and legal matters presented in these cases from their inception. Accordingly, long before the anticipated notices of appeal were filed, formally bringing them to us, we were about the study and review of the legal issues to be resolved. Thus, the reader of our opinions in this case should understand that our time for consideration has been considerably longer than it might appear at first blush.

Id. (footnotes omitted).

1080. *See supra* note 894 and accompanying text.

1081. *See supra* note 637 and accompanying text.

1082. *Siegel*, 234 F.3d at 1193 (Birch, J., dissenting).

1083. *See infra* note 1543 and accompanying text.

1084. *See infra* notes 1426–37, 1444 and accompanying text.

pure fairness of the recounts, and were able to summon some case law to support their positions, and the best response the concurrence could muster was to draw a distinction between strict scrutiny and a more deferential standard of review.

Finally, the Eleventh Circuit's decision, and the extraordinary separate opinions, issued on Wednesday, December 6, the day *before* the lawyers walked into the Florida Supreme Court to argue the trial court's decision not to overturn the Secretary of State's certification and not to engage in any further manual evaluation of ballots. Assuming that any of the lawyers for Gore involved in the Florida court proceeding had time to read the opinions—and one has to recognize how difficult that would have been—they might have recognized that a hurricane was brewing just off shore. Yet in the face of the storm, no one said a word.

VIII. THE FLORIDA SUPREME COURT PROCEEDING ON THE CONTEST

Immediately after Gore lost the contest action before Judge Sauls, on Monday, December 4, he asked the First District Court of Appeals to certify the case to the Florida Supreme Court.[1085] The intermediate court did so, and by Tuesday morning, the Florida Supreme Court had agreed to hear the case.[1086] The court ordered the parties to file briefs by noon on Wednesday, December 6, and scheduled the argument for the morning of Thursday, December 7.[1087]

A. *The Parties' Briefs*

The parties' briefs to the court were essentially a restatement of the closing arguments they had made to Judge Sauls.[1088] As he had done at trial, Gore emphasized the language of section 102.168, the statutory basis for his contest action. He pointed out at every turn that the statute expressly authorized contests brought on the sole ground that there were enough illegal votes included, or legal votes excluded, "to

1085. *See* Gore v. Harris, No. 1D00-4745 (Fla. Dist. Ct. App. Dec. 4, 2000) (order certifying the case to the Florida Supreme Court).

1086. Gore v. Harris, No. SC00-2431 (Fla. Dec. 5, 2000) (order setting oral argument and setting briefing schedule).

1087. *Id.*

1088. *Compare* Brief for Appellants, or in the Alternative, Petition for Writ of Mandamus or Other Writs at 18–35 (filed Dec. 6, 2000), Gore v. Harris, 772 So. 2d 1243 (Fla.) (No. SC00-2431), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000), *and* Brief of Appellees George W. Bush and Dick Cheney at 31–50 (filed Dec. 6, 2000), Gore v. Harris, 772 So. 2d 1243 (Fla.) (No. 00-2431), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000), *with supra* text accompanying notes 864–74 (relating the closing arguments in the contest trial). It bears noting here that Gore's brief, the Brief for Appellants, was apparently filed in such a rush that the document does not include page numbers. Thus, the page citations used in this Article have been arrived at by numbering the first page of text in the brief as page one and counting forward from there.

change or place in doubt" the outcome of the election.[1089] Further, Gore argued, the statute contained no language whatsoever to justify the three limitations Judge Sauls had placed on his case: the statute did not (1) require Gore to seek review of *all* the ballots in the election rather than ballots he chose,[1090] (2) impose upon Gore the burden of showing that the canvassing boards abused their discretion,[1091] or (3) require Gore to show a "reasonable probability" of a different outcome before the contested ballots could be reviewed.[1092] Gore

1089. *See* Brief for Appellants, or in the Alternative, Petition for Writ of Mandamus or Other Writs, *supra* note 1088, at 20, 22–24, 27 (quoting FLA. STAT. ANN. § 102.168(3)(c) (West Supp. 2001)) (emphasis omitted).

1090. *See id.* at 22–24. Gore argued that neither the statute nor the existing case law afforded any basis on which to conclude that a contest plaintiff was required to seek review of all the ballots. *Id.* at 23 ("[N]either the Circuit Court nor Defendants have cited *any* authority for that proposition."). He also argued that the courts in "numerous Florida cases" reviewed only the contested ballots. *Id.* (citing Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975); *In re* Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for City of Miami, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998); Spradley v. Bailey, 292 So. 2d 27 (Fla. Dist. Ct. App. 1974)).

1091. *See id.* at 22, 24–26. To support this argument, Gore cited four cases from the 1920s to 1940s in which the Florida Supreme Court had referred to the evaluation of ballots to see whether they contained uncounted votes as a pure judicial question. *Id.* at 24–25 (citing State *ex rel.* Carpenter v. Barber, 198 So. 49 (Fla. 1940); State *ex rel.* Millinor v. Smith, 144 So. 333, 336 (Fla. 1932); Wiggins v. State *ex rel.* Drane, 144 So. 62, 63–64 (Fla. 1932); State *ex rel.* Nuccio v. Williams, 120 So. 310, 314 (Fla. 1929)). Gore acknowledged that Judge Sauls had rejected those cases on the ground that they predated the modern statutory scheme for elections provided in chapter 102, but set forth four reasons why the enactment of chapter 102 did not reflect any legislative intent to limit judicial review to a standard of abuse of discretion. First, two of the grounds for a contest action enumerated in section 102.168 referred to challenging a canvassing board's actions for misconduct, but the other three grounds—including subsection (c), under which Gore was proceeding—did not. *Id.* at 24. Second, section 102.168 expressly conferred on the court extremely broad power to evaluate a plaintiff's claim that legal votes had been excluded: subsection (8) of the statute authorized the court "to 'fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.'" *Id.* at 26 (quoting FLA. STAT. ANN. § 102.168(8) (West Supp. 2001), but incorrectly identifying the subsection as subsection (11)). Third, the legislative history of the 1999 act creating the current version of the contest statute stated that the new statute was not intended to reduce, either directly or indirectly, the courts' authority to adjudicate disputes, which included the power in election contests to order a recount of ballots cast. *Id.* Finally, in *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998), a case handed down in 1998 after most of chapter 102 was in place, the Florida Supreme Court had given no indication that the de novo approach taken in the earlier cases was no longer valid, and had in fact approved the circuit court's manual review of the ballots. Brief for Appellants, or in the Alternative, Petition for Writ of Mandamus or Other Writs, *supra* note 1088, at 25.

1092. Brief for Appellants, or in the Alternative, Petition for Writ of Mandamus or Other Writs, *supra* note 1088, at 22, 26–28. Gore insisted that "plaintiffs are not required to prove their case before the evidence (*i.e.*, the ballots) are [sic] considered." *Id.* at 27. According to Gore, there were numerous cases in which the courts had reviewed ballots prior to any finding that the plaintiff was entitled to prevail, *see id.* (citing Hornsby v. Hilliard, 189 So. 2d 361 (Fla. 1966)), and in fact many in which the

also complained that the ballots themselves had been admitted into evidence, and were in fact the best evidence of his claim that there were legal votes excluded from the Secretary's certification, and yet Judge Sauls had refused ever to look at them.[1093] Finally, in an almost comical turnabout on Bush's prior argument, Gore asserted that if the Florida court upheld Judge Sauls's decision, then *that* might well be a change in the law as it stood on Election Day that would violate federal § 5.[1094]

There was hardly any disputing Gore's characterization of the statutory language. As set forth above,[1095] subsection (3) of section 102.168 includes five grounds for contesting a certification. Taken together, those grounds read as if the legislature intended to authorize a contest action to proceed on every conceivable basis a candidate might have for complaining about an election's outcome. Subsection (3)(a) addresses misconduct, fraud, or corruption on the part of election officials; subsection (b) the ineligibility of a candidate; subsection (c) the inclusion of illegal votes or the exclusion of legal votes; subsection (d) the possibility that a voter, election official or canvassing board member has been bribed; and then, in subsection (e), the statute allows for an action based on "[a]ny other cause or allegation" that "would show that a person other than the successful candidate was the person duly nominated or elected to the office in question."[1096] And apart from whether Judge Sauls made the wisest decision as a matter of policy, the reality is that several aspects of his decision could not have come from the language in section 102.168 itself. The statute simply does not say anything about contesting all ballots, reviewing canvassing board decisions only for abuse of discre-

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court had reviewed ballots but then ultimately found from that review that the plaintiff was *not* entitled to prevail. *See id.* (citing Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975)).

1093. *See id.* at 19, 26–28. To make this point, Gore posited a situation where there has been an election in which the initial certification reflected that one candidate won by 500 votes, but after the certification election officials discovered a still-sealed box of 1000 ballots. Under Judge Sauls's theory that a contest plaintiff had to show a reasonable probability of a different outcome, Gore reasoned, no one would ever look at those ballots because the plaintiff would never be able to demonstrate a reasonable probability that the ballots would yield him or her the net gain of 500 votes required to take the lead. *See id.* at 27–28.

1094. *See id.* at 31–32. Gore wrote:

> [G]iven that these holdings represent a radical departure from the scheme in place on election day, acceptance by this Court of these holdings could result in this state's electors being stripped of the protection found in 3 U.S.C. §5, because the method for resolving disputes surrounding the appointment of those electors may turn out NOT to have been resolved "by laws enacted prior to the day fixed for the appointment of the electors."

Id. (quoting 3 U.S.C. § 5 (1994)).

1095. *See supra* note 111 and accompanying text.

1096. FLA. STAT. ANN. § 102.168(3) (West Supp. 2001).

tion, or requiring a showing of reasonable probability before the court investigates further.

Presumably realizing that Gore had the upper hand with respect to the language of the statute, Bush stressed what he called the "statutory scheme."[1097] In Bush's view, reading the contest statute against section 102.166, which conferred on the canvassing boards the discretion to grant or deny a manual recount of ballots, required that courts hearing contest actions presume certifications correct and recount ballots only when a canvassing board has abused its discretion in refusing to do so.[1098] Bush argued that Gore had not overcome that presumption: there was no reason to conclude from the record that the canvassing boards had abused the discretion granted them.[1099]

The arguments reflected an ironic reversal from the parties' first appearance before the Florida Supreme Court. In that proceeding, addressing whether the Secretary must accept the results of manual recounts submitted after the statutory deadline, Bush had sought rigorous enforcement of the language in the statutes setting the seven-day deadline.[1100] And it was Gore who had relied on the statutory scheme, arguing that the only way to read the entire statutory scheme harmoniously was to permit acceptance of the recount results after the seventh day.[1101]

Even more notable, however, were the decisions by both parties not to address certain issues. Bush, for example, did not include any significant discussion of the electoral appointments, Due Process or Equal Protection Clauses,[1102] or the potential that a decision reversing the trial court and allowing a recount to proceed might violate those

1097. Brief of Appellees George W. Bush and Dick Cheney, *supra* note 1088, at 34–35.

1098. *Id.* at 32 (citing Boardman v. Esteva, 323 So. 2d 259, 268 (Fla. 1975); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992); Quinn v. Stone, 259 So. 2d 492, 494 (Fla. 1972)). To support this argument, Bush relied heavily on the holding of the Fourth District Court of Appeal in the *Hogan* case. *See id.* at 35–36. In *Hogan*, the Broward County Canvassing Board had declined to conduct a manual recount in an election where, after a machine recount, the plaintiff had lost by only five votes and there were still forty-two undervotes. Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992). The court held that the plaintiff was required to show that the canvassing board had abused its discretion—*i.e.*, had failed in some way to comply with mandatory statutory duties or engaged in some other impropriety-and that the canvassing board had not abused its discretion in deciding that it would not grant a manual recount based on allegations of voter error. *Id.* at 510.

1099. Brief of Appellees George W. Bush and Dick Cheney, *supra* note 1088, at 36–46; *see also supra* notes 872–74 and accompanying text (describing Bush's arguments that the Miami-Dade, Palm Beach and Nassau canvassing boards did not abuse their discretion).

1100. *See supra* notes 477–88, 507–08 and accompanying text.

1101. *See supra* notes 450–58 and accompanying text.

1102. It should be noted that the parties had filed briefs only the day before in connection with the United States Supreme Court remand, and Bush, certainly, had gone to great lengths addressing *McPherson* and the way in which the Florida court's first

provisions. As he had done in the first Florida Supreme Court proceeding,[1103] Bush simply mentioned those provisions at the very end of his brief, in a passage that barely articulated any complaint and included no analysis.[1104]

Gore also declined to discuss any constitutional issues. To a certain extent, this was understandable, on the conventional wisdom that a litigator does not usually undertake to defeat an argument that has not been properly raised by, or is not being pressed by, his or her opponent. Even so, Judge Sauls had made a critical point about fairness—and the "count every vote" theme upon which Gore had long depended—to which Gore offered no response whatsoever.

Specifically, Judge Sauls had held that Gore had not brought a proper contest action because he had sought review only of selected ballots from selected counties. In his brief to the Florida Supreme Court, Gore broad-brushed this aspect of Judge Sauls's ruling, characterizing it as though it were simply a ruling that Gore had to ask for a recount of all ballots statewide, and summarily dismissing it as unauthorized by the statutory language. In fact, Judge Sauls's ruling had *two* elements. It is true that, as Gore suggested, Sauls had seemed to believe that any contest action seeking a recount in a presidential election would have to ask for a statewide recount, because no single county elected the electors. Yet Judge Sauls had *also* observed that a proper contest must place in issue "all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred." In other words, Sauls was disturbed that Gore had alleged what was essentially a systematic error made by punch card counting machines, and yet

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decision had violated it. *See* Supplemental Brief of George W. Bush, *supra* note 1007; Appellant/Petitioner's Brief on Remand, *supra* note 1007.

1103. *See supra* notes 512–13 and accompanying text.

1104. *See* Brief of Appellees George W. Bush and Dick Cheney, *supra* note 1088, at 49–50. The entire constitutional discussion in Bush's brief was as follows:

> [F]or a court in a contest proceeding to now apply a standard that counts dimples as votes in selective counties would be directly contrary to 3 U.S.C. § 5, and it would also violate Article II, Section 1 of the U.S. Constitution. In addition, a change in the deadline for certification for election returns, along with a change in the time period for contesting an election, would likewise violate Article II, [s]ection 1 of the U.S. Constitution and 3 U.S.C. § 5. Finally, the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution. As Florida's Attorney General recently opined, "[a]s the State's chief legal officer, I feel a duty to warn that [if] the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions."

Id. at 49–50 (second and third alterations in original) (quoting Ruling Transcript, *supra* note 882, at 11 (quoting opinion of Florida Attorney General Robert Butterworth)).

Gore had challenged that error only in selected counties, not in all of the counties where the error might have infected the vote-counting. About *this* inequity, Gore said absolutely nothing.

B. *The Oral Argument*

From the moment the oral argument began, it was clear that Gore was not going to receive quite the reception he had during the first proceeding.[1105] David Boies had barely spoken his name when Chief Justice Wells chastised the parties for not alerting the court in the first proceeding to *McPherson v. Blacker*, and asked Boies how, consistent with *McPherson*, the Florida Supreme Court could have jurisdiction to be hearing the case.[1106] The Chief Justice stated that his reading of *McPherson* was that the legislature had plenary power to appoint presidential electors, and that the court could not invoke the state constitution to erode that power in any way.[1107] How then, the Chief Justice asked, could the Florida Supreme Court hear the case, if the Florida Legislature had not expressly provided for appellate judicial review of a contest proceeding, and the only basis for such appellate jurisdiction was the Florida Constitution?[1108] It was a telling indicator that the United States Supreme Court's decision had left at least some members of the court very tentative about deviating in any particular from the Florida Code.

Boies appeared taken aback by the question, and his response suggested that he either did not understand the Chief Justice's point, or simply did not have a persuasive response and wanted to sidestep the issue. First Boies addressed whether the district court of appeals or the Florida Supreme Court was the proper forum, and the Chief Justice made it clear that that was not the issue.[1109] Then Boies observed that the district court of appeals had certified the question and that Gore had, alternatively, asked for a writ of mandamus.[1110] This time Justice Harding jumped in as well, insisting on an answer to the precise question posed: "Where do we get our right to review, to appel-

1105. *See* Transcript of Oral Argument, Gore v. Harris, No. SC00-2431 (Fla. Dec. 7, 2000) (unofficial transcript), *available at* http://www.wfsu.org/gavel2gavel(old)/transcript/00.2349.htm. The Florida Supreme Court's website advises visitors that they can obtain oral argument transcripts and documents at the Florida State University website, but the transcript of the *Gore v. Harris* argument expressly advises readers that it is unofficial. Indeed, the transcript contains many errors that can be detected by watching the videotape of the argument available at the same website. For that reason, this Article will provide page citations to the transcript, but any quotations from the argument offered here will reflect that transcript only to the extent it has been corrected by the Author's viewing of the videotape.

1106. *See id.* at 1–2.

1107. *Id.* at 1.

1108. *Id.* at 1–2.

1109. *See id.* at 2.

1110. *Id.*

late review? From the rules and from the Constitution, and doesn't that create a federal question?"[1111]

At this point, Boies finally began addressing the substance of the Chief Justice's question. Boies insisted that the electoral appointments clause could not possibly mean that a legislature must sit as both a legislative and judicial body with respect to presidential electors, and that when the legislature passed section 102.168 and did not prohibit judicial review, it knew that the courts would have jurisdiction to interpret it at both the trial and appellate levels.[1112] Boies also claimed that the only power the electoral appointments clause conferred on the legislature was the power to establish the *method* of appointing electors, and thus the legislature's choice was effectuated on November 7 when the people voted.[1113]

Justice Lewis then changed the subject, and went immediately to the issue Gore had declined to address in his brief: why a court hearing a challenge to a statewide certification based on a systematic problem with punch card machines should not address the problem in any county in which it arose.[1114] When Boies took some time reaching the issue, Justice Harding interrupted, and again asked Boies why undervotes should not be counted statewide. And Harding cast the problem in federal constitutional terms.

Boies's response was remarkably non-substantive. In essence, it was that Gore was entitled under the statute to select the counties he was contesting, and the court should not be troubled by that because selective recounts had already been included in the vote total.

> Q. [by Justice Harding] Why does [counting undervotes] not have statewide application?
>
> A. Your honor, I think that it does have statewide application, if anybody contests ballots, other than in the particular categories that we have contested ballots.

1111. *Id.*

1112. *Id.* at 2–3.

1113. *Id.* at 3. This comment by Boies suggests that he had not put a lot of thought into the ramifications of the electoral appointments clause or the United States Supreme Court's opinion. Plainly, the Supreme Court had not interpreted the electoral appointments clause as narrowly as Boies was suggesting—as if it conferred on the states only the power to choose between legislative appointment and popular election or some variation thereof—but rather considered it to extend to all regulation of presidential elections. Otherwise, there would never have been a remand of the first proceeding; the Court would not have regarded the clause as *reaching* the issue of how Florida handled requests for manual recounts. Indeed, the interpretation of the clause that Boies asserted was never suggested by Laurence Tribe, when he argued before the Court in the first proceeding. Tribe had never argued that the clause was not even *applicable* to Florida's regulation of post-election procedures, but rather that the Florida Supreme Court had acted consistently with the power conferred upon the legislature. *See supra* notes 981–86 and accompanying text.

1114. Transcript of Oral Argument, *supra* note 1105, at 3.

> Q. [by Justice Harding] But Judge Sauls, in his order, referred to the opinion of the Attorney General that indicated that if, this type of result happened, that there would be serious or potential federal and state constitutional questions, and that the vote would be in jeopardy.
>
> A. Your honor, I think—there are two points to that. First, if merely having a manual recount in some areas and not in others would make the election defective, then this election would already be defective, because there were manual recounts in a number of counties that were included in the certified results of the secretary of state. Second, with respect to the attorney general's opinion, I think that opinion was pointed to the point that, if a manual recount was requested and received in one place and requested and not received, pursuant to state law, in another case, that would involve a disparity. I don't think that opinion addresses the situation where you have a request in certain counties but no request in other counties. There has never been a suggestion, under the state law, that you should have a recount where it was not requested.[1115]

This issue arose several more times during the argument, and each time it came up, Boies offered the same simple response: irrespective of whether the punch card problem affected other counties, a court hearing a contest should consider only those ballots that a party has specifically contested.[1116] At no point did he ever attempt to explain why interpreting the statute that way should not be seen as unfair or unconstitutional, and at no point did he ever try to justify why the counties at issue were chosen.

Several of the justices also seemed to be searching for limits on Gore's broad interpretation of the contest statute, but Boies neither identified any limits nor offered any meaningful reason why the legislature would have conferred upon the courts the power to count ballots anew. Justice Quince asked whether a party contesting a certification should be required to have first brought a protest,[1117] and Boies responded that he thought not, that protests and contests were simply alternative, optional remedies for a candidate.[1118] Chief Justice Wells pointed out that the contest statute required that canvassing boards be named as defendants, and asked why that should not be read to suggest that the courts were only supposed to review the canvassing boards' actions. Boies simply invoked the statutory language again, which directed courts to decide only whether there were legal

1115. *Id.* at 4.

1116. *See id.* at 5 (colloquy with Justice Anstead); *id.* at 6 (colloquy with Justice Pariente).

1117. *Id.* at 6. In context, it was apparent that Justice Quince was actually referring to a request for a recount, as opposed to a true "protest," because in her question she described Gore as having already brought what she called a "protest," and yet Gore actually never did invoke the "protest" procedure. *See id.*

1118. *Id.* at 6.

votes that had been rejected.[1119] Finally, Justice Anstead asked why the legislature would set up two procedures—one at the canvassing board level and one at the judicial level—to perform essentially the same task. Boies's response was almost amusing.

> A. . . . With respect to the reason for 166 and 168, we believe that 168 [sic][1120] was intended, by the legislature, to promote the certification process, to get that process done, and that is the responsibility of the canvassing boards. As this court held, in *Harris*, once that certification is done, the responsibility shifts, from the canvassing boards to the courts. *Now, there aren't very many contests. Usually people accept the results of the canvassing boards.* You have a contest, only when some party believes they have got a legitimate reason for it . . . .[1121]

In effect, Boies was saying that the legislature would have allowed the courts hearing contests to disregard the actions of the canvassing boards simply because contests would not happen very often.

Barry Richard, arguing for Bush, did not fare much better. Early in the argument, Richard committed a major gaffe. As he had done with Boies, Chief Justice Wells turned Richard immediately to the *McPherson* case, noting that Bush had never mentioned the case in the first proceeding before the Florida court, and yet had argued the case forcefully before the United States Supreme Court.[1122] Then Justice Harding asked the same question that had been put to Boies: did the Florida Supreme Court have jurisdiction to hear the appeal, given that the contest statute expressly provided only for a circuit court action?[1123] Inexplicably, Richard said, "Indeed."[1124]

One might have thought that Richard had simply misunderstood the question, but Justice Anstead, no doubt surprised at Richard's answer, repeated it, and Richard unmistakably took the position that *McPherson* had no effect on the court's appellate jurisdiction.

> Q. [by Justice Anstead] The bottom line, if I understand it, of your answer to the chief justice's question, is that this court does have appellate jurisdiction over the trial court's ruling. Do I understand that to be your answer?
>
> A. I think that this court has limited appellate jurisdiction over—
>
> Q. [by Justice Anstead] And that the *McPherson* case, the federal *McPherson* case, not this court's *McPherson* case, it does not affect that appellate jurisdiction?

1119. *Id.*

1120. It seems most likely that Boies misspoke here, and intended to refer to section 166 rather than section 168, inasmuch as 168 does nothing to "promote the certification process." *Id.* at 20.

1121. *Id.* (emphasis added).

1122. *Id.* at 8.

1123. *Id.*

1124. *Id.*

> A. No sir. I certainly believe that this court has the ability to review what a circuit court did, to determine whether the circuit court violated the traditional rules of—
>
> Q. [by Justice Anstead] Much in the way we would be reviewing it, if was another, county commissioner or an election for some other office, a member of Congress, and a contest was brought.
>
> A. Precisely, your honor . . . .[1125]

It was as though Richard did not even grasp the significance of the question, that the justices were giving him the opportunity to argue that *McPherson* precluded them from relying on the jurisdiction conferred by the state constitution. Richard's failure to appreciate the argument was especially strange because the justices had actually spelled out the theory at the very beginning of Boies's argument only moments earlier.[1126]

Indeed, Richard's mistake was so egregious that Bush's lawyers filed a "Clarification" the next morning.[1127] The "Clarification" did not expressly retract Richard's answer, but did emphasize, coincidentally, that the Florida court was dependent on the Florida Constitution for its jurisdiction and that *McPherson* precluded reliance on the state constitution.[1128] Bush also argued in the "Clarification," for the first time, that section 102.168 did not even apply to presidential elections, and so Gore's entire *action* was without a legal basis.[1129]

During the remainder of Richard's argument, it became clear that many of the justices were not persuaded by Bush's contention that a court hearing a contest action was limited to reviewing the actions of the canvassing boards for abuse of discretion.[1130] Instead, several justices honed in tightly on the language of the contest statute itself, and the fact that Judge Sauls had imposed on Gore the burden of showing a reasonable probability of a different outcome before Judge Sauls would even look at the ballots. Justice Lewis asked Richard what evidence it would take to satisfy the statutory element of placing the election outcome "in doubt."[1131] Justices Quince and Pariente likewise focused on the statutory ground, "changing or placing in doubt" the outcome, and observed that Judge Sauls's "reasonable

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1125. *Id.* at 8–9 (emphasis added).

1126. *See supra* notes 1106–13 and accompanying text.

1127. Clarification of Argument for Appellees George W. Bush and Dick Cheney, Gore v. Harris, 772 So. 2d 1243 (Fla.) (No. SC00-2431), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

1128. *See id.* at 2 n.1, 5–6.

1129. *See id.* at 6–8.

1130. Justice Lewis pointed out, for example, that Bush's insistence on an abuse of discretion standard would mean that any circumstances that came to light after the canvassing board had certified the vote totals—perhaps a lost ballot box—could not be the subject of a contest proceeding. Transcript of Oral Argument, *supra* note 1105, at 10. Richard essentially sidestepped Justice Lewis's observation, saying simply, "We don't find ourselves in that posture." *Id.*

1131. *Id.* at 10–13.

probability" standard did not appear in the contest statute.[1132] Justice Pariente recited subsection 8 of section 102.168,[1133] which directs a contest court to "ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."[1134] This was "rather unusual language," Justice Pariente said, that was specifically added in 1999, and she found it hard to understand how Judge Sauls could have complied with it if he refused even to look at the ballots.[1135]

Apart from the discussions already described—those regarding *McPherson*'s effect on the court's jurisdiction and Justice Harding's concern that counting only selected undervotes seemed at best unfair and at worst constitutionally questionable—the court did not question the attorneys for Gore and Bush on any federal law issues. Joseph Klock, however, the attorney for Katherine Harris and the state Elections Canvassing Commission, took it upon himself to delve more deeply into the federal issues. Seizing upon the Chief Justice's comments about *McPherson*, Klock cited the United States Supreme Court's opinion, and warned the court that it must not do anything that might be construed as changing the law enacted by the legislature: "what you need to do, is you need to be careful in terms of construing statutes or remedies to not do anything that would constitute a change in the law, because if that is done, then that places in jeopardy . . . , the safe harbor [of § 5]."[1136]

Justice Lewis questioned Klock further on the point, and wondered aloud how merely interpreting and applying section 102.168 could end up being characterized as "changing the law."[1137] And Klock was not hesitant in telling the court where it might go wrong:

> [T]he problem is that you have to create a pile of law to [apply the contest statute here]. You have to do a number of things. You have to, first, find that, in a presidential race where you are electing 27 electors, that you can do it on a county by county basis, then you have to figure out a way of having the contest statute used to establish a standard, when the only standard that applied anywhere for a manual recount . . . was limited to the situation in [section] 166, . . . and that calls for finding the voters' intent, but it, also, adds three specific people that are in a uniform basis throughout the state, the combination of whatever the voters' intent is plus the three people is what is done there. We go from there to a circuit judge in Leon County who then, I suppose, has to come up with a standard that is not articulated in the law, and as your honor pointed out, each time

1132. *Id.* at 14–16.
1133. *Id.* at 9–10.
1134. FLA. STAT. ANN. § 102.168(8) (West Supp. 2001).
1135. Transcript of Oral Argument, *supra* note 1105, at 9–10.
1136. *Id.* at 16–17.
1137. *Id.* at 18.

> you asked the question, you talked about legislation in other states. That is where it has to come from. There is no indication that the Florida legislature intended, by acknowledging and respecting the power of the state judiciary to interpret laws, that the judiciary would be in a position of having to create the standards that would be applied in this kind of situation. That is the problem we have.[1138]

The response could have been more eloquent, but it no doubt left its mark. The court was officially on notice that there could be a federal law problem, under either § 5 or the electoral appointments clause, if it went outside the legislature's own words to set a more precise standard for evaluating the ballots.

C. *The Court's Decision:* Gore v. Harris

Not much more than twenty-four hours after the oral argument, on Friday, December 8, the Florida Supreme Court handed down its ruling in Gore v. Harris.[1139] The decision was split, 4-3, in favor of reversing Judge Sauls.[1140] The opinion for the court was issued per curiam; the Chief Justice and Justice Harding wrote dissents, the former flatly predicting reversal by the United States Supreme Court.[1141]

In many respects, the court's decision was not surprising, because it reflected many of the doubts about Judge Sauls's ruling that the justices had expressed at oral argument. The majority, as well as two of the three dissenters, saw no basis in the contest statute for Judge Sauls to have limited Gore to proving that the canvassing boards had abused their discretion.[1142] The same six justices also concluded that Judge Sauls had improperly required Gore to demonstrate a "reasonable probability" of a different outcome.[1143] All six noted that Judge Sauls had relied on a 1982 case, *Smith v. Tynes*,[1144] that predated the 1999 amendment to section 102.168, which significantly expanded the grounds upon which a candidate could base a contest action and allowed a plaintiff to show only that there were legal votes rejected sufficient to "change or place in doubt the result of the election."[1145] Finally, and most importantly, all seven members of the court re-

1138. *Id.*
1139. 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).
1140. *See id.* at 1260–62.
1141. *See id.* at 1247; *id.* at 1262–63 (Wells, C.J., dissenting); *id.* at 1270 (Harding, J., dissenting). Justice Shaw joined Justice Harding's dissent. *Id.* at 1262. Chief Justice Wells also joined Justice Harding's dissent except for the portion in which Justice Harding found that Judge Sauls erred in certain respects and the portion in which Justice Harding agreed with Gore that sections 102.166 and 102.168 provided independent remedies. *Id.* at 1262–63.
1142. *See id.* at 1252; *id.* at 1270–71 (Harding, J., dissenting).
1143. *See id.* at 1255–56; *id.* at 1271 (Harding, J., dissenting).
1144. 412 So. 2d 925, 926 (Fla. Dist. Ct. App. 1982).
1145. *See* Gore v. Harris, 772 So. 2d at 1255 (quoting FLA. STAT. ANN. § 102.168 (West Supp. 2001)); *id.* at 1271 (Harding, J., dissenting) (quoting same).

mained as troubled as they had seemed at oral argument that Gore had proved a systemic problem with undervotes and yet sought manual counts of only two of Florida's sixty-seven counties.[1146]

Of course, if these substantive conclusions were no surprise, the same could not be said of the majority's *remedy* of the problem of recounting only in selected counties. Rather than conclude, as Judge Sauls and the three dissenters did, that Gore's focus on the undervotes of only two counties was fatal to his cause of action,[1147] the majority decided that Gore had successfully placed the category of undervotes in issue, and at that point it became the *court's* responsibility to expand the action statewide.[1148]

The majority began by parsing the statutory ground Gore had invoked: "'rejection of a number of legal votes sufficient to change or place in doubt the result of the election.'"[1149] To determine what constituted a "legal vote" under the statute, the majority turned to the Florida Code. Section 101.5614(5), the court pointed out, stated that "'[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board,'" and section 101.5614(6) provided that a ballot should be discarded if the canvassing board could not determine the intent of the voter.[1150] Further, section 102.166, the statute governing manual re-

1146. *See id.* at 1252–55; *id.* at 1265 (Wells, C.J. dissenting); *id.* at 1271–72 (Harding, J., dissenting). The reader will recall that Gore's contest action sought to have included in the certification 215 net votes identified by the Palm Beach Board from undervoted ballots; 160 net votes identified by the Miami-Dade Board from undervoted ballots before the board halted its recount; however many net votes could be identified from 3300 ballots Gore claimed that Palm Beach had improperly failed to count as votes; and however many net votes could be identified from 9000 ballots that Miami-Dade never manually reviewed. *See supra* note 759 and accompanying text. The results of manual recounts from two counties—Volusia (which used an optical scanning method of voting) and Broward (which used punch card voting)—had already been included in the certification that was the subject of the contest action. *See supra* notes 408, 710 and accompanying text. Early in the contest action, Bush had threatened to cross-contest the inclusion of these results, but ultimately he did not do so. *See supra* note 783 and accompanying text.

1147. *See supra* note 903 and accompanying text (describing Judge Sauls's ruling on this point); Gore v. Harris, 772 So. 2d at 1265–66 (Wells, C.J., dissenting) (concluding that Gore needed to have proven that there were enough votes for him in the undervotes statewide to change the outcome of the election and the trial court properly concluded that he did not); *id.* at 1271–72 (Harding, J., dissenting) (concluding the same).

1148. *Gore*, 772 So. 2d at 1254–55.

1149. *Id.* at 1253 (quoting FLA. STAT. ANN. § 102.168(3)(c) (West Supp. 2001)).

1150. *Id.* at 1256 (quoting FLA. STAT. ANN. § 101.5614(5), (6) (West Supp. 2001)). Chief Justice Wells objected strenuously to the majority's willingness to cite section 101.5614(5) for the "voter's intent" definition of a legal vote because section 101.5614 addresses situations where a ballot cannot be read by a machine because it is "damaged or defective," not ballots generally. *Id.* at 1267 (Wells, C.J., dissenting) (quoting FLA. STAT. ANN. § 101.5614(5) (West Supp. 2001)). The Chief Justice's observation about subsection (5) was correct. On the other hand, the other subsection of section 101.5614 cited by the majority—subsection (6)—does appear to address ballots gener-

counts, cast the issue in terms of discerning "voter intent": "'[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.'"[1151] From these references, supported by Florida case law and case law from other states, the court concluded that a "legal vote" was any ballot on which there was a "'clear indication of the intent of the voter.'"[1152]

To determine what constituted "rejection" of a "legal vote," the majority turned to Florida common law. It did so because the Florida House had indicated when it enacted the current version of section 102.168 that its intent was to codify the common law grounds for contesting an election, one of which was the ground now being invoked by Gore.[1153] Having justified its resort to common law, the majority cited a 1935 case in which the court had considered a candidate's claim that there was a group of ballots that had gone uncounted.[1154] In that case, the court had held that the mere rejection of votes, unaccompanied by fraud, was not a sufficient basis on which to overturn an election, unless the number of uncounted votes was enough to change the outcome.[1155] From this the majority concluded that the "rejection" of votes referred to in section 102.168 could include failure to count votes, even in the absence of any fraud, so long as the number of votes uncounted was high enough to change the outcome.[1156]

With "legal votes" defined as any ballots from which a clear indication of the voter's intent could be drawn, and "rejection" defined as a failure to count a number of votes sufficient to change the outcome, the majority found that Gore had satisfied his burden of proof by showing that there were thousands of undervoted ballots and that hundreds of legal votes had been recovered from them.[1157] Thus,

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ally, and calls for discarding of ballots when "it is impossible to determine the elector's choice." FLA. STAT. ANN. § 101.5614(6) (West Supp. 2001).

1151. *Gore*, 772 So. 2d at 1256 (quoting FLA. STAT. ANN. § 102.166(7)(b)).

1152. *See id.* at 1256–57 (citing McAlpin v. State *ex rel.* Avriett, 19 So. 2d 420 (Fla. 1944) (en banc); State *ex rel.* Peacock v. Latham, 169 So. 597, 598 (Fla. 1936); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975); Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996); Duffy v. Mortenson, 497 N.W.2d 437 (S.D. 1993); Pullen v. Mulligan, 561 N.E.2d 585, 611 (Ill. 1990)).

1153. *See id.* at 1257 (citing H.R. 281, 1999 Leg., Reg. Sess., at 7 (Fla. 1999)).

1154. *Id.* (citing State *ex rel.* Clark v. Klingensmith, 163 So. 704 (Fla. 1935)).

1155. *See id.* (quoting State *ex rel.* Clark v. Klingensmith, 163 So. 704, 705 (Fla. 1935)).

1156. *See id.*

1157. *See id.* at 1256–57. The court never seriously questioned whether the number of undervotes Gore had shown was sufficient to "change or place in doubt" the outcome; it was enough that the margin between Gore and Bush was in the hundreds and the number of undervotes in the thousands. *See id.* at 1261 ("The votes for each candidate that have been counted are separated by no more than approximately 500 votes and may be separated by as little as approximately 100 votes. Thousands of uncounted votes could obviously make a difference."). Justice Harding, joined in his dissent by Justice Shaw and Chief Justice Wells, took a very different view. The dissenters would have required Gore to demonstrate that he could reasonably be ex-

Gore was entitled to all of the votes that the Miami-Dade and Palm Beach boards had already identified during their respective recounts.[1158] Further, he was entitled to have the court review the 9000 ballots from Miami-Dade that did not register as votes to determine if any of those ballots reflected a "clear indication of the voter's intent" such that they must be considered "legal votes."[1159]

The majority did not feel, however, that Gore's showing was enough to end the court's inquiry. The legislature had directed courts hearing contests "to provide any relief appropriate under [the] circumstances,"[1160] and granting Gore's requested relief "would not be 'appropriate under such circumstances' if it failed to address the 'otherwise valid exercise of the right of a citizen to vote' of all those citizens of this State who, being similarly situated, have had their legal votes rejected."[1161] A compromise—acknowledging the legal votes already identified by the two counties where Gore had requested re-

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pected to net from the undervotes statewide a gain sufficient to place the outcome in doubt, and Gore's showing was deficient because it focused only on Miami-Dade and Palm Beach (two highly Democratic counties that presumably might be canceled out by undervote gains for Bush in other counties). *See id.* at 1272 ("Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the 'no-vote' in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient.").

1158. *See id.* at 1260 ("Because the county canvassing boards identified legal votes and these votes could change the outcome of the election, we hold that the trial court erred in rejecting the legal votes identified in the Miami-Dade and Palm Beach County manual recounts."). The court rejected the trial court's ruling that the votes identified by Palm Beach should not be included because the recount was not completed by the November 26 deadline on the ground that the deadline was established only "in order to allow maximum time for contests pursuant to section 102.168" not to exclude legal votes identified later. *Id.* There was some question, however, as to how many net votes had been identified—Gore claimed he had gained 215, and Bush claimed Gore had gained only 176—and the court directed the trial court to resolve that issue. *Id.* at 1248 n.6. With respect to the votes identified by Miami-Dade in its partial recount, the court found it proper to include those because, under its ruling, the recount would encompass the entire county's undervotes. *See id.* at 1260.

1159. *See id.* at 1260–61 ("On this record there can be no question that there are legal votes within the 9000 uncounted votes sufficient to place the results of this election in doubt. We know this *not* only by evidence of statistical analysis but also by the actual experience of recounts conducted.") (emphasis in original). The court did not reverse the trial court's decisions not to amend Nassau County's certification by returning to the results of the automatic recount and not to reevaluate the 3300 ballots on which the Palm Beach board did not find a vote. With respect to the Nassau board's decision, the court held simply that "appellants did not establish that the Nassau County Canvassing Board acted improperly." *Id.* at 1260. With respect to the Palm Beach ballots, the court held that even though a trial court in a contest action should make a de novo determination of whether contested ballots should have been counted as votes, evidence of a proper count by the canvassing board could be evidence used to conclude that legal votes were not rejected. *See id.*

1160. *Id.* at 1254–55, 1261 (emphasis omitted) (quoting FLA. STAT. ANN. § 102.168(8) (West Supp. 2001)).

1161. *Id.* at 1254–55 (alteration in original) (quoting FLA. STAT. ANN. § 102.168(8) (West Supp. 2001), and unidentified source).

counts, but also the possibility that there were uncounted legal votes in the undervoted ballots in other counties—was necessary, and it required that the court remand the case for the circuit court to conduct a review of all undervoted ballots statewide:[1162]

> While we recognize that time is desperately short, we cannot in good faith ignore the appellants' right to relief as to their claims concerning the uncounted votes in Miami-Dade County, nor can we ignore the correctness of the assertions that any analysis and ultimate remedy should be made on a statewide basis.[1163]

To accomplish this, the court instructed the circuit court of Leon County "to order the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, . . . in the individual counties where the ballots are located."[1164] The court acknowledged that such an order would require that county officials all over the state work over the weekend, but expressed its confidence that with cooperation, the undervotes statewide could be counted within the "required time frame."[1165] At the time the court issued its decision, the county canvassing boards had reported that there were at least 44,559 undervoted ballots to be reviewed.[1166]

However confident the court may have been that the counting of undervotes could be completed quickly, it did not offer the county canvassing boards any specific rules on evaluating the three-corner chads, two-corner chads, pattern dimples, rogue dimples and pin-pricked ballots that at least the punch card counties were likely to encounter. The only guidance the court provided was a single sentence, what was literally the final sentence of the court's opinion. In determining what constitutes a "legal" vote, the court wrote, "the standard to be employed is that established by the Legislature in our Election Code[,] which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'"[1167]

Both of the dissents warned that the majority's decision would bring the election to a chaotic end.[1168] To Chief Justice Wells, the majority's

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1162. *See id.* at 1262.
1163. *Id.* at 1261.
1164. *Id.* at 1262.
1165. *Id.* at 1262 n.22.
1166. NEW YORK TIMES, *supra* note 311, at 285 (providing a chart drawn from reports as of December 9, 2000 by the fifty canvassing boards, out of sixty-seven, who had tallied the number of undervoted ballots in their counties). The number in the text is the total number of reported undervoted ballots (62,327) reduced by the 17,768 undervoted ballots that had already been counted in Palm Beach, Broward and Volusia Counties. *See id.*
1167. *Gore*, 772 So. 2d at 1262.
1168. *See id.* at 1269 (Wells, C.J., dissenting) (extraordinary relief cannot be granted to complainant even when he would ordinarily be entitled to it if it will result in "'confusion and disorder and will produce an injury to the public which outweighs the

decision "propel[led] this country and this state into an unprecedented and unnecessary constitutional crisis," largely because allowing "county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress."[1169] Justice Harding spoke somewhat more softly, declining to expressly indict the decision as unconstitutional, but he fully agreed that the recounts would be unreliable: "Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions."[1170]

The dissents further agreed that it was impossible to have a final outcome by December 12, as they believed federal § 5 required, to avoid endangering Florida's vote in the electoral college. Chief Justice Wells wrote:

> Assuming the majority recognizes a need to protect the votes of Florida's presidential electors, the entire contest must be completed "at least six days before" December 18, 2000, the day the presidential electors meet to vote. *See* 3 U.S.C. § 5 (1994) . . . .
> . . . I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day.[1171]

Justice Harding expressed much the same thought, if in a somewhat less indignant tone: "Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable . . . . The circumstances . . . call to mind a quote from football coaching legend Vince Lombardi: 'We didn't lose the game, we just ran out of time.'"[1172]

The majority devoted little discussion to the dissents' complaints. In its statement of the "applicable law," the majority acknowledged its duty to hew closely to the Election Code enacted by the legislature,[1173] and stated that it was "cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 (1994)," even quoting § 5 in its entirety.[1174] But the jus-

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individual right of the complainant'") (quoting State *ex rel.* Pooser v. Wester, 170 So. 736, 738–39 (Fla. 1936)); *id.* at 1273 (Harding, J., dissenting) ("[T]he 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.").

1169. *Id.* at 1263, 1267 (Wells, C.J., dissenting).

1170. *Id.* at 1273 (Harding, J., dissenting).

1171. *Id.* at 1268–69 (Wells, C.J., dissenting).

1172. *See id.* at 1273 (Harding, J., dissenting).

1173. *See id.* at 1248–49 ("These statutes established by the Legislature govern our decision today.").

1174. *Id.* at 1248.

tices did not discuss the meaning of the electoral appointments clause or federal § 5, and they refused to let the calendar or the extraordinary logistical issues govern the outcome:

> The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn duties to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their responsibilities as they see them.[1175]

D. *The Remand*

The Florida court's order to begin counting "forthwith" set in motion a remarkable chain of events. By 6:50 that evening, Judge Sauls had recused himself from the case and requested its reassignment, in a written order offering no explanation.[1176] The case was then assigned to Judge Terry Lewis, the same judge who had handled Gore's request to force Katherine Harris to accept recount results after the seven-day deadline,[1177] and the same judge who had ruled for Bush earlier the same day in the Martin County absentee ballot case.[1178] Judge Lewis held a hearing that evening on the content of his order to the counties, a hearing convened so quickly that the court reporter transcribed the proceedings by watching them on C-Span rather than coming to the courthouse.[1179]

At the hearing, Bush's lawyers pressed Judge Lewis to establish a more specific, and uniform, standard for the counties to use in evaluating their ballots.[1180] Lewis declined to do so.[1181] Of course, under the circumstances, Lewis's decision was actually exactly what the Republicans were hoping for. As he left the courthouse, Bush lawyer

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1175. *Id.* at 1261 n.21.

1176. Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Dec. 8, 2000) (order by which Judge Sauls recused himself).

1177. *See supra* notes 386–99 and accompanying text.

1178. *See* Taylor v. Martin County Canvassing Bd., No. 00-2850 (Fla. Cir. Ct. Dec. 8) (final judgment for defendants), *aff'd*, 773 So. 2d 517 (Fla. 2000); *see also supra* note 439 and accompanying text (describing the absentee ballot cases involving Seminole and Martin Counties).

1179. David Firestone, *A 4-to-3 Decision: Statewide Tally Set for Uncounted Votes—Deadline Tomorrow*, N.Y. TIMES, Dec. 9, 2000, at A1.

1180. DEADLOCK, *supra* note 1, at 209.

1181. *See* Gore v. Harris, No. 00-2808, at 2 (Fla. Cir. Ct. Dec. 9, 2000) (order on remand).

Ben Ginsberg chided David Boies: "This is so bad it's good."[1182] And Bush co-counsel George Terwilliger told reporters, "It's exactly the kind of chaotic, confusing, standardless situation that we had warned the U.S. Supreme Court about."[1183]

By the next morning, Saturday, December 9, Judge Lewis had sent each of the Florida counties a written order to begin reviewing any undervoted ballots.[1184] Judge Lewis told the counties that they should bring in as many counting teams as necessary, preferably using county judges, to complete the count by 2:00 p.m. on Sunday, December 10.[1185] The counties were also directed to fax Judge Lewis a report of their planned "protocol" for counting the votes by 10:00 a.m. Saturday morning, and include in the report an estimate of the time it would take to complete the count and any anticipated difficulties.[1186] In evaluating the ballots, the counties were to decide only whether there was a "clear indication of the intent of the voter."[1187] Until each county's count was complete, there was to be no reporting, formal or informal, of partial results.[1188]

IX. THE UNITED STATES SUPREME COURT PROCEEDING ON THE STATEWIDE COUNT: *BUSH V. GORE*

Bush responded to the Florida court's order for a statewide recount with immediate filings in both the Eleventh Circuit and the United States Supreme Court. In the Eleventh Circuit, Bush asked the court both to stay Florida's counting of undervotes pending the resolution of his Supreme Court petition for writ of certiorari[1189] and to rehear his appeal from the district court's order denying him an injunction.[1190] The full court of appeals quickly denied both requests, but did enjoin Florida from certifying the results of the counting until the

1182. DEADLOCK, *supra* note 1, at 210.

1183. *Id.*

1184. *See* Gore v. Harris, No. 00-2808, at 1 (Fla. Cir. Ct. Dec. 9, 2000) (order on remand).

1185. *Id.* at 1–3.

1186. *Id.* at 3.

1187. *Id.* at 2 (counting the Miami-Dade ballots, "[i]n determining if a legal vote has been cast, the standard to be applied is: if there is a 'clear indication of the intent of the voter' then the vote should be counted"); *id.* at 3 (counting other than Miami-Dade ballots, "[t]he standard to be applied in determining what is a legal vote . . . shall be the same as noted above for the counting of the Miami-Dade County votes"). The judge expressly refused to give the counties any specific criteria by which they might apply the "intent of the voter" standard, noting that some of the parties had requested that he set forth such criteria, but "[t]he Florida Supreme Court has been asked at least twice recently to do so and has specifically declined." *Id.* at 2 n.1.

1188. *Id.* at 2 (counting the Miami-Dade ballots, "[n]o partial recounts will be done or reported, formally or informally"); *id.* at 3 (counting other than Miami-Dade ballots, "the method of reporting shall be the same as noted above for the counting of the Miami-Dade County votes").

1189. Touchston v. McDermott, 234 F.3d 1116, 1162 (11th Cir. 2000).

1190. *See* Siegel v. LePore, 234 F.3d 1218, 1219 (11th Cir. 2000).

Supreme Court had acted on Bush's petition.[1191] In the Supreme Court, Bush filed an emergency application for a stay with Justice Kennedy, the circuit justice for the Eleventh Circuit, asking for the relief pending his filing and the disposition of a petition for writ of certiorari.[1192]

A. *Bush's Emergency Application for a Stay*

In his Supreme Court stay application, filed Friday night, December 8, Bush claimed that the Florida Supreme Court had violated the electoral appointments clause, federal § 5, and the Due Process and Equal Protection Clauses.[1193] The Florida decision violated the electoral appointments clause, Bush argued, because (1) the state legislature had not conferred on the Florida Supreme Court appellate jurisdiction over contest proceedings; (2) the legislature had not authorized contest proceedings in the context of presidential elections; (3) the legislature had not authorized partial manual recounts like the count the court had set in motion (of undervotes only); (4) the Florida court had relied on its earlier decision, which the Supreme Court had vacated; and (5) the Florida court had permitted court officials to decide that dimpled ballots could be votes, in conflict with the legislature's directive that the only ballots to be treated as votes were those that canvassing boards decided reflected a "clear indication" of the intent of the voter.[1194] The Florida court had violated federal § 5, according to Bush, because the law as it stood on Election Day (1) conferred on only the canvassing boards the discretion to order manual recounts; (2) did not permit dimpled ballots to be counted as votes; (3) did not allow for manual recounts of ballots that went uncounted due to voter error, rather than machine error; and (4) did not authorize the standard by which Palm Beach County had identified votes the Florida court included.[1195] Finally, the Florida court had violated the Equal Protection and Due Process Clauses because it had ordered the count without establishing any uniform standard for evaluating the ballots, thus ensuring that ballots would be evaluated differently from one county to the next and even within counties (such as Miami-Dade, where the canvassing board evaluated the first set of undervotes and a panel of Leon County judges would be evaluating the remainder).[1196]

1191. *Touchston*, 234 F.3d at 1162; *Siegel*, 234 F.3d at 1219.

1192. Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Supreme Court of Florida (filed Dec. 8, 2000), Bush v. Gore, 531 U.S. 1046 (2000) (No. SC00-949 (00A504)) [hereinafter Emergency Application for a Stay, Bush v. Gore].

1193. *See id.* at 29–30, 34–39.

1194. *Id.* at 23–27; *see supra* notes 1162–65 and accompanying text (discussing undervotes).

1195. *See id.* at 30–31 & n.8, 32–33.

1196. *Id.* at 36–38. Bush's equal protection theory was based on Supreme Court cases, particularly *O'Brien v. Skinner*, 414 U.S. 524 (1974), and *Reynolds v. Sims*, 377

Bush contended that he would suffer irreparable injury if the counting continued,[1197] because Gore might be declared the winner right on the eve of December 12 and Bush would then have insufficient time to have the decision reversed in time for his slate of electors to be protected by the safe harbor of § 5.[1198] As Bush put it:

> The Florida Supreme Court's decision raises a reasonable possibility that the November 26 certification of Governor Bush as the winner of Florida's electoral votes will be called into doubt—or purport to be withdrawn—at a time when the December 12 deadline for naming Florida's electors could preclude Applicants' ability to seek meaningful review by this Court.[1199]

The State of Florida, according to Bush, would suffer much the same harm, because it too would be denied the conclusive effect of a proceeding completed by December 12.[1200] Finally, the "integrity of th[e] presidential election could be seriously undermined," because the vote totals resulting from the counting would be "incurable in the public consciousness and, once announced, cannot be retracted."[1201]

Responding to Bush's application, Gore argued that Bush's claim of irreparable harm in the absence of a stay—because the counting risked his ability to claim the safe harbor of § 5—was "manifestly wrong."[1202] Gore acknowledged that Bush could lose the benefit of the safe harbor if the *case* were not resolved by December 12,[1203] but pointed out that the *counting* had nothing to do with that risk.

> Even if Governor Bush is correct in all of his assertions—and in his further argument that the election contest is somehow "tainted by

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U.S. 533, 554 (1964), that Bush said prohibited "governmental officials from implementing an electoral system that operates to give the votes of similarly situated voters different effect based on the happenstance of the county or district in which those voters live." *Id.* at 34–35 (citing Roman v. Sincock, 377 U.S. 695, 712 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653 (1964)). Bush's due process claim focused on what he called the "arbitrary, capricious, and standardless manual recount being used," which would likely be "influenced, consciously or unconsciously, by the officials' desire for a particular result," and could not possibly be accurate. *See id.* at 38–39.

1197. For a federal court to issue a stay of a lower court order, a court must consider whether the applicant has shown that he is likely to succeed on the merits of the appeal, whether the applicant will suffer irreparable harm in the absence of a stay, whether a stay would substantially injure the non-applicant, and whether granting or denying the stay will serve the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

1198. *See* Emergency Application for a Stay, Bush v. Gore, *supra* note 1192, at 39.

1199. *Id.*

1200. *See id.* at 40–41.

1201. Supplemental Memorandum in Support of Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Supreme Court of Florida at 5–6 (filed Dec. 9, 2000), Bush v. Gore, 531 U.S. 1046 (2000) (SC00-949 (00A504)).

1202. Opposition of Respondent Albert Gore, Jr. to Emergency Motion for a Stay Pending Certiorari at 2 (filed Dec. 9, 2000), Bush v. Gore, 531 U.S. 1046 (2000) (No. SC00-949 (00A504)).

1203. *See id.*

> the Florida Supreme Court's unauthorized and unlawful rewrite of the legislative structure," a point that we address below—a stay would be *completely* irrelevant to his claimed injury. Governor Bush can achieve his objective of a conclusive resolution to this dispute by December 12 in only one of two ways: (1) the count can go forward and the courts can enter a final judgment [in Bush's favor] by December 12, or (2) this Court can grant review and determine that Governor Bush is entitled to prevail in the contest by that date. A stay of the count obviously does nothing to advance either of these goals, and thus does literally nothing to avoid the irreparable injury of which Governor Bush complains.[1204]

The reality, Gore argued, was that denying the stay would do *nothing* to Bush's ability to claim the safe harbor of § 5, while granting the stay—thus stopping the counting Gore needed to have completed to have any chance of winning by December 12—would *ensure* that Gore could not claim the safe harbor.[1205]

B. *The Stay Ruling and the Justices' Different Views on the "Cloud of Illegitimacy"*

As it happened, Gore's worst fears came to pass. Shortly before 3:00 in the afternoon on Saturday, December 9, as county officials across Florida were in the midst of efforts to count the undervotes, the Supreme Court granted Bush's application.[1206] Split five justices to four, the Court stayed the Florida order, treated Bush's application as a petition for writ of certiorari and granted it, ordered briefs to be filed the next day by 4:00 p.m., and set the case down for oral argument on Monday, December 11.[1207] The majority did not reveal its reasoning.

Justice Stevens wrote an opinion for the four dissenting justices.[1208] Its tone was civil: the majority has "acted unwisely," it said.[1209] To Justice Stevens, however, it was quite clear that Bush had not shown irreparable harm and that the stay might well cause irreparable harm to Gore. "Counting every legally cast vote," Justice Stevens wrote, "cannot constitute irreparable harm."[1210] Rather, "there is a danger that a stay may cause irreparable harm to respondents—and, more

1204. *Id.* at 8 (citation omitted) (quoting Emergency Application for a Stay, *supra* note 1192, at 40).

1205. *Id.* at 9; *see also id.* at 2 ("Gov. Bush proposes a grossly inequitable asymmetry: granting a stay of the vote count would have no bearing on his ability to benefit from the safe harbor, but would substantially undercut Vice President Gore's hope of invoking the provision.").

1206. Linda Greenhouse, *Supreme Court, Split 5-4, Halts Florida Count in Blow to Gore: Bush Had Sought Stay—Hearing Is Tomorrow*, N.Y. TIMES, Dec. 10, 2000, at A1.

1207. *See* Bush v. Gore, 531 U.S. 1046, 1046–47 (2000).

1208. *Id.* at 1047–48 (Stevens, J., dissenting).

1209. *Id.* at 1047.

1210. *Id.*

importantly, the public at large—because of the risk that 'the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.'"[1211] Stevens added that it was "certainly not clear" that the Florida decision violated federal law, because the Florida Code stated that "'[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board,'" and the Florida Supreme Court "gave weight to that legislative command."[1212]

Justice Stevens's dissent apparently compelled Justice Scalia to explain the decision to the American public.[1213] Concurring in the stay, Justice Scalia took issue with Justice Stevens's reference to "counting every legally cast vote."[1214] The issues, Scalia said, were whether the votes being counted could even be considered "legal votes," and the constitutionality of letting the standard for determining a legal vote vary from county to county.[1215] With that understood—that Florida was counting votes of questionable legality—Scalia concluded that Bush would suffer irreparable harm if the Court permitted the count to continue: it would "cast . . . a cloud upon what he claims to be the legitimacy of his election."[1216]

Presumably because this conclusion on irreparable harm depended on the premise that the counting was invalid, which was inescapably an evaluation of the merits, Justice Scalia left no doubt about the majority's view of Bush's claims. "It suffices to say," Scalia wrote, "that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that petitioners have a substantial probability of success."[1217] The statement should not have been surprising, because a significant probability of reversal is always required for a litigant to obtain a stay.[1218] But it was surely painful to Gore to face a weekend of briefing and oral argument preparation after such a stark declaration that the case was all but over.

The stay order stunned virtually everyone who had been following the case. Justice Stevens included in his dissent a caustic retort to Scalia's formulation of irreparable harm: "Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of

1211. *Id.* at 1047–48 (quoting Nat'l Socialist Party of Am. v. Village of Skokie, 434 U.S. 1327, 1328 (Stevens, Circuit Justice 1977)).

1212. *See id.* at 1048 (quoting FLA. STAT. ANN. §§ 101.5614(5), 102.166 (West Supp. 2001)).

1213. *See id.* at 1046 (Scalia, J., concurring) ("Though it is not customary for the Court to issue an opinion in connection with its grant of a stay, I believe a brief response is necessary to Justice Stevens' dissent.").

1214. *Id.* ("The issue is not, as the dissent puts it, whether '[c]ounting every legally cast vote ca[n] constitute irreparable harm.'").

1215. *Id.* at 1046–47.

1216. *Id.* at 1047.

1217. *Id.* at 1046.

1218. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 895 (1983); Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319 (Rehnquist, Circuit Justice 1994).

the election."[1219] Law professors were almost unanimously astonished.[1220] Former Michigan Dean Terrance Sandalow, known for his conservative judicial philosophy, has been quoted as saying the "balance of harms so unmistakably were on the side of Gore" that granting the stay was "incomprehensible."[1221] Indeed, Bush's own lawyers have since indicated to media representatives that they were not at all certain they could make the showing of irreparable harm necessary to obtain a stay.[1222]

In fact, it was not really Bush at all who came up with the theory of irreparable harm upon which Justice Scalia, and ostensibly the majority, relied. In his stay application, for his *personal* showing of irreparable harm, Bush had relied entirely on the threat the counting supposedly posed to his ability to invoke § 5's safe harbor. But Gore's response to this theory was undeniably correct. Merely *counting* would not make it impossible for Bush to win by December 12. The only thing that would make it impossible would be the failure to finish the case by that date, and an expedited Supreme Court ruling in favor of Bush on the merits would have prevented any such failure.

No doubt Justice Scalia and the rest of the majority recognized this, and so they converted into *personal* irreparable harm the argument Bush had made with respect to the *public interest*: Bush's statement that if the public heard the numbers shift in favor of Gore, the effect on the "public consciousness" would be "incurable."[1223] One has to

1219. *Bush*, 531 U.S. at 1048 (Stevens, J., dissenting).

1220. *See, e.g.*, Joe Battenfeld, *Presidential Race Courting Chaos*, BOSTON HERALD, Dec. 10, 2000, at 2 ("'It is quite surprising for the court to have issued the stay in the current time frame .... It's really not for the court to protect the Bush administration from political embarrassment.'" (quoting Gil Kujovich, Professor of Law, Vermont Law School)); William E. Gibson, *5-4 Decision Orders Stay of Undervote Hand Count: Gore, Bush to File Legal Briefs Today*, S. FLA. SUN-SENTINEL, Dec. 10, 2000, at A1 ("'Nobody can figure out why the court is acting the way it is, so we can't predict what it will do. But by the time they get to review these issues for whatever purpose, the mere fact that they entered a stay may render the relief impossible.'" (quoting Donald Jones, Professor of Law, University of Miami School of Law)); Bob Liff, *High Court's Deeply Divided: Justices Take Extraordinary Stance*, N.Y. DAILY NEWS, Dec. 10, 2000, at 4 ("'It's extraordinary.... This decision by the five justices will be talked about for decades.'" (quoting Vikram Amar, Professor of Law, Hastings College of the Law)); *id.* ("'What's particularly shocking ... is that this is a court that professes again and again to be an opponent of judicial activism and to be a supporter of states' rights.'" (quoting Jeffrey Shaman, Professor of Law, DePaul University)); Terri Somers, *Courts Weave Tangled Web: U.S. Top Court's Ruling Sends Both Sides Back to the Drawing Board*, S. FLA. SUN-SENTINEL, Dec. 10, 2000, at A1 ("'There was no need to issue a stay .... If the Supreme Court wants to hear arguments on Monday and decides the Florida Supreme Court was wrong, then it could order the Florida Supreme Court not to include the ballots that were counted [during the recount].'" (alteration in original) (quoting Steve Wermiel, Professor of Law, American University Washington College of Law)).

1221. Linda Greenhouse, *Collision with Politics Risks Court's Legal Credibility*, N.Y. TIMES, Dec. 11, 2000, at A1 (quoting Sandalow).

1222. KAPLAN, *supra* note 1006, at 237, 245.

1223. *See supra* note 1201 and accompanying text.

wonder, however, whether it was truly the public consciousness toward the new *president* about which the Court was concerned. As one commentator has aptly suggested:

> No, the "irreparable harm" that filled the majority with dread was the possibility that it might have to confront a vote count with Al Gore in the lead. . . . Assuming the Bush-leaning Court was going to invalidate the process by which Gore pulled ahead, that would put the justices in the embarrassing position of snatching away a victory.[1224]

In other words, the case might not have purely satisfied the legal requirement of irreparable harm to Bush, but knowing its plans to reverse, the majority feared irreparable harm to its own reputation.

In any event, the stay ruling brought the counts across Florida to an abrupt halt. In nine of the counties, the counting was complete, and in four others, the work was almost done.[1225] In Leon County, for example, workers estimated that they had thirty minutes worth of work left, and the Leon County judges counting the Miami-Dade ballots had reviewed approximately half of the 9000.[1226] On the basis of these counties, Gore's attorneys claimed that Gore had picked up fifty-eight votes.[1227]

In other counties, however, the counting had not even begun. In Bradford County, this was because officials did not have the computer software necessary to cull the undervoted ballots from the remainder.[1228] In Clay County, officials were having trouble finding counting teams.[1229] In Bay County, the canvassing board had not decided what to do, and had written Judge Lewis stating that it might ignore his order.[1230] Indeed, by the time the stay issued, only about half of the counties had sent in the plan he had ordered them to submit four hours earlier.[1231]

The great irony, of course, is that it was in precisely those counties in which the count was proceeding most smoothly that Bush's equal protection argument was gaining the most steam, because the boards were adopting bright-line rules that conflicted with one another. In Hillsborough County, for example, the canvassing board decided to count only "hanging chads," and so informed Judge Lewis.[1232] In Pi-

1224. KAPLAN, *supra* note 1006, at 242–43.
1225. *Id.* at 243; Dexter Filkins & Dana Canedy, *U.S. Supreme Court's Ruling Stops Florida's Election Workers in Their Tracks*, N.Y. TIMES, Dec. 10, 2000, at A43.
1226. Filkins & Canedy, *supra* note 1225.
1227. DEADLOCK, *supra* note 1, at 213; Filkins & Canedy, *supra* note 1225.
1228. Filkins & Canedy, *supra* note 1225.
1229. KAPLAN, *supra* note 1006, at 243 ("[A]s the *Florida Times-Union* of Jacksonville put it, 'most were at the grand opening of the BJ's Wholesale Club in Orange Park.'").
1230. *Id.*; Filkins & Canedy, *supra* note 1225.
1231. Filkins & Canedy, *supra* note 1225.
1232. *Id.*

nellas County, the board agreed to count some dimples, as long as they appeared in a pattern on the ballot.[1233] And in Suwannee County, the board decided that it would not count any ballots as votes unless all three members agreed, in contrast to the other boards who would count based on a majority vote.[1234] Thus, in the end, the cost to Gore of getting the votes counted quickly was strengthening Bush's argument that similarly situated ballots were being treated differently. One is left only to wonder how much of this "evidence" the nine justices heard.

C. *The Parties' Briefs*

With the stay, and particularly Justice Scalia's remarks that the majority expected to reverse, the case became Bush's to lose. So he held fast to what was obviously a winning strategy, emphasizing the same errors he had identified in his application for the stay.[1235]

Bush claimed that the Florida Supreme Court violated the electoral appointments clause by "overriding" numerous provisions of Florida law.[1236] Bush insisted that the Florida law did not allow for de novo review of ballots by courts (rather than canvassing boards), recounts of only part of a given county's ballots (the undervotes as opposed to all of the ballots), or the counting of ballots that were merely dimpled, rather than properly punched or marked, when such a practice had been neither uniform throughout the state nor approved by the Secretary of State.[1237] To Bush, it was obvious that the legislature had never empowered the judiciary to order such extraordinary relief: if one could ask a court to do all these things by bringing a contest ac-

1233. *Id.*
1234. *Id.*
1235. Bush made only three changes in his argument from the stay application to the brief on the merits. First, he essentially dropped his claim that the Florida court violated the electoral appointments clause by applying section 168 to a presidential election. *Compare* Emergency Application for a Stay, Bush v. Gore, *supra* note 1192, at 25 (arguing that it violated the electoral appointments clause to apply section 168 to a presidential election), *with* Brief for Petitioners at 19–33, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) (mentioning nothing of the argument other than "assuming *arguendo* that the contest statute even applies to presidential elections," *id.* at 21). Second, he expanded his list of § 5 violations from four in the stay application, *see* Emergency Application for Stay, Bush v. Gore, *supra* note 1192, at 29–34; *supra* note 1195 and accompanying text (describing the § 5 claims in Bush's stay petition), to nine in his brief on the merits, *see* Brief for Petitioners, Bush v. Gore, *supra*, at 19–40; *infra* note 1245 and accompanying text (describing Bush's § 5 claims in his brief on the merits). Finally, Bush added to his due process claim a complaint that he was being denied meaningful opportunity to object to the counting of individual ballots. *Compare* Emergency Application for a Stay, Bush v. Gore, *supra* note 1192, at 34–39, *and supra* note 1196 and accompanying text (describing the equal protection and due process claims in Bush's stay petition), *with* Brief for Petitioners, *supra*, at 49, *and infra* notes 1251–59 and accompanying text (describing the same claims in Bush's brief on the merits).
1236. Brief for Petitioners, *supra* note 1235, at 21.
1237. *See id.* at 22–28.

tion under section 168, why would anyone ever bother with the canvassing boards under section 166?[1238]

The Florida court had further defied the legislature's mandate, Bush argued, by hearing the case at all.[1239] Under Bush's reading of *McPherson*, the Florida court was not permitted to rely in any way upon the state constitution, and yet it had expressly invoked appellate jurisdiction pursuant to the Florida Constitution.[1240] The contest statute, Bush pointed out, referred only to the *circuit* court's ability to resolve election disputes, indicating that the legislature had not intended to confer jurisdiction on the Florida appellate courts.[1241]

Bush also claimed that the Florida court violated the electoral appointments clause by relying on its earlier decision in *Palm Beach County Canvassing Board v. Harris*, which had been vacated six days before, and to the remand of which the Florida court had not yet responded.[1242] The thrust of Bush's complaint was that the Florida court had violated the clause in its initial decision to extend the deadline for certification, and unless the Supreme Court ultimately affirmed that initial decision, any vote totals pursuant to the extended deadline were still in question.[1243] Thus, when the Florida court ordered the trial court to include votes counted after the deadline at issue in the first case, it "extend[ed] the error of the November 21 decision," committed an "ongoing violation of *McPherson* and its requirement that the legislature *alone* may define the method of appointing electors," and "flouted the mandate of [the Supreme] Court."[1244]

Having identified these "changes in the law" as constitutional violations, Bush complained of nine more respects in which the court had deviated from the "laws enacted prior to" Election Day in "conflict[ ] with" federal § 5. Bush objected that the existing law (1) did not authorize the court's order of a statewide manual recount; (2) provided for recounts by canvassing boards, and thus was rendered "superfluous" by the court's interpretation of the contest statute; (3) did not allow recounts of only the undervoted ballots; (4) did not allow courts rather than canvassing boards to determine the validity of a ballot; (5) did not authorize courts to determine the circumstances under which manual recounts should be conducted; (6) did not allow "dimpled" ballots to be counted as votes; (7) did not allow courts to review some

1238. *See id.* at 25.
1239. *See id.* at 28–31.
1240. *Id.* at 29 (citing McPherson v. Blacker, 146 U.S. 1, 35 (1892)).
1241. *Id.* at 28 (quoting FLA. STAT. ANN. § 102.168(1) (West Supp. 2001)).
1242. *Id.* at 32 (citing Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (Fla. 2000), and referring to the disposition in Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000)).
1243. *See id.* (votes identified after November 14 "could only *possibly* count if the court's November 21, 2000, holding were still binding").
1244. *Id.* at 31–32.

ballots de novo and others not at all; (8) did not allow votes submitted after the seven-day deadline to be certified; and (9) dictated, in Palm Beach County, that only ballots with detached chads could be counted.[1245]

If these errors appear here much like a laundry list, it is because they appeared in much the same "listing" fashion, without elaboration, in Bush's brief.[1246] Indeed, to the extent that Bush's brief contained any § 5 *legal* argument at all, it was devoted to explaining how the non-mandatory language of § 5 could be applied to invalidate the Florida court's decision: *i.e.*, why it was the Supreme Court's business if a state simply chose not to take advantage of an alleged "safe harbor" provided by a federal law.[1247] This was of course the issue that had puzzled the United States Supreme Court in the first case and remained unresolved.[1248] Bush apparently had two theories. First, Bush claimed that the Court should reverse because the Florida Legislature had intended to take advantage of the "safe harbor" provided by § 5, by "enacting laws prior to Election Day that seek to resolve potential controversies or contests concerning presidential electors," and had been thwarted by the Florida Supreme Court.[1249] Second, Bush asserted a kind of "constitutional crisis" theory: "Reversal of the decision below is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress."[1250]

Bush's final arguments with respect to the Florida court's decision were based on the Equal Protection and Due Process Clauses, and they were simply put.[1251] Bush argued that "[t]he Equal Protection Clause prohibits government officials from implementing an electoral system that gives the votes of similarly situated voters different effect based on the happenstance of the county or district in which those

1245. *See id.* at 36–39. Throughout the proceeding, Bush never articulated any theory by which one might distinguish a violation of the electoral appointments clause from a violation of § 5. He seemed to argue that any "change in the law" by the judiciary would violate either provision. So it is puzzling why he did not allege that all of the "changes" he alleged with respect to § 5 did not also violate the electoral appointments clause.

1246. *See id.* at 36–38.

1247. *See id.* at 33–35.

1248. *See id.* at 35 & n.15; *supra* notes 967–69 and accompanying text (describing the justices' skepticism that a state could *violate* § 5).

1249. *See* Brief for Petitioners, *supra* note 1235, at 34. Bush did not offer any evidence other than the *existence* of section 168 that the Florida Legislature had intended to take advantage of the "safe harbor" extended by federal § 5. The claim was therefore quite a stretch, inasmuch as section 168 was not even specific to presidential elections.

1250. *Id.* at 35.

1251. *See id.* at 40–49. As he had done throughout the entire controversy, Bush placed these constitutional arguments last in his brief.

voters live," and claimed that the Florida court had done just that.[1252] Under the Florida decision, Bush observed, "where there is a partial punch or stray mark on a ballot, that ballot may be counted as a 'vote' in some counties but not others."[1253] Further, while approximately twenty percent of Miami-Dade voters had had their ballots reviewed and counted even if their ballots were not within the "undervote" category, the other eighty percent of Miami voters would now have their ballots reviewed only if their ballots were considered undervotes.[1254] Worse yet, Bush claimed, there were ballots in Miami-Dade that might have been counted as votes in the first run through the machine and yet identified as undervotes in the second run. Thus, with the court's manual review, these ballots might end up being counted twice, unconstitutionally diluting the votes of those whose ballots were counted only once.[1255]

The Florida decision violated the Due Process Clause, Bush wrote, in three respects. First, the court had radically departed from the law as it stood on Election Day, as Bush had already explained at length.[1256] Second, the court had failed to provide "clear and consistent guidelines" for the counties conducting the recounts.[1257] By leaving "crucial decisions to the unbridled discretion and arbitrary decision-making of local election officials and as-yet unspecified other individuals," the court created "a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result."[1258] Third, the "chaotic and unfair procedures" set in motion by the Florida court deprived Bush of any meaningful opportunity to object to decisions on individual ballots and made it impossible for the trial court to review those decisions.[1259]

If Bush's brief reflected his position as the all-but-anointed winner, Gore's brief reflected how much ground he had to cover to pull at least one of the majority justices off course. It appears that to do so, Gore's attorneys adopted three major objectives. First, they sought to reconstruct the majority's view of the *McPherson* case, which Gore had not even briefed, and yet had been stung by, in the first proceeding.[1260] Second, they repeatedly cast Bush's objections as a mere disa-

1252. *Id.* at 41–42 (citing O'Brien v. Skinner, 414 U.S. 524, 529–31 (1974); Roman v. Sincock, 377 U.S. 695, 707–12 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653 (1964); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964)).

1253. *Id.* at 42.

1254. *Id.* at 43 (citing Gore v. Harris, 772 So. 2d 1243, 1264 n.26 (Fla. 2000) (Wells, C.J., dissenting)).

1255. *Id.* at 44.

1256. *Id.* at 45.

1257. *Id.* (citing Roe v. Alabama, 43 F.3d 574, 581 (11th Cir. 1995)).

1258. *Id.* at 48.

1259. *Id.* at 49 (citing Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678–79 (1930)).

1260. *See infra* notes 1268–78 and accompanying text.

greement with the Florida court's interpretation of state law, which would of course be an inappropriate basis for reversing.[1261] Finally, they warned the Court in no uncertain terms that if it found an equal protection or due process violation, the constitutional sky would fall on election law all across the country.[1262]

Gore began by attacking what he called Bush's "radical new proposition" that the Florida Supreme Court violated the electoral appointments clause even by hearing the case, because its appellate jurisdiction was based on the state constitution and not a legislative statute.[1263] The brief's tone was more than a little indignant. Never before, Gore said—not before the Florida Supreme Court and not before the United States Supreme Court in the first proceeding—had Bush suggested that the Florida court could not exercise appellate jurisdiction over the election cases, even though the court's jurisdiction had in every instance been founded on the state constitution.[1264] Rather, even as Bush was arguing that the court could not engage in "judicial lawmaking," he had expressly *acknowledged* the court's power to *interpret* the law.[1265]

Gore insisted that there was no reason to believe that the Florida Legislature meant to deprive the Florida Supreme Court of its appellate jurisdiction. The legislature had enacted section 168, after all, "against the settled background rule that decisions of circuit courts in contest actions are subject to appellate review," and legislative provisions granting jurisdiction to the circuit courts in Florida had long been taken to include appellate review.[1266] Just as importantly, the constitutional provision conferring appellate jurisdiction was *itself* a legislative product: it was part of a constitutional revision proposed by a joint resolution of the Florida Legislature and ratified by Florida's citizenry in 1980.[1267] In Gore's view, to treat the constitutional provision as anything else—and deny the Florida Supreme Court appellate jurisdiction solely on the fact that the legislature's intent was expressed in a constitution rather than a statute—"would run afoul of

1261. *See infra* notes 1279–88 and accompanying text.

1262. *See infra* notes 1300–01, 1311–13, 1319–21 and accompanying text.

1263. Brief of Respondent Albert Gore, Jr. at 13 (filed Dec. 10, 2000), Bush v. Gore, 513 U.S. 98 (2000) (No. SC00-949).

1264. *See id.* at 11–12.

1265. *Id.* (citing Brief for Petitioners, *supra* note 904, at 48; Reply Brief for Petitioner, *supra* note 931, at 9 n.6).

1266. *Id.* at 14 (citing State v. Sullivan, 116 So. 255 (Fla. 1928); Cote v. State, 760 So. 2d 162 (Fla. Dist. Ct. App. 2000)). Gore added that the Florida Legislature itself surely understood this to be the case, inasmuch as it had expressly acknowledged the Florida Supreme Court's appellate jurisdiction in the first United States Supreme Court proceeding. *Id.* "Florida has in place an election code for the resolution of disputes and a court system, *including a Supreme Court*, with the usual judicial powers of such courts." *Id.* (alteration in original) (quoting Brief of the Florida Senate and House of Representatives, *supra* note 906, at 9).

1267. *Id.* at 15.

[Bush's] *own* reading of Article II, under which legislatures have *carte blanche* in determining the manner of appointment. Article II cannot be read to swallow itself."[1268]

With that rhetorical flourish, Gore's lawyers began in earnest their assault on the theory that the electoral appointments clause prevented state courts from relying on their state constitutions. That theory, Gore wrote, was "based on misreadings of Article II and of this Court's precedents."[1269] The only source for the theory was the single passage in *McPherson v. Blacker*, and that passage was itself a dictum.[1270] Moreover, two other passages in *McPherson* made clear that once a state legislature passed laws establishing the manner of appointing electors, "the state courts may interpret those laws precisely as they would any other state legislative enactment."[1271]

1268. *Id.* at 18.

1269. *Id.* at 19–20.

1270. *Id.* at 20.

1271. *Id.* (quoting McPherson v. Blacker, 146 U.S. 1, 23, 39 (1892)). Gore's argument in this regard was a serious mischaracterization. He relied on two passages from *McPherson* for support. In the first, according to Gore, *McPherson* "explains that state statutes and the state constitution may be used by state courts in determining the precise scope of the right to vote" when the Court writes: "'Whenever presidential electors are appointed by popular election . . . [t]he right to vote [granted thereby] . . . refers to the right to vote as established by the laws *and constitution* of the State.'" *Id.* (alteration in original) (quoting McPherson v. Blacker, 146 U.S. 1, 23, 39 (1892)). Gore took this passage entirely out of context, however, and, properly understood, it does not in any way relate to the issue raised by the earlier *McPherson* passage stating that state constitutions cannot limit state legislative power to appoint presidential electors. When one reads the entire *McPherson* case, one realizes that the plaintiffs were claiming that the Fourteenth Amendment conferred on them as individuals a right to vote for presidential electors, *see* McPherson v. Blacker, 146 U.S. 1, 23, 38–39 (1892), and that the passage Gore quoted was simply the Court's rejecting *that* argument, and not in any way addressing the role state constitutions could play vis-à-vis the state legislatures. The Court's sole point was that the Fourteenth Amendment did not itself confer on anyone any right to vote; rather, any right to vote came from "state laws and constitutions," and the Fourteenth Amendment merely penalizes denials of a *state*-given right. *Id.* at 39. Were it not for the language that Gore conspicuously omitted from the passage, the passage might have been taken to mean that there is some state constitutional aspect to the right to vote in a presidential election, but the full language makes quite clear that the Court was addressing the right to vote *generally*, in all kinds of elections, so that no conclusion whatever can be drawn on the point. In full, the passage reads:

> Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, *and so of the right to vote for representatives in Congress, the executive, and judicial officers of a state, or the members of the legislature thereof.* The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the [s]tate. There is no color for the contention that under the amendments every male inhabitant of the [s]tate, being a citizen of the United States has from the time of his majority a right to vote for presidential electors.

Id. (emphasis added). Gore's second citation from *McPherson* was similarly misleading. Gore pointed out that in *McPherson* the state court "had measured the statute providing for the appointment of electors for conformity with 'the state constitution and laws,'" and then the Supreme Court "concluded that it was 'not authorized to

Further, Gore argued, there was no sound conceptual reason to conclude that the electoral appointments clause created a "'state-constitution-free' zone in a state's law."[1272] The state constitutions, after all, "determine[d] the very nature and composition of the state legislature[s]" on whom the electoral appointments clause conferred power.[1273] Because these state constitutions typically established the legislatures' quorum requirements, voting rules, and member qualifications, Gore wrote, "any attempt to isolate one from the other would give rise to a host of unforeseen practical and legal problems."[1274]

As Gore characterized the case, when the *McPherson* Court stated that the legislative authority could not be "circumscrib[ed]" by a state constitution, it meant only that state constitutions could not be invoked in ways that would *conflict with* the legislature's directives.[1275] "[T]he principle set forth in *McPherson* is not implicated at all," Gore wrote, when a constitutional provision "merely supplements the Legislature's scheme—much like judicial rules of procedure or evidence or principles of statutory construction—and does not invalidate a choice made by the Legislature."[1276] Similarly, a court does not undertake a "legislative" rather than "judicial" act simply because it interprets a statute in a way that extends, but does not conflict with, prior law.[1277] If that were what the electoral appointments clause accomplished simply by conferring power on the state legislatures, Gore argued, one would also have to conclude that the Supreme Court could not interpret federal statutes, because the Constitution likewise conferred "legislative power" only on Congress.[1278]

After this effort to recast *McPherson* and the meaning of the electoral appointments clause, Gore turned to the specific holdings of the Florida court to which Bush objected, which Gore contended did not qualify even as "extensions" of Florida law, much less conflicts therewith.[1279] Bush complained that the Florida court had undertaken its own recount, and had allowed a recount of less than all of the ballots

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revise the conclusions of the state court on these matters of local law.'" Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 20–21 (quoting *McPherson*, 146 U.S. at 23). Gore's clear implication was that the Supreme Court had approved of the state court evaluating the state legislation under its constitution. Once again, however, the context demonstrates how meaningless Gore's observations were. Because the state court in *McPherson* had *upheld* the state legislative act against state constitutional challenge, *see McPherson*, 146 U.S. at 23, there was no *occasion* for the Court to address the propriety of applying a state constitution, and the Supreme Court's statement was nothing more than an unremarkable acknowledgment that it had no reason to address state law issues.

1272. Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 21.
1273. *Id.*
1274. *Id.*
1275. *See id.* at 21–22.
1276. *Id.* at 22.
1277. *See id.* at 23.
1278. *Id.* at 22 n.8.
1279. *Id.* at 23–24.

cast, but that complaint, Gore said, was founded on section 166's directives to the canvassing boards, and the Florida court had fairly concluded that section 168's broad language empowered the courts to order a remedy different from that available through section 166.[1280] Bush also complained that the Florida court relied on the opinion the Supreme Court had earlier vacated, but Gore saw no such "reliance" in the Florida court's opinion, only an explanation of why the court felt it acceptable to include the Palm Beach votes identified even if they were not reported before the court's earlier deadline.[1281] Finally, Bush objected that the Florida court had permitted the counting of "dimpled" ballots, but Gore argued that the Florida court had done nothing but adhere strictly to the legislative standard in characterizing a "legal vote" as any ballot reflecting the "clear intent of the voter."[1282]

To Gore, the Florida court's decision was nothing more than "a routine example of statutory construction . . . entirely consistent with Article II," and Bush's arguments "nothing more than an impermissible attempt to persuade th[e] Court to redetermine these state-law issues."[1283] In contrast to the Florida court's decision in the first proceeding, Gore maintained, there was no reason whatsoever to believe that the Florida court had relied on the state constitution or any other source outside the Florida Code.[1284] Thus, Bush's argument was little more than a claim "either that the Florida Supreme Court deliberately misrepresented the basis for its decision by saying it was interpreting Florida statutory law when it was actually doing something else entirely—or that Florida's highest court seriously erred in interpreting Florida law."[1285] Acting on either contention, Gore wrote, would vio-

1280. *See id.* at 25 (citing FLA. STAT. ANN. § 102.168(8) (West Supp. 2001)).

1281. *See id.*

1282. *Id.* at 25–26. Gore appears to have engaged in some deliberate muddling with respect to Bush's arguments that the Florida court had improperly relied on its earlier decision and approved of the inclusion of dimpled ballots. Although these arguments were not articulated particularly well in Bush's papers, it was relatively clear that they were based on the Florida court's willingness to acknowledge counting that went on after the seven-day deadline pursuant to the Florida court's earlier, vacated decision, and included some dimpled ballots. *See supra* notes 436–38, 680, 710 and accompanying text (describing Broward counting). Gore's response did not really meet the merits of this contention but pretended that it was a different part of the Florida court's opinion, and the court's ordering of counting *prospectively*, about which Bush was complaining.

1283. Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 24. Gore pointed out, in this regard, that whatever differences the justices had about the appropriate remedy, six of the seven agreed on the statutory interpretation issues. *Id.*; *see also supra* notes 1143–45 and accompanying text (describing the consensus among the Florida justices on the interpretation of section 168).

1284. Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 26.

1285. *Id.* at 26–27.

late the "'general rule'" that the Court "'defers to a state court's interpretation of state statute.'"[1286]

With respect to Bush's § 5 objections, which were largely duplicative and/or subsidiary of those he had lodged under the electoral appointments clause,[1287] Gore took much the same approach. Gore claimed that the decision was in all respects consistent with "long-standing Florida election law," and reflected nothing more than the ordinary "post-election statutory interpretation" in which all state courts, including Florida's, routinely engaged.[1288] Bush's challenge to the statewide nature of the recount was "entirely disingenuous," Gore argued, because "it was [Bush] who argued that a statewide recount would be required in the event that [Gore's] contest of the 9000 uncounted Miami-Dade ballots was sustained."[1289]

Of course, Gore did not agree that Bush's § 5 claims were even properly before the Court. As he had in the first proceeding, Gore argued that Bush could not claim any judicial remedy based on § 5 because the statute "is focused exclusively on Congress and provides only an option" for the states.[1290] He claimed that Bush had even acknowledged as much, eventually, in his brief in the first proceeding.[1291] He noted further that Florida's own *legislature*, appearing in the first proceeding before the Supreme Court, had rejected the reading of § 5 that Bush was now again urging the Court to adopt.[1292]

1286. *Id.* at 27 (quoting Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76 (2000)).

1287. Bush argued that it violated *both* the electoral appointments clause and § 5 for the Florida court to allow ballots to be recounted by a court rather than a canvassing board; to allow partial recounts; and to permit dimpled ballots to be counted. *See supra* notes 1236–37, 1245 and accompanying text. In his § 5 argument, however, he broke these objections down even further, complaining additionally of the statewide nature of the recount ordered and the facts that a court, rather than a canvassing board would be determining the validity of a ballot and the circumstances under which a recount could be conducted. *See supra* note 1245 and accompanying text. Beyond these objections, which were essentially sub-issues of the claims he had made under the electoral appointments clause, Bush added three additional respects in which he believed the court's decision conflicted with § 5: by allowing some undervoted ballots to be reviewed by the court de novo and some not at all; by allowing votes submitted after the seven-day deadline to be certified; and by allowing merely dimpled votes in Palm Beach County to be counted even though they would not have been pursuant to the 1990 policy that recognized only ballots with "hanging chads." *See supra* note 1245 and accompanying text.

1288. Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 31, 34 (citing Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975); State *ex rel.* Peacock v. Latham, 170 So. 819 (Fla. 1940), 170 So. 472 (Fla. 1936), 170 So. 309 (Fla. 1936); State *ex rel.* Nuccio v. Williams, 120 So. 310 (Fla. 1929); Darby v. State *ex rel.* McCollough, 75 So. 411 (Fla. 1917); State *ex rel.* Knott v. Haskell, 72 So. 651 (Fla. 1916); State *ex rel.* Drew v. McLin, 16 Fla. 17 (1876)).

1289. *Id.* at 33.

1290. *Id.* at 28–29.

1291. *Id.* (citing Brief for Petitioner, *supra* note 904, at 17–19, 27–29).

1292. *Id.* at 29.

In any event, Gore argued, the Florida court "was attentive to Section 5's requirements, consistent with this Court's directive that 'a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.'"[1293] The court had acknowledged the federal statute, quoting it in full, and had hewn closely to the statutes enacted prior to the 2000 election.[1294]

Importantly, even as he claimed that the Florida court had taken proper notice of § 5, Gore did *not* concede that the Florida Legislature intended the courts to take advantage of the statute's "safe harbor." Nor did Gore suggest that the Florida *court* had recognized such legislative intent. To the contrary, Gore strongly implied that there was no evidence that the Florida Legislature had taken § 5 into account, and while the Florida court could have assumed that the legislature wanted the benefit of the safe harbor by providing for a contest action, the court had no choice but to simply apply the contest statute as written. Specifically, Gore wrote: "There is no question, for example, that a state legislature *can* intend to take a State out of the safe harbor to achieve some other objective and a state court's overriding obligation remains to interpret the terms of the statute as the State Legislature enacted it."[1295]

The final pages of Gore's brief responded to Bush's equal protection and due process arguments. As an initial matter, Gore noted that neither constitutional claim had been properly addressed below. In the Florida Supreme Court, Gore said, Bush had devoted "only one throwaway line" to the constitutional issues, and that line said only that "'the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution.'"[1296] As to his complaint that Florida's counties were applying disparate standards in evaluating the ballots, Bush had "failed to develop any record evidence . . . and can offer only unconfirmed rumors and untested accusations."[1297]

Turning then to the merits, Gore asserted that Bush's equal protection claim had "no support in the law" and "sweeping implications for the conduct of elections."[1298] Gore pointed out that the Florida Supreme Court had indeed pronounced a single, uniform counting stan-

1293. *Id.* at 28 (quoting Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 77–78 (2000)).

1294. *Id.*

1295. *Id.* at 30.

1296. *Id.* at 35 (quoting Amended Brief of Appellees George W. Bush and Dick Cheney at 45 (filed Dec. 8, 2000), Gore v. Harris, 772 So. 2d 1243 (Fla.) (No. SC00-2431), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000)).

1297. *Id.* at 47.

1298. *Id.* at 36.

dard: that "the intent of the voter" must control.[1299] And while that standard would "undeniably" result in "some degree of inconsistency in the treatment of individual ballots," the same could be said of any standard within the law, such as "negligence" or "public forum;" of any manual recount anywhere; of any state that allows some counties to use both optical scan voting and punch cards; and of all the other states where the "intent of the voter" standard was in place.[1300] For that reason, Gore said, "[s]imilar arguments regarding the conduct of elections uniformly have been rejected by the courts," although he offered no citations.[1301]

The recount ordered by the court, Gore argued, sought to "place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated," so that in the end, all persons intending to vote would be treated equally.[1302] By targeting for counting the ballots that initially had not registered any vote, the court had ordered a "narrowly tailored remedy authorized under state law," and by ordering the counting of such votes statewide, rather than in just the counties Gore had identified, the court had actually granted *Bush's* request.[1303] In Gore's view, there would be tabulation differences from county to county as long as there were different tabulation systems used from county to county, and that very disparity "demonstrate[d] the value in having statutory checks and balances such as a manual recount process."[1304] Moreover, all of the ordinary grounds for federal intervention in state election procedures were absent: "petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner; they do not claim that any citizens of Florida were improperly denied their right to vote; and there is no claim of any fraudulent interference with the right of anyone to vote."[1305]

Bush was wrong, Gore said, to claim that the standard for evaluating the ballots varied from county to county.[1306] The Florida court had directed all of the counties to apply the statutory standard and recognize votes only when there was a "'clear indication of the intent of the voter.'"[1307] In *Harris*, its earlier decision, the court had indicated that "[a]rbitrary exclusions would violate the Florida statutory scheme," and that each ballot must be reviewed individually "to deter-

1299. *Id.*
1300. *See id.*
1301. *Id.* To support this argument, Gore noted that Florida's optical scan counties had only a 0.3% undervote rate, or only four ballots out of 1000 that registered no vote with the machine, whereas the counties using a punch card system had a 1.5% undervote rate, or fifteen ballots out of 1000 that registered no vote. *Id.* at 43 n.24.
1302. *Id.* at 38.
1303. *Id.* at 38–39.
1304. *Id.* at 42–43.
1305. *Id.* at 41.
1306. *Id.* at 44.
1307. *Id.* (citation omitted).

mine the voter's intent in the context of the entire ballot."[1308] Between this direction and the circuit court's guidelines for ensuring that the count proceeded in a uniform fashion, Gore argued, there was nothing unconstitutional about the standard for evaluating ballots.[1309]

Indeed, according to Gore, Bush's complaint about the lack of standards to guide the counting was in reality a claim that any recounts at all would be unconstitutional.[1310] Yet "[m]anual counting and recounting of ballots under the intent of the voter standard has been the *rule*, not the exception, in this country for generations—indeed, for most of the period since its founding."[1311] Twenty-two states, including Texas, had statutes allowing manual recounts as a check on punch card tabulation systems, and most of those made no attempt to define what specific appearance was required before a ballot could be counted as a vote.[1312] And even in those states that had enacted more detailed statutes, again like Texas, there was usually a "catch-all [provision allowing] the counting of any ballot that 'otherwise reflects the intent of the voter.'"[1313]

If Bush had a problem with the counting of any particular ballot, Gore said, then his remedy lay with the judicial review of the counting and any disputed ballots.[1314] To end the counting altogether, however, would be an "absurd and unprecedented response to an asserted flaw in the process for tabulating votes," and one that was not required by the equal protection clause.[1315] "In fact," Gore wrote, "if there is anything to petitioners' equal protection claim, the remedy is not to end the counting of votes; it is, instead, to articulate the proper

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1308. *Id.*

1309. *See id.* at 43–44.

1310. *See id.* at 44.

1311. *Id.* at 44–45 (citing eleven state and federal cases approving the counting of votes on ballots from which the voter's intent could be determined).

1312. *Id.* at 46 (citing IND. CODE ANN. § 3-12-1-1 (West 1997); TEX. ELEC. CODE ANN. § 127.130 (Vernon 1986 & Supp. 2000)).

1313. *Id.* Gore was correct that Texas law would have applied no standard more specific than that ordered by Florida's Supreme Court. Texas law provides as follows:

> (d) Subject to Subsection (e), in any manual recount conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
>
> (1) at least two corners of the chad are detached;
>
> (2) light is visible through the hole;
>
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or
>
> (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.
>
> (e) Subsection (d) does not supersede any clearly ascertainable intent of the voter.

TEX. ELEC. CODE ANN. § 127.130(d)–(e) (Vernon Supp. 2002).

1314. Brief for Respondent Albert Gore, Jr., *supra* note 1263, at 47.

1315. *See id.*

standard and—as required by state law—to have the counting go forward under that standard."[1316]

Because Bush's due process arguments were largely reformulations of his electoral appointments clause and equal protection contentions, Gore essentially reiterated the arguments he had already made. To Bush's claim that the recounts were proceeding in a standardless fashion subject to partisan influence, Gore reminded the Court that the Florida court had adopted a standard, and that Bush had no factual basis or evidence on which to suggest that the recounts were being improperly conducted. To Bush's claim that the Florida court had retroactively changed the law, Gore referred to his earlier arguments and responded that "the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it."[1317] Further, to make out a due process claim on this basis, Bush would have to show that any change in the law arbitrarily deprived him of a "cognizable liberty or property interest," and yet "[t]he only due process right even arguably implicated" ran to the voters whose undervoted ballots had never been reviewed.[1318]

"At bottom," Gore wrote, "all petitioners can really claim is that, in their view, the Florida Supreme Court got Florida law wrong."[1319] To act on his contention, and reverse the Florida court, would "do violence both to principles of federalism and to the independence of the judiciary throughout the United States."[1320] It would also have the "unthinkable consequences" of invalidating Florida's entire election and "calling into question numerous other results nationwide in a host of local, state, and national elections."[1321]

With such words, Gore threw the gauntlet down before the justices who had agreed to stay the counting. They would have to choose between permitting the imperfect counting in Florida and abandoning their previous commitment to states' rights. The language most likely came from Laurence Tribe.

Tribe appeared on Gore's brief on the merits as the "counsel of record,"[1322] the designation given to the lead counsel on a case.[1323] He had learned of the Florida Supreme Court's decision in the middle of a make-up class at Harvard on Friday, and he had begun working on the brief immediately, only to travel to Washington on Saturday afternoon after the Court had stayed the Florida order and scheduled

1316. *Id.*
1317. *Id.* at 48.
1318. *See id.* at 48–49 (citing E. Enters. v. Apfel, 524 U.S. 498, 537 (1998) (O'Connor, J., plurality opinion); *id.* at 548–49 (Kennedy, J., concurring in part and dissenting in part); *id.* at 556 (Breyer, J., dissenting)).
1319. *Id.* at 50.
1320. *Id.*
1321. *Id.* at 48.
1322. *E.g.*, *id.* at 51.
1323. SUP. CT. R. 9, 34.

oral argument for Monday.[1324] The case would mark at least his twenty-first appearance before the Supreme Court.[1325]

On Saturday night, however, Warren Christopher visited Tribe at his hotel and informed him that Gore had decided he wanted David Boies to argue the case.[1326] As Tribe has told the story, Christopher said that Gore felt the argument needed someone intimately familiar with Florida law, and Boies had better qualifications in that regard.[1327] Tribe says he disagreed, feeling that the Supreme Court would not have taken the case unless they were concerned about the constitutional implications, but he quickly concluded that the decision had been irrevocably made.[1328]

Although he was disappointed by the Vice President's decision, Tribe continued working on the brief.[1329] After the brief was filed, at 4:00 Sunday afternoon, Tribe worked with Boies until 7:00 p.m. discussing the questions that were likely to arise.[1330] But he did not attend the oral argument. He had asked not to, he said, because he thought it would be too difficult to maintain his silence as the justices leveled questions at Boies.[1331]

D. *The Oral Argument*

The oral argument in *Bush v. Gore* began promptly at 11:00 a.m. on Monday, December 11.[1332] From the first questions, it became clear that the case would *not* turn on Florida law.

Justice Kennedy opened the questioning of Ted Olson by expressing concern that Bush's theory of the electoral appointments clause would

1324. KAPLAN, *supra* note 1006, at 246–47, 253.

1325. *See* Neil A. Lewis, *Old Hands at Arguing Before Supreme Court: For Democrats, a Legal Scholar*, N.Y. TIMES, Dec. 1, 2000, at A31. *But see* KAPLAN, *supra* note 1006, at 246 (reporting that Tribe had argued thirty cases before the Court). A computer search through Westlaw reveals that, before the election cases, Tribe played some role as counsel in thirty-three reported cases before the Court, appearing as lead counsel for the parties in twenty-six of them.

1326. KAPLAN, *supra* note 1006, at 248; DEADLOCK, *supra* note 1, at 218.

1327. DEADLOCK, *supra* note 1, at 218; KAPLAN, *supra* note 1006, at 248. David Boies had argued before the Court once previously, in *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1 (1987), and lost to Laurence Tribe. KAPLAN, *supra* note 1006, at 250; *Pennzoil*, 481 U.S. at 3, 18.

1328. KAPLAN, *supra* note 1006, at 249–50; DEADLOCK, *supra* note 1, at 218–19.

1329. KAPLAN, *supra* note 1006, at 250–52; DEADLOCK, *supra* note 1, at 219.

1330. DEADLOCK, *supra* note 1, at 219; KAPLAN, *supra* note 1006, at 251–52.

1331. DEADLOCK, *supra* note 1, at 221; KAPLAN, *supra* note 1006, at 252. Ironically, Tribe had boarded a plane to *south Florida*, where he and his wife had a second home. DEADLOCK, *supra* note 1, at 221.

1332. Transcript of Oral Argument at 1, Bush v. Gore, 531 U.S. 98 (2000) (No. SC00-949), *available at* 2000 WL 1804429. The citations provided here are from the official transcript available from the United States Supreme Court. However, because the official transcript does not identify the justices who asked particular questions, those justices have been identified from a review of the oral argument tape, *at* http://oyez.nwu.edu/cases/cases.cgi?case_id=766&command=show.

leave state legislatures "unmoored" to their state constitutions.[1333] Justice O'Connor and he were particularly troubled by Bush's suggestion that the Florida court had no jurisdiction over the case simply because it had founded its jurisdiction on the state constitution.[1334] Justice O'Connor preferred to think that Article II "create[d] a presumption that the scheme the legislature has set out will be followed even by judicial review in election matters," and she noted that the Florida Legislature had not enacted special contest provisions with respect to presidential elections, which ordinarily would leave those contests subject to appellate review the way any other election contest would be.[1335]

Initially, Olson refused to budge on the point. He noted that authority was "explicitly vested in the circuit court," and that the legislature was not required to provide for appellate review.[1336] Facing resistance from his own majority, however, Olson apparently decided to move on. "It may not be the most powerful argument we bring to this Court," Olson said, and, almost under his breath, Justice Kennedy responded, "I think that's right."[1337] The gallery laughed out loud.

With the state jurisdictional issue all but dismissed, the justices turned to Bush's contention that the Florida court had "changed the law" in violation of the electoral appointments clause and § 5. Justice Souter was especially skeptical of Bush's position that the Florida court had defied the legislative power conferred by those provisions, noting that "subsection 8 [of the contest statute, section 168] gives at least to the circuit court, leaving aside the question of appellate jurisdiction, about as broad a grant to fashion orders as I can imagine going into a statute."[1338] Olson acknowledged that subsection 8 was written broadly, but contended that to interpret it to permit the Florida court's action would violate the larger "statutory framework," including section 166, that had vested recount authority in elections officials, not the courts.[1339] Justice Souter, at least, was not persuaded:

> It may well be and I'll grant you for the sake of argument that there would be a sound interpretive theory that in effect would coordinate these two statutes, 166 and 168, in a way that the Florida Supreme Court has not done. But that's a question of Florida Supreme Court statutory construction and unless you can convince us, it seems to me, that in construing [section] 168, which is what we are concerned with now, the Florida Supreme Court has simply

1333. *Id.* at 4.
1334. *See id.* at 7 ("I have the same problem Justice Kennedy does, apparently . . . .").
1335. *See id.* at 5, 7.
1336. *Id.* at 5.
1337. *Id.* at 6.
1338. *Id.* at 13.
1339. *Id.* at 13–14.

> passed the bounds of legitimate statutory construction, then I don't see how we can find an article II violation here.[1340]

After this exchange, Olson shifted his focus from the electoral appointments clause to the "timetable" established by § 5, and articulated a § 5 theory that had appeared nowhere in Bush's brief. The Florida court, Olson argued, had engaged in an "utter revision of the timetables" in the Florida Code.[1341] When Justice Souter responded that there *were* no "timetables" for contests under the Florida Code, Olson invoked § 5, and claimed that the Florida court "incorrectly interpreted and construed federal law . . . because what they have inevitably done is provide a process whereby it is virtually impossible, if not completely impossible . . . to have these issues resolved and the controversies resolved in time for that federal statutory deadline."[1342]

Souter continued to press. "[I]f your concern was with impossibility," he said, "why didn't you let the process run instead of asking for a stay?"[1343] Olson's response was telling. He complained that the process "already had violated Article II of the Constitution," and was "already throwing in jeopardy compliance with [§] 5," but did not even mention the Equal Protection and Due Process Clauses.[1344] That "task" fell to Justice Kennedy: "Oh, and I thought your point was that the process is being conducted in violation of the Equal Protection Clause and it is standardless."[1345] It would not be the only time that the justices who had ordered the stay would rescue Olson.

With equal protection now the issue, Justice Breyer observed that Bush had complained about the Florida court's "intent of the voter" standard and asked that Olson advise the Court what a "fair" standard would be.[1346] Olson was understandably hesitant to articulate one, not wanting to help the Court "cure" the equal protection problem, but Justice Breyer insisted.[1347] Finally, Olson answered that, at a minimum, "penetration of the ballot card would be required."[1348]

Justice Souter then joined the exchange, asking whether it would be feasible for the Court to remand the case and ask the Secretary of State to advise what the standard should be.[1349] Surprisingly, Olson responded that that would be a "feasible" outcome.[1350] Olson's next response, however, was even more remarkable.

1340. *Id.* at 14–15.
1341. *Id.*
1342. *Id.* at 14–17.
1343. *Id.* at 17.
1344. *Id.*
1345. *Id.*
1346. *See id.* at 17–18.
1347. *See id.* at 18.
1348. *Id.*
1349. *Id.* at 20.
1350. *Id.*

> QUESTION [by Justice Souter]: Is it your position that if any official, judicial or executive, at this point were to purport to lay down a statewide standard which went to a lower level, a more specific level than intent of the voter, and said, for example, count dimpled chads or don't count dimpled chads. In your judgment, would that be a violation of Article II?
>
> MR. OLSON: I don't think it would be a violation of Article II provided that [dimpled chads were not counted].[1351]

This was an extraordinary concession. In one breath, Olson appeared to have eliminated the constitutional conundrum in which the Florida Supreme Court had found itself: the fact that the broad statutory standard might be insufficient for equal protection purposes, but a more specific one could not be announced without intruding on legislative prerogative under the electoral appointments clause.

Justice Scalia simply could not sit quiet. Plainly, Olson had to be reminded to argue that a more specific standard was *already in place*: namely, that a vote should be counted when the voter followed the instructions given at the polls. "Mr. Olson," Scalia said, "[i]t is also part of your case, is it not, . . . that there is no wrong when a machine does not count those ballots that it's not supposed to count?"[1352] With that, Olson was jolted back to his case: "That's absolutely correct, Justice Scalia."[1353] Presumably for emphasis, Scalia restated the contention: "The voters are instructed to detach the chads entirely, and [when] the machine, as predicted, does not count those chads where those instructions are not followed, there isn't any wrong."[1354]

Joseph Klock, arguing next, for the Secretary of State and the Canvassing Commission, took Justice Scalia's cue. When Justice Breyer pressed him as to what the "fair" standard would be, Klock said it should be that dictated by the instructions given the voters: "if the ballot is not properly executed, it's not a legal vote."[1355] It did not matter, Klock asserted, that this would leave uncounted at least some ballots that clearly reflected the voters' intent.[1356] Under the legislative scheme, the only entities empowered to recognize votes were canvassing boards, and under the constraints of the electoral appointments clause, the courts could not travel outside that scheme and themselves define a "legal vote."[1357]

Justice Stevens accepted Klock's position for the sake of argument but asked him how he thought ballots should be counted in the event of a machine malfunction.[1358] In that situation, Justice Stevens asked,

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1351. *Id.* at 23–24.
1352. *Id.* at 24.
1353. *Id.*
1354. *Id.*
1355. *Id.* at 30–31.
1356. *See id.* at 31.
1357. *Id.* at 34–35.
1358. *Id.* at 33, 35.

would it not be acceptable for a court to employ the "intent of the voter" standard, which the legislature had expressly chosen at least in the context of damaged or defective ballots?[1359] Plainly, Justice Stevens was trying to establish that the legislature itself considered the "intent of the voter" a standard sufficiently specific to evaluate ballots. Klock saw the point coming, however, and sidestepped it: "[T]here could be problems under [that statutory standard]," Klock said, and in any event, it "was designed for a very limited situation where there was a problem with the mechanism of voting."[1360] Before Justice Stevens had the chance to push further, Klock's time was up.[1361]

The irony of Gore's choosing David Boies for the oral argument emerged as soon as Boies walked to the podium. "Let me begin by addressing what happened in the *Beckstrom* case," Boies said, referring to a 1998 Florida Supreme Court decision.[1362] The justices, however, apparently had little interest in Florida law. Justice Kennedy interrupted and asked Boies to address the Court's federal jurisdiction.[1363]

The exchange that followed focused extensively on the Supreme Court's jurisdiction to address § 5 and the nature of the Florida court's reference to the federal law. Observing that the Florida court had said it was "cognizant" of § 5, Justice Kennedy suggested that that statement indicated that the Florida court had interpreted the federal statute.[1364] Boies was noncommittal on the point: it looked to him as though the court was simply saying it wanted the state to be able to take advantage of § 5's "safe harbor."[1365] Apparently seeking a more definite basis for the Court's jurisdiction, Kennedy continued: "it seems to me that if the Florida court, and presumably the Florida Legislature have acted with reference to 3 U.S.C. § 5 that it presents now a federal question for us to determine whether or not there is or is not a new law by reason of the . . . two Florida Supreme Court decisions."[1366] Boies, however, held fast to his "non-jurisdictional" position: he acknowledged that the Florida court "desire[d]" to fit within § 5, especially its "deadline," but he did not concede that the Florida court had "interpreted" the federal statute.[1367]

Although Boies refused to characterize the Florida court's decision in a way that would ensure federal jurisdiction under § 5, he was willing to debate the substantive core of the statute and defend the Flor-

1359. *Id.*
1360. *Id.* at 36.
1361. *See id.*
1362. *Id.*
1363. *Id.* at 36–37.
1364. *Id.* at 37.
1365. *Id.*
1366. *Id.* at 38.
1367. *See id.* at 39.

ida court against the charge that it had "changed the law." The Court might legitimately find such a "change," Boies argued, if it concluded that the Florida court's interpretation were "either a sham or it is so misguided that it is simply untenable in any sense."[1368] Otherwise, Boies said, the standard ought be the one the Court had "generally applied in giving deference to state supreme court decisions," and the Florida court was certainly worthy of that deference.[1369]

Justice O'Connor responded that Boies's standard did not sufficiently account for the special role conferred on state legislatures by the electoral appointments clause: "[I]n this one context, not when courts review laws generally for general elections, but in the context of selection of presidential electors, isn't there a big red flag up there, watch out?"[1370] Put so generally, this was a hard proposition with which to argue, and Boies did not even try. His candor, however, led perfectly into a direct reprimand of the Florida Supreme Court.

> MR. BOIES: I think there is [a red flag] in a sense, Your Honor, and I think the Florida Supreme Court was grappling with that.
>
> QUESTION [by Justice O'Connor]: And you think it did it properly?
>
> MR. BOIES: I think it did do it properly.
>
> QUESTION [by Justice O'Connor]: That's, I think, a concern that we have, and I did not find really a response by the Florida Supreme Court to this Court's remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes and deadlines were just fine and they would go ahead and adhere to them, and I found that troublesome.[1371]

Justice Scalia went further, complaining that the Florida court had "contravene[d] our vacating of their prior order" by ordering the "certification" of the votes identified by the Palm Beach and Miami-Dade boards.[1372]

1368. *Id.* at 42–43.
1369. *See id.* at 43.
1370. *Id.* at 43–44.
1371. *Id.* at 44.
1372. *See id.* at 46. Boies was mystified by Justice Scalia's complaint in this regard and began trying to convince the justice that amending a certification was always the remedy in a contest action. *See id.* at 46–48 (extending exchange between Justice Scalia and Boies with respect to the Florida court's remedy). It was the appellate litigator's communications nightmare: Justice Scalia never really articulated why the Florida court behaved scandalously in ordering the Secretary of State to amend her "certification" to add the Palm Beach and Miami-Dade votes, and Boies wasted precious minutes of his argument unsuccessfully trying to figure out the nature of Scalia's objection. It may be that Scalia objected to the fact that the Florida court thought there was any "certification" in place to amend—the only "certification" in existence might be invalid unless the Florida court responded to the Supreme Court with an opinion that would satisfy the concerns it had raised in the first proceeding—but it remains hard to say. *See id.* at 47 ("[W]hat the Florida Supreme Court said is that there shall be added to the certification these additional numbers . . . . It's not added to the certification."). A cynic might alternatively conclude—particularly given Jus-

With the scolding out of the way, approximately one-third of the way into Boies's argument, the Court turned with full force to what would become the basis for the Republican victory: Bush's claim that the counting ordered by the Florida court violated the Equal Protection Clause. Justice Kennedy cut directly to the issue: "Do you think that in the contest phase, there must be a uniform standard for counting the ballots?"[1373] Boies said yes, and in fact there was one: whether the intent of the voter was reflected on the ballot.[1374]

Justice Kennedy appeared loaded for bear. "That's very general," he said, and "[i]t runs throughout the law," but "[e]ven a dog knows the difference in being stumbled over and being kicked."[1375] The difference between a general intent standard and the one in this case, he continued, was the focus on "this little piece of paper called a ballot."[1376] Under these circumstances, Justice Kennedy wanted to know, "could each county give their own interpretation to what intent means, so long as they are in good faith and with some reasonable basis finding intent? . . . Could that vary from county to county?"[1377]

Without a moment's thought, Boies responded, "I think it can vary from individual to individual."[1378] The answer was apparently so abrupt that Justice Kennedy asked another version of the same question: "so that even in one county [it] can vary from table to table on counting these ballots?"[1379] Boies then began to explain. Some variation "on the margin," as Boies put it, would be there any time the law employed an "intent" standard, whether it be in criminal law or administrative practice or elsewhere.[1380] And while "intent" was "susceptible of a more specific standard," virtually every state that had attempted a more specific standard, including Texas, had also adopted a general provision allowing a ballot to be counted whenever the voter's intent could be discerned.[1381]

Justice Souter then joined the questioning, and it became clear that the justices who had issued the stay order were not the only ones left wanting by Gore's position.

> QUESTION [by Justice Souter]: . . . [I]n jury to jury cases, we assume that there is not an overall objective standard that answers

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tice Scalia's uncharacteristically repetitive and cryptic responses to Boies, and the fact that it was Justice Breyer who put a stop to the bickering—that Scalia was deliberately eating up Boies's time at the podium. *See id.* at 46–48; *see also id.* at 55–58 (Justices Scalia and O'Connor and Chief Justice Rehnquist asking Boies to do nothing more than clarify aspects of the Florida court's decision).

1373. *Id.* at 49.
1374. *Id.*
1375. *Id.*
1376. *See id.*
1377. *Id.* at 49–50.
1378. *Id.* at 50.
1379. *Id.*
1380. *Id.*
1381. *See id.* at 50–51.

> all questions definitively. We are assuming that there is detail that cannot be captured by an objective rule. [But t]he assumption of this question, and . . . I think, it's behind what's bothering Justice Kennedy, Justice Breyer, me and others, is, we're assuming there's a category in which there just is no other—there is no subjective appeal. All we have are certain physical characteristics. Those physical characteristics we are told are being treated differently from county to county. In that case, where there is no subjective counter indication, isn't it a denial of equal protection to allow that variation?[1382]

Boies attempted to respond to this by claiming that the counties were not actually applying different "objective standards" to the same physical characteristics.[1383] Justice Souter, however, would not accept that contention, and because "[w]e can't send this thing back for more fact finding," asked Boies to assume that the counties were in fact applying different objective standards.[1384] "On that assumption," Souter asked, "what would you tell them to do about it?"[1385]

The moment of reckoning had come for Gore. On the one hand, he could stand on the ground that there was nothing wrong with the "intent of the voter" standard and that more objective criteria would be inappropriate, risking what appeared to be the consensus that the intent standard was insufficient under the Equal Protection Clause. On the other, he could accept that the "intent of the voter" standard was constitutionally unsound, and commit to some form of uniform, objective rule, but several justices might decide that the Court could announce no new rule without violating the electoral appointments clause, and in any event, a remand for a more specific standard would consume virtually all the time remaining before midnight on December 13.

Facing these risks, Boies paused for a very long while, and then all but acknowledged that he was out of choices: "that's a very hard question."[1386] By the time that he decided to hedge, and urge the use of the Texas standard—the one that *combined* objective criteria with a "voter's intent" rule[1387]—his equivocation was clear, and several of the justices had grown impatient. Justice Scalia delivered an exasperated barb—"you would tell them to count every vote"—to guffaws from the gallery.[1388] And Justice O'Connor no longer concealed her

1382. *Id.* at 52.

1383. *Id.* at 52–53 ("Maybe I'm quarreling with a premise that says there are these objective criteria. Maybe if you had specific objective criteria in one county that says we're going to count indented ballots and another county that said we're only going to count the ballot if it is punched through.").

1384. *Id.* at 53.

1385. *Id.*

1386. *Id.*

1387. *See id.* at 54; *see also supra* note 1381 and accompanying text.

1388. *See id.* at 53.

disgust: "why isn't the standard the one that voters are instructed to follow, for goodness sakes?"[1389]

Much as the justices in favor of the stay had jumped in to save Ted Olson, the justices dissenting from the stay did their best to help Boies recover. Justice Stevens asked whether the fact that a single judge reviewed the counts for uniformity solved the problem, and Boies heartily agreed: "Yes, that's what I was going to say, Your Honor, that what you have here is you have a series of decisions that people get a right to object to . . . . They submit written objections, and then that's going to be reviewed by a court."[1390] Justice Souter followed up on this alternative approach, asking whether the trial judge could approve the counting even if the counties followed different rules, as long as he concluded that those rules were all aimed at discerning the "intent of the voter."[1391] This gave Boies the chance to emphasize that any variations in the counting pursuant to the voter's intent rule would pale in comparison to the variations caused by the fact that the counties all had different voting and tabulation systems.[1392] Indeed, during Olson's rebuttal, Justice Ginsburg returned to that point, questioning the very idea of a single standard: "how can you have one standard when there are so many varieties of ballots?"[1393]

The case was inevitably complicated, however, by the specter of December 12. Justice Kennedy, who now appeared Gore's only hope for switching sides (after O'Connor's revealing comment), observed that the contest period required "the setting of standards," and judicial review, and yet the Florida Supreme Court had rendered that impossible when it "truncated" the contest period "by 19 days."[1394] Boies responded simply that the counting might still be completed in the "time available."[1395] He did not assert that the "time available" might extend beyond December 12. Indeed, he actually suggested the De-

1389. *Id.* at 58.
1390. *Id.* at 54.
1391. *Id.* at 71.
1392. *Id.* at 72.
1393. *Id.* at 74.
1394. *See id.* at 65–66. Justice Kennedy's reference to "truncating" the contest period by *nineteen* days made little sense. He was clearly referring to the Florida court's decision to extend the deadline for certification, but that extension was for at most *twelve* days—from November 14, the seven-day deadline always accepted by Bush, to November 26—and more accurately, for only *eight* days—from November 18, the first day certification became possible due to the need to count overseas absentee ballots, to November 26. The contest statute required, after all, that a candidate contest "certification," and a candidate would not have wanted to risk bringing a contest action prior to announcement of the final results, so the contest period could never have begun until one of those two dates. *See* FLA. STAT. ANN. § 102.168 (West Supp. 2001). Further, even assuming Justice Kennedy misspoke, and meant to say that the Florida court *reduced* the contest period *to* nineteen days, his reference still would have been wrong. If December 12 were considered the deadline, the Florida court's extension to November 26 reduced the contest period to *sixteen*, not nineteen, days.
1395. Transcript of Oral Argument, *supra* note 1332, at 66.

cember 12 deadline could be met if the Court told Florida it was not really necessary to count the undervotes in counties other than those Boies had contested.[1396]

E. *The Florida Court's Decision on Remand:* Palm Beach County Canvassing Board v. Harris II

By 12:30 on Monday afternoon, December 11, the argument was over, and the case was in the Supreme Court's hands.[1397] There would be no more briefing, but there was one final document still bearing potential to influence the outcome. On Monday evening, hours after the nation had heard it reprimanded by the highest court in the land, the Florida Supreme Court issued its opinion[1398] responding to the remand of *Bush v. Palm Beach County Canvassing Board.* Six of the seven justices joined the opinion; Chief Justice Wells issued a single-sentence dissent.[1399]

An early footnote in the opinion was aimed at explaining why the court had not responded earlier to the Supreme Court's remand. The court explained that, in the week since the case was remanded, it had allowed the parties to file supplemental briefs addressing implementation of the Supreme Court's mandate, and had considered briefs and heard oral argument in the contest action, "which also required immediate attention."[1400] The majority disagreed with Chief Justice Wells's position that the opinion should not issue while *Bush v. Gore* was pending, and quietly jabbed back at the Court: "we have issued this opinion as expeditiously as possible in order to *timely* respond to the questions presented by the Supreme Court."[1401]

In an opening section of the opinion entitled "The Applicable Law," the court introduced the federal and state law that governed its decision.[1402] Calling it "[a] fundamental principle governing presidential election law in the United States," the court quoted the electoral appointments clause in full, and then quoted the by now well-known passage from *McPherson v. Blacker* interpreting the clause.[1403] Section 5 was also quoted in full.[1404] The court then wrote:

> Consistent with the above provisions of federal law and with long-standing principles of state law, the Florida Legislature in 1951 en-

1396. *See id.* at 68–69.
1397. *Id.* at 78.
1398. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000) [hereinafter *Palm Beach II*].
1399. *Id.* at 1292. Chief Justice Wells did not agree that the opinion should be released while *Bush v. Gore* was pending and did not concur in the merits of the opinion. *Id.* (Wells, C.J., dissenting).
1400. *Id.* at 1279 n.2.
1401. *Id.* (emphasis added).
1402. *Id.* at 1281–82.
1403. *Id.* at 1281.
1404. *Id.* at 1282 (quoting 3 U.S.C. § 5 (1994)).

> acted the Florida Election Code, . . .which sets forth uniform criteria regulating elections in this state and which provides methods and procedures, including judicial methods and procedures, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of this state.[1405]

After acknowledging the federal law, the court sought to erase any impression that its earlier decision had been based on the Florida Constitution. Its decision on the first issue—whether manual recounts could be conducted only when there was some form of machine malfunction—remained the same.[1406] Its decision on the second issue, however—the circumstances under which the Secretary of State and the Canvassing Commission should accept the results of manual recounts submitted after the seven-day deadline in sections 102.111 and 102.112—read quite differently.[1407] As it had done in the first opinion, the court noted that the recount provisions of section 102.166, in particular the provision allowing a candidate to request a recount at any time prior to certification, conflicted with the seven-day deadlines for certification, because virtually any recount would take more than a single day to complete.[1408] The court's *resolution* of the conflict, though, became unambiguously a matter of statutory interpretation: "if the seven-day limit were to be strictly enforced, the manual recount provision would be eviscerated and rendered meaningless. The Legislature could not have intended such a result."[1409]

The court also modified its analysis of the Secretary of State's discretion to accept returns after the seven-day deadline. The court reinstated its holdings that the Secretary had discretion to accept amended returns after the seven-day deadline had passed and that she could only refuse such amended returns if accepting the returns would preclude the losing party from pursuing a contest action or would result in Florida's losing its participation in the electoral college, "as provided in section 5."[1410] It added language, however, designed to limit its constraints on the Secretary's discretion to *presidential* elections where a county has "proceed[ed] in good faith with a manual recount under section 102.166."[1411]

The earlier references to the Florida Constitution[1412] no longer appeared. The court asserted, in its conclusion, that its earlier opinion

1405. *Id.*
1406. *Compare id.* at 1282–84, *with* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228–30 (Fla.), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) [hereinafter *Palm Beach I*].
1407. *Compare Palm Beach II*, 772 So. 2d at 1284–90, *with Palm Beach I*, 772 So. 2d at 1230–40.
1408. *Compare Palm Beach II*, 772 So. 2d at 1284, *with Palm Beach I*, 772 So. 2d at 1232–33.
1409. *Palm Beach II*, 772 So. 2d at 1287.
1410. *Id.* at 1289–91; *see also Palm Beach I*, 772 So. 2d at 1237, 1239.
1411. *Palm Beach II*, 772 So. 2d at 1289.
1412. *See Palm Beach I*, 772 So. 2d at 1236–38.

had "identified the right of Florida's citizens to vote and to have elections determined by the will of the Florida's voters as important *policy concerns* of the Florida Legislature in enacting Florida's election code."[1413] Yet the limits on the Secretary's discretion were based on the court's "perception of legislative intent," and reflected the court's "view that the Legislature would not wish to endanger Florida's vote being counted in a presidential election."[1414]

Finally, the court sought to justify its earlier decision to extend certification of the election results until November 26.[1415] The court explained that Palm Beach County, and potentially other counties, were "thwarted in their efforts" to complete manual recounts by the November 13 Division of Elections opinion that the court had since ruled was legally erroneous.[1416] Had the counties not been thrown off by that opinion, the court wrote, they might have completed their manual recounts by November 18, the earliest date on which the Secretary could have certified the final election results (*i.e.*, the day after the last overseas ballots could arrive).[1417] Thus, by selecting November 26, five days after the issuance of its opinion, the court simply restored the five days the counties lost because of the erroneous Division of Elections opinion: "[t]he November 26, 2000 date was not a new 'deadline' and has no effect in future elections."[1418]

F. *The Supreme Court's Decision*

After the Florida Supreme Court weighed in on December 11, there was no more news to cover. The nation sat waiting for the Supreme Court to rule, and the media was reduced to broadcasting stills of the Court building. One half expected smoke to rise from the roof, either anointing a president or signaling that the controversy would continue.

The smoke never rose, but at 10:00 on Tuesday night, December 12, the Court issued its decision[1419] in *Bush v. Gore*.[1420] The decision was not read from the bench, as is customary—the justices had all gone home. The pressroom staff simply handed out copies[1421] of the six opinions: the five-member majority's per curiam opinion, a concurrence by Chief Justice Rehnquist joined by Justices Scalia and

1413. *Palm Beach II*, 772 So. 2d at 1290 (emphasis added).
1414. *Id.* at 1291.
1415. *See Palm Beach I*, 772 So. 2d at 1240.
1416. *Palm Beach II*, 772 So. 2d at 1290.
1417. *Id.* at 1290; *see also id.* at 1288.
1418. *Id.* at 1290.
1419. Linda Greenhouse, *By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle: An Awareness of Hazards*, N.Y. TIMES, Dec. 13, 2000, at A1.
1420. 531 U.S. 98 (2000).
1421. Greenhouse, *supra* note 1419.

Thomas, and four dissents, by Justices Stevens, Souter, Ginsburg and Breyer, each joined to different extents by the other dissenters.[1422]

The majority flatly reversed the Florida Supreme Court and remanded "for further proceedings not inconsistent with this opinion."[1423] There would be no meaningful "further proceedings," however. The Court found that the recounts ordered by the lower court violated the Equal Protection Clause, and that the equal protection problem could not be cured in time to comport with the Florida Legislature's intent that any contest action be completed by December 12.[1424] The majority did not address Bush's claims that the Florida court had violated the electoral appointments clause and § 5, although the three justices on Chief Justice Rehnquist's concurrence concluded that it had.[1425]

The majority began by observing that the electoral appointments clause does not confer upon any citizen the right to vote for the presidential electors, vesting that power instead in the state legislatures.[1426] When the state legislatures choose to delegate that right, however, "the [individual's] right to vote as the legislature has prescribed is *fundamental*,"[1427] and "the State may not, by later arbitrary and dispa-

1422. *Bush*, 531 U.S. at 100; *id.* at 111 (Rehnquist, C.J., concurring); *id.* at 123 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 135 (Ginsburg, J., dissenting); *id.* at 144 (Breyer, J., dissenting).

1423. *See id.* at 111.

1424. *See id.* at 109–10.

1425. *See id.* at 112–20 (Rehnquist, C.J., concurring).

1426. *Id.* at 104 (citing U.S. CONST. art. II, § 1; McPherson v. Blacker, 146 U.S. 1, 35 (1892)).

1427. *Id.* (emphasis added). The majority's decision to label as "fundamental" the right to vote in a presidential election (once the legislature conferred it) seemed to bear serious ramifications, because traditionally, rights that the Court deems "fundamental" cannot be burdened by state action without triggering "strict scrutiny" by the Court. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). One would thus have thought that the conclusion warranted an extensive discussion, but the Court devoted only one sentence to it: "One source of [the vote's] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush*, 531 U.S. at 104. And even this explanation was odd, because the very principle that votes must be accorded equal weight followed upon the holding that the right to vote was fundamental, not the other way around. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) ("Since the right of suffrage is a fundamental matter . . . , any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized," and "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with citizens living in other parts of the state."). Further, there was a special oddity about deeming the right to vote in a *presidential* election "fundamental," because, as the *Bush v. Gore* Court itself acknowledged, the legislature could under the electoral appointments clause choose to do away with the right completely. Bush v. Gore, 531 U.S. at 104.

rate treatment, value one person's vote over that of another."[1428] According to the majority, the Florida court had done just that, by allowing the counting to go forward under the "intent of the voter" standard in the absence of more specific rules to ensure that the "intent of the voter" standard was equally applied.[1429]

The majority noted that Gore's counsel had acknowledged during argument that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[1430] The majority also cited examples from the record suggesting that the standards for finding a legal vote had *already* diverged: testimony that the three Miami-Dade officials seemed to be applying three different criteria and testimony that the Palm Beach board had begun with a "hanging-chad" rule, had switched to a "sunshine" rule, had returned to a "hanging-chad" rule, and then abandoned any bright-line rule, "only to have a court order that the county consider dimpled chads legal."[1431] By ordering the inclusion of votes identified under differing standards, the majority wrote, the Florida court "ratified th[e] uneven treatment" of Florida voters.[1432]

The Court seemed to suggest that these variations in the standard for evaluating ballots would be sufficient to find an equal protection violation, but it did not stop there. The order to count only undervotes also reflected differential treatment, the majority said, be-

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So it was a bit of an anomaly, one that might at least merit some discussion, to say that the state could fully eliminate a right but could not burden it.

With this said, it is also odd that having deemed the right to vote in a presidential election "fundamental," the majority did not go on to suggest that the Florida counting should undergo "strict scrutiny." To the contrary, the majority stated only that the state must refrain from engaging in "arbitrary and disparate treatment" of its citizens' votes, *id.* at 104–05, which suggested a much more lenient evaluation than strict scrutiny usually involves. It may be that the majority deemed it unnecessary to apply strict scrutiny because it felt the state's action could not survive even a lower form of review, but if that were the case, then it would seem that labeling the right "fundamental" was unnecessary as well. *Cf.* Romer v. Evans, 517 U.S. 620, 625–26 (1996) (holding that Colorado law violated equal protection rights of homosexuals even under rational basis review and declining to decide whether classifications based on sexual orientation should be subject to strict scrutiny).

1428. *Bush*, 531 U.S. at 104–05 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

1429. *Id.* at 105–06.

1430. *Id.* at 106.

1431. *See id.* at 106–07 (citing Trial Transcript at 497, 499, Gore v. Harris, No. 00-2808 (Fla. Cir. Ct. Dec. 2–3, 2000), *available in unofficial version at* 2000 WL 1802941). The majority offered a record citation for the first testimony referenced but not for the second. And the reality was that the Court's rendition of what had happened in Palm Beach—the second piece of "evidence"—was inaccurate. Judge Burton did not testify that a court told the board to "consider dimpled chads legal." He testified that Judge Labarga ordered that no ballots should be excluded on the basis of a per se rule, such as "all dimpled ballots are excluded." *See* Trial Transcript, *supra* note 362, at 91–94 (relating Judge Burton's testimony on the point).

1432. *Bush*, 531 U.S. at 107.

cause the citizen who "undervoted" would have his ballot evaluated for intent, but the estimated 110,000 voters who "overvoted" would not, "even if a manual examination of the ballot would reveal the requisite indicia of intent."[1433] Further, because the Florida court had been willing to let a partial count from Miami-Dade be certified, the majority had "no assurance" that the Florida court would require that all the recounts be complete. In fact, Gore's counsel had encouraged that course, and stated that the Florida decision would allow for it.[1434] Finally, because the Florida court's order did not specify who would do the counting, the canvassing boards "were forced to pull together ad hoc teams of judges . . . who had no previous training in handling and interpreting ballots," and even those allowed to observe had been prohibited from objecting during the counting.[1435]

The Court concluded that these "features" of the count ordered in Florida were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."[1436] The majority emphasized, however, that its holding could not readily be transferred to other cases or other circumstances. "Our consideration," the majority wrote, "is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[1437]

Having decided that the count as ordered violated the Equal Protection Clause, the Court had only to determine the nature of its remand. "[I]t is obvious," the majority wrote, "that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work."[1438] The Florida court would have to adopt adequate statewide standards for evaluating the ballots, put in place "practicable procedures" for implementing those standards, and provide for judicial review.[1439] Florida would have to deal with the fact that the election equipment was not designed to sort out undervotes and overvotes, and the Secretary of State would have to oversee this process for accuracy.[1440]

At the same time, the majority wrote, the Florida Supreme Court had said that "the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5."[1441] Section 5, in turn, required that "any controversy or contest

1433. *Id.* at 107–08.
1434. *See id.* at 108.
1435. *Id.* at 109.
1436. *Id.*
1437. *Id.*
1438. *See id.* at 110.
1439. *Id.*
1440. *See id.*
1441. *Id.* (quoting *Palm Beach II*, 772 So. 2d at 1289). In truth, the Florida Supreme Court had said no such thing at *any* point in the process. Notwithstanding the many

that is designed to lead to a conclusive selection of electors be completed by December 12," and that date was "upon us."[1442] Thus, in the majority's view, there was no possibility of a remand for a new count: "Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed."[1443]

The § 5 theory that Ted Olson had spun for the first time during the oral argument, under pressure from Justice Souter, had in effect won the day. There would be no more recounts, no more court actions, no more doubt. The election was finally over, and it had gone to Bush.

The dissenters could not have disagreed more strenuously with the result. Two of them—Justices Souter and Breyer—were prepared to agree that the count as ordered by the Florida court would probably violate the Equal Protection Clause,[1444] but even they were adamant that preventing any count from taking place, on the ground that it was already December 12, was wrong.[1445] Much of the time lost, the dissenters argued, was attributable to the Court's precipitous vote to stay the counting.[1446] More importantly, as Justice Ginsburg (joined by Justice Stevens) pointed out,

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opportunities that it had to discuss § 5, the Florida court had never acknowledged that the Florida Legislature even knew that § 5 existed, much less that the legislature had expressly *intended* to invoke it. *See supra* notes 590, 1173–75, 1404–05 and accompanying text. Indeed, the Supreme Court majority's own quotation comes not from any passage discussing the Florida Legislature's intent with respect to § 5, but from a passage in which the Florida court enumerated the two reasons why the Secretary of State could refuse amended returns. That passage reads:

> the reasoned basis for the exercise of the Department's discretion to ignore amended returns is limited to those instances where failure to ignore the amended returns will: . . . (2) in the case of a federal election, will result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.

Palm Beach II, 772 So. 2d at 1289. It was therefore entirely disingenuous for the Court to suggest from this limited statement (or any other) that the Florida court would contravene the intent of the legislature if the contest action extended beyond December 12.

1442. *Bush*, 531 U.S. at 110.

1443. *Id.*

1444. *See id.* at 134 (Souter, J., dissenting); *id.* at 145–46 (Breyer, J., dissenting). Justice Breyer actually stopped short of stating definitively that the count would violate the equal protection clause, because the majority's remedy made it unnecessary, but he certainly suggested that it would be unconstitutional as ordered:

> I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

Id. at 146.

1445. *See id.* at 134–35 (Souter, J., dissenting); *id.* at 146–47 (Breyer, J., dissenting).

1446. *See id.* at 135 (Souter, J., dissenting) ("To recount these [ballots] manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get the job done."); *id.* at 143 (Ginsburg, J.,

> [T]he December 12 date for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "had not been . . . regularly given."[1447]

And whether a constitutionally-corrected count could be completed by December 18—the date on which the electors were actually supposed to vote—was a matter for Florida, not the United States Supreme Court, to decide.[1448]

Three of the four wrote, with the agreement of the fourth, that the Supreme Court should never have taken the case because it did not present a "substantial" federal question.[1449] All of the dissenters felt that the electoral appointments clause claim was meritless, because there was a sound interpretive basis for all of the Florida court's decisions,[1450] and that the § 5 claim was not even "serious," because § 5 did not *require* anything of the states.[1451] As for the equal protection claim, two of the justices acknowledged that the counts would be imperfect—it would be impossible to craft a perfect process under the circumstances—but did not believe those imperfections rose to the level of an equal protection violation, especially in light of the thousands of intended votes that would go uncounted in the absence of the Florida court's order.[1452] And even the other two dissenters, who likely would have found an equal protection violation, felt that the Florida court should have been left to address the equal protection issue on its own, and possibly correct any violation, before the Supreme Court intervened.[1453] Justice Breyer even noted that the Court had probably contributed to the problem, because its comments on the electoral appointments clause in the first decision rendered the Florida judges overly cautious about elaborating on the "intent of the voter" found in the Florida Code.[1454]

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dissenting) ("Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process.").

1447. *Id.* at 143 (Ginsburg, J., dissenting) (quoting 3 U.S.C. § 15 (1994)); *see also id.* at 155 (Breyer, J., dissenting) ("If, for example, a state submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes 'have not been . . . regularly given.'") (quoting 3 U.S.C. § 15 (1994)).

1448. *Id.* at 146–47 (Breyer, J., dissenting); *see id.* at 135 (Souter, J., dissenting).

1449. *See id.* at 123 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 144 (Breyer, J., dissenting).

1450. *See id.* at 123–24 (Stevens, J., dissenting); *id.* at 130–33 (Souter, J., dissenting); *id.* at 135–43 (Ginsburg, J., dissenting); *id.* at 147–52 (Breyer, J., dissenting).

1451. *Id.* at 130 (Souter, J., dissenting); *see id.* at 124 (Stevens, J., dissenting); *id.* at 148–49 (Breyer, J., dissenting).

1452. *See id.* at 126–27 (Stevens, J., dissenting); *id.* at 143 (Ginsburg, J., dissenting).

1453. *Id.* at 129 (Souter, J., dissenting).

1454. *Id.* at 145 (Breyer, J., dissenting) ("In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II.").

But perhaps even more important than the merits of the dissenters' objections was the undeniable bitterness in their voices. Justice Stevens stated flatly that the only explanation for the majority's decision was its unspoken conclusion that the Florida courts were incapable of being impartial, a position that "can only lend credence to the most cynical appraisal of the work of judges throughout the land."[1455] Justice Ginsburg appeared equally skeptical of the majority's motives. After a long exposition of the Court's ordinary deference to state courts, she wrote: "Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."[1456] Justice Breyer, having concurred in both of the above statements, focused not on the majority's motive, but on what he plainly thought the horror of the Court's intervention: "Justice Brandeis once said of the Court, 'the most important thing we can do is not doing' . . . . What it does today, the Court should have left undone. I would repair the damage as best we now can, by permitting the Florida recount to continue under uniform standards."[1457] Whether one agreed with the dissenters' positions or not, these were emotional words, and they revealed a polarization on the Court that may have run stronger even than the electorate's.

Within twenty-four hours of the Court's decision, Vice President Gore appeared on national television and conceded the election to Governor Bush. "Now that the United States Supreme Court has spoken," Gore said, "[l]et there be no doubt. While I strongly disagree with the outcome, I accept it."[1458]

PART THREE: THE LAWYERS' EFFECT ON THE OUTCOME—MISTAKES REAL AND IMAGINED

As complex as the 2000 election was, there is a certain foolhardiness in trying to isolate what caused it to end with the Supreme Court calling time and Gore conceding. At least in some measure, the result was the product of incredible happenstance, from the premature calls by the media, to the butterfly ballot design in Palm Beach County, to the fact that many of those who voted in Florida were new to the polls, to the Republican effort to turn out absentee voters, to the time the Miami-Dade canvassing board took just to decide to count ballots, even to the Palm Beach board's decision to take Thanksgiving off. Whether the outcome would have been different without any one of

1455. *Id.* at 128 (Stevens, J., dissenting).
1456. *Id.* at 142–43 (Ginsburg, J., dissenting).
1457. *Id.* at 158 (Breyer, J., dissenting) (citation omitted) (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71 (1962) (quoting Justice Louis D. Brandeis)).
1458. Richard L. Berke & Katherine Q. Seelye, *An End to a Quest: Vice President Offers To Aid Bush But Admits Disappointment*, N.Y. TIMES, Dec. 14, 2000, at A1.

these events, it is impossible to say, but their cumulative effect is unmistakable.

Skeptics would surely say that partisanship on the part of the members of the highest state and federal courts played an enormous role. There is certainly some circumstantial evidence in support of that conclusion. The Florida Supreme Court, for example, frequently took positions almost completely aligned with Gore's. There were several points at which that alignment seemed to morph into advocacy. The court originally enjoined Secretary Harris's certification, for example, even though Gore had not even sought that relief.[1459] The court also claimed, in the first proceeding, that Bush had not asked it to address any constitutional issues, when that just was not factually so.[1460] Finally, the court refused to admit on the Supreme Court's remand that it had relied on the Florida Constitution, although it plainly had, claiming instead that the constitution had been invoked only to reflect the "policy concerns" behind the legislative enactment.[1461]

The same charge, of course, may be levied at the United States Supreme Court. Its willingness even to consider Bush's § 5 claim a substantial federal question,[1462] and its decision to base its first decision on a single Court dictum from an 1892 decision, without any discussion,[1463] strongly suggest that the justices were reaching for a particular result. Indeed, the oral arguments are literally rife with instances in which the justices jumped in to remind the attorneys of their best arguments and prevent them from conceding too much.[1464] Further, in issuing its stay of the Florida count, the majority essentially manufactured the "irreparable harm" Bush stood to suffer, converting his claim with respect to the public interest into a full-blown entitlement he personally stood to lose.[1465] And the Court's explanation of its decision not to let any recounts proceed—that the Florida Supreme Court had concluded that the Florida legislature *intended* its scheme to satisfy the December 12 deadline of § 5—was flatly dishonest.[1466]

On the other hand, when one takes a larger view of the events, there are a variety of reasons not to conclude that the courts' decisions were politically motivated. The Florida Supreme Court, for ex-

1459. *See supra* notes 427–28 and accompanying text.

1460. *Compare Palm Beach I*, 772 So. 2d at 1228 n.10, *with supra* notes 566–69 and accompanying text (summarizing constitutional arguments in briefs and oral argument).

1461. *Compare Palm Beach II*, 772 So. 2d at 1290, *with supra* notes 623–29 and accompanying text (discussing portion of *Palm Beach I* based on Florida Constitution).

1462. *See supra* notes 671–78 and accompanying text.

1463. *See supra* note 162 and accompanying text (quoting the *McPherson* passage and describing the passage as a dictum); *supra* notes 996–98 and accompanying text (describing the Court's decision).

1464. *See supra* notes 969, 971, 975, 987–90, 1343–45, 1352–54, 1390–93 and accompanying text.

1465. *See supra* notes 1201, 1216, 1223 and accompanying text.

1466. *See supra* note 1441 and accompanying text.

ample, decided the primary cases in Gore's favor, but it also affirmed the rulings against Gore in the butterfly ballot case and the absentee ballot cases and refused to order the Miami-Dade canvassing board to resume its manual recount at a time when Gore really needed to find more votes.[1467] Likewise, notwithstanding all the consternation over the Supreme Court's equal protection holding, the reality is that fully seven of the nine justices agreed that the count would have violated the Equal Protection Clause,[1468] just as four of the twelve judges on the Eleventh Circuit had concluded a few days earlier.[1469] The further reality is that the case presented an entirely new equal protection question and a situation that could never be perfectly fair. There were no prior equal protection cases like it, and the Court came into the case with sparse precedent addressing the appointment of presidential electors, precedent that itself had not settled the level of scrutiny to be applied to state election laws.[1470]

Indeed, that is why the lawyering was so critical. Lawyers all know that judges have partisan leanings from which it is difficult to extricate themselves, and they learn from early on to work that much harder when facing a judge with an opposing proclivity. Their very job is to extricate judges from their preconceptions. At a minimum, this must include learning the law cold, honestly evaluating the weaknesses in one's case, anticipating the opposing arguments that will be most persuasive, and convincing the court that neither existing law nor wise policy counsel an opposing decision. And put most simply, these were the tasks at which Gore's lawyers,[1471] in particular, did not succeed.

This is not to say that Gore's lawyers performed poorly throughout the case. They did not. David Boies was almost always clear and per-

1467. *See* Fladell v. Palm Beach County Canvassing Bd., 772 So. 2d 1240 (Fla. 2000) (butterfly ballot case); Taylor v. Martin County Canvassing Bd., 773 So. 2d 517 (Fla. 2000) (absentee ballot case); *supra* note 707–08 and accompanying text (describing the Miami-Dade case).

1468. *See supra* note 1424 and accompanying text (discussing majority holding); *supra* note 1444 and accompanying text (discussing Justice Souter's and Justice Breyer's agreement).

1469. *See supra* notes 1024–25, 1038–41 and accompanying text.

1470. *See supra* notes 194–207 and accompanying text.

1471. At the outset of this discussion, a very important point is in order: there were two different teams of lawyers working for Gore, one handling the case coming up through Florida, and one handling the federal case once the initial district court proceeding was over and Gore had won. The latter team of lawyers, who were associated largely with the Atlanta law firm of Sutherland, Asbill & Brennan, was responsible for all of the Eleventh Circuit proceedings, and it is quite plain that they took their work very seriously and prepared fully their response to Bush's equal protection and due process claims. So this discussion does not in any way implicate them, and henceforth, the term "Gore's lawyers" should be taken to mean the lawyers responsible for the Florida and United States Supreme Court proceedings. Indeed, Gore's federal-court lawyers are relevant to this discussion only inasmuch as Gore's state-court lawyers should have relied more heavily on their work, and Gore should have considered letting them—instead of David Boies *or* Laurence Tribe—handle the Supreme Court argument.

suasive with the points he made,[1472] Laurence Tribe confirmed his reputation as one of the few lawyers capable of true dialogue with Supreme Court justices,[1473] and the team of attorneys working in Florida pulled off unparalleled feats racking up victories all across the state.[1474]

Nor is it to say that Gore's lawyers were overmatched. They were not. Bush's lawyers must be given full credit for developing a solid long-term strategy aimed at using federal law to their advantage,[1475] but their performance at trial and during oral arguments was at best very weak. Michael Carvin came across as contemptuous of the Florida Supreme Court.[1476] The Republican contest trial team put on as much evidence to favor Gore as Gore's own team did.[1477] Barry Richard and Ted Olson appeared woefully inept at understanding the issues during oral argument, even when the various judges threw out arguments to help them.[1478]

These observations notwithstanding, lawyers take cases as they find them, and Gore's case, from the beginning, was a more difficult one to win. In contrast to Bush, he sought to upset the status quo, and to do so on an unprecedented scale. Hence, there was far less room for error than there was for the Republicans, and the Democrats' mistakes had much more meaningful consequences than the failings of their counterparts.

Indeed, this Article argues that critical mistakes by the Gore legal team had as much to do with the outcome as any other circumstance. It does not claim that the outcome *necessarily* would have been different had Gore's attorneys not committed the errors. As acknowledged earlier, the controversy was too complex to attribute causation to any single aspect of it. Further, the most that Gore's team could have accomplished was saving some form of recount, and no one can know what result that might have brought.[1479] But one thing is for certain:

1472. *See, e.g.*, *supra* notes 532–34 and accompanying text.

1473. *See, e.g.*, *supra* notes 981–83 and accompanying text.

1474. *See supra* notes 324, 326, 371, 387, 401, 406, 415–16, 427, 432, 589–90, 685 and accompanying text.

1475. *See supra* notes 638–57 and accompanying text.

1476. *See supra* notes 566, 572 and accompanying text.

1477. *See supra* notes 828–42 and accompanying text.

1478. *See supra* notes 968–76, 1343–54 and accompanying text (relating Olson's arguments); *supra* notes 1122–29 (relating Richard's argument).

1479. After the controversy ended, two different consortia of media organizations obtained the Florida ballots and concluded that Bush would likely have won the election if the Supreme Court had permitted the recount to go forward as the Florida court ordered. MARTIN MERZER, THE MIAMI HERALD, THE MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE 167 (2001); Jackie Calmes & Edward P. Foldessy, *Florida Revisited: In Election Review, Bush Wins Without Supreme Court Help*, WALL ST. J., Nov. 12, 2001, at A1. To reach that conclusion, the consortia used slightly different methodology. The first consortium, comprised of representatives from *The Miami Herald*, its parent company Knight Ridder, and *USA Today*, looked at all of the undervoted ballots in counties that did not complete their recounts to

he could never have won *without* the recounts, and there is reason to

determine whether they bore any markings that might reflect intent. MERZER, *supra*, at 170–72. To this was added the numbers from Miami-Dade and Palm Beach that the Florida Supreme Court ordered included, as well as the numbers from the counties that completed the recount before the stay issued. *Id.* at 171–72. The second consortium, made up of the *Wall Street Journal* and seven other media organizations, surveyed all of the county canvassing boards to find out "what standards they planned to use to evaluate their ballots," then "accepted all the completed recounts and applied each county's recounting plans and standards to that county's ballots." Calmes & Foldessy, *supra*. As "a statistical check of variations between observers," both consortia employed independent research firms who recorded the number of ballots falling in a number of objective categories. MERZER, *supra*, at 170; Calmes & Foldessy, *supra*.

If these analyses were sound, one might argue that the lawyering had no effect whatsoever on the outcome of the election controversy. There are, however, significant problems with the consortia's approaches. The *Miami Herald* consortium, for example, seems to have made no effort similar to the *Wall Street Journal*'s to account for actual decisions by individual counties to adopt or not adopt bright-line objective criteria, and simply based its conclusion on a tally of votes bearing any conceivable indicia of intent. MERZER, *supra*, at 170–72. This itself could cause the consortium's conclusion to be inaccurate, if, for example, a county with a large number of undervotes used a very strict standard, either formally or informally. Conversely, the *Wall Street Journal* consortium attempted to factor in the various counties' plans, but it ran into four counties that claimed that they simply would not have counted any ballots, and nine other counties that claimed they would have counted both undervotes and overvotes, and apparently the consortium accepted these claims, even though the counties might well have run into contempt problems with the Leon County judge overseeing the process. *See* Calmes & Foldessy, *supra*. Further, the *Wall Street Journal* admitted that

> [w]hile every effort was made to ensure precision, the consortium was unable to segregate with certainty all of the ballots that went uncounted in the certified result. As a result, [the consortium's independent research firm, National Opinion Research Center] said Friday that margins of a few hundred votes or less would be, in his professional opinion, too close to call.

Id. Yet the *Journal* declined to exercise the caution the independent firm urged and unabashedly relied on precisely such a "margin[ ] of a few hundred votes or less." If the Supreme Court had not intervened, the *Journal* wrote, "Bush still would have won the election by 493 votes." *Id.*

Just as importantly, one cannot appropriately gauge the effect of the lawyering by addressing only the total affirmance scenario, when there were so many other alternatives available. It is entirely possible, for example, that the Supreme Court would have permitted some counting to continue had Gore's lawyers not mishandled their arguments concerning the effect of the December 12 date in § 5. *See infra* notes 1480–1509 and accompanying text. Had the Court done so, it might well have directed Florida to count overvotes as well as undervotes. *See supra* note 1433 and accompanying text (discussing the Court's focus on the failure to count overvotes as part of the equal protection violation). And under that scenario, the two consortiums agree that Gore quite likely would have won. *See* Calmes & Foldessy, *supra* ("In several scenarios, overvote ballots from which voter intent could be discerned netted Mr. Gore hundreds of votes, enough to edge out Mr. Bush."); MERZER, *supra*, at 189 ("If [there had been] a manual examination of all machine-rejected ballots between Election Day and official certification of the election, thousands of additional votes would have been salvaged and the outcome of the election might have been different."). In short, any causation analysis has to end with the Supreme Court decision, because it simply cannot be predicted what the Supreme Court, the Florida courts, and to the extent they remained involved, the county canvassing boards might have done.

believe that three particular failings of his lawyers contributed significantly to the Supreme Court's decision not to let those recounts happen.

The Article also identifies some prevailing misconceptions about the performance of Gore's lawyers. As it will show, much of the existing commentary—which has focused on the attorneys' decision to seek recounts before bringing a contest action, and to do so in only four Florida counties rather than statewide—reflects either an incomplete understanding of the law and the events, or a willingness to engage in second-guessing judgment calls that any lawyer might rightfully have made.

I. DISTINGUISHING JUDGMENT CALLS, UNDERSTANDABLE MISTAKES, AND HARMLESS ERROR

To undertake a fair and constructive assessment of a lawyer's performance, one must at the outset acknowledge three important distinctions. The first is the distinction between a judgment call and a mistake. The second is the distinction between a reasonable mistake and one that should not have been made. The third is the distinction between harmless and critical error.

At its best, litigation is an art, not a science. At various points in a given case, lawyers must evaluate the likelihood of competing scenarios and then take calculated risks, not knowing every circumstance that will develop in the future. To come behind them later, with the benefit of knowing how the case evolved, and criticize only their *choice* is nothing more than Monday-morning quarterbacking. In short, pure judgment calls, unless they are utterly unsound, ought not to be the focus of second-guessing.

Not every decision a lawyer makes, however, involves this type of judgment call. There are some aspects of a lawyer's performance with respect to which the expectations are fixed. Fully understanding all the applicable law is one such fixed expectation. Lawyers across the country will attest that it is this expectation that fuels them in the wee hours of the morning. Their singular nightmare is learning in court the next morning of the controlling case they missed.

Another fixed expectation is anticipating the weaknesses that one's opponents will exploit and preparing to respond. This requires a lawyer to be brutally honest, both internally and with the client. It requires developing responsive arguments, and strategy to mitigate the harm, in the event an opponent's case begins to take hold, even though it sometimes happens that the responsive arguments never become necessary. It does not require, or even counsel, foregoing aggressive strategies beneficial to one's client, but it does require one not to be blind to the obstacles a more aggressive strategy will en-

counter. In short, ignoring a case's weaknesses will not make them disappear.

A lawyer's failure to meet these threshold, fixed expectations can only be deemed a mistake, not a judgment call. There may be explanations for the mistake, not the least of which is the press of time. Lawyers are human beings, and human beings have limits on how much information they can absorb, and how well they can work with it, in short spaces of time. This observation, however, does not change the nature of the failing. It is still a mistake, not a judgment call, and recognizing it as such is important if the profession is to represent its clients well in the future.

With that said, it would be folly to suggest that lawyers must be deemed fully culpable for every mistake they make. Even with the distinction between mistakes and judgment calls in mind, practicing lawyers would no doubt agree that it is extraordinarily difficult to make *no* mistakes, particularly in complex litigation. Some margin of error must exist. For this reason, a fair analysis requires a second distinction, between a mistake that might understandably have been committed under the circumstances and one that simply should not have been made.

Finally, not every mistake, even if understandable under the circumstances, bears causative significance. Some of the mistakes that inevitably will be made will carry no consequences. Thus, to the extent one wants to measure the impact of a lawyer's performance on a given outcome, one has to draw a distinction between harmless and critical error. One must ask: realistically, how would the court have reacted to a different course? And when a case involves multiple issues, one must ask, would the court's different reaction on one issue have mattered in light of the others?

This distinction is of course difficult to apply with precision, because there is no way to be certain how a court (made up of humans) would have reacted to a different course. Yet it is certainly possible to identify the decisive issues in a case, and conclude that a lawyer's case would have been much stronger on those issues in the absence of the mistake. Indeed, whatever fallibilities such estimations involve, lawyers engage in them every day as they develop strategies. And if those same lawyers refuse to evaluate the effects of mistakes on their cases on the ground that outcomes are not *precisely*—as opposed to generally—predictable, they are simply being hypocritical.

In the analysis that follows, these distinctions have been sharply drawn. Whenever it is charged that Gore's lawyers should have handled the case differently, the analysis examines whether the lawyers' performance realistically made any difference, and addresses any circumstances, strategic or otherwise, that might account for their actions. The results are nonetheless disturbing. Even allowing for judgment calls, understandable mistakes, and harmless error, it is

clear that Gore's legal team may have played a substantial role in his loss.

II. THE DEMOCRATS' CRITICAL ERRORS

The first task in litigating any dispute is to determine the legal framework applicable to the case. Some disputes are inevitably more complicated than others, but there is no point in proceeding at all without mastering the applicable law. In the election controversy, as Part One sets forth, this meant that the attorneys needed to master not only the Florida Election Code, and any cases interpreting it, but also a body of Supreme Court decisions interpreting the electoral appointments clause and a title of the United States Code addressing presidential elections in considerable detail. To do so, to reach a full understanding of the law, would have involved more than just reading the relevant provisions and cases. It would also have required considering the constitutional validity of the laws and the interrelationship between them.

What seems to have happened is that Gore's legal team never finished this process. To be sure, the Democrat's lawyers became intimately familiar with *Florida* law. David Boies frequently astonished his audience by citing the exact pages of Florida cases off the top of his head. But federal law was an entirely different matter. Looking back over the entire record, it becomes clear that Gore's lawyers (1) never reached a correct understanding of federal § 5, (2) failed to appreciate the ramifications of the electoral appointments clause until after the Republicans had wreaked avoidable havoc with their case, and (3) did not prepare adequately to defend the equal protection challenge that their own instinct alerted them would become a major issue.

All of these were critical errors in the lawyers' representation. They cost not just Gore, but the Florida and United States Supreme Courts, who, without accurate and complete arguments before them, issued opinions that in some respects were demonstrably incorrect.

A. *The Consistent Mischaracterization of § 5*

To the extent one can ever be idealistic about the law—and believe, albeit on rare occasions, that the meaning of a law is clear—the most irksome aspect of the election controversy has to be the fretting by the Florida and United States Supreme Courts that Florida's electoral votes would be "in jeopardy" if the litigation did not conclude before December 12.[1480] All of the anxiety along that line was based on 3 U.S.C. § 5, which provides that if a state reaches a final determination

1480. *See supra* notes 590, 1414 and accompanying text (relating the Florida court references); *supra* notes 999, 1441 and accompanying text (relating the Supreme Court references).

of its electors by six days prior to the electoral college, according to a dispute-resolution method put in place prior to Election Day, that determination "shall be conclusive, and shall govern in the counting of the electoral votes."[1481] The courts took this to mean that if there was no final determination according to the pre-existing dispute-resolution method by December 12—*i.e.*, if the election litigation did not end by December 12—then the results from Florida would be "*in*conclusive," *i.e.*, any electoral votes submitted by Florida would be subject to challenge on the floor of Congress.[1482] Yet that interpretation is demonstrably wrong.

As set forth in detail in Part One, federal § 15 directs Congress on how to handle virtually every permutation of electoral vote submissions that might arise.[1483] First, it provides that in the event only one slate of electors is submitted, Congress *must* honor that slate.[1484] Second, it provides meticulously for the universe of scenarios in the event more than one electoral slate is submitted, including a situation in which a state does not submit electors pursuant to a § 5 determination. If a slate has been determined pursuant to a method complying with § 5, that slate wins; if there is a dispute over which is the true § 5 slate, Congress has to evaluate state law and anoint one slate the legitimate § 5 claimant; and if there is no slate able to claim the presumption afforded by § 5, Congress again has to evaluate state law and choose one. Finally, if the two houses of Congress cannot agree in their application of § 15, the statute itself provides a tiebreaker: the slate certified by the state's executive wins.[1485]

Neither the statute nor its legislative history leaves room for the notion that if a state does not comply with § 5, any electoral vote the state ever submits is at risk of disqualification. If the votes of only one slate are submitted, Congress is required in no uncertain terms to accept the votes from that slate, and § 5 does not even come into play. If the votes of more than one slate are submitted, and none of the slates qualify for the § 5 presumption, then § 15 expressly addresses what happens, and the options do *not* include entirely disregarding a

1481. *See supra* text accompanying note 275 (quoting § 5 in full).

1482. *See supra* notes 590, 1414 and accompanying text (relating Florida court references); *supra* notes 999, 1441 and accompanying text (relating Supreme Court references). Indeed, the courts eventually became so sure of that interpretation that they even adopted the "safe harbor" euphemism to describe § 5, and referred to Florida's need to take advantage of the "safe harbor" so that its vote would not be excluded. *See, e.g.*, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 77 (2000) ("The parties before us agree that whatever else may be the effect of this section, it creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned.").

1483. *See supra* notes 265–81 and accompanying text.

1484. *See supra* notes 266–68 and accompanying text. Certain of the *votes* by members of the slate can be challenged, but even those can be disregarded only if both houses of Congress agree. *See supra* note 268 and accompanying text.

1485. *See supra* notes 269–74 and accompanying text.

state's vote.[1486] All that happens is that the houses of Congress undertake their own evaluation of state law in order to choose a slate, and even the disagreement of the houses is provided for, because the statute includes a way to break the tie.[1487]

Thus, any "conclusiveness," or "safe harbor," that § 5 offers is *only* to electors chosen by a state's judiciary, or whatever other institution might resolve a controversy. If there are electors *otherwise* chosen and certified to Congress, a *state* has no need of a "safe harbor." Section 15 makes quite clear that, as long as Congress has at least one certified slate of electors before it, whether by way of § 5 or not, the state will have a vote in the electoral college. Thus, as of November 27, when Bush transmitted to Washington the certificate of ascertainment naming the Republican electors,[1488] Florida was going to have some vote in the electoral college. It did not matter whether the court battles did not finish by December 12—that would simply render "inconclusive" the slate the *judiciary* ultimately chose—because there was already in place at least one electoral slate that Congress would be required to honor under § 15.

The failure of Gore's lawyers to educate the courts on this point—and dispense early on with the idea that Florida's electoral votes would be "in jeopardy" after December 12—proved directly fatal to his case. In two different decisions, the Florida Supreme Court characterized § 5's deadline as threatening *Florida*'s participation in the electoral college, and in the second, the court expressed its "view that the Legislature would not wish to endanger Florida's vote being counted in a presidential election."[1489] Then, drawing directly from this completely mistaken interpretation of § 5, the United States Supreme Court concluded that it could not permit the count to go forward because that would violate the "legislative intent" that the contest finish by December 12.[1490] All of these decisions proceeded from an incorrect premise that Gore's lawyers allowed to remain in place throughout the controversy.[1491]

In fact, Gore's lawyers not only failed to present the correct interpretation of § 5, but they consistently promoted the incorrect one. In the first Florida Supreme Court argument, for example, David Boies

1486. *See supra* note 270 and accompanying text (quoting the relevant portions of § 15 in full).

1487. *See supra* notes 270, 272 and accompanying text.

1488. *See supra* note 743 and accompanying text.

1489. *See supra* notes 590 (*Palm Beach I*), 1414 (*Palm Beach II*) and accompanying text.

1490. *See supra* notes 1441–43 and accompanying text.

1491. Of course, the consequence to Gore of the consistent mischaracterization of § 5 was not limited to his court battles. Had it been understood from the beginning that Florida's votes were never "in jeopardy," the public surely would have been less tolerant of the Florida Legislature's threat to step in and appoint the electors itself. *See supra* notes 646–51, 661, 663 and accompanying text (describing the Florida Legislature's threats).

advised that the contest must be completed by December 12 "so that the votes of Florida are not in peril."[1492] In Gore's initial brief to the Supreme Court, his lawyers actually coined the term "safe harbor," and represented that § 5 offered a way for *states* to protect themselves from disqualification in the electoral college.[1493] And in Gore's final brief to the United States Supreme Court, his lawyers wrote: "the statute's only purpose and effect is to provide each State with a way to guarantee that its electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment."[1494] This just was not true. Section 5 does not really do anything for a "state" *qua* state: the statute's only "purpose and effect" is to provide a method of selecting which of two or more slates from the *same* state must be accepted.

It is so unimaginable that lawyers of the caliber Gore had could have made this error, that one wants to believe that they had some good *reason* to mischaracterize § 5 as they did, but there does not appear to be any such reason. One can certainly understand why, once Bush was certified and Gore's only chance for winning was through the Florida judiciary, Gore's lawyers might have encouraged the courts to treat December 12 as a "deadline." At that point, December 12 had indeed become a "deadline" of sorts for Gore. He desperately needed the presumption a pre-December 12 determination would have afforded him under § 5. If it happened that two slates of electors ended up before Congress on January 6—one slate for Bush certified by Florida's governor on November 26 and one slate installed by the judiciary at the end of the contest proceeding—congressional Republicans would almost certainly favor the Bush slate, and without the § 5 presumption, Gore's slate would lose in the House, which was majority Republican. The fact that he might win in the Senate—because Gore himself could cast the decisive vote—would not have made any difference: in the event the houses disagreed, the slate certified by the state's executive, Jeb Bush, would win.[1495] And if the courts thought of December 12 as a "deadline," Gore might have reasoned, they might actually finish.

This does not explain, however, why the lawyers promoted the idea that failure to meet the "deadline" would place the state's *entire* electoral vote in jeopardy, when all it actually would do is cause the judicially-appointed slate to lose its presumption of validity.[1496] Nor does

1492. *See supra* note 539.

1493. *See supra* note 951.

1494. Brief of Respondent Albert Gore, Jr., *supra* note 1263, at 29–30.

1495. *See supra* notes 270–72, 580, 657 and accompanying text. One of Gore's lawyers, Dexter Douglass, has confirmed that this was a major worry: "You had to have certification in by the 12th, or . . . you threw it into Congress. It's Republican. They would elect Mickey Mouse if he was a Republican." Cooper, *supra* note 656.

1496. Indeed, some commentators have criticized Gore's lawyers for speaking of December 12 as a "deadline," but they have not taken the interpretation of §§ 5 and

it explain why, when squarely facing a loss in the final Supreme Court argument, Gore's lawyers did not *then* correct the misimpression under which the courts had so long been operating. At that point, Gore had no choice but to seek counting out beyond December 18, and hope that with Supreme Court approval of the judicial recount, he would not need the presumption of § 5 to survive Congress. The only way to get there was to scuttle the notion once and for all that counting after December 12 would jeopardize the whole of Florida's vote. Instead, with a single day left to do any counting *and* complete the inevitable appeals, David Boies offered only that he thought the count could still be completed, or the appalling alternative that the Court just tell Florida that counting statewide was not really necessary.[1497]

This strongly suggests that Gore's lawyers never actually reached a full understanding of § 5 and its relationship to § 15. The question thus becomes whether their failure to do so was understandable under the circumstances: specifically, the time constraints. There are several reasons to conclude that it was not.

First, it seems fair to say that Gore's legal team should have familiarized itself with §§ 5 and 15 from the beginning, as soon as they knew they were going to challenge the initial election results, simply because those sections are part of the basic law governing presidential elections. Plainly, the Republicans focused on those laws from very early on. Tom DeLay issued a memo summarizing the statutes within days of the election,[1498] and the Florida Legislature issued its first threat to step in under federal § 2 even before Gore filed his brief in the Florida Supreme Court.[1499]

Second, understanding §§ 5 and 15 did not require extensive research. There were no cases interpreting the statutes to read. Understanding how they worked required only a close, thoughtful reading. In fact, the Supreme Court dissenters finally arrived at the correct interpretation of § 5 without any help from Gore's legal team.[1500]

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15 far enough. *See, e.g.*, David A. Strauss, Bush v. Gore: *What Were They Thinking?*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184, 188, 191–93 (Cass R. Sunstein & Richard A. Epstein eds., 2001). Not only was December 12 not a deadline for anything other than the presumption, but Florida's vote was *never* in jeopardy. This is a critical distinction, because a theoretical possibility that the counting could have continued after December 12 would not have been particularly appealing to the Florida courts, if they thought they would have to endanger the entire state's vote to take advantage of it. *See supra* notes 1442–43 and accompanying text.

1497. *See supra* notes 1395–96 and accompanying text.

1498. *See supra* notes 641–43 and accompanying text.

1499. *See supra* notes 646–51 and accompanying text. This is not meant to suggest that the Republican lawyers trying the election case were entirely schooled on the interrelationship between §§ 5 and 15. In the first argument before the Supreme Court, Ted Olson seemed completely incapable of discussing the intersection of the two statutes. *See supra* notes 970–71 and accompanying text.

1500. *See supra* note 1447 and accompanying text.

Third, even if Gore's lawyers made the mistake of not focusing on §§ 5 and 15 initially, it is not as though the meaning of § 5 *remained* an obscure question. It was one of only two issues before the United States Supreme Court on Bush's first petition, and the Court asked the parties to address specifically "the consequences" if the Court found that the Florida decision did not comply with § 5.[1501] One would have thought that this would trigger scrutiny of the statutes sufficient to understand them fully.

Finally, as mentioned above, Gore desperately *needed* the correct interpretation of § 5 in the final moments. On December 9, the counting was stayed, and oral argument was to take place on December 11.[1502] From field operatives (or even the media), the lawyers had to know that the count was running into trouble from several resistant canvassing boards, and thus there probably would not have been enough time to complete the count, allow the trial court to hear objections and issue a decision, and hear the ensuing appeals by the *original* deadline, much less in the single day that would be remaining after the Supreme Court heard argument. So as of the very *moment* the count was stayed, a Plan B with respect to § 5 became critically important. Yet even in the face of this life-or-death need, Gore's lawyers failed to find it.

This is not to say that Gore's legal team could have predicted precisely the way in which the Supreme Court majority used § 5 against Gore. The justices' claim that the Florida court had found that the legislature had intended to satisfy § 5, and its December 12 deadline, was an intellectually dishonest holding.[1503] The issue of the deadline, however, was of paramount importance even if the majority had not chosen the course it did. After all, what was going to happen if the Supreme Court *affirmed* the Florida court? Would the *Florida* court have tolerated missing December 12 if, as it mistakenly believed, that would endanger Florida's entire vote?

Of course, the Supreme Court majority's very willingness to contrive the § 5 portion of its holding raises one final issue: whether the majority would have found some other way to end the case irrespective of the lawyers' failing to correct their consistent mischaracterization of § 5. Indeed, the very fact that the majority placed the incorrect interpretation of § 5 at the feet of the Florida court, rather than themselves, suggests that the justices knew the prevailing interpretation was wrong, but were looking for a way to do Gore in. But there are two substantial reasons to believe that if Gore's lawyers had characterized § 5 correctly, the result might have been different.

1501. *See supra* note 671 and accompanying text.
1502. *See supra* notes 1206–07 and accompanying text.
1503. *See supra* note 1441 and accompanying text.

First, if the correct interpretation had been offered from the beginning, the Florida Supreme Court would never have made any reference to jeopardizing Florida's vote, and the Supreme Court therefore would not have had any material with which to reach its ultimate conclusion. Second, if the correct interpretation had been set squarely before the Supreme Court justices, even in the final argument, Justice Kennedy might have allowed the counting to continue.

During the oral argument, Justice Kennedy asked whether there was any "place in the Florida scheme for [the Secretary of State] to [set a uniform standard] in the contest period,"[1504] suggesting that he might be amenable to a remand under that condition. Justice Souter latched onto Kennedy's suggestion,[1505] presumably with an eye toward building a majority around it. But Justice Kennedy continued to be bothered specifically by the timing, and it was bothering him to the point that he was the first justice to raise it.[1506]

There is no way to be sure, of course, but this suggests that had the timing issue been mitigated, Justice Kennedy might have reached a different conclusion about a remand. Two different media sources, who appear to have had off-the-record conversations with Supreme Court insiders,[1507] confirm that Justices Souter and Breyer were seeking a compromise that would have sent the case back for the articulation of a uniform standard.[1508] And one of those sources quotes Justice Souter as lamenting months later that he might have persuaded Justice Kennedy if he had more time.[1509] Souter's statement as to why he was unable to convince the justice is supremely ironic, an unintended double entendre, given the circumstances. "One more day," Souter said, "one more day."[1510]

1504. Transcript of Oral Argument, *supra* note 1332, at 19–20.

1505. *See supra* note 1349 and accompanying text.

1506. *See supra* note 1394 and accompanying text.

1507. *See* Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1 (reporting that "[t]he justices who became the dissenters . . . were startled to learn from a memorandum that circulated shortly before the justices met on the day after Thanksgiving to discuss the appeals that the votes were there to take the case," information that only Supreme Court insiders would know); KAPLAN, *supra* note 1006, at 306–07 (stating that the author interviewed fourteen people who would not permit themselves to be identified and noting that some of these were critical to the portions of the book addressing the Supreme Court).

1508. Greenhouse, *supra* note 1507; KAPLAN, *supra* note 1006, at 284.

1509. KAPLAN, *supra* note 1006, at 284.

1510. *Id.* In fairness to the media sources relied upon here, both suggest that Justice Kennedy was not receptive to the compromise position offered. It is not clear, however, from where the sources drew their conclusions, whether their conclusions were drawn from conversations with reliable sources or were solely their own reading of what the oral argument and the decision revealed. Indeed, the two reporters claim Kennedy was not receptive to the compromise for two somewhat incompatible reasons. Linda Greenhouse says "[t]he question was whether the Florida Supreme Court could be trusted to supervise a recount under any circumstances," and that Justice Kennedy came "slowly and ambivalently" to the conclusion that it could not. Linda Greenhouse, *supra* note 1507. David Kaplan reports that Kennedy "thought the

B. *Finding and Defeating* McPherson *Too Late*

When all was said and done, the United States Supreme Court handed down a decision that said nothing whatsoever about the electoral appointments clause.[1511] Three justices signed on to a concurrence offering the clause as an additional basis for reversing the Florida Supreme Court,[1512] but they could not persuade any others to join. Neither the clause, nor the *McPherson v. Blacker* case interpreting it, which was the linchpin of the Court's first decision,[1513] played any role in the majority's decision. And yet one could argue that more than any other single case, *McPherson* is responsible for the final outcome. Indeed, a single *passage* from that single case could be deemed responsible for the outcome.

As discussed at length in Part One, the electoral appointments clause confers on state legislatures the power to decide the "manner" in which their state's presidential electors will be appointed.[1514] *McPherson* was the second Supreme Court decision ever to address the substance of the electoral appointments clause.[1515] It was handed down in 1892, at a time when the Court still adhered to the notion that the Equal Protection Clause's sole effect was to protect African-Americans from race discrimination.[1516] In it, the plaintiffs complained that the Michigan Legislature had adopted a method of appointing presidential electors that violated the Federal Constitution.[1517] On the way to rejecting that claim, the Supreme Court made one remarkable observation that it surely could not have imagined would acquire such historical significance. The Court stated that when the federal constitution conferred on the state legislatures the power to appoint electors in the "manner" they chose, that power could not be "circumscribed" by a state's own constitution.[1518]

Acting on this single passage from *McPherson*, the 2000 Supreme Court vacated the Florida Supreme Court's first decision.[1519] Of

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trauma of more recounts, more fighting—more *politics*, as it were—was too much for the country to endure." KAPLAN, *supra* note 1006, at 285. In the end, it seems difficult to say with any certainty precisely what Kennedy thought about the compromise proposed, much less what he would have thought had the timing circumstances been presented differently and Justice Souter been given the opportunity to factor that into his efforts to persuade him.

1511. *See supra* note 1425 and accompanying text.

1512. *See* Bush v. Gore, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

1513. *See supra* notes 996–98 and accompanying text.

1514. *See supra* notes 134–207 and accompanying text.

1515. *See supra* notes 139–65 and accompanying text.

1516. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1873) ("[The Court] doubt[s] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.").

1517. *See supra* note 151 and accompanying text.

1518. *See supra* note 162 and accompanying text.

1519. *See supra* notes 996–98 and accompanying text.

course, the Court did not explain exactly what the passage meant. The Court did not discuss what it might mean to "circumscribe" the legislature's power. Nor did the Court discuss what it might mean to circumscribe the legislature's choice with respect to the "manner" of appointing electors. In fact, the Court did not even hold that the Florida court's decision had improperly relied upon the constitution to circumscribe the Florida Legislature's power. The Court simply dropped the single passage from *McPherson*, cited the portions of the Florida court's decision that referred extensively on the state constitution, and asked the Florida court whether it had acted "without regard to the extent to which the Florida Constitution could . . . 'circumscribe the legislative power.'"[1520]

The Court did acknowledge that *McPherson* dealt with a question "different" from that involved in the election case,[1521] but the Florida Supreme Court probably paid little attention to that qualification. The much more important message was that if the Florida court relied on anything but pure legislative enactments, it would risk violating the electoral appointments clause. For this reason, all of the subsequent Florida Supreme Court decisions emphasized that they were based only on the Florida Code.[1522] Two of the Florida justices even became so nervous about deviating from the Code that they suggested during oral argument that the Florida court did not have jurisdiction to hear the appeal of the contest action because its only jurisidictional source was the Florida Constitution.[1523] This was an argument that Bush had not even made (although his attorneys ultimately adopted it when the case went to the Supreme Court).[1524]

Had the Florida Code been a finely tuned, precise instrument with which to work, the Florida court's exaggerated reaction to the Supreme Court's reliance on *McPherson* might have made little difference. But the Code was not artfully drafted.[1525] Most importantly, the Code included no definition of a "legal vote." The closest thing was some scattered references to ballots bearing a "clear indication" of the "intent of the voter."[1526] So that sole legislative reference became the standard, and the *only* standard, that the Florida courts would allow the counties to use when counting ballots.[1527] This in

1520. *See supra* note 997 and accompanying text.
1521. *See supra* note 998 and accompanying text.
1522. *See, e.g.*, Gore v. Harris, 772 So. 2d 1243, 1248 (Fla.) ("This case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes 2000."), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000); *Palm Beach II*, 772 So. 2d at 1291 ("[O]ur construction of the above statutes results in the formation of no new rules of state law but rather results simply in a narrow reading and clarification of . . . statutes, which were enacted long before the present election took place.").
1523. *See supra* notes 1106–11 and accompanying text.
1524. *See supra* notes 1125, 1128, 1239–41, 1336 and accompanying text.
1525. *See, e.g.*, *supra* notes 92, 95.
1526. *See* FLA. STAT. ANN. §§ 101.5614(5), (6), 102.166(7)(b) (West Supp. 2001).
1527. *See supra* notes 1150–52, 1167 and accompanying text.

turn allowed the United States Supreme Court to hold that the "intent" standard allowed too much variation to be constitutional.[1528] This odd sequence of events—which might be called the "whipsaw" of the Florida Supreme Court—was directly attributable to Al Gore's lawyers.

It strongly appears that in the early stages of the case, either none of Gore's lawyers had read *McPherson* closely enough to be aware of the passage limiting state courts' reliance on state constitutions, or the lawyers did not take it seriously. In the first Florida Supreme Court proceeding, David Boies offered a cogent and reasonable interpretation of the Florida Code based entirely on statutory construction,[1529] but he (and the brief) also offered the court alternative ways to decide the case on state constitutional, or even public policy, grounds.[1530] In effect, Boies and his co-counsel led the Florida Supreme Court directly into a constitutional trap.

Then, when the electoral appointments clause had been *directly* placed in issue, before the United States Supreme Court, Gore's lawyers did nothing to repair their error. It does appear that, by this time, someone on the legal team had found the passage from *McPherson* (notwithstanding the failure of Bush's lawyers to cite it), because Gore's brief studiously avoided any admission that the Florida Supreme Court had based its decision on the Florida Constitution and any notion that the source of the Florida court's decision was even at issue.[1531] Even more tellingly, when Chief Justice Rehnquist dropped the bombshell passage at oral argument (Bush's lawyers apparently still had not found it), Laurence Tribe clearly was familiar with it.[1532]

Thus, by this point, legal *research* was no longer the problem, but judging from Tribe's performance, preparation was. Rather than make even the *first* attempt to dissuade the Court from applying the *McPherson* passage to the Florida court's opinion, Tribe simply accepted it as a governing principle and tried to fit the Florida decision *within* it. First, Tribe claimed that the Florida court did not use the Florida Constitution as an independent basis for its decision, but Justice Scalia—who had read the Florida opinion closely enough to know that the court had—would have none of that.[1533] So Tribe launched into a convoluted, highly theoretical argument. By providing for judicial review, Tribe mused, the Florida Legislature had delegated its power to regulate presidential elections to the judiciary, and in doing

1528. *See supra* notes 1429–32 and accompanying text.
1529. *See supra* notes 532–34 and accompanying text.
1530. *See supra* notes 459–61, 535 and accompanying text.
1531. *See supra* notes 965–66 and accompanying text.
1532. *See supra* notes 981–86 and accompanying text.
1533. *See supra* notes 981–82 and accompanying text.

so the legislature knew that the judiciary would look to the state constitution.[1534]

Tribe's limited response makes no sense under the circumstances. Gore stood to *lose* if the Court ruled that the Florida court unconstitutionally invoked the state constitution. So there was no reason whatsoever to avoid a direct attack on the *applicability* of the *McPherson* passage, and thereby prevent it from constraining the Florida courts as they considered Gore's contest action. And there was an array of powerful arguments with which to do so.

First and foremost, a close reading of *McPherson* reveals that the passage upon which the Supreme Court relied was a *dictum*.[1535] Second, the situation addressed in *McPherson* was fundamentally different in kind from the one presented by *Bush v. Palm Beach County Canvassing Board*. In *McPherson*, the plaintiff electors had lodged a challenge to the *method* of appointment the Michigan Legislature had chosen (the "Manner" to which the electoral appointments clause expressly referred), and the Court had held that the state constitution could not interfere with that chosen *method*.[1536] Bush, however, was complaining not about a change in the method, but only about a change in how the state should handle controversies arising *out of* that method. Finally, there were a variety of constitutional policy reasons to limit the electoral appointments clause to the *method* chosen by the legislature, rather than every aspect of a state's law on presidential elections. Chief among them was that resolving questions about whether the courts had altered the method of appointing electors would be a manageable judicial task for the federal courts, but attempting to decide whether a judicial decision "changed" some remote aspect of a state's election code would not. The federal courts could end up acting as the final arbiter in every disputed presidential election, essentially supplanting the role of the state courts in interpreting state election law.

Indeed, when Gore's lawyers appeared before the Supreme Court only ten days later, with their case now all but lost, they presented some of these arguments on the electoral appointments clause and *McPherson* for the very first time.[1537] Apparently they were persuasive, because only three members of the Court concluded that there had been an electoral appointments clause violation, and even those three did not mention the restrictive *McPherson* passage.[1538] By this

1534. *See supra* notes 984–86 and accompanying text.

1535. *See supra* note 162 and accompanying text.

1536. *See supra* notes 159–60 and accompanying text. This was surely the "difference" between the questions in *McPherson* and the election case to which the Court referred in its decision. *See supra* notes 997–98 and accompanying text; *supra* text accompanying note 1520.

1537. *See supra* notes 1268–78 and accompanying text.

1538. *See* Bush v. Gore, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

point, however, it was far too late. The Florida court had already been whipsawed into an equal protection violation by an 1892 dictum.

As with Gore's lawyers' failure to reach a full understanding of § 5, there is no good explanation for their mishandling of the electoral appointments clause and *McPherson*. Again, the electoral appointments clause was basic governing law in the context of presidential election litigation. The clause should have been one of the earliest research topics. Moreover, the case law interpreting the clause was not extensive. There were less than fifteen cases addressing it in substance.[1539] Finally, even if it were understandable that Gore's lawyers did not initially find the *McPherson* passage—it was written rather awkwardly, and Bush's lawyers did not find it either[1540]—that does not explain how ill-prepared Gore's lawyers were to address it when the electoral appointments clause was one of only two issues before the United States Supreme Court. Not only should all of the electoral appointments clause cases have been read very closely in handling that proceeding, but by then at least Laurence Tribe knew about the passage, and yet the lawyers appear to have developed no comprehensive or meaningful strategy to address it.

C. *Avoiding the Merits of Bush's Equal Protection Claims*

The first two errors described here seem to have resulted from the lawyers' early failures to understand the ramifications of § 5 and the electoral appointments clause. The error discussed here, however, is of a different nature altogether. It does not involve being caught by surprise, by law that required research and contemplation. It involves adopting a strategy that had certain weaknesses—albeit not necessarily fatal ones—and ignoring one's own intuition that those weaknesses could become meaningful. Specifically, Gore's lawyers knew from early on that Bush had some colorable equal protection claims, and yet the lawyers handling the Florida and Supreme Court proceedings refused to take them seriously and prepare to address their merits.

This refusal to do so cost Gore dearly. With virtually no assistance whatsoever from the lawyers, the contest trial judge developed his own ideas about the Constitution and found Gore's case deficient for failing to seek a statewide remedy.[1541] The Florida Supreme Court, again without the benefit of any meaningful briefing or oral argument on the equal protection issues, shocked everyone by expanding the

1539. *See supra* notes 135–207 and accompanying text.

1540. *See supra* notes 963–64, 975–76 and accompanying text.

1541. *See supra* notes 899–903 and accompanying text. Notably, Judge Sauls's ruling about Gore's failure to seek a statewide remedy was statutorily, not constitutionally, based. *See supra* note 899 and accompanying text. He mentioned the Constitution only in observing that it might violate the Constitution if he were to allow counties to employ different standards. *See supra* note 894 and accompanying text.

counting from the two counties Gore had requested to sixty-four.[1542] This was a move certain to suggest that the election had spiraled out of control and thus prompt the United States Supreme Court to act.

Just as importantly, the lawyers' failure to contend earlier with the equal protection issues really hurt when the Supreme Court finally forced the issues upon them. As will be discussed below, there were numerous ways to argue that the recount did not violate the Equal Protection Clause, and yet the lawyers offered only two or three of the weakest.[1543] It seems that they had wished the issue away for so long that the key arguments were not readily in mind. And if there was at that point any chance of derailing the Supreme Court's equal protection holding, the lawyers let it slip away.

This analysis assumes, of course, that there was at least some merit to the various equal protection claims Bush made throughout the proceeding, and to the equal protection reasoning adopted by seven of the Supreme Court justices. After all, if Bush's arguments were absurd from the beginning, Gore's lawyers can be forgiven for not taking them more seriously. Many of those who have ridiculed the Supreme Court's decision might take this position.

To do so, however, would be silly. It may be that the Supreme Court's analysis was unwise, ill-advised, and in conflict with holdings on the Equal Protection Clause in other contexts.[1544] Yet Bush's equal protection arguments were never even close to being frivolous. Anyone watching the canvassing boards peer so intently at ballots, hoping to divine the voter's true intent, had to feel that a certain arbitrariness had crept into the process, however well-intentioned those implementing it were. And the idea that one county might have counted any dimple as a vote, while another county counted only hanging chads, while another counted only machine-readable ballots, had to give any candid lawyer pause. From the beginning, the nagging unfairness of these circumstances made Bush's equal protection claims at least arguable,[1545] particularly given the absence of precedent holding that an arbitrary vote-counting process could *not* be

1542. *See supra* notes 1160–66 and accompanying text.

1543. *See infra* notes 1571–1601 and accompanying text.

1544. *See* BUGLIOSI, *supra* note 28, at 42–50, 65–66; DERSHOWITZ, *supra* note 19, at 87–81; Sunstein, *supra* note 23, at 212–15; Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1727–28 (2001).

1545. The Court had very recently held, in an eight-justice per curiam opinion, that state action could be a violation of the Equal Protection Clause solely on the ground that it was "irrational and wholly arbitrary," irrespective of whether the state set out to harm the person acted upon. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923); Allegheny Pittsburgh Coal Co. v. Comm'n of Webster County, 488 U.S. 336 (1989)). Justice Breyer concurred only in the judgment, plainly because he believed some form of subjective intent to harm in addition to arbitrariness was required. *See id.* at 565–66 (Breyer, J., concurring in judgment).

deemed an equal protection violation.[1546] And litigators (who often stand in contrast to academics in this regard) know that one should not treat any opposing argument lightly, unless there is binding precedent squarely on point.

Indeed, on this much—that Bush's equal protection arguments were far from frivolous—*every* court connected to the case agreed. The federal district court who first heard Bush's equal protection claims rejected them, but before he did so, he acknowledged that the decentralized nature of counting would result in discrepancies between the counties' treatment of ballots, and undertook an extensive look at existing presidential election cases just to determine the level of scrutiny appropriate to Bush's claims.[1547] The next time Bush complained (albeit very quietly) that the recounting violated the Equal Protection Clause was in the Florida Supreme Court,[1548] and judging from that court's reaction during oral argument, several justices were concerned at least with the fact that only selected counties were recounting.[1549]

In the Eleventh Circuit, on Bush's appeal from the district court's decision, the court did not reach the merits of Bush's equal protection claims, because it found that Bush's request for an injunction was lacking in the requisite allegation of irreparable harm.[1550] Four of the twelve judges dissented, however, and they issued three opinions unequivocally concluding that the recounts being allowed in Florida violated the Equal Protection Clause in a variety of respects, most importantly that they were not being undertaken statewide and were being conducted without sufficient standards to guide the counters.[1551] Chief Judge Lanier Anderson wrote a special concurrence responding to these dissents and defending the recounts, but even he had to devote several pages to the argument, and adopt the same deferential standard the district court had, to do so.[1552] In sum, not one of the courts familiar with the case thought Bush's equal protection arguments beyond the pale.

1546. Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 98, 105 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (prior to *Bush v. Gore*, the Equal Protection and Due Process Clauses had "never been applied in the context of a presidential election before, nor ha[d] the Supreme Court addressed the problem of differ[ent] voting systems and methods of vote counting").

1547. *See supra* notes 370–79 and accompanying text.

1548. *See supra* notes 512–13, 566 and accompanying text.

1549. *See supra* notes 550–51, 571–72 and accompanying text.

1550. *See supra* notes 1015–22 and accompanying text.

1551. *See supra* notes 1027–49 and accompanying text.

1552. *See supra* notes 1026, 1050–76 and accompanying text. Whether the seven remaining members of the majority agreed with Chief Judge Anderson, or shared concerns similar to the dissents, is unknown due to the procedural posture of the case. *See supra* note 1017 and accompanying text.

Much more importantly, there is reason to believe that Gore's lawyers *themselves* knew, all along, that the Equal Protection Clause presented a meaningful risk. In the very first oral argument before the Florida Supreme Court, David Boies represented that Gore would accept a statewide count, even though Gore was not requesting such a process.[1553] This was obviously designed to address any concerns the Florida court had about basic fairness or the equal protection argument Bush had made based on the fact that only selected counties were recounting. Even more significantly, Boies acknowledged that uniformity in the way the canvassing boards evaluated the ballots was essential to the "integrity" of the process, and that "very wide variations" in the way the boards looked at ballots might be unconstitutional.[1554] Plainly, Gore's lawyers had concerns even then that the counting had to be guided in such a way that it would not become arbitrary.

Yet consistently, in the state case, Gore's lawyers threw out minimal arguments on the merits of Bush's equal protection claims. In the first Florida Supreme Court proceeding, Gore offered only three responses to Bush's constitutional claims: that trying to reach a full count in one county could not possibly be deemed "dilution" of the votes in another; that the "intent of the voter" standard was sufficient to guide the canvassing boards; and that Bush had not asked for any recounts even though Florida law permitted him to.[1555] None of these arguments went to the reality, or the fairness to the voters, of what was going on in Florida, and just as importantly, they did not address the quandary that the federal courts had already discovered lay at the heart of the case: to what level of scrutiny should Florida's recounts be subjected?

In the second Florida Supreme Court proceeding, Gore's lawyers were even more casual. In their brief, they included no constitutional argument whatsoever, and they dismissed Judge Sauls's ruling that a request for a recount must be sought statewide in the contest of a statewide election, solely on the ground that the contest statute did not require that.[1556] When the Florida justices raised Judge Sauls's point during oral argument, David Boies said only that the statute entitled Gore to select the counties he wanted to contest, and the court should not be troubled by that because, after all, selective recounts had *already* been included in the vote total.[1557] Wholly apart from the insufficiency of this approach, the last point was truly bizarre. Given that it was the Florida Supreme Court *itself* that had allowed those first selective recounts, Boies was effectively arguing that the court

1553. *See supra* note 552 and accompanying text.
1554. *See supra* note 550 and accompanying text.
1555. *See supra* notes 524–27 and accompanying text.
1556. *See supra* note 1090 and accompanying text.
1557. *See supra* notes 1114–16 and accompanying text.

could not possibly find an equal protection violation because it would impeach itself in doing so. This certainly was not material the *United States* Supreme Court would find persuasive, and the Florida court did not either.

In sum, the lawyers might have guided the Florida courts to the conclusion that even though the recounting was imperfect, it required neither a statewide count nor bright-line rules to be constitutional, but they chose not to try. When the Florida Supreme Court finally extended the count statewide, they should not have been surprised. They had given the court almost nothing with which it could have chosen not to do so.

There is an argument that the decision not to address the equal protection issues more forthrightly was nothing more than a judgment call, which would put it beyond the range of fair criticism. Throughout the Florida proceedings, Bush downplayed the equal protection issue. In the first Florida Supreme Court proceeding, Bush buried his constitutional claims forty-plus pages into his brief, really did nothing more than simply state them, without analysis, and then did not emphasize them at all during the oral argument.[1558] During the contest trial, Bush all but abandoned the equal protection argument, leaving it to be advanced by the lawyers representing voters.[1559] In the second Florida Supreme Court proceeding, Bush's approach was precisely the same as it had been in the first. The claims were there, but Bush did not elaborate on them or particularly press them during the oral argument.[1560]

The conventional wisdom thus might have suggested to the lawyers that Gore let sleeping dogs lie. To have taken up the sword and addressed the merits of the equal protection problems would only have called the court's attention to them and lent legitimacy to Bush's claims. The specific circumstances, however, plainly called for an exception to the conventional wisdom.

Gore's lawyers had to know, for example, that Bush was pressing the equal protection issue hard. His lawyers were just pressing it hard some place else, over in the federal courts.[1561] So clearly their plan was not to forsake any reliance on the constitutional claims. It was just to do whatever they could to get to the judges most likely to be receptive and conclusive: the five conservative justices of the United States Supreme Court.[1562] Bush would try the Eleventh Circuit first, which was in all events more likely to side with him than the Florida Supreme Court, but as a precaution, his lawyers would drop sufficient references to the Equal Protection Clause in their Florida arguments

1558. *See supra* notes 512–13, 566–72 and accompanying text.
1559. *See supra* notes 876–77, 880–81 and accompanying text.
1560. *See supra* notes 1102–04, 1122–29 and accompanying text.
1561. *See supra* notes 330–35, 430–31, 1009–14, 1027–49 and accompanying text.
1562. *See supra* note 656.

so that the issue would be preserved if it went up from the state system.[1563] This was of course basic lawyering, and the safe bet is that Gore's lawyers fully understood it to be Bush's strategy. But if that is so, it is hard to understand why they would not at least try to help the Florida Supreme Court reach an intelligent, well-reasoned analysis of the equal protection issues rather than simply hand the United States Supreme Court a clean slate on which to write.

It may be that Gore's lawyers simply miscalculated the likelihood that Bush could be successful in the Supreme Court. Bush's arguments were based on a novel interpretation of the Equal Protection Clause, and he was aiming them at five justices who, whatever their political background, were not amenable to finding equal protection violations unless precedent forced them to.[1564] Further, the five conservative members of the Court tended to be highly deferential to state courts,[1565] and the lawyers may have believed that they would be unwilling to consider equal protection issues arising out of a state proceeding if the state court itself had not first addressed them.[1566] If this was their thinking—that the novelty of Bush's claims and the state court's avoidance of them counseled leaving them alone—the lawyers' decision makes more sense, because it partakes more of a judgment call gone awry than a pure error.

There is a problem with this theory, however, stemming from Judge Sauls's decision against Gore in the contest action. Judge Sauls had held that Gore's contest action was deficient because he had not sought a statewide recount, or at least a recount in "all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred," *i.e.*, all of the counties where punch card systems had the effect of excluding intended votes.[1567] So to reverse Judge Sauls, the Florida Supreme Court was going to *have* to address the issue of extending statewide the count of punch card undervotes: if Gore had

1563. *See supra* text accompanying notes 655–56.

1564. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring in judgment, joined by Justice Rehnquist) (disagreeing with Court's "extension of vote dilution claims to mainstream political groups"); United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175, 179 (1980) (Rehnquist, J.) (noting that "the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn," and that such laws "do[ ] not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality,'" and holding that as long as "there are plausible reasons" for a law, it should be upheld) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

1565. *See Bush*, 531 U.S. at 135–43 (Ginsburg, J., dissenting) (cataloguing the views expressed by the majority justices on the need to show deference to state court decisions).

1566. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 533 (1992) (O'Connor, J.) (holding that the Court would not consider a due process claim not pressed in or passed on first by state court).

1567. *See* Ruling Transcript, *supra* note 882, at 12–13.

proved punch card *systems* were the problem, how could it be equitable to correct that problem only in three overwhelmingly Democratic counties chosen by Gore and none of the twenty-one other punch card counties? And while Judge Sauls had not cast his ruling in constitutional terms, his statement did dovetail with precisely the constitutional arguments Bush had been making.[1568] In fact, the day before the Florida oral argument, Eleventh Circuit Judge Carnes, with three other judges concurring, had made this very point and deemed it a violation of the Equal Protection Clause.[1569]

Thus, assuming that Gore could persuade the Florida Supreme Court to reinstate the count, it was not very likely that he could do so without the court addressing at least the "statewide" aspect of Bush's equal protection argument. So at this point, it might still have made sense for Gore to omit the constitutional issues from his Florida brief, because Bush was barely pressing the claim,[1570] but to offer so little on oral argument, once the Florida justices *themselves* questioned the fairness of recounting only some of the counties that had been afflicted with the punch card problem, could not be considered a judgment call. At that point it was lack of preparation, pure and simple: the failure to develop a body of arguments to address a weakness that the lawyers knew had been there from the very beginning.

One would have hoped that the Supreme Court's stay, issued the day after the Florida court's decision, would jolt Gore's lawyers into rethinking their strategy on Bush's equal protection claims. One of those claims—the unfairness of counting only selected counties—was now gone, but there remained the issue of the standard to be used in counting, and it had suddenly grown gargantuan.[1571] Perhaps some new approach was in order.

Yet the lawyers' Supreme Court performance made their failure to prepare throughout only that much *more* glaring. Justice Scalia, at least, had based the stay in part on the "constitutionality" of "letting the standard . . . vary from county to county," indicating that the Court was prepared to address the constitutional issue and had already decided that the counties were in fact treating ballots differently.[1572] Yet Gore's lawyers opened their brief by quarreling with the basis of Bush's claims: Bush had not properly raised the issue below; he had no record evidence that the counties actually were applying disparate standards in evaluating the ballots; and the Florida court had in fact imposed a uniform standard for counting a vote, a "clear

1568. *See supra* note 1541 and accompanying text.

1569. *See supra* notes 1027–37 and accompanying text.

1570. *See supra* notes 1558–60 and accompanying text.

1571. *See supra* notes 1176–88 and accompanying text (describing what happened on remand and Bush's lawyers' delight when the judge hearing the case refused to elaborate on the standard for finding legal votes).

1572. *See supra* note 1215 and accompanying text.

indication of the intent of the voter."[1573] From there, the brief defended primarily on the ground that many laws are unfair. Gore's lawyers admitted that "the intent of the voter" standard would result in "some degree of inconsistency" but charged that all sorts of accepted legal practices were susceptible to inconsistency.[1574] If the Court were going to overturn this standard on the basis of inconsistency, the lawyers complained, juries would no longer be able to find "negligence," states could no longer allow different voting systems to be used, and laws all over the country allowing for manual recounts under an "intent of the voter" standard, including those in Texas, would fall.[1575] With the inconsistency seen in this light, the brief claimed, it would be an "absurd and unprecedented response" to invalidate the counting altogether, particularly when there was a judge who would be overseeing the process.[1576]

There was nothing per se *wrong* with any of these arguments, but they were truly inadequate given the complexity of the case. The brief did not even *discuss*, for example, whether a strict or deferential level of scrutiny should be applied, even though a deferential approach to nondiscriminatory state election laws had been the linchpin of all the federal court opinions that had upheld the recounting, and presidential election precedent appeared to require that approach.[1577] Indeed, at one point the brief actually suggested that *strict* scrutiny might be appropriate, inasmuch as the lawyers wrote that the Florida court's decision was "narrowly tailored" to serve the state's interest in ensuring that all persons intending to vote were treated equally.[1578] Likewise, the brief made virtually no reference to the absence of discriminatory intent on Florida's part, even though the Court had often indicated that such intent was the evil at which the Equal Protection Clause was aimed.[1579] That concept was reduced to a single clause in a single sentence: "petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner."[1580]

1573. *See supra* notes 1297, 1307 and accompanying text.
1574. *See supra* notes 1300–01, 1304 and accompanying text.
1575. *See* Brief for Respondent Albert Gore, Jr., *supra* note 1263, at 36, 46.
1576. *See supra* notes 1314–15 and accompanying text.
1577. *See supra* notes 200–07, 370–79, 1050–76 and accompanying text.
1578. *See supra* note 1303 and accompanying text.
1579. Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("[W]hen there is no 'reason to infer antipathy,' it is presumed that 'even improvident decisions will eventually be rectified by the democratic process . . . .'") (citation omitted); McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (requiring criminal defendant charging equal protection violation to show that state acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (quoting *Feeney*, 442 U.S. at 279)); Washington v. Davis, 426 U.S. 229, 238–39 (1976) (referring to the "constitutional rule" that plaintiff must show discriminatory purpose to make out equal protection violation); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion) (reciting in voting discrimination case "the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment").
1580. *See supra* note 1305 and accompanying text.

These arguments would have been much more to the point, and persuasive, than claiming that the law in place everywhere was an imperfect beast, and so there was no need to make the recounts any different.

Of course, if the brief suggested weak preparation, David Boies's argument confirmed it. When asked whether different counties might apply the intent of the voter standard differently, a question that obviously required a delicate response, Boies volunteered that two different *individuals* sitting at the same counting table might apply the standard differently to the same ballot.[1581] This shows how, over the course of the case, the lawyers had stopped listening to their instincts, because not twenty days earlier Boies had stated that wide variations in the standards applied to ballots might be unconstitutional.[1582] Boies quickly tried to qualify his response, by adding that the differences between individuals would be only "on the margin,"[1583] but the cavalier way in which he had answered the question left a terrible impression of the Gore camp's attitude toward integrity in the process.

Later in the argument, Boies stumbled again. Ostensibly because the lawyers had finally begun to recognize that Bush's equal protection argument presented a real threat, they had argued in the brief that even if the Court found that there should be a more specific standard to guide the counting, the proper remedy would be to remand for the counting to continue under a newly announced, more specific standard.[1584] Justice Souter had obviously seized upon this point as the one possibility of saving the recount, and so he questioned Boies on what that standard should be.[1585] Boies, however—notwithstanding that Gore's own brief had raised the question and Justice Breyer had put the same question to Ted Olson before him[1586]—was not ready. He paused, and sighed, and finally suggested a standard that would not even correct the problem, because it incorporated the very same open-ended "intent of the voter" evaluation at which most of the justices were balking.[1587]

One would have thought from the argument that Gore was simply out of ammunition, pinned to the wall because there really was a clear equal protection violation. But that simply was not the case. If

1581. *See supra* notes 1377–78 and accompanying text.
1582. *See supra* note 550 and accompanying text.
1583. *See supra* notes 1379–80 and accompanying text.
1584. *See supra* note 1316 and accompanying text.
1585. *See supra* notes 1384–85 and accompanying text.
1586. *See supra* notes 1316, 1346 and accompanying text.
1587. *See supra* notes 1386–87 and accompanying text. Boies's hesitance might have been explained by his fear of the electoral appointments clause problem discussed earlier—the idea that any standard not drawn only from the legislature might violate the electoral appointments clause—except that, inexplicably, Ted Olson had conceded moments before that it would *not* be unconstitutional for the Florida court to devise one. *See supra* note 1351 and accompanying text.

Gore's lawyers had been paying attention to the equal protection issues throughout the proceeding, they would have known there were many ways to defend both the counting and the "intent of the voter" standard.

First, they could have pointed directly to *Anderson v. Celebrezze*, and cases that followed it, and argued that those cases required the Court to adopt a more deferential approach, weighing any burden on those invoking equal protection against the state's interest in permitting the recount.[1588] This would have enabled Gore to accentuate, in *legally cognizable* terms, the lopsided choice between having a few ballots evaluated differently (the burden) and completely foregoing an effort to honor the intent of thousands of voters whose ballots had in effect been discarded by the machines (the state's interest). An analogy would have been available from precedent in which the Court tolerated unconstitutional vote dilution when the choice was foregoing an election altogether.[1589]

Second, as alluded to above, the lawyers could have emphasized the line of Supreme Court cases making clear that it is intentional discrimination at which the Equal Protection Clause is aimed.[1590] Doing so would not have eliminated Bush's claim: a finding that it was conducted in an arbitrary manner could still have invalidated the count.[1591] Yet by focusing the Court on the purpose behind the Equal Protection Clause—and making clear that the Florida court could not possibly have intended to discriminate against any Florida voters whose ballots might be treated differently—the justices might have become more willing to show deference to the Florida court's decision.

Third, the lawyers could have made an argument in favor of the decentralized approach to evaluating ballots that the Florida court had adopted. Specifically, just as some counties in Florida used opti-

1588. *See supra* notes 200–07 and accompanying text.

1589. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 739 (1964).

1590. *See* cases cited *supra* note 1579.

1591. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000). The Court made clear in *Olech* that at least some state actions could be violations of the Equal Protection Clause if they were intentional and "irrational or wholly arbitrary," even if unaccompanied by a discriminatory intent. The plaintiff in *Olech* complained that the Village had arbitrarily demanded a thirty-three-foot easement from her before it would connect her water. *Id.* at 563. The district court dismissed her case, and the Seventh Circuit reinstated it. *Id.* at 563–64. In affirming the decision, the Court was even more receptive to her claim than the Seventh Circuit had been:

> The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of "subjective ill will" relied on by that court.

Id. at 565.

cal scan equipment and some used punch card systems, different counties used different punch card systems and maintained those systems differently.[1592] These differences in turn could justify one county's counting a dimpled ballot as a vote, and another's refusal to do so. For example, if one county was using the stylus that had been described at trial as defective, and had not cleaned its machines in many years, it was much more likely that a dimpled ballot was intended as a vote than it was in a county with the corrected stylus that had regularly cleaned its machines.[1593] Hence, it made sense to permit *local* officials, who had voted on the machines, and were uniquely familiar with both their operation and their maintenance, make the call on intent.

Fourth, the lawyers could have drawn from the record to show that the "intent of the voter" standard was not in fact likely to lead to arbitrary treatment of ballots. Bush's lawyers, for example, had Judge Burton testify as to his canvassing board's application of the "intent of the voter" standard, and then they argued that the Palm Beach board had done "exactly what . . . the Florida Supreme Court . . . says you should do," and what "any rational judgment of a human being suggests you should do."[1594] This of course would have been impossible if the standard was truly as amorphous and arbitrary as Bush was claiming before the Supreme Court. Further, another of Bush's own witnesses, the developer of the Votomatic punch card machine, testified that it was actually "simple" to distinguish a stylus mark on a chad from some other indentation, because the stylus was pointed and of a particular diameter.[1595] This witness added that the paper used for ballots was designed to be durable enough that chads would not fall out just from handling.[1596] Thus, the popular impression that the count would necessarily have been a chaotic exercise in guesswork, with the ballots deteriorating by the moment and resulting in "false" votes, could effectively have been discredited.

Finally, the lawyers could have cited record evidence to rebut the claim that the "intent of the voter" standard improperly allowed partisan canvassing boards to find votes for Gore. Gore's trial statistician had studied the recovery of votes in Broward County, and compared the percentages of votes for Bush and Gore resulting from the manual recount with the percentages of votes for Bush and Gore recorded by the machines. The results showed that Bush actually received a higher percentage of votes during the manual recount than he had in

1592. *See supra* notes 794, 799, 823, 828 and accompanying text.
1593. *See supra* notes 796, 834, 838–39 and accompanying text. Justice Ginsburg seemed to be sensing this point when she asked during Olson's rebuttal how one could have a uniform standard when there were so many different voting systems in place. *See supra* note 1393 and accompanying text.
1594. *See supra* notes 819–22, 877 and accompanying text.
1595. *See supra* note 831 and accompanying text.
1596. *See supra* note 837 and accompanying text.

the machine count, even though two of the three board members were Democrats.[1597] This evidence went unrebutted at trial, but Gore's lawyers never mentioned it in response to Bush's charges that the "intent of the voter" standard would allow partisanship to taint the count.

In light of the extraordinary time constraints on writing the brief and presenting the case at oral argument, one certainly cannot fault Gore's lawyers for failing to raise all of these arguments. But one can fault them for not raising *any* of them. Bush had been complaining all along about the unconstitutionality of the counting standard (however quietly),[1598] two different federal judges had written extensive opinions defending the constitutionality of the standard,[1599] there was an entire team of lawyers handling the federal proceeding to which the lawyers in the Florida and Supreme Court proceedings could have turned,[1600] and Boies himself had conducted a trial during which a great deal of evidence relevant to the "intent of the voter" standard was discussed.[1601] So time should not have been that much of a factor. If Gore's lawyers had taken the weakness in their case seriously from the start, and begun developing arguments to address it even then, they would have been prepared when the final bell rang.

In some defense of Laurence Tribe, it has been reported that Tribe unsuccessfully "tried to get David Boies and Ron Klain to spend more time on the equal-protection issue in the various briefs before the Florida Supreme Court."[1602] If this is so, Tribe cannot be faulted for the absence of any equal protection analysis by the Florida court that could have had improved the outcome. But there is another level on which the reporter's observation indicts Tribe, because it shows that he knew all along that Bush's equal protection claims needed to be taken seriously. Yet Tribe wrote the final Supreme Court brief, and it was sorely lacking in arguments the Supreme Court needed to hear.

Indeed, it now appears that different members of the team may have had different reasons for being unprepared on the equal protection issue, but that none of those reasons is compatible with good lawyering. In explaining why Tribe was unsuccessful in convincing the team to brief the equal protection issue, the same reporter writes:

> Part of the reason was logistics and the crunch of time: Tribe was never in Tallahassee and always had to get in his two cents by phone. More important, though, Boies and Klain had decided that, strategically, they needed to concentrate on state law; getting into

1597. *See supra* note 808 and accompanying text.
1598. *See supra* notes 512–13, 1104 and accompanying text.
1599. *See supra* notes 370–79, 1050–76 and accompanying text.
1600. *See supra* note 1471 and accompanying text.
1601. *See supra* notes 1591–96 and accompanying text.
1602. KAPLAN, *supra* note 1006, at 220.

> federal matters, statutory or constitutional, only made the litigation more appealing to federal judges.[1603]

This strongly suggests that Tribe's failure to fully address the equal protection issue resulted from his inability to devote his full attention to the litigation. If so, his performance simply cannot be justified: working part-time on a case this large, with such extraordinary stakes, in a knowingly accelerated time frame, was just not an acceptable choice. No matter how brilliant, how experienced, or even how incomparable they may seem to be, lawyers cannot perform properly without adequate time for preparation, and if their circumstances do not allow for the time required, they should not undertake the representation.

The ostensible explanation for the other lawyers' failure to prepare is similarly inadequate. It was one thing for Boies and Klain to decide that the equal protection issues should not be briefed in Florida, but wholly another not to take the issues seriously behind the scenes and develop a strategy to address them. As discussed above, at the moment Judge Sauls ruled that it was unfair to count undervotes in some counties and not in others—if not much earlier—it should have been clear that the Equal Protection Clause was not just going away, but coming at Gore with full force.

The hardest question, of course, remains. Would the outcome really have been different if Gore's lawyers had mastered and presented his equal protection response as they should have? This "causation" question is in many ways easier to answer with respect to the other two errors Gore's lawyers made (mischaracterizing § 5 and finding *McPherson* too late), because in those instances the lawyers urged affirmatively wrong visions of the law, and one certainly hopes that the courts would have taken different paths had they known their impressions of the governing law were incorrect or incomplete. The equal protection issues, in contrast, were never susceptible of a definitively right or definitively wrong answer.

Thus, the Supreme Court majority might have rejected whatever analysis Gore's lawyers presented. But it is worth noting the justices' own words: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[1604] What if the "circumstances" had looked very different, and the "complexities" not nearly so daunting?

D. *A Necessary Additional Comment*

The intense focus here on Gore's lawyers may seem to some unkind, one-sided. Some may complain that it shows disrespect for a

1603. *Id.*
1604. *See supra* note 1437 and accompanying text.

group of attorneys who obviously tried very hard and worked to exhaustion to advance their client's cause.

Although these would be understandable reactions, there are several responses. First, although it is true that this Part of the Article emphasizes the mistakes of Gore's lawyers, that is purely because only the errors on Gore's side were of ultimate consequence, and the purpose here has been to examine the role the lawyering played in the outcome. In presenting the history of the case, in Part Two, every effort has been made to be comprehensive and evenhanded: to observe the weak moments, but also the strong moments, of both sides.

Further, no disrespect is or has been intended. The lawyers' conduct would not have been studied at all were it not for its significance as an historical matter, and criticism offered solely for its historical value should not be equated with disrespect. Most trial lawyers will at some point in their lives have a case on which they make critical mistakes, and it would be particularly shortsighted to treat any one such case, especially a case as peculiar as the election controversy, as representative of their abilities as lawyers.

Indeed, even if they made mistakes that came back to haunt them, Gore's lawyers deserve great credit for sustaining his campaign as long as they did. They managed to have well over a million ballots manually recounted,[1605] an extraordinary feat. They tried the case with a grace that inspired a remarkable level of patience in the American public. They made hard but wise decisions on the allocation of their various resources, choosing not to devote them to the butterfly ballot or absentee ballot cases that were eventually unsuccessful.[1606]

These accomplishments alone are worthy of respect. In fact, they make it especially important to dispel some of the common misconceptions about the lawyers' work.

III. THE UNFOUNDED CHARGES OF ERROR

In the aftermath of the election, several legal commentators have condemned Gore's lawyers for two decisions. Some have insisted that Gore's lawyers should have asked, from the beginning, for a statewide recount.[1607] Others have questioned their decision to seek an exten-

1605. *See supra* text accompanying notes 336, 680–81.

1606. *See supra* notes 756–58, 1467 and accompanying text.

1607. One commentator, for example, has written:

> "If Gore's lawyers had asked for a statewide recount with uniform standards from the beginning, they, and not Bush, would have had the more reasonable argument. The Gore side would not have appeared to be unfairly pursuing a tactical advantage, and they would not have wasted five weeks going after something that ultimately the courts could not uphold."

H. Lee Sarokin, *David v. Goliath: A Law School Debate About* Bush v. Gore, 38 SAN DIEGO L. REV. 1081, 1085–86 (2001) (quoting University of San Diego law professor Michael Ramsey). *See also* Barstow & Nagourney, *supra* note 316 ("'It had the appearance of being manipulative[.] It had the appearance of making it look as if he

sion for the recounts rather than proceed immediately to a contest action.[1608] These criticisms, however, are entirely unfair. They are nothing but potshots at legitimate judgment calls, accusations made easy for those who know how things turned out, but have thought little about the facts at the time the decisions were made.

A. *The Decision To Seek Selective Recounts*

At the time the lawyers decided where to seek recounts, they had several immediate ramifications to consider. The first was resources. Gore would need to staff every county with monitors qualified enough that he could trust them to represent his interests.[1609] The second was public relations. Gore had to avoid appearing as though he was throwing Florida into turmoil.[1610] The third was Florida law. There had never been a statewide recount and Florida law did not expressly provide for such a thing.[1611] The fourth was likelihood of success: whether one, two, or sixty-seven counties were likely to net him the 1700-plus votes he needed to win.[1612]

With these factors in mind, the decision to seek selective recounts was entirely reasonable. The goal, after all, was to have Gore declared the winner, and if the existing percentages were any indication of what votes would be recovered, seeking a recount statewide could well have made the overall results a wash. If the number of counties was limited, they could be properly staffed and Gore would not appear as though he was just fomenting confusion. Florida law certainly seemed to permit him to choose certain counties, and if Gore had challenged the count statewide, there was the risk that state and local officials would balk at the unprecedented nature of the move.

This does not mean that seeking recounts in selected, Democratic counties was the *fairest* choice Gore could have made. Nor does it mean that there were not very serious consequences of the choice. The courts' discomfort with the selectivity is now quite obvious, and this Article has already argued that Gore's lawyers should have predicted and defended against that discomfort.[1613] But it is absurd to

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didn't want a level playing field. I think it seeped into the way the judicial system perceived things.'" (quoting Northwestern University law professor Thomas W. Merrill)); DEADLOCK, *supra* note 1, at 247 ("Gore came under heavy criticism from Republicans and some independent analysts for his decision to seek recounts in only four counties that were heavily Democratic.").

1608. *See, e.g.*, McConnell, *supra* note 1546, at 111–12, 120 (criticizing "the fact that Gore's lawyers asked for the extension of the certification deadline, only to be injured by the . . . shrinkage of the contest period"); Barstow & Nagourney, *supra* note 316 (quoting New York University law professor Joshua Rosenkranz describing the decision as "questionable").

1609. *See supra* note 317 and accompanying text.

1610. *See supra* note 316 and accompanying text.

1611. *See supra* note 315 and accompanying text.

1612. *See supra* notes 30, 318 and accompanying text.

1613. *See supra* notes 1541–1604 and accompanying text.

suggest that the entire decision should have turned on the potential for negative perceptions, because Gore would not even get to the point where the negative perceptions *mattered* unless he first reversed the 1700-plus margin that existed at the time the decision was made. There were defenses to an equal protection challenge,[1614] but there were no defenses to a vote tally that remained in Bush's favor.

Now, after all that happened, it is easy to observe that Gore's strategy backfired on him. The equal protection elephant never went away, and in the end, it caused the Florida Supreme Court to order a recount statewide in such a short time frame that the count's integrity was threatened. The mistake, however, was not in the initial decision to seek a selective recount: it was in not preparing more vigorously to defend it.

To the extent that the decision revealed a certain hypocrisy on Gore's part, that is a legitimate discussion for another day. It suffices to say that the charge of hypocrisy can be levied only at Gore, not at his attorneys. His attorneys were responsible for surveying the choices available *within the law*, laying out the potential consequences of each choice, and presenting to their client the best avenue, within the law, for accomplishing the result he wanted. If Gore unconditionally wanted a victory, that called for one option. If he wanted a victory only on terms that would be considered the fairest, that might have called for another option. But in the end, that decision was Gore's, and Gore's alone, to make.

B. *The Decision To Have the Recounts Included Before Bringing Suit*

Criticizing Gore's lawyers because he did not seek a statewide recount is unfair enough, but criticizing them for trying to have the manual recounts included in the certification (as opposed to allowing the certification to stand without them and proceeding immediately to the contest action) is even more unjustified. Virtually *every* circumstance that could have been known to Gore's lawyers at the time counseled in favor of pursuing precisely the path he chose.

First, there was the ever-present "public consciousness" (to borrow the term Bush's lawyers used in seeking the stay). In deciding whether to challenge Katherine Harris's decision to exclude the recounts, Gore's lawyers had to imagine the effect on that consciousness if he simply gave in and Bush was "certified" the winner of the election. The lawyers may or may not have exaggerated the threat (as it turned out, the public remained surprisingly tolerant even after certification, although it may simply have become numbed to the controversy by then), but they had to be concerned whether Bush's certification alone would bring such an outcry for Gore to concede

1614. *See supra* notes 1588–97 and accompanying text.

that he would have no choice but to do so. The gravity of that risk cannot be overstated.

Second, there was the issue of how Gore best stood to recover votes. From the beginning, Gore needed a pool of Democratically-disposed ballots large enough that Gore might close the margin even if his relative percentage within that pool stayed the same. As it stood at the time Katherine Harris rejected any recounts, that pool, from Broward, Palm Beach, and Miami-Dade Counties, consisted of well over 1.5 million ballots.[1615] It could not possibly have made more sense for Gore to go to a judge and ask him, as opposed to four canvassing boards that were well on their way, to review a million and a half ballots.

Of course, in the contest phase, in contrast to the recount phase, the governing law did not require that Gore seek a recount of *all* of a given county's ballots,[1616] and so he might have asked the court to count only the 34,000 or so undervotes from those counties. This would have reduced the number the contest judge would have to count, but it would also have dramatically reduced the number from which Gore might achieve steady incremental gains (it would have, for example, removed the overvoted ballots from consideration). And there was no reason at all to believe that an unknown judge hearing a contest action would find votes more readily than the canvassing boards. Indeed, at the time Gore asked the Florida Supreme Court to rule that the recounts must be accepted, both Palm Beach and Broward Counties were under a court order requiring them not to exclude dimpled ballots, and they were giving such ballots consideration.[1617]

Third, if seeking the recounts spawned a lot of difficult and time-consuming legal questions, there was no reason to believe that a contest action would be any different. The contest statute had been amended in 1999, so there was little precedent addressing it, and it did not provide at all for the context of a presidential election.[1618] (The reader will recall, for example, that Bush actually urged the United States Supreme Court to hold that Gore could not invoke the contest statute in the context of a presidential election.[1619])

Fourth, it was in large measure the number of votes found by the Broward, Palm Beach, and Miami-Dade boards during the recounts on which Gore relied in the contest proceeding to show the court that there were a sufficient number of legal votes rejected to "place the election in doubt." Yet if he had simply conceded the certification,

1615. *See supra* text accompanying notes 354, 432 (stating Palm Beach had more than 460,000 ballots and Miami-Dade more than 654,000 ballots); *supra* note 355 (stating Broward had more than 580,000 ballots).

1616. *See supra* notes 111, 1147–48 and accompanying text.

1617. *See supra* notes 435–38 and accompanying text.

1618. *See* FLA. STAT. ANN. § 102.168 (West Supp. 2001).

1619. *See supra* note 1194 and accompanying text.

those boards would have stopped counting, and how many votes were there would not have been available to him as proof.

Fifth, pure common sense dictated that Gore should seek first to have the canvassing board's recounts included. There was no reason not to take two bites at the same apple. If the first bite (the recount requests) worked, and the canvassing boards reversed the outcome, Gore would be certified the winner, and it would be Bush appearing as the litigious loser. And even if the second bite (the contest action) did become necessary, at least the issues would be markedly reduced, and Gore would know a lot more about what was in the different groups of ballots from having witnessed the recount efforts.

The only possible response to all of this is a post hoc observation that Gore ran out of time. At the time the decision had to be made, when Katherine Harris refused to allow the counties to amend their returns, Gore had no reason to believe that it would be *he* who would run out of time. It was just as likely that the boards' recounts would yield him the votes, and that it would be *Bush* racing against the clock.[1620] Indeed, if the Miami-Dade board had not been so slow and indecisive in considering whether to count,[1621] which in turn made it impossible for the board to finish by November 26, it is easy to imagine that reverse scenario. That the scenario did not materialize cannot be laid at the feet of the lawyers. They could make decisions only on the facts that were known at the time.

Finally, for the sake of accuracy (*i.e.*, recognizing that Gore's lawyers apparently did not know this at the time), it must be reiterated that the entire premise of this criticism is wrong. Gore did *not* "run out of time." As discussed at length above, everyone, the courts included, just assumed that December 12 was a drop-dead date, when in reality the only deadline was December 18.[1622] And it is impossible to know whether the contest action could have been completed by December 18, because the United States Supreme Court stopped it cold, six days early.

In sum, Gore's lawyers made certain critical errors in representing him, but the decisions not to seek a statewide recount and not to proceed directly to a contest action are not among them. The only commentators who would claim otherwise either have not studied the case in depth, or have no qualms about second-guessing what were reasonable judgment calls on the information available at the time. In either case, they do the profession a disservice by oversimplifying the events.

1620. In fact, this was the primary objection Bush raised in the first Florida Supreme Court argument. *See supra* notes 553–57 and accompanying text.

1621. *See supra* notes 409, 432, 703–06 and accompanying text.

1622. *See supra* notes 1480–94 and accompanying text.

CONCLUSION

Ordinarily, scholarship focuses on the content of the law. It generally does not matter much what was argued in a case. It matters how the case came out, what we can take forward from it, what ought to be built on or revised in later decisions.

Bush v. Gore, however, was no ordinary case. The litigation over the election polarized what had otherwise been a sleepy electorate. The realms of politics and judgment became more dangerously intertwined in the American psyche. Even legal scholars began pointing fingers at the institutions they had been trained to criticize but nonetheless revere. If you leaned Democratic, you pointed to Washington; if you leaned Republican, you pointed to Tallahassee.

This Article was born squarely on the assumption that such condemnation of the judicial system is unhealthy and uncalled for, unless there is no explanation other than partisanship for the result. That is why it has traveled so far into the case, in so much detail. It has sought to let the reader decide whether there are the grounds to condemn *Bush v. Gore* or the grounds to explain it.

In doing so, it has uncovered an uncomfortable combination of both. It certainly does seem that the courts (much like the legal scholars who have reviewed their work), leaned Republican and Democratic. Yet it also appears that the adversary system itself—which is based on the idea that the most just results emerge when cases are presented by those with opposing personal stakes in the outcome—broke down. Time and time again, the lawyers made significant mistakes that failed to protect the courts from the humans at their center.

This might at once discourage and hearten us. It should discourage us because it suggests that there could have been a wiser resolution of the election, irrespective of who might have won. But it should hearten us to discover that what seemed entirely to be partisanship was merely a function of how important our profession really is.