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## Reuschlein Lecture

### THE LAWFULNESS OF THE ELECTION DECISION: A REPLY TO PROFESSOR TRIBE

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#### I. INTRODUCTION

IN 1960, while the legal academy was still earnestly debating whether *Brown v. Board of Education*<sup>1</sup> was rightly decided, Charles L. Black, Jr., a young white law professor who had worked with the NAACP's victorious legal team, rejected a merely pragmatic defense of the unanimous landmark Supreme Court decision that ended segregation in public schools:

If the cases outlawing segregation were wrongly decided, then they ought to be overruled. One can go further: if dominant professional opinion ever forms and settles on the belief that they were wrongly decided, then they will be overruled, slowly or all at once, openly or silently. The insignificant error, however palpable, can stand, because the convenience of settlement outweighs the discomfort of error. But the hugely consequential error cannot stand and does not stand.<sup>2</sup>

It was Black's bold contention that the Court's result in *Brown* could not be good, however attractive the holding, if the law that underlay it was bad. And Black showed with disarming simplicity that *Brown* was good law, based on a reasonable reading of the Fourteenth Amendment and a proper recognition that the doctrine of "separate but equal" in education consigned blacks by law to a second-class education.

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1. 348 U.S. 886 (1954).

2. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

We do not confuse the momentous questions, entangled with the best and the worst in our nation's history, that lay at the core of *Brown*, with the complicated legal and political issues implicated in the Court's dramatic intervention in the 2000 election controversy. Yet we do believe that something similar to what Black said about *Brown* should be said about the Court's election decision.

Contrary to the dire predictions of the Court's critics, its December 12, 2000, 5-4 per curiam opinion in *Bush v. Gore*<sup>3</sup> has not proved nearly as divisive as *Brown*—at least not yet. Yet, if *Bush v. Gore* was wrongly decided, it must not stand. Its specific result—George W. Bush's presidency—cannot be reversed. If the decision rests on a mistaken view of the law, however, then law professors should criticize it sharply and unsparingly to make sure that its legal errors do not become accepted doctrine. If it was indefensibly wrong, moreover, law professors should expose the sham, and the decision should stain the Court's legacy. And if, as some allege, its indefensible wrongness was the product of brute partisan manipulation, not honest differences over fact and law, it should burden the Bush presidency itself. Certainly if Bush (in the increasingly unlikely event) has an opportunity to name justices to the very Court whose dramatic intervention in the 2000 election controversy resulted in his victory, and if the Court's ruling reflected unlawful and undemocratic maneuvering by conservative justices keen to ensure that he would have the chance to put like-minded zealots on the bench, then the justices' corrupt conduct should loom large over the Senate's confirmation process.<sup>4</sup>

In fact, the Court's academic critics—who are numerous, influential and vehement—do believe that *Bush v. Gore* is indefensibly wrong and corruptly partisan.<sup>5</sup> Some of the biggest guns in the business—New York University's Ronald Dworkin,<sup>6</sup> Yale's Bruce Ackerman<sup>7</sup> and Harvard's Alan Dershowitz<sup>8</sup>—weighed in early and denounced the decision unequivocally. Along with a substantial portion of their colleagues from law schools around the country, they insisted in a massive outpouring of newspaper op-eds, opinion magazine essays, law journal articles, academic conferences and university press books that the Court's per curiam opinion joined by the five more conservative justices was lawless and undemocratic.

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3. 121 S. Ct. 525 (2000).

4. Early on in 2001, Democratic senators extended this line of reasoning to the confirmation of all of President Bush's nominations to the federal bench. See Neil A. Lewis, *Hurdles to Agenda*, N.Y. TIMES, Jan. 2, 2001, at A10.

5. This paragraph draws upon Peter Berkowitz, *Tribe v. Truth*, 7 WKLY. STANDARD 29, 29-33 (Feb. 4, 2002).

6. See generally Ronald Dworkin, *A Badly Flawed Election*, 48 N.Y. REV. BOOKS 1 (Jan. 11, 2001).

7. See generally Bruce Ackerman, *Anatomy of a Constitutional Coup*, 23 LONDON REV. BOOKS 3 (Feb. 8, 2001); Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48.

8. See generally ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (Oxford Univ. Press 2001).

Particularly, given the seriousness of the accusation, the inadequacy of their collective critique is breathtaking; it includes such basic failures as an inability or unwillingness to state the Court's holding correctly, not to mention numerous errors of fact and law.<sup>9</sup> The magnitude of the critics' failure, in turn, raises another possibility: that it is the professors, not the justices, who are wrong, and that the Court's decision, while imperfect, was a fairly creditable job under exceptionally difficult circumstances. If this is the case, it is the professors, and not the Court, who should be criticized sharply. If the professors are indefensibly wrong, moreover, it is their legacy, and not the Court's, that should suffer the consequences. And if the professors' indefensible wrongness is owing to partisan disregard for evidence and the canons of fair argument, this should cause us to think long and hard about the public role of our legal academics.

Recognizing many deficiencies of the conventional critique of *Bush v. Gore*, Laurence Tribe—the Tyler Professor of Constitutional Law at Harvard Law School, an eminent appellate advocate and among the nation's foremost scholars of constitutional law—stepped forward in the pages of the November 2001 *Harvard Law Review* to correct and refine the critique and lend it scholarly gravitas.<sup>10</sup> In the preciously entitled “Erog .v Hsub and Its Disguises: Freeing *Bush v. Gore* from Its Hall of Mirrors,”<sup>11</sup> Tribe provides perhaps the densest and most legally sophisticated attempt to thoroughly discredit the Court's opinion. If anybody could demonstrate, once and for all, the indefensibility of *Bush v. Gore*, it is reasonable to suppose that it would be Tribe. Though an interested party—he notes that during the 2000 election controversy he was Vice President Gore's “counsel of record in all of the U.S. Supreme Court proceedings”<sup>12</sup>—Tribe is the author of a treatise on constitutional law that is widely considered authoritative,<sup>13</sup> and few surpass his command of the subject. Yet Tribe's 133 pages and 535 footnotes in the *Harvard Law Review* weave a bigger and better disguise for *Bush v. Gore* and contribute mightily to locking the doors and bolting the gates of the house of mirrors in which legal scholars have relentlessly sought to imprison it.

Given his stellar credentials and his undoubted authority, Tribe's failure to demonstrate the indefensibility of *Bush v. Gore* is unusually instructive. Indeed, by demonstrating the unreasonableness of Tribe's critique of *Bush v. Gore*, we aim to bring into focus the lawfulness of the Court's decision.

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9. For a critique of the early academic criticism, see Peter Berkowitz & Benjamin Wittes, *The Professors and Bush v. Gore*, WILSON Q., Autumn 2001, at 76-89, available at <http://mason.gmu.edu/~berkowitz/theprofessorsandbushvgore.htm>.

10. This paragraph also draws upon Berkowitz, *supra* note 5.

11. Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001).

12. *Id.* at 180.

13. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed., vol. 1 2000).

We proceed in several steps. In Part II, we sketch the conventional critique of *Bush v. Gore* and describe how Tribe intends to separate himself from the pack. In Part III, we show that contrary to Tribe's analysis of the "political question doctrine," the Constitution did not "command the Court" to stay out of the election controversy and leave it for resolution by Florida and ultimately, if necessary, by Congress. We emphasize, however, that the constitutional values that the political question doctrine seeks to protect were strongly implicated in the Court's initial decision to grant certiorari and were throughout relevant to the Court's adjudication of the case. In Part IV, we maintain that the Court's per curiam holding that the Florida recount violated the Equal Protection Clause of the Fourteenth Amendment by impermissibly weighting citizens' votes differently is much closer to the Court's vote dilution jurisprudence than Tribe officially allows (but which he also eventually surreptitiously concedes). Indeed, despite the surface differences that Tribe stresses, the Court's decision can be seen as a reasonable application or extension of its vote dilution precedents. In Part V, we observe that Tribe, in contrast to many of his colleagues, openly embraces the premise of Chief Justice Rehnquist's concurring opinion: a ruling by a state supreme court that substantially departs from the legislative scheme for selecting presidential electors violates Article II, Section 1 of the Constitution. That section provides that presidential electors must be appointed by states "in such Manner as the Legislature thereof may direct."<sup>14</sup> We then show, contrary to Tribe, that when properly analyzed, the Florida court's opinions can reasonably be seen, as Chief Justice Rehnquist's concurring opinion would have held, as violating the Constitution by departing substantially from the election code enacted by the Florida legislature and in place on November 7, 2000.

Finally, in Part VI, having shown that *Bush v. Gore* presented a valid legal question ripe for Supreme Court resolution, not a political question whose resolution was reserved for Congress, and that the Equal Protection Clause offered one reasonable ground for reversal of the Florida Supreme Court's recount order and that Article II, Section 1 offered another, we consider the alternatives to the Court's resolution of the case. We identify three other potentially lawful approaches and show that all present both advantages and disadvantages in relation to the Court's actual handling of the case. We emphasize, however, that none of the alternatives is obviously more correct than the opinions the justices in the majority actually issued and each is marked by serious disadvantages. We conclude that notwithstanding Tribe's various refinements of the conventional critique, *Bush v. Gore* has far greater merit than the best that the leading scholars, Tribe included, have offered in criticism of it. The decision, while far from perfect and in some respects doctrinally incomplete, is less remarkable for these imperfections—given the circumstances under which it was produced—than for its lawfulness and overall adequacy.

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14. U.S. CONST. art. II, § 1, cl. 2.

## II. THE CONVENTIONAL CRITIQUE

The academic critics of *Bush v. Gore* charge that the U.S. Supreme Court was wrong in holding that the statewide hand recount of undervotes (ballots on which machines detected no vote for president) ordered by the Florida Supreme Court on December 8, 2000 (in *Gore v. Harris*<sup>15</sup>) violated the Equal Protection Clause of the Fourteenth Amendment.<sup>16</sup> It erred as well, according to the critics, in concluding that under Florida law, time had run out as of December 12 (the 3 U.S.C. § 5 federal safe-harbor deadline) to conduct a constitutionally proper recount. In so ruling, the charge continues, the conservatives made a mockery of their oft-professed dedication to judicial restraint, and states' rights and democratic process, and committed an inexcusable violation of their judicial duty to decide cases in a principled and impartial manner. In the end, the charge proclaims, the conservatives' disgraceful decision was only intelligible as a reckless partisan act perpetrated to hand the presidency to their candidate.

This grave accusation, which quickly congealed into the academy's conventional wisdom, has far-reaching consequences. It inflames partisan anger. It poisons the important public debate about the relation in our constitutional system between the courts and the democratic process. And—most damaging of all, perhaps—over the long haul, as the legal academy disseminates its disgust and disdain in the classrooms, it threatens to corrode the next generation of lawyers' confidence in the judiciary and respect for the rule of law. These consequences are particularly baleful because, despite its wide acceptance, the conventional wisdom about *Bush v. Gore* is deeply flawed.

To begin with, the academic critics consistently misstate the holding of the case. It was not only that the Supreme Court held that the Florida recount unconstitutionally diluted the weight of citizens' votes by treating similarly marked ballots differently, applying different standards from county to county and sometimes within the same county, in the same counting room and at the same counting table.<sup>17</sup> What the critics overlook is that votes were also subjected to arbitrary and disparate treatment, the Court held, in a variety of other ways: the Florida court's recount excluded overvotes, the much larger class of ballots spoiled by voter error, on which machines detected more than one choice for president; it included the results of a partial and unfinished manual recount in Miami-

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15. 772 So. 2d 1243 (Fla. 2000).

16. The following paragraphs draw on Berkowitz, *supra* note 5.

17. See DERSHOWITZ, *supra* note 8, at 56; Ackerman, *Anatomy of a Constitutional Coup*, *supra* note 7, at 3-11; Dworkin, *supra* note 6, at 2. Even with the benefit of time and distance, critics of the decision failed to state the holding accurately. See, e.g., Cass R. Sunstein, *Order Without Law*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT 205*, 211-15 (Cass R. Sunstein & Richard E. Epstein eds., 2001); Michael Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1727 (2001).

Dade County; and it allowed untrained and unsupervised personnel to count votes after they received information about how the application of competing standards to improperly marked ballots was likely to influence the outcome.<sup>18</sup>

In addition, the academic critics misrepresent the Court's reasoning about the remedy. The critics say that the Court imposed its own interpretation of Florida law on the Florida Supreme Court.<sup>19</sup> That's incorrect. The Court relied upon the Florida court's construction of Florida law to conclude that December 12 was the outside deadline for determining the winner of Florida's twenty-five electoral votes.<sup>20</sup>

And the academic critics misunderstand the conservatives' judicial philosophy. They imply that conservative jurists doubt that the Supreme Court has an obligation to review state action to ensure that it conforms to federal law and the Constitution.<sup>21</sup> This too is incorrect. What the more conservative justices believe is that invalidation of state action by the Court must be grounded in settled precedent and explicit textual statements, rather than based on moral values and substantive goods thought to be implicit in the Constitution.

Tribe rejects each element of the conventional critique. In the process, he at least recognizes the full range of infirmities that, the Court held, rendered the Florida recount unconstitutional. In addition, he acknowledges that the Court concluded that the Florida recount must be terminated because it understood the Florida court to have already held that under Florida law all recounts in the presidential election must be completed and the vote certified by the December 12 federal safe-harbor deadline. And, though he harshly criticizes their legal conclusions, he ruefully affirms that both the *per curiam* opinion and the concurrence were, alas, consistent with the conservatives' judicial philosophy, in no way anomalous for the Rehnquist Court. Yet by a different route, Tribe reaches the same conclusion as the conventional wisdom, which is that the Court's conduct was lawless and indefensible.

Despite his wholesale condemnation of the Court's conduct, Tribe seeks to present himself as the voice of moderation. Accordingly, he begins his article by describing two caricatures of the controversy, one of the Right and one of the Left, both of which he wishes to set aside. In the Right's caricature, the U.S. Supreme Court courageously intervened to block a lawless attempt by the Florida Supreme Court to help Gore by

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18. See *Bush v. Gore*, 121 S. Ct. 525, 530-33 (2000).

19. See Ackerman, *Anatomy of a Constitutional Coup*, *supra* note 7, at 8; Dworkin, *supra* note 6, at 2; Sunstein, *supra* note 17, at 215-16.

20. See *Bush*, 121 S. Ct. at 533.

21. See DERSHOWITZ, *supra* note 8, at 146, 149-50; Ackerman, *Anatomy of a Constitutional Coup*, *supra* note 7, at 1; Dworkin, *supra* note 6, at 121-72; see also Stephen Holmes, *A Constitutional Earthquake?*, in *THE UNFINISHED ELECTION OF 2000: LEADING SCHOLARS EXAMINE AMERICA'S STRANGEST ELECTION* 240, 244-45 (2001); Klarman, *supra* note 17, at 1721.

rewriting the Florida Election Code.<sup>22</sup> In the Left's caricature, the Court's intervention itself was lawless, a cynical reversal—driven purely by politics and in knowing violation of the states' rights creed of the Court's conservative majority—of a reasonable decision by the Florida court.<sup>23</sup> Tribe aims to “deconstruct” these two caricatures—“fairy tales,” he calls them—and in their place present “a more balanced account of the Supreme Court's role in the presidential election of 2000.”<sup>24</sup>

Alas, the lure of caricature proves too strong. For the conclusions that Tribe seeks to discredit are entirely those of the Right and the conclusions he seeks to place on firmer foundations are only those of the Left:

My intent is to dispel the suspicion that Florida's highest court played fast and loose with the state's election statutes, while showing that the U.S. Supreme Court acted in a manner wholly inconsistent with its constitutional responsibilities, whether viewed in terms of equal protection and due process or in terms of Article II; that it had no warrant to interfere with the political process as it did; but that its having done so was sadly of a piece with much that the Court has done in recent years.<sup>25</sup>

While he avoids casting aspersions on the justices' motives and avoids some of the most obvious errors of the conventional critique, Tribe's ultimate judgment about the 2000 election controversy closely resembles that of the Left's “fairy tale.” Tribe too concludes that the majority's legal arguments were “completely without merit,”<sup>26</sup> and he too believes that the Court's intervention betrayed an “utter disdain for democracy and its pluralistic institutions.”<sup>27</sup>

In reality, Tribe's essay is less an effort to mediate between the fairy tales than to recast the one that proclaims *Bush v. Gore* indefensible in more legally compelling terms. But the result is still essentially a fairy tale.

Nevertheless, the aim that Tribe set for himself—to present “a more balanced account of the Supreme Court's role in the presidential election of 2000”<sup>28</sup>—is an excellent one; indeed we embrace it ourselves. By critiquing Tribe's critique, we seek to accomplish in this Article what he said he set out to do in his: develop, based on the facts and a fair reading of Florida and federal law, an accurate understanding of the Court's election decision. That more accurate understanding reveals that the conclusion that Tribe shares with the conventional critique, that *Bush v. Gore* was indefensible, cannot withstand the analysis of the facts and Florida and federal law that Tribe agrees is necessary to a proper evaluation of the case.

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22. See Tribe, *supra* note 11, at 173-74.

23. See *id.* at 174-75.

24. *Id.* at 175.

25. *Id.* at 178.

26. *Id.*

27. *Id.* at 171.

28. *Id.* at 175.



## III. THE POLITICAL QUESTION DOCTRINE

Tribe's least balanced claim may well be that the so-called political question doctrine clearly and completely prohibited the Court from hearing and deciding the issues that it adjudicated in *Bush v. Gore*. If Tribe were correct about this, most of his critique of *Bush v. Gore* would be utterly extraneous to the manner in which the case ought to have been resolved. For after devoting one-hundred pages to laying out the deficiencies he believes plagued the Court's ruling on the merits—as well as the concurring opinion—Tribe turns around in Section V of his article and contends that there is “a powerful case” for “treating the matter as a political question textually committed to Congress under the Twelfth Amendment—rather than a legal question properly resolved by a court.”<sup>29</sup> In fact, he argues, “[t]he requisite textual commitment to a political branch could hardly be clearer.”<sup>30</sup>

Yet on the crucial point—whether the issues raised in *Bush v. Gore* were clearly assigned by the Constitution to Congress—Tribe's arguments are amazingly weak.<sup>31</sup> This is for the simple reason that, notwithstanding

29. *Id.* at 277.

30. *Id.* at 277-78.

31. For a powerful critique and a hard-hitting exchange, see Nelson Lund, “EQUAL PROTECTION, MY ASS!”? *Bush v. Gore and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT. 543, 562 (2002) [hereinafter Lund, “EQUAL PROTECTION, MY ASS!”?]; Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 593-94, 607 (2002). The third and fourth installments are Nelson Lund, *Carnival of Mirrors: Laurence Tribe's “Unbearable Wrongness”*, 19 CONST. COMMENT. 609 (2002) [hereinafter Lund, *Carnival of Mirrors*], and Laurence H. Tribe, *Lost at the Equal Protection Carnival: Nelson Lund's “Carnival of Mirrors”*, 19 CONST. COMMENT. 619 (2002). Tribe appears to back off of the contention that the Constitution categorically forbade any intervention in the matter by the Supreme Court. Yet his concession manages to confuse matters further. For starters, he mischaracterizes the tone of his original argument and misidentifies the nature of his error. He acknowledges that it is proper to “criticize some of the language I used in my first formulation of the argument.” And his original account approached the question “too mechanically.” Tribe, *The Unbearable Wrongness of Bush v. Gore*, *supra*, at 593. But these apologies conceal the real problem, which, as we show below, was that Tribe's language was consistently extreme and uncompromising, and that in his original account, he answered the question of justiciability categorically, repeatedly arguing that the Constitution unequivocally barred the Court from considering the issues raised in *Bush v. Gore*. In his reply to Lund, Tribe purports to arrive at the same conclusion by a different route, defending a new theory that he calls the “political process doctrine.” *See id.* at 596. However, by means of this doctrine, which calls for “deference to the political process,” Tribe actually arrives at a different conclusion, namely that the Court's intervention was *not* absolutely barred by the Constitution. While he continues to maintain that the Court's intervention was improper, he argues in the exchange with Lund that it rested on mistaken empirical judgments about the ability of Florida political institutions to address the constitutional problems presented by Gore's legal challenge to the original recount. *See id.* at 596-603. This is a defensible view; it corresponds in important ways to a view sketched by Justices Souter and Breyer in their dissents, and we examine its merits below, concluding that ultimately it is not clearly preferable to the view adopted by the majority of justices on the U.S. Supreme Court. But it is a far cry from Tribe's original claims. Nevertheless, Tribe's

Tribe's assertions, the requisite textual commitment in the Twelfth Amendment—which specifies that electoral votes shall be opened by the president of the Senate “in the presence of the Senate and House of Representatives” and that the “votes shall then be counted”<sup>32</sup>—simply is not there.

Wrong as Tribe's analysis of the political question doctrine is, we do not mean to suggest that there were no political question doctrine issues present in the case. There were indeed good reasons, rooted in the political question doctrine, for the Court to have waited more patiently on the sidelines during the Florida election controversy, or to have refrained altogether from involving itself. But a proper understanding of the ways in which the Court might have lawfully exercised its discretion to avoid ruling on the merits in *Bush v. Gore* involves understanding, contrary to Tribe, that the Court's ruling on the merits was also a lawful exercise of its discretion.

Despite the amazing weakness of his argument, Tribe's rhetoric is uncompromising. He thunders that the Twelfth Amendment's

text, structure, and history are entirely decisive in establishing that power to resolve electoral disputes—to decide which electors were duly selected to represent any given state in the manner that state's legislature directed in accord with Article II, Section 1, Clause 2—is not entrusted to the Chief Justice of the United States, to the Supreme Court of the United States, or to any other officer or part of the judicial branch of the United States. The House Committee reporting the bill whose ultimate embodiment was the Electoral Count Act of 1887, of which the famous safe harbor provision was a part, had no difficulty concluding that “the power to determine [contests over competing electors or electoral slates] rests with the two Houses, and there is no other constitutional tribunal.” That conclusion tracks the plain language of the Twelfth Amendment, and of Article II before it, and sounds like a “textually demonstrable constitutional commitment of the issue to a coordinate political department” if ever there were one.<sup>33</sup>

Tribe finds it “remarkable” that “neither the Court's per curiam opinion nor the concurrence so much as mentioned the political question issue” and sarcastically notes that “[i]t's hardly the sort of thing a Supreme Court

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original claims remain well worth rehearsing and refuting: they demonstrate the ferocity with which Tribe argued in a scholarly venue for demonstrably false legal doctrines, and they articulate opinions that reinforce the conventional scholarly wisdom, which has not budged.

32. U.S. CONST. amend. XII.

33. Tribe, *supra* note 11, at 277-79.

Justice simply forgets about. And even if it were, the briefs called the attention of the justices to the problem.”<sup>34</sup>

Tribe is absolutely certain that the Court’s obligation to throw out Bush’s challenge on political question grounds was an obvious call, not a subtle matter in any way:

For we are not talking here about some discretionary zone within which the Court may properly exercise, or decline to exercise, the passive virtues of abstention from decision, as the Court so often does in denying certiorari even though a matter is within its jurisdiction and may meet the technical requirements of a conflict in the lower courts or some other pressing need for Supreme Court intervention. Nor are we talking merely about some sort of judge-made “doctrine” serving to fill in the vast open spaces of the Constitution. This space is fairly well closed. . . . [T]he only lawful choice, not because of any theory of passive virtues or because the counsel of prudence so dictated, but rather because the Constitution so commanded the Court, was not to inject itself into the dispute.<sup>35</sup>

In other words, concerning whether to review the constitutionality of the Florida recount, the Constitution gave the Court no discretion, no leeway, no room to maneuver. Its message to the Court was loud and clear: Stay Out!

Tribe’s case for *mandatory* abstention on the part of the Court is wrong in many ways and on many levels. For starters, there is the discrepancy between the after-the-fact interpretations of the law that Tribe the scholar advances one year later and the legal theories that Tribe the lawyer presented to the Court on behalf of his client. For although Tribe claims in the *Harvard Law Review* that the Court was forbidden by the Constitution from intervening in *Bush v. Gore*, Tribe himself, as counsel of record for Vice President Gore, did not urge such a holding on the Court.<sup>36</sup> Moreover, his contention that “the briefs called the attention of the justices to the problem” is highly misleading, since Tribe’s own brief did nothing of the kind, not bothering even to mention the political question doctrine or to suggest that the issues in the case were nonjusticiable.<sup>37</sup>

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34. *Id.* at 279.

35. *Id.* at 280.

36. Bizarrely, in conceding error for proclaiming that the Constitution absolutely barred the Court from intervening, Tribe blames his excess on the heat of the battle. See Tribe, *The Unbearable Wrongness of Bush v. Gore*, *supra* note 31, at 593. This cannot be right, though, since in the heat of the battle, as Gore’s “counsel of record,” Tribe did not invoke the political question doctrine (which he contradictorily concedes in the same article and a few pages later at page 606). In fact, the invocation in question took place long after the dust had settled, in the *Harvard Law Review*, nearly a year after the Court’s decision.

37. See generally Brief for Respondent Albert Gore, Jr., *Bush v. Gore*, 121 S. Ct. 525 (2000) (No. 00-949), available at 2000 WL 1809151.

Indeed, Tribe relegates to a footnote in the *Harvard Law Review* the embarrassing fact, given his claims, that the brief to which he refers as having brought the political question doctrine to the attention of the justices was an amicus brief filed on behalf of the Florida legislature in a case, *Bush v. Palm Beach County Canvassing Board*,<sup>38</sup> that was no longer before the U.S. Supreme Court.<sup>39</sup>

Tribe fails to note, however, even in the footnote, two other facts about the brief that further subvert his claims: first, it dealt only with the Article II, Section 1 issue and argued that it was nonjusticiable on the grounds that whether the Florida court had departed from the legislative scheme was a question committed to the state legislature<sup>40</sup>; second, the brief urged the Court, in opposition to Tribe and his client and in support of Bush, to reverse the Florida court's holding.<sup>41</sup> In other words, the only people to bring the political question doctrine to the Supreme Court's attention did so advancing precisely the opposite holding from the one Tribe now blames the justices for failing to reach. And, it is worth emphasizing, no party to the litigation urged the Court to consider the equal protection claim or the entire adjudication of the election controversy as textually committed to Congress.

Nonetheless, a question of justiciability is always before the Court, and if Tribe is right that the issues presented to the Court by the Bush challenge were nonjusticiable, the Court had no business even discussing the Equal Protection Clause or Article II, Section 1. If nonjusticiable, the Court should have resolved the case in very few paragraphs. Whether the political question doctrine precludes any intervention, therefore, is necessarily the threshold inquiry, and though Tribe treats it as a decisive afterthought and the Court does not treat it at all, we consequently treat it first.

Tribe does not argue, nor could he plausibly, that the political question doctrine generally precludes election law challenges based on the Equal Protection Clause or Article II, Section 1. As far back as *McPherson v. Blacker*,<sup>42</sup> after all, the Court insisted that challenges to state election codes as violating Article II are justiciable. Moreover, the very case that defined the modern conception of the political question doctrine itself, *Baker v. Carr*,<sup>43</sup> was a voting rights case involving an equal protection chal-

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38. 531 U.S. 70 (2000).

39. See Tribe, *supra* note 11, at 279 n.442.

40. See Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 7, *Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471 (2000) (No. 00-836).

41. See Tribe, *supra* note 11, at 279 n.442.

42. 146 U.S. 1 (1892).

43. 369 U.S. 186 (1962) (ruling that whether Constitution has committed matter to another branch of government, or whether action of that branch exceeds whatever authority has been committed to it, is responsibility of Supreme Court as ultimate interpreter of Constitution).

lence to a state's apportionment scheme. As the court said subsequently in *Williams v. Rhodes*<sup>44</sup>:

[The] 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*, 146 U.S. 1, 23-24, and more recently it has been squarely rejected in *Baker v. Carr*, 369 U.S. 186, 208-237 (1962), and in *Wesberry v. Sanders*, 376 U.S. 1, 5-7 (1964). 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.<sup>45</sup>

Tribe argues that what distinguishes *Bush v. Gore* from *McPherson*, as well as *Baker* and the voting rights cases generally, is the timing of the challenges. He concedes that it would be "altogether different" to have "a federal constitutional challenge, brought in advance of the presidential election, to a state's scheme for choosing electors, alleging that the design of the scheme offends Article II, Section 1, Clause 2 or the Equal Protection Clause or any other constitutional provision or principle."<sup>46</sup> The Twelfth Amendment, he contends, "does not give Congress the authority to jump into the fray in anticipation of the next election, before there are any electoral 'certificates' to open or any 'votes' to count, in order to weigh in on the question of a state electoral scheme's constitutional validity."<sup>47</sup> But the Constitution does require, in his view, "that challenges that reach the Court during the election or so close to the election that it appears no decision other than one stepping on Congress's Twelfth Amendment toes would be possible, should be regarded as political rather than justiciable."<sup>48</sup>

The initial problem with this position—that equal protection and Article II challenges to a state's scheme for selecting presidential electors are nonjusticiable if brought near to or after an election—is that, elsewhere in his article, Tribe concedes that it is wrong. He does so all but explicitly in a remarkable passage in which he rightly rejects the contention by the Court's shriller and less-informed critics that the justices had no business meddling in a state court's interpretation of state law. In this discussion, Tribe insists that had the Florida court after the election actually changed the statutory regime in place on Election Day—which he contends it did not do—the U.S. Supreme Court would have been right to intervene. And he also acknowledges that had the state court's recount involved a genu-

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44. 393 U.S. 23 (1968).

45. *Id.* at 28 (parallel citations omitted).

46. Tribe, *supra* note 11, at 282.

47. *Id.*

48. *Id.* at 282-84.

ine equal protection violation—which he insists it did not—then federal judicial involvement would have been appropriate as well. “Of course, the federal judiciary has a role to play in policing what a state’s courts do with respect to the manner in which presidential electors are chosen,” he argues. “If a state court were to rule that only white males who own real property in the state may vote for presidential electors, would anyone doubt that the federal judiciary could properly intervene? True, the basis for intervention in that case would be the Fourteenth Amendment, but what of it?”<sup>49</sup>

Imagine, Tribe goes on, that the state legislature had required electors to be chosen by popular vote. And then suppose the state’s highest court ruled: “Notwithstanding the state legislature’s plain preference for a popular vote, it is the view of this court that the people are dunderheads and that this court should, and it hereby does, designate the presidential electors as follows. . . .” Would anyone doubt that, in this case as well, the federal judiciary could properly intervene—indeed that it would be derelict if it did not?<sup>50</sup>

This concession cannot be reconciled with Tribe’s later claim that “challenges that reach the Court during the election” must be deemed political, rather than legal, questions. If the constitutional commitment to Congress of the power to resolve disputes over electoral vote-counting precluded the Court from entertaining the case that it was in fact entertaining in December 2000, it should also preclude the Court from entertaining Tribe’s hypotheticals. The test of justiciability cannot be whether Tribe agrees that a constitutional violation has taken place. Whether a claim is justiciable does not depend on whether it is meritorious. What distinguishes a political question, rooted in a textual commitment, is that the remedy for the challenged action, no matter how outrageous that action may be, is one to be administered by the political system.

Consider, for example, what would happen if the president, instead of giving a traditional State of the Union address, went before Congress on national television, gargled in the microphone and then screamed obscenities in Latin. A legitimate question might arise as to whether he had satisfied the Constitution’s command that the president inform Congress about the state of the union.<sup>51</sup> But even in this outlandish example, nobody would suppose that the president’s conduct presents a justiciable question. Rather, it would be one for the voters and, conceivably, for Congress pursuant to the impeachment clauses. By contrast, if the Court has license to reverse on Article II grounds a state court ruling that the winner of the statutorily mandated state popular vote in a presidential election must be replaced with a better candidate—a license that Tribe insists the

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49. *Id.* at 187-88.

50. *Id.* at 188.

51. *See* U.S. CONST. art. II, § 3 (mandating that president from time to time give Congress information regarding state of union).

Constitution does give to the Court—it is because the question whether a state court is changing the legislatively established rules governing presidential elections is not textually committed to another branch of government.

And if that question is not textually committed to another branch of government, neither is the question whether in late autumn 2000, the Florida court changed the legislatively established rules in a less flamboyant manner than in Tribe's hypothetical.

This brings us back to the text of the Twelfth Amendment, which reads in relevant part:

[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. . . . [I]f no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.<sup>52</sup>

The Amendment's language clearly commits some authority to Congress, and there is no question that a challenge implicating that authority would raise serious political question concerns.

The trouble for Tribe's categorical claim is that the authority that the Constitution actually commits to Congress is that of *counting* electoral votes, not that of determining the legality of the procedures under which a state's electors are selected. Certainly, the political question doctrine would have prevented the Court from intervening in a dispute concerning which slate of electors Congress should have recognized had, for example, the Florida judicial process and the state's legislature each produced a competing slate and sent their slates to Congress. But in *Bush v. Gore*, the

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52. U.S. CONST. amend. XII.

case before the Court, Congress had not yet begun counting electoral votes; indeed, Florida had not yet even appointed electors. The Twelfth Amendment's terms, which cover the process beginning with the meeting of these not-yet-named electors, were simply not the operative law governing the stage of the proceedings concerning which the Court was asked to rule.

If the Framers of the Twelfth Amendment had intended it to require that Congress, in the course of counting electoral votes, resolve all election disputes of whatever variety that may have arisen in the states as votes were cast for presidential electors, they could well have done so. They did not, however, do that. Rather, they fashioned rules governing the process by which, once states select presidential electors, those electors cast electoral votes in Congress and Congress counts them. The Twelfth Amendment is absolutely silent concerning the manner in which the electors themselves are to be chosen. This it left to the states, subject of course, as state action always is, to the requirement of conformity to federal law and the Constitution, including both Article II, Section 1 and the subsequently ratified Fourteenth Amendment. The electoral vote-counting power textually committed to Congress, therefore, in no sense interferes with the Supreme Court's general authority to adjudicate cases implicating two provisions—the Equal Protection Clause and Article II, Section 1—that the Court had long regarded as presenting justiciable questions in the context of elections, including presidential elections.

Nor does the Electoral Count Act of 1887 (otherwise known as Title 3 of the *United States Code*), as Tribe erroneously suggests, interfere with the Court's general authority to adjudicate the issues that came before it in *Bush v. Gore*.<sup>53</sup> Enacted in the aftermath of the Hayes-Tilden controversy of 1876, when Florida and other states sent competing electoral slates to Congress, the Electoral Count Act, as its name suggests, elaborates procedures to govern Congress's Twelfth Amendment electoral vote-counting power, particularly in the case of disputes concerning competing electoral slates sent from the same state. It does not redirect or expand that Twelfth Amendment power.

In short, in addressing the questions put to it in *Bush v. Gore*, the Court in no way deprived Congress of its textually committed power to count electoral votes. Nor did the Court shut down the political process. In response to its decision, a challenge in Congress still could have been mounted—indeed, an abortive one was attempted.<sup>54</sup> The Court's ruling

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53. See Tribe, *supra* note 11, at 277-79.

54. See Juliet Eilperin & Edward Walsh, *Gore Presides as Congress Tallies Votes Electing Bush; Black Caucus Members Object as Fla. Numbers Are Accepted*, WASH. POST, Jan. 7, 2001, at A1. Nevertheless, Michael Klarman repeats the common charge: "On December 12, 2000, the United States Supreme Court, for the first time in its history, picked a president. By shutting down the statewide manual recount that had been ordered just days earlier by the Florida Supreme Court, the High Court Justices ensured that George W. Bush would become the forty-third president of



merely ensured that the slate that Congress received was one chosen in a fashion that did not offend the Constitution as the majority of justices understood it.<sup>55</sup>

This is not to say that a resolution of the case informed by political question doctrine principles would have been indefensible. In fact, the Court could conceivably have abstained from the Florida controversy for a variety of reasons grounded in the political question doctrine other than unequivocal textual commitment. The doctrine covers a variety of concerns, and its boundaries are fuzzy. As the Court explained in *Baker*:

Prominent on the surface of any case held to involve a political question is found 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.<sup>56</sup>

One can imagine how some combination of these factors might have led a reasonable justice to conclude that abstention from the Florida controversy was the wisest course.

Given the textual commitment of the electoral vote-counting power to Congress, such a justice might hold, it is impossible to decide the otherwise justiciable issues presented by the case without expressing a lack of respect for Congress as the ultimate adjudicator of electoral vote-related controversies. Moreover, such a justice could add that the problem is compounded by the inevitable tendency of the case to embroil the Court in political controversy, which creates both a problem of "judicially discoverable and manageable standards" and the "potentiality of embarrass-

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the United States." Klarman, *supra* note 17, at 1721. The common charge is misleading. Enforcing the rules of play is not the same as picking a winner.

55. Moreover, because the Court remanded the case to the Florida court for further proceedings not inconsistent with its opinion, the Court's decision also did not shut down the legal process. For example, it was open to Gore to challenge the ruling in *Bush v. Gore* by arguing that the U.S. Supreme Court had misread the Florida court as requiring that all recounts be completed by the December 12 federal safe-harbor deadline. Indeed, in anticipation of the Court's decision in *Bush v. Gore*, Ron Klain, one of Vice President Gore's lawyers, had been hard at work on a brief to file with the Florida Supreme Court making just such a claim. On December 13, however, Gore reached the political decision that he would pursue no further legal challenges and conceded the election. See DAVID A. KAPLAN, *THE ACCIDENTAL PRESIDENT* 285 (2001) (discussing legal strategy); see also Lund, *Carnival of Mirrors*, *supra* note 31, at 614-16.

56. 82 S. Ct. 691, 710 (1962).

ment” should the Court and Congress ultimately head in different directions on how to resolve the disputes. Such a political question holding, however, would have involved precisely the type of discretionary judgment that Tribe insists the Constitution disallowed in *Bush v. Gore*.

In fact, the point at which the factors involved in such a discretionary judgment were most germane was not at the December 12 moment of truth, but at the time the Court granted certiorari. The anxiety that the writ had been wrongly granted clearly animates the opening of Justice Souter’s dissent, which begins by insisting that:

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.* . . . or this case, and should not have stopped Florida’s attempt to recount all undervote ballots . . . by issuing a stay of the Florida Supreme Court’s orders during the period of this review. . . . If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15.<sup>57</sup>

Justice Breyer begins his dissent by echoing this theme: “The Court was wrong to take this case. It was wrong to grant a stay.”<sup>58</sup> Justice Breyer actually goes a step further, sketching out various dimensions of the political question doctrine and implying that they should resolve the case. But even he frames this argument as a discretionary judgment bearing on certiorari, not as the constitutional command that Tribe vehemently claims it to be. “Of course, the selection of the President is of fundamental national importance,” Justice Breyer writes. “But that importance is political, not legal. And this Court *should* resist the temptation *unnecessarily* to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.”<sup>59</sup> But critically, Justice Breyer does not argue

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57. *Bush v. Gore*, 121 S. Ct. 525, 542-43 (Souter, J., dissenting).

58. *Id.* at 550-51 (Breyer, J., dissenting).

59. *Id.* at 555 (Breyer, J., dissenting). Justice Breyer’s characterization of the legal disputes in question as tangential is mistaken. In his exchange with Lund, Tribe embraces the mistake. See Tribe, *The Unbearable Wrongness of Bush v. Gore*, *supra* note 31, at 604-05. In fact, the disputes in Florida were essentially legal, not political, in nature, and they were legalized early on—the two cases that reached the Court originated as Gore-initiated lawsuits. Therefore, the proper presumption was that the justices on the Court rather than the politicians in Congress were best suited to understand and resolve them. Moreover, Justice Breyer obscured the distinction between process and result when he contended that Congress should have been allowed to decide the dispute because “Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.” *Bush*, 121 S. Ct. at 556. This is true in a broad sense. But elections are also a formal process governed by law. While the aim of the process is to determine the people’s will, whether the law governing the process has been respected is not itself a question of popular will but a legal question.

that having agreed to hear the case, the Court should hold that the political question doctrine precludes adjudication of the issues. Indeed, he debates the merits of the issues with the majority justices and concludes that since “the absence of a uniform, specific standard to guide the recounts . . . does implicate principles of fundamental fairness,” the Court should on remand order the Florida court to impose uniform standards to govern the recount.<sup>60</sup>

It is true that a good case can be made that the wisest course for the Court—particularly given the interest that all nine justices had in who would become the next president with the opportunity to name new justices to the Court—was to stay out of the election controversy entirely.<sup>61</sup> There were several ways for it to have done so. The easiest, as we have suggested, would have been to decline to hear the case in the first instance. Having agreed to hear it, however, the Court could have—at some institutional embarrassment to itself—dismissed the writ as improvidently granted. Less plausibly, it could have issued an opinion using the various elements of the political question doctrine to avoid addressing the merits.

Tribe, however, is altogether incorrect to argue that any of these alternatives were “commanded” by the Constitution.<sup>62</sup> The Court’s exercise of its discretion to hear Bush’s challenge to the Florida court decisions was arguably inadvisable. But the Court was acting well within its lawful authority in considering the merits of a significant question—whether the Florida recount was consistent with the Fourteenth Amendment and Article II, Section 1, which are both indisputably justiciable on their own terms, and whose adjudication one could reasonably conclude did not interfere with or prejudice Congress’s exercise of its own constitutional duties.

#### IV. THE PER CURIAM OPINION

The core holding of the Court’s per curiam opinion in *Bush v. Gore*, that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment, has been much maligned. There are notable exceptions,<sup>63</sup> but by and large the criticism

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60. *Bush*, 121 S. Ct. at 551-52.

61. See RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 175-76* (Princeton Univ. Press 2001) (discussing Court’s role). Of course, as Posner also points out in the cited passage, under the longstanding and well-settled doctrine known as the “rule of necessity,” in cases where the justices, as members of the judiciary, have an interest in the outcome but where no better institutional alternative exists for adjudicating the dispute, the justices should handle it. See *United States v. Will*, 449 U.S. 200, 213 (1980) (discussing rule of necessity).

62. See Tribe, *supra* note 11, at 280.

63. For the most thoroughgoing and uncompromising defense, see Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 *CARDOZO L. REV.* 1219 (2002) [hereinafter Lund, *Rightness of Bush v. Gore*]. Lund’s article is unusually instructive, and we follow it in many respects, but whereas he contends that “the major-

has been withering. While acknowledging that the holding has “a certain appeal in common sense,” Cass Sunstein contends that it “had no basis in precedent or history.”<sup>64</sup> Going further, Michael Klarman argues that “the majority’s equal protection rationale is objectionable not because it represents new law, but rather because it represents bad law—and law that the conservative justices almost certainly would have rejected in any other setting.”<sup>65</sup> Not to be outdone, Alan Dershowitz describes the holding as “the most perverse misuse of the equal-protection clause I have seen in my forty years as a lawyer.”<sup>66</sup> Even Judge Richard Posner, who forcefully defends the Court’s decision to cut off the recount on Article II, Section 1 grounds, maintains that equal protection “is not a persuasive ground.”<sup>67</sup>

Tribe agrees with the consensus, only more so. His purpose is to fortify it, to remove all doubt as to the emptiness and invalidity of the Court’s legal reasoning in support of its equal protection holding. On examination, however, Tribe’s analysis contains a stunningly high proportion of bluster and bombast, and routinely employs argumentative tactics more appropriate to a lawyer in an adversarial process than a scholar in search of the truth. In particular, Tribe expends considerable energy highlighting certain formal differences between Bush’s challenge to the Florida recount and the vote dilution precedents on which the Court relied. And formal differences there are. Nevertheless, Tribe lavishes excessive attention on the flaws of the original count and of the automatic recount, neither of which were at issue in the case, while downplaying or glossing over the substantive flaws of the recount ordered by the Florida court, which were at issue. Had he devoted a fraction of his energy to considering the respects in which these latter flaws raised concerns implicated by the Court’s vote dilution precedents, Tribe might have approached more closely the “balanced account” that he declared as his goal. Still, his own critique, both of the Court and of the conventional critique of the Court, contributes important observations in support of the conclusion he rejects, that the Court’s equal protection holding was reasonable and lawful.

For all the overheated criticism directed at it, the per curiam opinion, though compressed and marked by the haste and pressure under which it was written, fairly outlines the major issues. Both sides agree, the Court announces, on two governing principles rooted in its classic 1960s voting

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ity’s equal protection analysis was quite straightforward, and firmly grounded in precedent,” we argue that the analysis, while rooted in precedent, required application to novel and difficult circumstances of a legal principle whose reach was uncertain. *Id.* at 1244; *see also* Lund, *Carnival of Mirrors*, *supra* note 31, at 609; Lund, “EQUAL PROTECTION, MY ASS!”, *supra* note 31, at 562; Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001); Einer R. Elhauge, *The Lessons of Election 2000*, POL’Y REV., Dec. 2001/Jan. 2002, at 15-36.

64. Sunstein, *supra* note 17, at 221.

65. Klarman, *supra* note 17, at 1721, 1728.

66. DERSHOWITZ, *supra* note 8, at 63.

67. POSNER, *supra* note 61, at 128.

rights jurisprudence. The first, arising from *Harper v. Virginia Board of Elections*,<sup>68</sup> (abolishing state poll taxes on equal protection grounds), declares that, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>69</sup> The second, emerging out of *Reynolds v. Sims*<sup>70</sup> (requiring on equal protection grounds that states give citizens’ votes equal weight in the election of state legislators), proclaims that “the right to suffrage can be denied by a debasement or a dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>71</sup> Since Gore did not contend that these principles represented bad law, the question for the Court was whether the Florida recount complied with them.<sup>72</sup>

Following the reasoning of the three Florida judges who dissented from the Florida court’s 4-3 December 8, 2000 decision in *Gore v. Harris*,<sup>73</sup> the Court concluded that in a variety of ways the statewide hand count of undervotes ordered by the Florida court as the appropriate relief for Gore’s contest of the certified election results did weigh citizens’ votes differently. The leading problem was the absence of uniform and specific standards for determining whether undervotes contained a legally valid vote for president.<sup>74</sup> In *Gore v. Harris*, the Florida court declared that the legal standard that county canvassing boards were to use in inspecting ballots by hand was “the clear indication of the intent of the voter.”<sup>75</sup> But this standard, while technically uniform, was extremely vague, leaving much room for arbitrary and disparate treatment. For example, in Palm Beach

68. 383 U.S. 663 (1966).

69. *Bush v. Gore*, 121 S. Ct. 525, 530 (2000).

70. 377 U.S. 533, 555 (1964).

71. *Bush*, 121 S. Ct. at 530.

72. The Court explicitly confined its inquiry to the issue before it:

Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimum procedural safeguards.

*Id.* at 532. Alan Dershowitz pounces on this language, declaring that the Court’s explicit limitation made its action unprincipled. See DERSHOWITZ, *supra* note 8, at 81-84 (criticizing Court’s decision). This is nonsense. The Court’s language, in no way novel, does not free it from the obligation to treat cases similar to *Bush v. Gore* similarly. To be sure, the language narrows the range of relevant similarities. But it does not turn the court’s decision into a decree good for that day only. In any future statewide recount of votes in a national election, a state court that has the power to ensure uniformity of standards for determining what is to count as a legal vote will be required by *Bush v. Gore* to do so.

73. 772 So. 2d 1243, 1262-73 (Fla. 2000).

74. See *Bush*, 121 S. Ct. at 529-31 (describing how undervotes are counted).

75. 772 So. 2d at 1256-62; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000) (arguing for manner in which county was to interpret ballots).

County, a dimple on a punchcard ballot could be counted as a legal vote. In another county, or indeed in Palm Beach County but at a different counting table, or at the same counting table on a different day or at a different hour, an identically marked ballot might be treated as a non-vote, an extreme variation in the weight given to identically marked ballots. Under the rules endorsed by the Florida court, or because of its failure to endorse specific rules, a dimpled ballot sometimes counted for one and sometimes counted for none.

The leading problem, however, was not the only problem of constitutional proportions that the Court held afflicted the Florida recount. In addition, the Florida recount arbitrarily excluded overvotes, ballots on which machines detected more than one vote for president.<sup>76</sup> Overvotes comprised the much larger subset of spoiled ballots, with estimates, as the Court noted, placing the number statewide at 110,000,<sup>77</sup> almost double the number of undervotes, estimated to number 60,000.<sup>78</sup> Yet the Florida court lacked a principled reason for excluding overvotes from the recount. Indeed, notwithstanding the objections of Chief Justice Wells in dissent,<sup>79</sup> the majority in *Gore v. Harris* simply failed to address the matter. There was no reason, however, to suppose that some overvotes did not exhibit a "clear indication of the intent of the voter," which, according to the Florida court, was the definition of a legal vote in Florida.<sup>80</sup> So the

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76. See *Bush*, 121 S. Ct. at 531.

77. See *id.*

78. See *id.* at 544 n.1.

79. See *Harris*, 772 So. 2d at 1264 (Wells, J., dissenting) (noting significance of overvotes).

80. See *Tribe*, *supra* note 11, at 198. Tribe, like Jack Balkin before him, lamely argues that "the positive law of Florida simply did not permit the counting of overvotes." *Id.* at 237. Both appeal to section 101.5614(5) of the relevant Florida statute, which deals with "damaged or defective" ballots and furnished the basis for the Florida court's definition of a "legal vote." FLA. STAT. ANN. § 101.5614(5) (West 2000). The part of the statute on which Tribe and Balkin draw provides that "[i]f an elector marks more names than there are persons to be elected to an office or if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office, but the ballot shall not be invalidated as to those names which are properly marked." *Id.*; see also Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1417-18 (2001); Tribe, *supra* note 11, at 237. However, as Chief Justice Wells points out in his dissent in *Gore v. Harris*, if machines can *mistakenly* determine that no vote has been cast for a particular office, there is reason to suppose that they can *mistakenly* determine that more than one vote has been cast for the office. See *Harris*, 772 So. 2d at 1264 n.26 (Wells, J., dissenting) (discussing imperfection of vote-tabulating machines). In other words, although *actual* overvotes are of course statutorily disqualified by the provision in question, under the principles set forth in *Gore v. Harris*, those ballots that machines designated as overvotes would have to be reviewed by hand to determine whether machines had accurately read them to contain marks for more than one candidate for president. It is plain that the statute did not mean to lay down a blanket prohibition on hand recounts of ballots designated as overvotes by machines while permitting recounts of ballots designated as undervotes. Certainly, the statute excludes recovering legal votes from ballots on which a voter "marks more names than there are persons to be elected to an office." Such a ballot

failure to order that overvotes be included in the statewide hand recount involved the arbitrary and disparate treatment of the largest subset of spoiled ballots. By singling out approximately one-third of the improperly marked ballots, the undervotes, for special consideration, the Florida court diluted the legal votes among the much larger subset of spoiled ballots, the overvotes, arbitrarily reducing their weight to zero.

A third problem with the Florida recount was that, as a matter of law, it accepted a partial hand recount of all ballots from Miami-Dade County.<sup>81</sup> The canvassing board in Miami-Dade had only managed to manually recount all ballots in the most heavily Democratic precincts, about twenty percent of the precincts in all, when it concluded that it could not meet the November 26 deadline set by the Florida court in its first decision, *Palm Beach County Canvassing Board v. Harris*<sup>82</sup> (which had extended the statutorily imposed deadline for county certification by twelve days). But on December 8, in *Gore v. Harris*, the Florida court ordered that those partial results be included in the final vote tallies, without regard to whether the full hand recount in Miami-Dade would ever be completed, and that the remaining 9,000 or so undervotes from across the county be recounted.<sup>83</sup> The practical effect of this order was that legal votes missed by machines in precincts that favored Gore were treated more favorably than legal votes in precincts where support was more evenly balanced between Gore and Bush or where Bush was favored.

A fourth problem was the use of untrained and unsupervised personnel to conduct the recount.<sup>84</sup> To permit those with no experience, guided only by a vague, highly manipulable standard, to count ballots by hand

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would leave the voter's intention utterly ambiguous. But this is quite different from the situation in which voters mistakenly mark the *same* name for a single person office twice as, for example, when a voter placed the appropriate mark or punch in front of Gore's name, and then at the bottom of the ballot, next to the words "Write in," wrote in Gore's name. A ballot spoiled by voter error could not exhibit more sharply a "clear indication of the intent of the voter." POSNER, *supra* note 61, at 124-25. According to the *Miami Herald's* study, overvoted ballots in which the same name is marked twice could have contained enough recoverable votes to have changed the outcome of the election. See *The Miami Herald Report: Democracy Held Hostage*, MIAMI HERALD 2001, at 187-98 [hereinafter *Democracy Held Hostage*]. A subsequently published study, commissioned by a consortium of major newspapers, went further, showing that overvotes definitely contained enough recoverable votes to have given Gore the election. See NORC, *The NORC Florida Ballots Project*, at <http://www.norc.org/fl/press.asp> (last visited Apr. 3, 2004). Of course, as the per curiam opinion observes, from the vantage point of equal protection, the question is not whether the Florida court correctly interpreted the Florida Election Code's definition of a legal vote, but whether, whatever Florida law required, the order the Florida court issued complied with the demands of the Fourteenth Amendment. See *Bush*, 121 S. Ct. at 530 (noting equal protection issue involved with order by Florida court).

81. See *Bush*, 121 S. Ct. at 531-32.

82. 772 So. 2d 1220 (Fla. 2000).

83. 772 So. 2d 1243, 1260-62 (Fla. 2000).

84. See *Bush*, 121 S. Ct. at 532 (discussing who would count ballots).

after the preliminary results of the election were already known, as were the candidates' beliefs about which standards for determining a legal vote were most favorable to their cause, was to invite arbitrary and disparate treatment into the recount process.<sup>85</sup>

The Court did not hold that all four of the equal protection problems it identified in the Florida recount were of equal seriousness. But it did hold that these four problems, taken together, rendered the Florida recount "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."<sup>86</sup>

It would have been possible to cure the recount of its constitutional infirmities, but, the Court indicated, it would have taken time. The cure called for a variety of measures involving elaborate judicial procedures and the performance of mechanical tasks for which the technology in Florida was lacking:

It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary [of State] has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary [of State], as required by Fla. Stat. § 101.015 (Supp. 2001).<sup>87</sup>

It is anybody's guess how long such a complicated and multistaged process might take.

Nevertheless, Florida law, according to the Court, rendered the question moot. Declaring that it was deferring to the Florida Supreme Court's interpretation of Florida law, the Court concluded that time had run out for Florida to design and conduct a constitutionally adequate recount:

Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appro-

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85. See Elhauge, *supra* note 63, at 15.

86. *Bush*, 121 S. Ct. at 532.

87. *Id.* at 532-33.



priate” order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).<sup>88</sup>

Accordingly, the Court reversed the judgment of the Florida Supreme Court and remanded the case for further proceedings not inconsistent with its opinion.

Tribe offers, more or less in agreement with the conventional critique, three major lines of criticisms of the per curiam opinion, which, separately and together, he regards as devastating. First, the Court’s equal protection holding is unsupported by precedent. Second, such flaws and inequalities as the Court identified in the recount were “dwarfed” by other flaws and inequalities in the Florida election. Third, even if the inequalities and flaws that the Court identified rose to the level of constitutional violation, the constitutionally proper remedy would have been for the Court to remand the case to the Florida court with instructions to conduct a recount consistent with constitutionally adequate standards. Each of Tribe’s criticisms points to vulnerabilities in the Court’s reasoning. But neither separately nor taken together do they succeed in showing that the Court ruled unreasonably or in a fashion contrary to law.

Tribe’s first line of criticism—that the Court’s equal protection reasoning derives no support from the one-person, one-vote jurisprudence of *Reynolds v. Sims* and its progeny—starts unpromisingly with a preposterous proposition: “[N]o one doubts that, in the Florida recount procedure that the Court found unconstitutional, each vote counts, and is counted, equally.”<sup>89</sup> Of course whether each vote counted, and was counted equally, was precisely what was placed into doubt by Bush’s legal challenges both in the Florida courts (which ultimately led to the U.S. Supreme Court) and in federal district court (culminating in the Eleventh Circuit Court of Appeals in *Touchston v. McDermott*,<sup>90</sup> which denied Bush’s request for an injunction to stop standardless recounts in select counties). It was also placed into doubt by the three dissenting Florida judges in *Gore v. Harris* who warned of equal protection flaws in the recount, by the four dissenting federal appeals court judges in *Touchston v. McDermott* who found equal protection violations in the recount, and by the U.S. Supreme Court’s per curiam holding. Indeed, the most striking feature of the standard criticism of the Court’s equal protection holding, and Tribe’s too, is the failure to confront the forms of unfairness in how votes were counted under the Florida court’s recount order.

Yet even if there were doubt about whether each vote in the Florida recount was counted equally, Tribe believes that *Reynolds* would have been inapplicable. *Reynolds*, he contends, forbids only a particular form of vote dilution, and certainly not the differences in how votes were treated under the terms of the procedure authorized by the Florida recount:

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88. *Id.* at 533.

89. Tribe, *supra* note 11, at 222.

90. 234 F.3d 1133 (11th Cir. 2000).

Nor would that procedure result in differential weighting across districts—for example, by placing more people in one district, and fewer in another, so that a vote in the less populous district would go further towards electing a representative than would a vote in the more populous district. For Florida’s was an at-large election to choose a single slate of presidential electors: there was only one pool for all the voters, and only one pool for all the ballots being counted.<sup>91</sup>

Tribe is right about the formal difference between the election for president in Florida and the election for state legislatures in Alabama that the Court invalidated in *Reynolds*, but he is wrong to think that the difference is legally decisive, rendering the *Reynolds* precedent inapplicable to the vote-counting irregularities in Florida.

It is true that in *Reynolds*, as well as in *Gray v. Sanders*<sup>92</sup> and *Wesberry v. Sanders*<sup>93</sup> (also cited by the majority), the Court dealt with unequal representation in state legislatures and Congress resulting from the coexistence within states of lightly populated rural voting districts and highly populated urban voting districts, each of which was represented by a single legislator. These schemes had the effect of diluting the weight of votes cast by citizens in the highly populated urban districts, where it took many more votes to elect a representative. And to be sure, the vote dilution that the Court found in the reapportionment cases differed from the variety of forms of vote dilution that it found in the Florida recount. But it is odd to find Tribe, a harsh critic of literalism and rigidity in legal reasoning,<sup>94</sup> and a mocker of “surface-hugging” definitions of equality,<sup>95</sup> embracing so literal and rigid and surface-hugging a reading of the inequality in weighting votes that *Reynolds* forbids. It is especially odd to find Tribe enthralled by the particular facts of the reapportionment cases, and unable or unwilling to recur to the general principle that underlies *Reynolds* and its progeny, since the Court itself in *Reynolds* emphatically directs attention from the particular facts of malapportionment to the general principle.

The Court could hardly have been clearer in *Reynolds* that it was holding that constitutionally impermissible vote dilution was not limited to the particular scheme it was invalidating in Alabama:

Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids “sophisticated as well as simpleminded modes of discrimination.”<sup>96</sup>

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91. Tribe, *supra* note 11, at 222-23.

92. 372 U.S. 368 (1963).

93. 376 U.S. 1 (1964).

94. See TRIBE, *supra* note 13, at 33-89.

95. See Tribe, *supra* note 11, at 170, 177, 195, 247, 288, 294.

96. 377 U.S. 533, 563 (citations omitted).

Counting dimpled ballots of citizens who reside in some counties while throwing out dimpled ballots of citizens who reside in others fits the general *Reynolds* formula for vote dilution, especially when dimpled ballots were commonly thought to favor a particular candidate. So too does recounting some spoiled ballots (the undervotes) and not others (the overvotes) fit the general formula, especially when the subset of spoiled ballots chosen for special treatment was chosen by a particular candidate. So too does hand recounting all of the votes in a fraction of a county's precincts and not recounting all of them in the other precincts, especially when those precincts in which votes were recounted tilted heavily in favor of the candidate who requested the recount. And so too does giving untrained and unsupervised personnel wide latitude to determine what is and what is not a legal vote after those personnel know how the exercise of their discretion is likely to affect the candidates. That residents of Florida's sixty-seven counties were voting for the same presidential electoral slate did not preclude the Florida court from constructing a recount that weighted citizens' votes differently across counties and within the same county.

Eventually, and contrary to his opening gambit and official position, Tribe acknowledges that the Florida recount treated similarly marked ballots differently. He contends, though, that this should not be seen as vote dilution or arbitrary and disparate treatment of ballots, but as an expression of constitutionally permissible, good, old-fashioned, democratic politics:

*Reynolds*, aided and abetted by *Davis v. Bandemer*, permits just the sort of partisan politicking the *Bush* Court seemingly wanted to exclude. While a degree of precision is required, that precision is bought at the cost of permitting the parties to draw district lines that take political parties into account. Given that *Davis* permits a great deal of explicitly political and partisan discretion in drawing the districts in which votes are counted, it seems odd that the Court would invoke the *Reynolds* line of cases in an effort to exclude political discretion altogether during the counting phase.<sup>97</sup>

Tribe of course loads the dice by falsely asserting that the Court sought to "exclude political discretion *altogether* during the counting phase" [emphasis added]. In fact, what the Court sought to limit was substantial variation, unrelated to any legitimate state purpose, in the treatment of similarly marked ballots. More importantly, it is not at all odd—indeed it is perfectly consistent with the Court's one-person, one-vote jurisprudence—to permit a healthy dose of politics in the drawing of district lines, while insisting that after the lines have been drawn and the votes have been cast, that each vote be counted in a manner as free as possible from

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97. Tribe, *supra* note 11, at 223-24 (footnotes omitted).

party politicking, certainly in a manner in which similarly marked ballots are counted similarly.

Eventually, Tribe also acknowledges (how could he not?) that *Reynolds* imposed some limitations on the parameters of the Florida recount:

No one doubts that the *Reynolds* line would prevent a state from adopting a system in which those who tally machine-rejected ballots manually are instructed to toss out ballots with ambiguous marks indicating an intent to vote for Bush but to count all the votes for Gore. But the Court neither could nor did base its repudiation of the Florida recount order on any such basis. *Reynolds* certainly would not condone any such scheme.<sup>98</sup>

In fact, something very much like Tribe's own hypothetical, which he believes certainly would have been unconstitutional under *Reynolds*, was ordered by the Florida court.

For example, the original Gore contest of the certified election results asked that 9,000 or so undervotes in Miami-Dade be recounted.<sup>99</sup> Presumably, Gore sought advantage in requesting a recount of only a small subset of Florida's 170,000 spoiled ballots—those presumably that tended to favor him—and in tossing out the rest.<sup>100</sup> It was this selectivity, this quest for a recounting of those spoiled ballots that were likely to turn up more votes for him than for Bush which, on appeal from the decision of Leon County Circuit Court Judge N. Sanders Sauls to reject Gore's contest on December 4,<sup>101</sup> led the Florida Supreme Court to find Gore's request inappropriate:

[I]t is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted.<sup>102</sup>

But the relief the Florida court ultimately ordered was inconsistent with the principle that it invoked. The relief expanded the hand recount from the Miami-Dade 9,000 to include all undervotes throughout the state; but it still restricted the recount to undervotes, that subset of ballots spoiled by voter error that Gore had singled out for special treatment, presumably

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98. *Id.* at 224.

99. See *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla. 2000) (summarizing appellants' contentions).

100. It also meant that only ballots in the most heavily Democratic precincts—the twenty percent or so of precincts in Miami-Dade County that completed manual recounts around the time of the November 26 deadline and were ordered included in the certified vote totals by the Florida court on December 8—were subject to a full manual recount.

101. See *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, slip op. (Dec. 4, 2000), available at <http://election2000.stanford.edu>.

102. *Gore*, 772 So. 2d at 1253.

because he thought counting that subset of the spoiled ballots, and only that subset, was most likely to change the election in his favor. However, the Florida court's exclusion of overvotes from its recount order contradicts the Florida court's own justification for its recount order, "the necessity for counting all legal votes."<sup>103</sup> And this seems to be just the sort of thing that Tribe concedes *Reynolds* certainly forbids.

And then Tribe gives the store away. He acknowledges that the flexibility *Reynolds* permits to states in how they recount votes is limited by the requirement that states count each vote equally and fairly:

It does, however, at least by extrapolation, permit a state to develop its own decentralized systems of vote tabulation for statewide recounts supervised by a single judge, no less than for countywide elections that are not overseen by one person (and are thus more, not less, vulnerable to unresolved disparities). The only requirement is that everyone's vote must be counted equally, within a margin of error. Put bluntly, *Reynolds* clearly supports some small degree of inaccuracy in the count so long as the method of counting is fair, and *Davis* contemplates a large dollop of politics in developing the method of counting.<sup>104</sup>

Put aside that the politics that *Davis* contemplates is in the drawing of district lines and not in the counting of votes once those lines have been drawn. Put aside as well that the imprecision in the drawing of geographical lines is inherently much greater than that inhering in the counting of votes. Put aside finally that Tribe's own formulation implies that the margin of error that *Reynolds* permits refers to error in the implementation of the vote-counting rule and not to arbitrary and disparate treatment flowing directly out of the rule itself. The larger point is that while insisting that the Court's equal protection arguments are "completely without merit," Tribe, after much waving of the hands and gnashing of the teeth, actually embraces the majority's analytical framework. He does this by conceding that the very precedents that the Court invokes require, just as the Court itself asserted, that the method by which states count votes in a statewide election must meet a minimum level of "equal treatment and fundamental fairness."<sup>105</sup>

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103. *Id.* at 1261.

104. Tribe, *supra* note 11, at 224 (footnote omitted).

105. *Bush*, 121 S. Ct. at 532. Stephen Holmes worries needlessly that the per curiam's equal protection argument "strikes directly at the Florida legislature" by limiting the power delegated to the Florida legislature—and the power delegated to the Florida courts to interpret what the Florida legislature has enacted into law—by Article II, Section 1 (which provides that each state shall appoint presidential electors "in such manner as the legislature thereof may direct."). See Holmes, *supra* note 21, at 244-45. To which the proper reply is, "Of course." Indeed, the Equal Protection Clause limits all exercises of state power, including those that flow directly from the Constitution, and it is the job of the Supreme Court to enforce those limits.

Tribe, of course, reiterates his assurance that everyone's vote *was* counted equally in Florida's recount and the process *was* fair:

The procedure that the Florida Supreme Court developed to implement the enactments of the Florida Legislature—a procedure that included representatives of the candidates and was overseen by an impartial magistrate—certainly passed this test.<sup>106</sup>

But, as we have seen, Tribe's assurance and his certainty are baseless. Despite or perhaps because of the sophisticated intellectual labors he invests in distinguishing *Bush v. Gore* from *Reynolds*, Tribe comes full circle without actually answering the Court's specific arguments about how the features of the Florida recount, when taken together, fail the test of "fundamental fairness." And he only obscures matters by insisting that to be unconstitutionally unfair the inequalities in the Florida recount would have had to have been the result of intentional discrimination, on the part of the legislature, the courts or the county recount teams.<sup>107</sup> This misreads *Reynolds*. In contrast to "suspect classifications" cases, the paradigmatic example of which involves race, vote dilution cases do not require a showing of intent to discriminate.<sup>108</sup> In sum, Tribe's first line of criticism of the majority opinion is vitiated by his surreptitious acknowledgment of the applicability of the Court's vote dilution jurisprudence, combined with his refusal to apply it to the tangled substance of the Florida recount.

Tribe's second line of criticism proclaims that even if there were flaws inhering in the Florida recount, they were trivial compared to the flaws that afflicted Florida's original count of the vote:

As is true in most states, there were enormous differences among counties in voting machines, types and designs of ballots, and other variables that powerfully affected the odds that a voter's intentions would be accurately tallied. These underlying inequalities dwarfed whatever inequalities might have existed among counties with respect to methods of recounting ballots. Yet the Court refused to see beyond the surface inequalities in the recount and insisted that a clear set of objective rules, uniform across the state, was needed to solve the alleged constitutional problems.<sup>109</sup>

What Tribe's analysis glosses over is that not all flaws are legal flaws, or transgressions for which the law provides relief. Much as it is important to improve the quality of vote tabulation technology in Florida and around the country, a higher rate of voter error in counties that used punchcard ballots or still higher rates of voter error in counties that used optical scan

106. Tribe, *supra* note 11, at 224 (footnote omitted).

107. *See id.* at 225-26.

108. For a forceful elaboration of this point, see Lund, "EQUAL PROTECTION, MY ASS!?", *supra* note 31, at 548-56.

109. Tribe, *supra* note 11, at 177.

ballots but did not give voters a second chance at the polling place to correct their ballots cannot legitimate the abandonment of objective rules where objective rules were available.<sup>110</sup> Besides, the Court's vote dilution jurisprudence does not extend to the protection of a "voter's intentions." It does, however, protect the actual votes, which is how the Court understood it.

Nevertheless, Tribe commends Justice Ginsburg's view that appreciation of the problems that afflicted the original count should have restrained the Court from finding the recount unconstitutional:

[D]espite the obvious errors and inequities in the underlying count, only Justice Ginsburg's dissent posed the logically crucial comparative question: what in the Court's opinion (or in the dissenting opinion of Justice Souter) demonstrated "that the recount adopted by the Florida court, flawed as it was, would have yielded a result any less fair or precise than the certification that preceded that recount?"<sup>111</sup>

Actually, the logic underlying Justice Ginsburg's question is defective.

The view that Tribe shares with Ginsburg—that flaws in the administration of the election and the conduct of the original count somehow neutralize or cancel out or justify the introduction of new flaws in the recount—is on its face bizarre. It collapses the crucial distinction between flaws that create legally cognizable injuries capable of redress by the courts and flaws that do not. To speak only in terms of flaws is to suppress rather than to address the constitutional challenge. Surely Tribe and Ginsburg cannot believe that it is constitutionally permissible to introduce in a recount flaws that violate the Equal Protection Clause of the Fourteenth Amendment to neutralize or cancel out or justify practical flaws in the administration of the election and the conduct of the original count. But this is what Tribe's appeal to Justice Ginsburg's dissent implies.

Moreover, the defect in Justice Ginsburg's suggestion that the flaws afflicting the original recount are indistinguishable from those afflicting the recount is dealt with effectively by Justice Souter's dissenting opinion:

It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of

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110. *See id.* at 259 (comparing ballot rejection in counties with different ballot measures).

111. *Id.* at 260.

machines and exhibiting identical physical characteristics (such as “hanging” or “dimpled” chads).<sup>112</sup>

It is Justice Souter’s contention that whereas legitimate state interests—experimentation and keeping costs down—are served by allowing local variation in voter technology for casting ballots and counting votes, no legitimate state interest is served in a recount by treating identically marked ballots differently. To Justice Souter’s principled distinction between the problems inhering in the statutorily mandated original count and the Florida court’s judicially crafted recount, it is Tribe and Ginsburg who offer no answer.<sup>113</sup>

Tribe’s third line of criticism is that the remedy announced in the per curiam opinion, or the holding that since time had run out under Florida law no remedy was available, had no basis in Florida law. But where other critics condemn the Court for failing to defer to the Florida court’s interpretation of Florida law, Tribe condemns the Court for trying, but failing to defer:

Far from second-guessing the state’s highest court on the meaning of state law, as many of the Court’s critics mistakenly accuse it of doing, the Court just *guessed* at what the state court would say, if asked, about whether Florida law permitted recounts in a presidential election to continue past the December 12 safe harbor or instead required recounts to stop at midnight on December 12, whatever the cost in potentially decisive legal votes that would remain uncounted. The Court claimed that it had to defer to the Florida Supreme Court’s supposed finding that the Florida Legislature, to ensure that Florida could “participate fully in the fed-

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112. *Bush v. Gore*, 121 S. Ct. 525, 545 (2000) (Souter, J., dissenting) (citation omitted); see also *id.* at 532 (per curiam).

113. As Lund emphasizes, nowhere in her dissent does Justice Ginsburg explain how the forms of unfairness that the Court identifies in the recount ordered by the Florida court can be reconciled with the requirements of fundamental fairness. See Lund, “*EQUAL PROTECTION, MY ASS!*”?, *supra* note 31, at 1558. Nor does Klarman, a harsh critic, have an answer. Echoing Tribe and Justice Ginsburg, he argues that “if it violates the Equal Protection Clause to conduct a manual recount under a vague standard that might result in identical ballots being counted differently, then certainly it should be unconstitutional to use different ballot designs or different ballot-reading technologies, if these yield substantially different likelihoods of a particular vote being counted.” Klarman, *supra* note 17, at 1728. This, however, is a false analogy that depends upon confusing the state’s obligation to treat similarly marked ballots in a similar manner with a state’s obligation to ensure that voters have equal success in translating their intention into a vote by marking their ballots properly. In fact, there is no inconsistency in insisting that similarly marked ballots must be counted according to a uniform rule while refusing to count ballots spoiled as a result of voter error, even when the rates of spoilage vary depending on the technology used. To repeat Justice Souter’s point: legitimate state purposes may be served by allowing states to experiment with voter technology (so long as the same rules are adhered to where the same technology is used), while no legitimate purposes are served by varying the rules according to which similarly marked ballots are counted.



eral election process,” wished to avail itself of the safe harbor offered by 3 U.S.C. § 5. This federal statutory provision indicated that Congress would accept without challenge the presidential electors from any state that by December 12 had fully and finally resolved, in accord with the “judicial or other methods or procedures” in place on election day, any election-related “controversy or contest.” And the Court treated that imagined state judicial finding as a mandate to end the recount by December 12, come what may. To many whose main mantra had been that the U.S. Supreme Court should defer to the Florida Supreme Court on all matters of Florida law, that twisting of the knife should have brought to mind the famous maxim: “Be careful what you wish for. You just might get it!”<sup>114</sup>

Contrary to Tribe, however, the Court did not simply guess or imagine that the Florida court had declared December 12 as the deadline under Florida law for the completion of all recounts. In fact, the Florida court’s crucial December 11 opinion can be reasonably read in just the way the Court reads it.

Keep in mind that on December 4, in *Bush v. Palm Beach County Canvassing Board*,<sup>115</sup> its first intervention in the Florida election controversy, the Court vacated the Florida court’s November 21 judgment in *Palm Beach County Canvassing Board v. Harris*<sup>116</sup> (extending the statutorily imposed seven-day protest period deadline for vote tally submissions by county canvassing boards by twelve days). The Court asked the Florida court to reconsider its judgment and rewrite its opinion in light of two large issues. The first concerned the extent to which the Florida court leaned on the Florida constitution in circumscribing the authority of the Florida legislature. The second dealt with “the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5.”<sup>117</sup>

On December 11, in response to this direct query from the U.S. Supreme Court, the Florida Supreme Court issued a revised opinion in the case of *Palm Beach County Canvassing Board v. Harris* (strangely enough, this was three days *after* it issued *Gore v. Harris*, which presupposed the judgment in the as yet unissued revised opinion). The Florida Supreme Court discussed 3 U.S.C. § 5 at a number of junctures. One basis on which

114. Tribe, *supra* note 11, at 264-65 (emphasis added).

115. 121 S. Ct. 471 (2000).

116. 772 So. 2d 1220 (Fla. 2000).

117. *Bush*, 121 S. Ct. at 475. It is unwarranted for Klarman to assert that by posing this question the U.S. Supreme Court “essentially had coerced the Florida court, upon threat of reversal, to acknowledge the importance of the safe harbor provision.” Klarman, *supra* note 17, at 1732-33. The Florida court remained quite free to conclude that there was no wish on the part of the Florida legislature to treat December 12 as the drop-dead date for completing recounts. In response to the Supreme Court’s request for clarification, neither law nor politics stood in the way of a decision by the Florida court to “acknowledge the importance of the safe harbor provision” in such a way as to deny that it was a final deadline.

the secretary of state could exercise her discretion to refuse to accept late returns in the post-election protest period, the court wrote, would be to ensure that Florida's vote-certification process was completed within the safe-harbor deadline provided for in 3 U.S.C. § 5.<sup>118</sup> But was the federal safe-harbor deadline itself discretionary under Florida law or was it binding? Late in its opinion, in footnote 22, the Florida court seemed to answer that under Florida law, 3 U.S.C. § 5 was indeed a binding date:

We add that we did not extend the deadline for completion of the manual recounts but made clear only that the date for certification must be set within a reasonable time to allow for the election contest provisions of section 102.168. As always, it is necessary to read all provisions of the elections code in *pari materia*. In this case, that comprehensive reading required that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.<sup>119</sup>

That sure sounds like the Florida Supreme Court regarded December 12 as the last day under Florida law on which Florida could complete a contest of the election and certify the results.<sup>120</sup>

Tribe thinks that if the Florida court's recount order had involved an equal protection violation (which he denies), then the U.S. Supreme Court would still have been bound to ask the Florida court on remand from *Bush v. Gore* whether it preferred securing safe-harbor protection for its electoral votes or completing its recount.<sup>121</sup> But since only a week earlier the Supreme Court had asked the Florida court about the significance it attached under Florida law to 3 U.S.C. § 5, and since the Florida court declared on December 11 that December 12 was the "outside deadline" for the contest period as well as for the protest period, it was not unreasonable for the Court to conclude that the Florida court had spoken.<sup>122</sup>

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118. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000).

119. *Id.* at 1290 n.22; see also *id.* at 1286 n.17 (discussing time reasonableness in 3 U.S.C. § 5).

120. In criticizing the remedy, Sunstein incorrectly asserts that there was no legal basis for the Court to hold under Florida law that the December 12 federal safe harbor was the deadline for completing recounts and certifying vote totals. He does not so much as notice, let alone address, the Florida court's December 11 opinion. See Sunstein, *supra* note 17, at 215-16.

121. See Tribe, *supra* note 11, at 187 n.33.

122. Klarman categorically condemns the Court's analysis of the Florida court's view of the December 12 federal safe-harbor deadline:

[N]othing in the Florida Supreme Court opinion, and no sensible reading of state law, treated the December 12 safe harbor deadline as dispositive, regardless of any competing considerations. It is one thing to say that the Florida legislature would have wished, all things being equal, to take advantage of the federal safe harbor provision. It is another thing

To be sure, there is also reason to suppose that the Florida court blundered and misspoke in its December 11 opinion, that it did not really mean to declare that December 12 was an “outside deadline” for the completion of all recounts, and that the Court’s per curiam opinion took advantage of the Florida court’s hurried, ill-considered formulations.<sup>123</sup> Perhaps it would have been more generous for the Court to have asked the Florida court on remand whether “outside deadline” referred to contest-period as well as protest-period recounts. The Court might have inquired as well whether by “outside deadline” the Florida court meant, as is commonly understood, “the very last opportunity” or whether it meant a provisional and aspirational end point, or whether it had simply spoken in error. Perhaps if the Court had had more confidence in the Florida court, which showed a strange laxity in regard to its own rules,<sup>124</sup> it would have found a way to encourage the Florida court to rule again on whether and under what rules to proceed with a recount, or at least address head-on the question whether time had run out on all recounts.

It certainly would have been legally permissible for the Court in *Bush v. Gore*, consistent with the suggestions of Justices Souter and Breyer in dissent, to craft an opinion that invited the Florida court, for the second time, to clarify the status under Florida law of the December 12 federal

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entirely to say that the legislature would have wanted the availability of the safe harbor provision to trump any and all competing considerations, such as ensuring that every vote be counted. The outcome of the 2000 presidential election quite possibly turned on this aspect of the Bush decision, a rationale that is, to put it bluntly, a complete fabrication.

Klarman, *supra* note 17, at 1733. To make the case for fabrication, however, Klarman must distort the record. He asserts that the Court “reads the Florida Supreme Court decision under review [the December 8 opinion in *Gore v. Harris*] as declaring the state legislature’s intention to take advantage of this federal safe harbor provision.” *Id.* at 1732. In fact, the Court also properly appealed to the December 11 opinion, which Klarman, like Sunstein, fails to consider. In addition, Klarman contradicts himself on a key point: prior to dismissing as a “complete fabrication” the Court’s conclusion that the Florida court had held that under Florida law December 12 was a binding deadline for completing all recounts, Klarman had suggested that the Florida court’s holding was all too real, the Florida court having been “coerced” by the U.S. Supreme Court into producing it. *See id.*; *supra* note 117.

123. One reason to think this is that in its opinion on remand from *Bush v. Gore*, the Florida court denied that it regarded December 12 as the outside deadline for concluding recounts. *See generally* *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000) (reaching conclusion regarding deadline). Yet the Florida court did not explain why its December 11 formulations should not be read as they were by the per curiam.

124. On November 21, in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000), the Florida court extended the deadline for county submission of vote totals to November 26. On November 26, Secretary of State Harris enforced the court ordered deadline, refusing to accept late returns from Palm Beach County and Miami-Dade County. On December 4, in *Gore v. Harris*, the Florida court ignored its own deadlines and ordered the secretary of state to accept the late totals submitted by Palm Beach County and Miami-Dade County. *See* 772 So. 2d at 1262 (Fla. 2000).

safe-harbor deadline. But this solicitude was not required by law. The Court's reading of the Florida court's interpretation of Florida law may have bumped up against the outer boundary of reasonable readings, but given the Court's direct question to the Florida Supreme Court on December 4 and the Florida court's tardy reply on December 11, which identifies December 12 as an "outside deadline" for completing counts and recounts, the Court's conclusion that it was forbidden by the deadline imposed by Florida law from ordering the Florida court to conduct a constitutionally valid recount did not go beyond the boundary.<sup>125</sup>

## V. THE CONCURRENCE

Three justices of the Supreme Court believed that Article II, Section 1 of the Constitution, which provides that states shall appoint presidential electors "in such Manner as the Legislature thereof may direct,"<sup>126</sup> offered an alternative ground for holding that the Florida recount was unconstitutional. Critics of *Bush v. Gore* have devoted less time and energy to criticizing the legal theory developed in Chief Justice Rehnquist's concurrence, signed as well by Justices Scalia and Thomas. But Michael Klarman concludes that the concurrence was just as indefensible as the majority opinion. Speaking for many, he argues that had the positions of the parties to the controversy been reversed, and had Gore been challenging the Florida court recount order with Bush's legal arguments, Rehnquist, Scalia and Thomas would have laughed him out of court.<sup>127</sup> In contrast, Nelson Lund maintains that the concurrence provides an alternative ground,<sup>128</sup> and Judge Posner and Richard Epstein have argued vigorously that the concurrence provided the preferred, indeed the only legally defensible, ground.<sup>129</sup>

Tribe argues that the concurrence is as indefensible as the majority opinion. Unlike many of the Court's critics, however, he gives considerable ground to the concurring justices. Most importantly, he readily concedes that the analytical framework embraced by the concurrence is sound. That is to say, contrary to Court critics who claim that the justices had no business meddling in a state court's interpretation of state law, Tribe acknowledges that had the Florida court actually changed the statu-

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125. Lund argues adamantly that the Court's remand provided no legal obstacle to the Florida court's reconsideration of whether December 12 was a final deadline, and he convincingly cites Ron Klain, one of Gore's attorneys, in support of this claim. See Lund, *Carnival of Mirrors*, *supra* note 31, at 614-16. Lund is technically correct, but he goes too far. Legal arguments are made against the backdrop of political circumstances. And the political circumstances, in part created by the Court's opinion in *Bush v. Gore*, created an all but insuperable obstacle for Gore's legal arguments back in Florida.

126. U.S. CONST. art. II, § 1, cl. 2.

127. See Klarman, *supra* note 17, at 1746-47.

128. See Lund, *Carnival of Mirrors*, *supra* note 31, at 615-16.

129. See POSNER, *supra* note 61, at 92-220; Sunstein, *supra* note 17, at 211-15 (assenting to concurring opinion in *Bush v. Gore*).

tory regime in place on Election Day, the U.S. Supreme Court could rightly intervene on the basis of Article II, Section 1:

Although the concurring opinion's application is unsound on the merits, the institutional function of checking the state court's construction of state election legislation to ensure that federal institutional ground rules (here, those of Article II) are followed is unexceptional. Of course, it must be conceded that this checking function authorizes the Supreme Court to reject only manifestly unreasonable state judicial constructions of state statutes and not simply to substitute its own preferred construction for the state court's.<sup>130</sup>

The trouble with the concurrence, in other words, was not that it claimed the authority to check outlandish state judicial constructions of legislative schemes for selecting presidential electors. Rather, the trouble is that in *Bush v. Gore*, in violation of the deference the Court owes to state supreme court interpretations of state law even on an Article II, Section 1 theory, it rejected a manifestly *reasonable* Florida court ruling.

If the goal is to condemn the concurring justices' preferred holding, Tribe concedes too much. For his admission that the analytical basis of the opinion is correct ultimately renders his substantive position untenable. This is because Tribe's defense of the Florida court's fidelity to the statutory scheme in place on Election Day is based on a misreading of that scheme. Indeed, once freed from certain misleading but non-essential arguments and when complicating details of Florida law are given their due significance, the concurrence makes a simple and powerful case for terminating the Florida recount.

Unfortunately, the simplicity and power of the concurrence's underlying legal reasoning is obscured by two factors, only one of which was avoidable. The avoidable obscurity stems from the misleading arguments Rehnquist interjects into the opinion concerning the status under Florida

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130. Tribe, *supra* note 11, at 193. In contrast, Klarman rejects the analytical framework. See Klarman, *supra* note 17, at 1733-47. But he does so, on the basis of a defective argument. After considering and dismissing originalist and functionalist arguments for the Article II theory that the concurrence does not make, Klarman considers, or purports to consider, the text-based argument that it does:

In *Bush*, Chief Justice Rehnquist does not explain why broad-ranging judicial and administrative interpretation of federal statutes is permissible in spite of Article I's requirement that "all legislative powers" be vested in "Congress," but Article II's injunction that state "legislatures" direct the manner of appointing presidential electors forbids state courts from engaging in ordinary statutory interpretation of state election law.

Klarman, *supra* note 17, at 1736. The theory—that in presidential elections, Article II bars state courts from engaging in ordinary interpretation of state election codes—that Klarman attacks, however, was not at issue in *Bush v. Gore*. It was raised in Bush briefs earlier in the litigation but was nowhere propounded in the concurrence. What was at issue was whether, in presidential elections, the Constitution forbids state supreme court rulings on the state election code that are not ordinary interpretations of state law, but rather rewritings or overridings of it.

law of the 3 U.S.C. § 5 December 12 federal safe-harbor deadline. Rehnquist declares that 3 U.S.C. § 5 should “inform[ ] our application” of Article II, Section 1 to “ensure that post-election state-court actions do not frustrate the legislative desire to attain the ‘safe harbor’ provided by § 5.”<sup>131</sup> Yet, on the federal level, there is nothing mandatory about 3 U.S.C. § 5. The safe harbor that it provides for a state’s electoral votes is optional. Moreover, even if the Florida court held that the December 12 federal safe-harbor deadline was binding under Florida law (as the majority concluded the Florida court had), the concurrence would have been obliged under an Article II, Section 1 theory to conduct an independent review (which it did not) to determine whether that interpretation was indeed consistent with the Florida legislative code.<sup>132</sup>

The second obscurity, this one unavoidable, is rooted in the nature of the legal question presented. Precisely because Article II, Section 1 obliged the Court to undertake an independent review of Florida law, the concurrence’s evaluation of the constitutionality of the Florida court’s rulings was inevitably bound up with the examination of details of an unfamiliar and complicated state election code and of little-known state case law.

Even with these qualifications in mind, however, the argumentative movement of the concurrence is not hard to track. Searching review of a state supreme court’s interpretation of state law by the U.S. Supreme Court is unusual, the concurrence acknowledges, but the Constitution mandates exceptions:

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. *See* U.S. Const., Art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government. This is one of them. Article II, § 1, cl. 2, provides that “each State shall appoint, in such Manner as the *Legislature* thereof may direct,” electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.<sup>133</sup>

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131. *Bush v. Gore*, 121 S. Ct. 525, 534 (2000) (Rehnquist, J., concurring).

132. *See* Klarman, *supra* note 17, at 1732.

133. *Bush*, 121 S. Ct. at 534.

Consistent with a straightforward reading, and as interpreted in *McPherson v. Blacker*,<sup>134</sup> Article II, Section 1 makes state supreme court rulings concerning the legislative scheme for selecting presidential electors subject to U.S. Supreme Court review. Of course, Article II, Section 1 does not preclude ordinary adjudication by state courts of legal disputes concerning the legislative scheme. But Article II, Section 1 does mean that the Constitution requires state courts to confine themselves to interpretation of the code rather than rewriting or overriding it: “[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”<sup>135</sup>

In a variety of ways, argued the concurrence, the Florida court’s rulings involved a constitutionally impermissible departure from the duly enacted Florida Election Code. In its first opinion, on November 21, which dealt with the protest period of the controversy, the Florida court changed Florida law by ignoring authority vested in the secretary of state by the state election code and overriding her enforcement of the original seven-day statutory deadline for submitting vote tallies. It changed it further by extending the deadline for such recounts by twelve days.<sup>136</sup>

The Florida court’s December 8 ruling, upholding Gore’s contest of the certified election results, involved several more departures from the legislative scheme. The Florida court changed Florida law in a second way by engaging in *de novo* review of the canvassing boards’ decisions about whether to recount ballots past certification deadlines; this deprived the secretary of state’s certification of the presumptive validity conferred on it by Florida law and deprived the canvassing boards’ decisions of the presumptive validity conferred on them by Florida law.<sup>137</sup> Third, the Florida court changed Florida law by overturning the secretary of state’s decision to enforce that court’s own November 26 bright-line deadline for submitting recount tallies (declared in its November 21 opinion), and by compelling her to accept late tallies submitted after the deadline.<sup>138</sup> Fourth, the Florida court changed Florida law by rejecting the secretary of state’s reasonable interpretation of the election code, according to which a “legal vote” was one cast in accordance with the published instructions so that it was readable by a machine. Despite its statutorily imposed duty to defer to her reasonable interpretations, the Florida court instead ordered relief on the basis of an unreasonable reading of the Florida Election Code, according to which improperly marked ballots in close elections must be manually recounted in a search for “a clear indication of the intent of the voter.”<sup>139</sup> Fifth, the Florida court changed Florida law by ordering a rem-

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134. 13 S. Ct. 3 (1892).

135. *Bush*, 121 S. Ct. at 534.

136. *See id.* at 536-37 (describing how state court changed Florida election law).

137. *See id.* at 537 (noting effects of changes in Florida law).

138. *See id.* (describing secretary of state’s functions under new laws).

139. *Id.* at 537-38.

edy—a statewide manual recount of undervotes—that with all the appropriate judicial procedures, could not possibly be completed by the December 12 federal safe-harbor deadline, which the Florida court held was recognized by the legislature as binding under Florida law.<sup>140</sup> Because the Florida recount depended on these numerous changes in the Florida legislative scheme, and because such changes are forbidden by Article II, Section 1, the concurrence concluded that the recount was unconstitutional and must be terminated.

This, in outline, is the concurrence's legal argument, and on one important point Tribe is in complete agreement with it. As we noted, in contrast to many commentators, Tribe readily concedes that the concurrence was correct to regard Bush as having raised, under Article II, Section 1, a challenge to the Florida recount of constitutional significance. In other words, the issue that separates Tribe from the concurring justices is not whether Bush raised a question of constitutional significance, but how that question should be answered: Did the Florida court reasonably interpret the Florida Election Code, or did the Florida court change Florida law? Did it substitute its own ideas about how a challenge should proceed in a close election for the scheme enacted by the Florida legislature, a scheme that the Florida legislature was entitled under federal constitutional law to write and have applied as written?

Having embraced the legal theory, or analytical approach, of the concurring justices, Tribe goes on to attack their view that the Florida court had, in fact, changed the state's election laws. The Florida court's reading of Florida election law, Tribe contends, was definitely the right reading:

[B]y rejecting a formulaic, rule-bound interpretation of the state election code, [the Florida court] was adhering faithfully to both the letter and the spirit of the statutory scheme that the Florida Legislature put in place and made applicable to presidential elections pursuant to its duty under Article II, Section 1, Clause 2. The image of a partisan state court run amok, an image that seemingly drove the Court's majority and continues to haunt its defenders, dissolves under close analysis, leaving in its place the straightforward picture of a workmanlike judicial tribunal doing its best, under trying and unprecedented circumstances, to apply an admittedly imperfect set of election rules.<sup>141</sup>

By contrast, the concurrence's "substantive reading of the state's election law, not to put too fine a point on it," Tribe sarcastically concludes, "turns out to be baloney."<sup>142</sup>

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140. *See id.* at 538-39 (describing effect of mandatory manual recount of undervotes).

141. Tribe, *supra* note 11, at 216.

142. *Id.* at 193-94.



For Tribe, the key problem with the concurrence is the chief justice's insistence that, as Tribe summarizes, "no 'legal votes' were missed if a machine counted all ballots without mechanical error, a tautological result under [a] circular definition of a 'legal vote' as a ballot marked such that a vote-tallying machine can read it."<sup>143</sup> Counting votes and counting ballots, Tribe argues, are different, and it was wrong for the Court "to equate the statutory commands of the legislature with the programming commands of voting machine or software manufacturers and the physical limitations of the voting machines themselves."<sup>144</sup> The "real question," he contends, "is whether the degree of accuracy programmed into the machines is, in extremely close elections, a degree of accuracy with which the Florida Legislature would have been content."<sup>145</sup> The answer, in Tribe's view, is no. The Florida court properly "read the state election code to make the clear manifestation of voter intent, rather than full technical compliance with all the stated rules, the critical test in determining which votes count as 'legal' and thus which ballots must be counted."<sup>146</sup>

The Florida court's relaxation of standards to ensure that votes were counted was reasonable, in Tribe's view, in light of its history of interpretation of the election statutes:

Until 1975 Florida common law oscillated between demanding strict compliance with election law requirements and providing a more relaxed interpretation of the statutes. In *Boardman v. Estevea*, the Florida Supreme Court stated definitively that it would "recede" from the more rigid approach and henceforth read the statutes to regard as valid all votes cast in "substantial compliance" with state regulations.<sup>147</sup>

He further argues that the Florida court's approach fits with the "primacy of the right to vote in the state constitution" and so was

clearly preferable to that of the Secretary of State. By reading the relevant statutes in light of this right and hewing to the constitutional avoidance maxim, the court did not replace the scheme established by the Florida legislature. It simply employed a heuristic for determining what that scheme meant in light of the background constitutional principles operative at the time of the legislative passage and its own case law interpreting the election code—case law with which the legislature was familiar.<sup>148</sup>

Nor, Tribe contends, was the Florida court's intent of the voter standard an unreasonable one unduly subject to partisan wrangling by local

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143. *Id.* at 200.

144. *Id.* at 202.

145. *Id.*

146. *Id.* at 203.

147. *Id.* at 206.

148. *Id.* at 206-09.

canvassing boards. The state's election code "attempts to harness rather than to exile partisan motives and political self-interest, while providing safeguards against partisan fervor."<sup>149</sup> In addition, "the election statutes simultaneously reveal the legislature's confidence that, even in the midst of partisan wrangling, closely watched election officials will perform their duties in an ethical manner."<sup>150</sup> The court's

decision to reject uniform, mechanically applicable, statewide rules in favor of the legislature's "intent of the voter" standard, as implemented on a county by county or even a case by case basis, is not a mindless or an underhanded choice of a standardless process. Rather, it is a considered and open decision which recognizes that, under the governing statutes requiring that ballots be counted in a public and visible manner, county canvassing boards can and should be relied upon to apply the "intent of the voter" standard with integrity in manual recounts.<sup>151</sup>

Altogether, he concludes, there "is simply no reason to see Florida's highest court as some kind of lawless renegade bent on manipulating the rules to elect Gore to the presidency."<sup>152</sup>

While there may be no reason to doubt the Florida court's good intentions, there is excellent reason to conclude, even if its motives were pure as the morning dew, that the Florida court violated Article II, Section 1 by setting aside the legislature's scheme for the selection of presidential electors and replacing it with its preferred scheme. Despite all the ink spilled in the Florida court's defense, much of it spilled by Tribe, that conclusion is actually hard to escape once the case is properly described. Tribe, in fact, manages to dispute it chiefly by relying on what might generously be termed an error concerning a fundamental point of Florida law.

Tribe claims emphatically that the Florida court was under no legal obligation to defer to Secretary of State Katherine Harris's interpretation of the state's election code or to the canvassing boards' decisions related to recounts:

[T]he contest provisions say nothing about reviewing particular certification-related rulings of the Secretary of State as though they were the rulings of an Administrative Procedure Act agency. . . . [T]he statutory language offers no support for Judge Posner's assertion that "principles of administrative law required the contest court . . . to defer to the canvassing boards, as the experts in counting votes, unless their decisions were unreasonable." Posner invokes these "principles of administrative law" as if

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149. *Id.* at 215.

150. *Id.*

151. *Id.*

152. *Id.* at 216.

they were a sort of natural law—a brooding omnipresence in some technocratic world. Nowhere, however, does he point to any provision of state legislation to anchor his “reading” in the statutory scheme established by the Florida Legislature. Nor, for that matter, does he cite Florida judicial precedent adopting any doctrine similar to the *Chevron* deference familiar in federal administrative law.<sup>153</sup>

On this critical matter, however, Tribe is wrong about Posner<sup>154</sup> and, more importantly, wrong about Florida law.

Tribe is not alone, however, in this misunderstanding of the Florida court’s statutorily imposed obligations to defer to election officials in general and to the secretary of state in particular. Justice Souter, joined in this part of his dissent by Justices Stevens, Ginsburg and Breyer, termed the dispute over what constitutes a legal vote under Florida law a “mere disagreement[ ] about interpretive merit.”<sup>155</sup> Justice Breyer, joined in this part of his dissent by Justices Stevens, Souter and Ginsburg, noted that the Florida court “did not accept [Harris’s] definition. But it had a reason,” and he claimed that “nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary’s view on such a matter.”<sup>156</sup> Both statements presume, as Tribe does explicitly, that the Florida court, based on mere disagreement, was entitled to supplant Harris’s reasonable reading with its own preferred reading. Tribe is wrong in esteemed company, but that does not lessen his error.

In fact, Florida’s statutory scheme is quite clear in its assignment to the secretary of state of “responsibility to . . . [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws.”<sup>157</sup> Tribe only confuses matters by asserting that “the contest provisions” of the Florida Election Code do not assign the secretary of state any particular administrative role.<sup>158</sup> That’s true but utterly misleading. The

153. *Id.* at 204-05.

154. For his analysis of the Florida court’s legal obligation, grounded in Florida law, to defer to local canvassing boards, see POSNER, *supra* note 61, at 107 n.29.

155. *Bush v. Gore*, 121 S. Ct. 525, 544 (2000).

156. *Id.* at 554.

157. FLA. STAT. ANN. § 97.012(1) (West 2000). Regarding the secretary of state’s interpretation of the meaning of legal votes in Florida, Klarman argues: Nor is it clear that the Florida Supreme Court owed any particular deference to the Secretary of State’s contrary interpretation, given the political nature of her position, the absence of any obvious agency “expertise” that would entitle her interpretation to deference, the fact that her interpretation was post hoc rather than a product of ex ante rulemaking, and the generally uncertain standard of judicial deference to agency legal interpretations called for by Florida administrative law.

Klarman, *supra* note 17, at 1743. Actually, it is clear. For starters, Klarman does not examine the significance of the provision at the head of the Florida Election Code that makes the secretary of state the chief executive office official responsible for providing legally binding interpretations of election statutes.

158. See Tribe, *supra* note 11, at 204.

contest provisions do not mention the secretary of state or her administrative role because they do not need to. The election code, of which they constitute only one small part, already assigned to the secretary of state up front and comprehensively, general responsibility for interpreting the code as a whole.

The Florida code's language necessarily demands of Florida courts some deference to the secretary of state as the executive official to whom it assigns responsibility for achieving uniformity in its interpretation. The statute does not specify how much deference her interpretations are owed, but implicit in the delegation itself is a requirement of *some* deference. Embedded in any delegation of authority, after all, is a presumption of regularity in the actions of the executive officials charged with carrying out the statute's commands. The statutory delegation would be meaningless if the courts reviewed the secretary's interpretations *de novo*. Such a reading would effectively say that the secretary has discretion to interpret the code so long as she agrees with the courts in every particular—which is to say that she has no discretion at all. For the Florida courts to refuse to afford any deference to Harris's reading of the law, assuming that such a reading is reasonable, would affect a fundamental change in the statutory scheme, giving the courts themselves, rather than the secretary of state, the primary responsibility to ensure uniformity in the code's interpretation.

Notwithstanding Tribe's claims to the contrary, and his inapt reference to *Boardman v. Esteve*,<sup>159</sup> Florida's case law actually unambiguously proclaims that the secretary's reading was entitled to some deference. One might argue that for purposes of Article II, Section 1, the Florida court did not need to respect its own case law, since the case law was not explicitly part of the legislative scheme enacted by the Florida legislature and was, therefore, not protected by the federal Constitution. But this dubious argument was not open to Tribe, who throughout his critique of the concurrence treats the Florida court's case law as part of the legislative

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159. 323 So. 2d 259 (Fla. 1975). We shall return to Tribe's dramatic misrepresentation of *Boardman*. Even at this preliminary stage in the argument, however, it is important to stress that the case did not deal with "all votes cast in 'substantial compliance' with state regulations." Tribe, *supra* note 11, at 206. Rather, it dealt with a specific class of ballots, improperly marked *absentee* ballots, that the canvassing board chose to recount. Moreover, in *Boardman*, the Florida court most certainly did not, as Tribe suggests, impose an obligation on canvassing boards to review all improperly marked ballots. See generally 323 So. 2d at 259-70. Rather, the court read the statute to regard as valid all votes that the canvassing board decided to count and which were also counted in "substantial compliance" with state laws. See *id.* *Boardman* was a case about the considerable deference owed by courts to decisions by local canvassing boards, not about the power of courts to compel canvassing boards to undertake actions they had decided against. See *id.* Far from licensing the courts to appeal to the Florida Constitution to overturn the canvassing board decisions, as Tribe would have it, the Florida court held in *Boardman* that so long as canvassing boards' decisions about what counts as a legal vote were made in substantial compliance with the laws, the courts would honor them.

scheme and indeed explicitly affirms that it was part of the presumed background of Florida legislation.<sup>160</sup> And on this point Tribe is correct. Fidelity to the state's own constitutional tradition did demand that the case law be respected, for the case law does illuminate the background expectations that legislators would have had when they empowered the secretary of state to interpret the statute.

It must be stressed that while Tribe (and the dissenters on the Court) denied the Florida court's legal obligation to defer to the secretary of state's interpretation of the election code, the Florida court's opinions wholeheartedly affirmed it, provided that her reading was not clearly contrary to the law. According to the Florida court's November 21, 2000 opinion, "Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged with implementing and enforcing."<sup>161</sup> This merely restated long-standing and unquestioned Florida precedents—which stand for precisely the *Chevron*-like principle of administrative law whose existence in the Florida legal system Tribe mockingly dismisses as a natural law fantasy conjured by Chief Justice Rehnquist and later by Judge Posner.

Indeed, only a few months before the 2000 election controversy erupted, the Florida court declared: "We recognize the general rule that the interpretation of a statute by the administrative agency or body 'charged with its enforcement is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute.'"<sup>162</sup> Perhaps even more decisive was the 1994 case of *Smith v. Crawford*,<sup>163</sup> in which the Florida court affirmed in unmistakable language that it was bound to defer to the Division of Elections on the meaning of the state's election code unless the division's view was unreasonable:

On September 16, 1994, the Division issued Advisory Opinion DE 94-17 dealing with the issues in this case. No review of the Division's advisory opinion was sought and, accordingly, the opinion remains in effect so far as the Division and the parties bound by it are concerned. While the advisory opinion was not necessarily binding on Bob Crawford, as he was not a party who sought the opinion or a person with reference to whom the opinion was sought, nevertheless, as the trial court recognized in its September 22 order, in construing and applying these statutory provisions a court is required to give deference and great weight to the agency's construction of the statutes it is charged with administering, and a court is not authorized to overturn the

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160. See Tribe, *supra* note 11, at 206-07.

161. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1229 (Fla. 2000).

162. Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000).

163. 645 So. 2d 513, 521 (Fla. 1994).

agency's determination unless it is "contrary to the language of the statute," *Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973), or "clearly erroneous," *Department of Professional Regulation v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st DCA 1984). If the agency's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497, 99 S. Ct. 1842, 60 L. Ed. 2d 420 (1979). Deference to an agency's interpretation is even more compelling where an agency's interpretation, as here, is consistent with its prior published opinions.<sup>164</sup>

The court made the same point the previous year in *Krivanek v. Take Back Tampa Political Committee*,<sup>165</sup> citing for authority *Boardman v. Esteva*:

We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), cert denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman*:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.<sup>166</sup>

In sum, the only proper question facing the Florida court in its initial crack at the election controversy on November 21 was whether Secretary of State Katherine Harris's decisions about manual recounts were based on a reasonable interpretation of the legislative scheme, and not "clearly erroneous." If her interpretation was reasonable, in the sense of not "clearly erroneous" or, to borrow Tribe's formulation to describe interpre-

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164. *Id.*

165. 625 So. 2d 840 (Fla. 1993).

166. *Id.* at 844-45 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975)).

tations unworthy of deference, “manifestly unreasonable,” then the Florida court was legally bound to give it “great weight” and had no business replacing her reading with its preferred reading. In the context of a presidential election, such a failure to honor its legal obligation to defer risked running afoul of Article II, Section 1.

Harris’s decisions were based on her view about the definition of a legal vote. And she had stated her view quite clearly. In an advisory opinion, a response to questions posed by Judge Charles Burton, chairperson of the Palm Beach County Canvassing Board, during the protest period in the week following the election, and pursuant to power granted her under section 106.23(2) of the Florida Election Code, Harris declared her interpretation of the law governing the conduct of county recounts:

An “error in the vote tabulation” means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.<sup>167</sup>

In other words, hand recounts are reserved for situations of machine failure. As Harris’s lawyers later put it in their brief before the U.S. Supreme Court, “‘Legal votes,’ as that term is used in section 102.168(3)(c), means votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places.”<sup>168</sup>

This reading is a strict one. It certainly would have precluded the manual recounts that were Gore’s only shot at overtaking Bush and winning Florida. But a strict reading is not necessarily a wrong one; it is quite possible, after all, that the legislative scheme envisioned voters who followed instructions and machine counts that were presumptively final. Indeed, though much maligned at the time, Harris’s reading is in certain respects preferable to that of the Florida court.

For example, Harris’s reading removes the major problem in the protest provisions of the Florida Election Code, which, in its November 21

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167. Letter from L. Clayton Roberts, Director, Division of Elections, Florida Department of State, to The Honorable Charles E. Burton, Chairperson, Palm Beach County Canvassing Board (Nov. 13, 2000), available at [http://jurist.law.pitt.edu/election/de00\\_13.html](http://jurist.law.pitt.edu/election/de00_13.html) (offering opinion on “Manual Recount Procedures and Partial Certification of County Returns”).

168. Brief on the Merits of Katherine Harris et al. at 10, *Bush v. Gore*, 121 S. Ct. 525 (2000) (No. 00-949), available at 2000 WL 1845986.

opinion, the Florida court identified as grounds for its fateful first intervention. According to the Florida court, the election code exhibited a contradiction between the seven days allotted for recounts and the length of time that a full hand recount would take.<sup>169</sup> But this contradiction only arises if one interprets, as did the Florida court, “error in the vote tabulation” to include properly functioning machines reading, as they are programmed to do, no votes on improperly marked ballots.<sup>170</sup> If that were the proper interpretation of the statute, then in close elections arduous and time-consuming manual recounts would always be necessary and the seven-day deadline would be next to impossible to meet. But if, as Secretary of State Harris believed and ruled, “error in the vote tabulation” refers to a counting error owing to machine malfunction, then the supposed contradiction disappears. Canvassing boards should be able to find the equipment error—in the machines or in the software—and fix it and count or recount ballots mechanically within the seven-day deadline for submitting vote tallies.<sup>171</sup> It is only when counties must undertake a labor intensive and irreducibly subjective manual recount that a seven-day protest period becomes completely impracticable.<sup>172</sup>

Moreover, Harris’s interpretation of a legal vote as one that is properly marked in accordance with published instructions so that it can be read by a machine fares well when compared with the Florida court’s definition, which Tribe embraces. In both its November 21 opinion and its December 4 opinion, the Florida court relied on section 101.5416(5) of the Florida code for the definition of a legal vote as a ballot that exhibits “a clear indication of the intent of the voter.”<sup>173</sup> This was problematic. As

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169. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1284-87 (Fla. 2000) (attempting to discern and resolve ambiguity between statutes).

170. See FLA. STAT. ANN. § 102.166(5)(a)-(c) (West 2000) (“If a manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board ‘shall’: (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.”).

171. See POSNER, *supra* note 61, at 93-109 (pointing out that progression of measures in statute for dealing with protests lends support to Harris’s view by suggesting that what is envisaged by election code is response to breakdown of machines and not recovery of votes from ballots spoiled by voter error). See generally McConnell, *supra* note 63.

172. As for the other alleged ambiguity in the code that worried the Florida court, between the older provision that provided that the secretary of state “shall” ignore late vote submissions and the subsequently enacted provision that provided that she “may” ignore late submissions, there never really was a problem. Clearly the subsequent provision governed. The secretary of state had discretion. What was mysterious was the court’s reasoning, which sought to reconcile the older “shall ignore” provision and the more recent “may ignore” provision by concluding that the secretary “must,” except under extraordinary circumstances, accept late submissions. See *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1286-88; Lund, *Rightness of Bush v. Gore*, *supra* note 63, at 1232-33.

173. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1229, 1283-84; see also *Gore v. Harris*, 772 So. 2d 1243, 1256-57 (Fla. 2000).



Chief Justice Wells noted in his December 4 dissent,<sup>174</sup> and as Chief Justice Rehnquist elaborated in his December 12 concurrence,<sup>175</sup> section 101.5416(5) of the Florida code deals with damaged or defective ballots, and so had no clear connection to the improperly marked but undamaged and nondefective ballots at issue in Florida.<sup>176</sup>

Indeed, the explicit requirements for recounting damaged or defective ballots under section 101.5416(5) of the Florida code reveal that provision's inapplicability to the undervotes whose recount Tribe, following the Florida court, insisted the statutory provision made mandatory. The statute provides:

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174. See *Gore*, 772 So. 2d at 1268 n.26.

175. See *Bush v. Gore*, 121 S. Ct. 525, 538 (2000).

176. Tribe does cite *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 723 (Fla. 1998), for the proposition that a "legal vote" in Florida "clearly encompasses incompletely punched-through ballots." Tribe, *supra* note 11, at 200. This is incorrect. Indeed, *Beckstrom*—which was written by Chief Justice Wells (who in dissent on December 8 rejected the definition of legal vote embraced by Tribe)—undercuts Tribe's proposition. True, in *Beckstrom*, the Florida court stated, "We construe 'defective ballot' [of the sort that Florida statutes prescribe procedures for counting] to include a ballot which is marked in a manner such that it cannot be read by a scanner." 707 So. 2d at 723. The Florida court, though, was dealing with an optical scan vote-tabulating system, not with a punchcard vote-tabulating system, and with very different sorts of voter error than those at issue in *Bush v. Gore*. Moreover, in *Beckstrom*, the Florida court was dealing with a discrete set of improperly marked ballots: absentee ballots improperly marked with number two pencils but whose improper markings nevertheless clearly and unambiguously indicated the voter's choice. See *id.* In contrast, at issue in the 2000 election controversy were incompletely punched through ballots, the interpretation of which was inherently contestable. Moreover, the question before the Florida court in *Beckstrom* was not whether to compel the Volusia County Canvassing Board to count votes it had decided not to count. The question was whether to uphold or set aside the county's decision to count improperly marked ballots and the county's counting of the improperly marked ballots in a manner contrary to the law (Volusia County illegally marked over the improperly marked absentee ballots with a black marker so that they could be read by machine, instead of creating the duplicate copies that were required under section 101.5614(5) of the Florida code). See *id.* at 722-23. The Florida court upheld the actions of the Volusia County Canvassing Board on the grounds that despite "substantial non-compliance with statutory election procedures," no fraud was found, and so the election results could be seen as giving expression to the will of the people. *Id.* at 725. There is no hint in *Beckstrom* that the Florida court believed that, to give effect to the will of the people, the Volusia County Canvassing Board had a general obligation to search through spoiled ballots for improperly marked nonabsentee ballots or, for that matter, any improperly marked ballots. And as for the general relation between Florida courts and local canvassing boards, the Florida court pointedly declared, "It is clear that the controlling authority in Florida is the *Boardman* decision and that, in *Boardman*, the supreme court intended to circumscribe the courts' involvement in the electoral process." *Id.* at 724 (analyzing *Boardman*). Perversely, Tribe takes the critical cases in which the Florida court emphatically circumscribes its role in disputes about improperly marked ballots by establishing the principle of considerable deference to election officials as justifying a great expansion of the role of courts and a shrinking of the deference owed election officials. In this perverse misinterpretation, he is joined by his colleague Alan Dershowitz. See DERSHOWITZ, *supra* note 8, at 58-61.

If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot.<sup>177</sup>

The punchcard ballots, which played so large a role in the controversy, were “of the type for which the offices and measures are not printed directly on the card.” This means that under the statute to which the Florida court and Tribe appeal, a legal recount of damaged or defective punchcard ballots involves a machine recount using duplicate copies. Given the requirement of a duplicate copy, the statute must be referring to a properly marked ballot whose intention is obvious but which for some reason—tearing, bending, wetting or the like—is incapable of being run through or read by a machine.

In fact, neither the Florida court nor Tribe mentions the statutory requirement of making duplicate ballots and running the duplicates through machines. And given their position, this is understandable, for creating duplicate copies of the improperly marked punchcard ballots at issue in the 2000 election controversy would have been useless. Duplicate copies would simply have duplicated the errors (dimpled chad, hanging chad) that rendered the spoiled ballots unreadable by a machine in the first place and would have left the voter’s intention as ambiguous as before. In short, the only provision of the Florida Election Code to which

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177. FLA. STAT. ANN. § 101.5614(5) (West 2000). The provision in full reads: If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot card shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballot cards shall be clearly labeled “duplicate,” bear a serial number which shall be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot. If any ballot card of the type for which offices and measures are printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy may be made of the damaged ballot card in the presence of witnesses and in the manner set forth above, or the valid votes on the damaged ballot card may be manually counted at the counting center by the canvassing board, whichever procedure is best suited to the system used. If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board. The totals for all such ballots or ballot cards counted manually shall be added to the totals for the several precincts or election districts. No vote shall be declared invalid or void if there is a clear indication on the ballot that the voter has made a definite choice as determined by the canvassing board. After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for that precinct.

*Id.*

the Florida court, and to which Tribe in its defense, appeals establishes requirements for the recovery of votes from damaged or defective ballots that were blatantly violated by the recount that the Florida court ordered. Indeed, the ballots in question in November and December 2000 fell outside the purview of the statute because they were not damaged or defective.

Nevertheless, following the Florida court in its flight away from the Florida Election Code, Tribe repeats his contention that Florida case law is on his side. Florida precedent, he insists, clearly indicates that in a close election the state has an obligation to do whatever it takes to retrieve all votes that exhibit a clear indication of the intent of the voter, including undertaking hand recounts of improperly marked ballots.<sup>178</sup> Following the Florida court's flight, Tribe cites what everybody agrees are the critical cases, *Boardman v. Esteve*<sup>179</sup> and *Beckstrom v. Volusia County*.<sup>180</sup> Following the Florida court's flight, Tribe egregiously misreads these critical cases.

Tribe's egregious misreading of the Florida court's case law compels us to further elaborate the proposition, which should have been fatal to Tribe's client's case, for which these cases in fact stand: that Florida courts must show great deference to the decisions of local canvassing boards and must accept their decisions unless clearly wrong.

*Boardman* involved a legal challenge to a close election in which a local canvassing board decided to count improperly but clearly marked absentee ballots. *Beckstrom* involved a challenge to a close election in which a local canvassing board decided to count improperly but clearly marked absentee ballots and count them in an illegal way. In both cases, the Florida court upheld the exercise of discretion by the county canvassing boards and stressed that the discretion vested in the boards was broad.

Moreover, in neither case was there ambiguity about what the voters intended. And in neither case did the court face the question whether local canvassing boards had a legal duty to, and therefore *must*, count improperly marked ballots that they had chosen not to count. In both cases, rather, the legal question was whether local canvassing boards *may* count improperly marked ballots, and in *Beckstrom*, whether the canvassing board may count those ballots in a manner contrary to the statute.<sup>181</sup> The Florida court in *Beckstrom* reaffirmed what it had held in *Boardman*: absent evidence of fraud, courts will defer to the decisions of canvassing boards, even in cases of substantial noncompliance with the law, about what votes to count and what counts as a legal vote. It turns out that the cases Tribe cites to defend the legality of the overruling by the Florida court of exercises of discretion by election officials show instead that the decision

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178. See Tribe, *supra* note 11, at 196 n.72, 207-08.

179. 323 So. 2d 259 (Fla. 1975).

180. 707 So. 2d 720 (Fla. 1998).

181. See DERSHOWITZ, *supra* note 8, at 59.

whether to undertake such counts belongs, providing the absence of gross illegality, to the election officials and not to the courts.<sup>182</sup>

In short, Harris's reading—unfavorable to Gore though it was—of the Florida Election Code on the question of the definition of a legal vote was at the very least reasonable, and the Florida court's reading was at best strained. What is crucial, though, is not who had the better reading but that the question whether a better reading than Harris's was possible was emphatically not the question under Florida law that the Florida court confronted. The Florida court was obliged by Florida law to defer to the secretary of state's official interpretations of the meaning of the Florida Election Code (and those of the canvassing boards) if they were reasonable. The only real legal question for the Florida court, therefore, was whether Harris's interpretations were so extravagant as to be "contrary to the language of the statute" or "clearly erroneous." If her view of the statute was "reasonably defensible," it should not have been "rejected merely because the courts might prefer another view of the statute." A rejection by the Florida court of her "reasonably defensible" interpretation of the Florida code would involve a substantial departure from the Florida legislature's allocation of authority between the secretary of state and the Florida courts for the administration of elections and would thereby involve a violation of Article II, Section 1 of the Constitution. And as we have suggested, Harris's interpretations were certainly reasonable.

Ironically, given how high passions were running, nobody on the U.S. Supreme Court questioned the reasonableness of Harris's interpretation of the Florida Election Code, which in his concurrence Chief Justice Rehnquist adopted as his own. To the contrary, the dissenters specifically affirmed its reasonableness. Justice Souter, joined in this part of his dissent by the other three dissenting justices, declared, "The [Florida] court read that objective of looking to the voter's intent as indicating that the legislature probably meant 'legal vote' to mean a vote recorded on a ballot indicating what the voter intended. It is perfectly true that the majority might have chosen a different reading."<sup>183</sup> He offered, as an example, the reading advanced by Harris.<sup>184</sup> Justice Ginsburg, joined in this part of her dissent by the other three dissenting justices, went further, actually suggesting that the Rehnquist-Harris view might be *preferable* to the one the court adopted: "My colleagues have offered a reasonable construction of Florida's law. . . . I might join The CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated."<sup>185</sup> In fact, Justice Ginsburg's

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182. When it is useful to his argument, Tribe does contradict his more often stated view and affirm that canvassing board decisions are presumptively correct. See Tribe, *supra* note 11, at 210 n.148.

183. Bush v. Gore, 121 S. Ct. 525, 544 (2000) (Souter, J., dissenting).

184. See *id.*

185. *Id.* at 546 (Ginsburg, J., dissenting).

admission, embraced by all the dissenting justices, that Harris's interpretation of Florida law was within the boundaries of acceptable statutory construction, is fatal to the dissenting justices' dissent and does warrant the conclusion that the justices of the Florida Supreme Court went beyond legitimate interpretation to illegitimate lawmaking. For if reasonable, Harris's interpretations were entitled to prevail under the statutory scheme in place in Florida before Election Day November 7, 2000.

When all four High Court dissenters admit the reasonableness of Harris's interpretations of Florida law, they also implicitly acknowledge—in light of the deference that the Florida legal code, emphatically affirmed by Florida case law, requires its courts to give to executive officials who have responsibility for interpreting the election law—that the Florida court's refusal to defer to those interpretations substantially changed Florida law. And when all four High Court dissenters implicitly acknowledge that the Florida court substantially changed Florida law, they also implicitly acknowledge—certainly as Professor Tribe, in agreement with Justices Rehnquist, Scalia and Thomas, understands the constitutional responsibilities of the U.S. Supreme Court in presidential elections—the reasonableness of the conclusion that the Florida recount violated Article II, Section 1 of the U.S. Constitution.

## VI. CONCLUSION

*Bush v. Gore* was a genuinely hard case. It raised two novel and distinct issues of constitutional law on which the Constitution's text, history and structure offered less than dispositive guidance and which the relevant case law did not authoritatively resolve. Moreover, it presented these questions against a backdrop of one of the most intense political moments our constitutional system contemplates: the selection of the only two officers in the federal government elected by the nation as a whole. And while the justices normally have months to resolve issues far less complex than those it faced in December 2000, they produced their opinions in *Bush v. Gore* in a matter of hours.

Under these circumstances, it should surprise nobody that the Court's opinions lack a certain doctrinal richness. The tragedy of the case is that the 5-4 majority decision broke along the Court's conventional ideological fault lines (although not perfectly since seven justices did agree that the Florida recount was on constitutionally infirm equal protection grounds), a turn of fate that lent support to the accusation of partisan politicking on the part of the justices (although for some reason the critics reserve the charge of partisanship for justices on only one side of the fault line). Among those committed to this point of view, the relative brevity and sketchiness of the decision has often been confused with doctrinal inadequacy, even contemptibleness. But the Court's academic critics—Tribe among them—have consistently and indeed wildly overstated the

problems with the decision, imagining lawlessness in what are better seen as deficiencies, imperfections and failures of elaboration and explication.

In contrast to Tribe who in criticism of the Court's holding offers extravagant arguments and sophisticated, multi-layered legal theories that he did not advance as Gore's lawyer, and that were not argued by the dissenting justices, we have defended the Court's reasoning by elaborating it. Considering the trying circumstances of the decision's production, its shortcomings are actually less striking than its overall doctrinal adequacy.

This is not to say that the justices got the single correct answer, that they correctly divined the law from the complex interaction of text, structure, history and precedent with which the case presented them. The uncomfortable truth—and it should be particularly uncomfortable for those conservatives and the liberal followers of Ronald Dworkin who insist that each case presents a question with a single correct answer out there for the finding—is that there was no one lawful manner to resolve *Bush v. Gore*. There were, in fact, several potentially lawful paths, that is to say answers not precluded by text, structure, history and precedent and arguably indicated by them. While it is fair to debate which of these would have been the most desirable outcome, our critique of Tribe has shown that the Court's actual resolution of the case belongs on the list of reasonable resolutions, certainly not, as Tribe would have it, beyond the pale and therefore a disgraceful chapter in the Court's history and a stain on the legacy of the justices who signed it.

There were at least three courses other than the one the justices took that also would have been, to one extent or another, defensible approaches to the case. First, the Court did not, as a preliminary matter, have to grant certiorari at all to Bush's challenge of the Florida court's recount order. Had the justices not stayed the recount and considered Bush's petition, it would have left to Florida's political and legal processes the job of sorting out the mess. The subsequent media recounts suggest that if the Florida recount had been faithfully conducted in accordance with the instructions laid down by the Florida court—and this is a very big if, considering the time and care that went into the media recounts and the haste and disarray surrounding the official recount—Bush very likely would have emerged victorious.<sup>186</sup> His constitutional complaints against the recount, at that point, would have become moot. And Gore's request for the recounts would have been satisfied, whether lawfully or not. If the Court's correction of the recount's legal deficiencies was unnecessary to protect a victory that under law was rightfully Bush's, then that victory surely would have been less controversially obtained from Florida institutions than from federal ones, particularly the Supreme Court.

The great advantage of this path would have been that all other possible modes of state resolution would have been exhausted before the Court

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186. See generally *Democracy Held Hostage*, *supra* note 80; *The NORC Florida Ballots Project*, *supra* note 80.

agreed to accept an invitation to intervene in the electoral process. Such restraint might have spared the Court some of the questions it has suffered concerning the justices' motives, and it would likely have spared the country the odd spectacle—replete with anti-democratic overtones—of a president seeming to be chosen by nine politically unaccountable federal judges split exactly as those who believe courts to be political bodies would have predicted.<sup>187</sup>

The disadvantage to this approach would have been the possibility that Gore might have prevailed under a recount of dubious legality. The Court would not necessarily have had to forswear consideration of the questions posed in the case had this eventuality come to pass. After all, had Gore won his contest and had the Florida court entered judgment in his favor, the Court would still have retained the ultimate power to review the Florida court's final judgment in the litigation for consistency with the federal Constitution and federal law. The trouble is that had the justices, at that point, decided the case in Bush's favor, they would have found themselves in a truly preposterous posture politically, well beyond the strained posture in which they actually found themselves in *Bush v. Gore*. Instead of halting a recount without knowing who would win it, they would have had to reverse the official and final results of an election, the victor of which had already been proclaimed by the highest tribunal of the state. Or they would have had to defer once again, this time to Congress, on the substantive and serious issues of federal law that Bush's challenge to the Florida recount presented.

Accordingly, refusing to hear a case in which they nonetheless found a constitutional violation, as Justices Souter and Breyer recommended in their dissents,<sup>188</sup> would have been a calculated risk. As long as the recount did not proceed favorably for Gore, the Court would have protected its reputation. Had Gore overtaken Bush, however, the justices who believed that Gore had captured Florida's twenty-five electoral votes on the basis of a constitutionally impermissible recount might have emerged even more vilified than they have been by their academic critics.

Having taken the case, the Court, as a second alternative, could have engaged in some verbal acrobatics in order to avoid reaching its merits. The vehicle for this, as we have suggested,<sup>189</sup> would have been the political question doctrine, albeit not the mandatory form of the doctrine that Tribe suggests. The advantage to such a holding would have been that, like denying certiorari altogether, it would have kept the Court out of the

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187. While it is certainly incorrect to speak of a 7-2 decision, it is just as incorrect to overlook that both Justices Souter and Breyer found equal protection infirmities with the Florida recount. See *Bush*, 121 S. Ct. at 542-43 (Souter, J., dissenting); see also *id.* at 550-51, 555-58 (Breyer, J., dissenting).

188. See *id.* at 542-43 (Souter, J., dissenting); see also *id.* at 550-51, 555-58 (Breyer, J., dissenting).

189. For a further analysis of the political question doctrine, see *supra* notes 29-62 and accompanying text.

political thicket and permitted—or forced—both state authorities and Congress to resolve the matter in a fashion that permitted political accountability. Moreover, unlike a certiorari denial, a political question doctrine dismissal would have been a pointed statement of restraint—an affirmative insistence that other institutions were better positioned than the Court to resolve the matter. Ironically, given Tribe's contention that such a holding was mandated by the Constitution and the contention of Justice Breyer that it was strongly indicated,<sup>190</sup> the disadvantage would have been a certain doctrinal implausibility.

As we have argued, the case law could not have been clearer that the specific categories of questions the Court confronted were *not* mandatory political questions within the meaning of the doctrine. To have contended that the case nonetheless presented a nonjusticiable political question, therefore, the justices would either have had to make a great deal of the timing of the issues presented—as Tribe suggests—or to aggressively elaborate and expand some of the ambiguous language in *Baker*. The former approach would have been as tendentious in an opinion of the Supreme Court as it is in Tribe's *Harvard Law Review* article. The latter, framing some discretionary political question rationale for abstention, was certainly accomplishable—but it would have also raised the embarrassing question of why the Court had stayed the recount and agreed to hear the case only then to announce that it was beyond its institutional competence to resolve.

The third alternative was the course advanced in the dissents of Justices Souter and Breyer, given that the Court had proceeded to consider the case on the merits. Correcting the equal protection errors in the Florida court's order and remanding for a constitutional recount, as they favored, also would have been a defensible approach, at least in part. The most vulnerable aspect of the Court's opinion, after all, was the alacrity with which it concluded that Florida law prohibited further recounting. Inviting Florida's court to reconsider the status under federal law of the December 12 federal safe-harbor deadline would have alleviated that problem to some degree.

Importantly, however, the Court could only have taken this approach had it held, as both Justices Souter and Breyer would have, that the Article II, Section 1 claim lacked merit. A further recount under any standards, after all, would have failed to remedy the constitutional flaw claimed under Article II—a flaw rooted in the fact, not the manner, of the recount that the Florida court had ordered. In retrospect, at least, the Article II, Section 1 ground seems as strong as, and in some ways stronger than, the equal protection ground. This would have made the Breyer-Souter approach vulnerable to the charge that the strongest constitutional argument against the Florida court's recount would also have precluded the very remedy they would have ordered. Such a holding would have risked

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190. See *Bush*, 121 S. Ct. at 555-58 (Breyer, J., dissenting).



validating the noxious notion that a state court can change the rules of an election after the votes are cast provided that it does so in a fashion consistent with equal protection.

That said, had the majority been willing to resolve the matter on equal protection grounds alone and remand the case as Justices Breyer and Souter suggested—and simply not reached the Article II, Section 1 question—the 7-2 opinion that would have resulted would have commanded far wider respect than the per curiam opinion that the five justices in the majority produced. And the result would likely have been a recount that, while imperfect, lacked the grotesque unfairness that marred the Florida court's December 8 recount order. Had Bush been elected following a recount consistent with the requirements of equal protection, he and the Court might have avoided some of the controversy surrounding his accession.

All three of these approaches present plausible and potentially lawful resolutions of the case. All offer certain advantages, doctrinal and pragmatic, over the one the Court chose. All, similarly, present disadvantages. But none was an obviously more appropriate resolution, all factors considered, than the approach adopted by the majority. Ironically, the one approach that the Court could not plausibly have taken is the one urged upon it by Tribe, representing the bulk of the professorate—a holding that simply denied the merits of both claims of constitutional infirmity, or declined to reach their merits citing some mythical, mandatory duty to abstain based on the Twelfth Amendment.

As we have sought to show, the view, widespread among academic critics and vehemently advanced by Tribe, that the Court's action was lawless is indefensible. That this view is being propagated by scholars who apparently lack the desire or interest to engage the Court's own legal theories—not novel theories dreamed up after the fact, but theories sketched, roughly and inelegantly to be sure, in the per curiam opinion and the concurrence—highlights the legal academy's eagerness to pronounce the matter a scandal, rather than evaluate it seriously. The Court's own legal theories, as Tribe might put it, are hardly the kind of thing a professor of constitutional law simply forgets about. But, because of the routine reliance in our complex society by journalists, elected officials and thoughtful citizens on law professors for expert interpretation, when the professors do forget, or ignore, or suppress what the Constitution provides and what the Supreme Court holds, they corrupt the public debate on which democracy depends.

Tribe, to his credit, has avoided the most glaring failures of his fellow law professors. But that is faint praise, indeed. And if Tribe's critique is the best the academic critics can do—as so far, it is—then history will likely treat *Bush v. Gore*, written under intense pressure and in the harsh glare of the public spotlight, far better than the academic criticism,

churned out over the course of many months and now stretching into years, that has sought to cast it as contemptible. It is far from a perfect decision. But *Bush v. Gore* is a respectable and reasonable decision, consistent with the Constitution, and lawful.

