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BUSH V. GORE - GEORGIA LIVED IT BEFORE: PICKRICK AND THE WARREN COURT

Alfred R. Light*

INTRODUCTION

Rufus Miles' famous law, "where you stand depends on where you sit," has clear application with respect to commentary on the roles of the United States and Florida Supreme Courts in the 2000 presidential election controversy.¹ On November 7, 2000, Americans went to the polls to elect a President. Though the media declared in the early morning hours that Governor George W. Bush won Florida and thus the presidential election, moments later Vice President Al Gore recanted his concession; by dawn the Florida election was again too close to call.² Post-election day controversy over the close result,

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1. See Rufus Miles, *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399-402 (1978).

2. See James Poniewozik, *TV Makes a Too-Close Call* (2000), at <http://www.cnn.com/ALLPOLITICS/time/2000/11/20/close.html>; Tom Baxter, *The Thirst to be First Makes Media Embarrass Themselves*, ATLANTA J. CONST., Nov. 12, 2000, at C2. On the day following the presidential election, the Florida Division of Elections reported that George W. Bush had received 2,909,135 votes and that Albert Gore, Jr., had received 2,907,351—a margin of 1,784 for Governor Bush. See *Bush v. Gore*, 531 U.S. 98, 100-01 (2000). After the Florida Supreme Court's decision of December 8, 2000, and prior to its mandated recount of "undervotes" in Miami-Dade and other Florida counties, Governor Bush's margin narrowed to only 193 votes. Following the United States Supreme Court's reversal and remand of that decision, on December 14, 2000, the Florida Supreme Court dismissed the case, seemingly leaving the vote tally as the total certified by Florida's Secretary of State on November 26. See *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000). The Supreme Court ultimately mandated that any manual recount be concluded by December 12, 2000, as provided in 3 U.S.C. § 5. In light of the time of the release of the Supreme Court opinion, these tasks and this deadline could not

including legal challenges from both presidential contenders, dominated the nation's headlines until the United States Supreme Court's pronouncement on December 12, 2000, which effectively ended the election.³ That day, in a controversial 5-4 ruling, the Court reversed a similarly controversial 4-3 judgment of the Florida Supreme Court that ordered a recount of presidential votes cast in that state.⁴ The Court's decision carried into office a President-elect who

possibly be met. The Florida Supreme Court opinion asserted: "Moreover, upon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature." *Id.* (citations omitted).

In this certified total, Governor Bush received 2,912,790 votes and Vice President Gore received 2,912,253 votes, a Bush margin of 537 votes. *See Touchston v. McDermott*, 234 F.3d 1133, 1136 (11th Cir. 2000) (Tjoflat, J., dissenting). Interestingly, one Eleventh Circuit judge, who found an Equal Protection problem with Florida's system of manual recounts, would have directed

the [federal] district court to enjoin the Secretary of State and/or Elections Canvassing Commission to issue amended vote certifications under Fla. Stat. §§ 102.121 and 103.011 that do not contain the results of manual recounts conducted in response to a candidate or political party's request under Fla. Stat. § 102.166 (namely, Volusia, Broward, Miami-Dade, and Palm Beach Counties). I would further enjoin the Secretary of State and/or the Elections Canvassing Commission from issuing any future certification that includes manual recounts requested by a candidate or political party in select counties pursuant to Fla. Stat. § 102.166.

Id. at 1157-58.

No court ever issued such an injunction, as it is unclear what the vote totals would have been had such an injunction been issued.

3. Governor Bush filed the first lawsuit, in federal court, challenging Florida's manual recounting procedures. *See Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000).

The Republican candidates for the offices of President and Vice President of the United States, along with several registered Florida voters, filed suit in federal court in Miami, seeking to enjoin four Florida counties from conducting manual recounts of ballots cast for President of the United States in the November 7, 2000, election.

Id. at 1168.

The district court heard oral argument on the motion for a preliminary injunction on November 13, 2000, and denied Plaintiff's request. *Id.* at 1179. The Volusia County Canvassing Board filed suit in state court on November 13, 2000, to enjoin Secretary of State Katherine Harris from ignoring returns resulting from its manual recount of ballots, which the county feared would not be completed prior to November 14, 2000, at 5 P.M. Palm Beach County intervened in the suit and the Florida Democratic Party and Vice President Gore filed a motion seeking to compel the Secretary to accept amended returns. *See Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1279-80 (Fla. 2000). The day after Secretary Harris certified the official election results on November 26, 2000, Vice President Gore filed his election contest of that certification in Florida circuit court. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

4. *Bush v. Gore*, 531 U.S. 98, 111 (2000), *rev'g Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

received less popular votes nationwide than his opponent.⁵ Even after the Court's decision, controversy continued over who actually won Florida, one of the closest statewide elections in American history.⁶ Pundits marveled at the unique and startling intervention of the federal courts to decide such an important election, deemed by *Time* as the "wildest election in history."⁷

In the decision's aftermath, the usually less hyperbolic George Will, typical of those criticizing the underlying Florida Supreme Court decisions, verbally assaulted the Florida high court as a partisan and lawless institution.⁸ Professor Alan Dershowitz was typical of those critical of the subsequent reversal by the U.S. Supreme Court, opining that the U.S. decision "may be ranked as the single most corrupt decision in Supreme Court history."⁹ Professor Karen O'Connor, President of the Southern Political Science Association, exclaimed in somewhat less acerbic terms, "[c]learly, the Supreme Court of the United States can never again be referred to as the 'least

5. Vice President Gore received 50,996,116 votes, while Governor George W. Bush received a total of 50,456,169 votes. See CNN.com, *National Results* (2000), at <http://www.cnn.com/ELECTION/2000/results/national.html>. After the Supreme Court decided Florida's electoral votes for Bush, totals included 271 electoral votes for Bush to Gore's 266. See *id.* One elector, pledged to Gore, did not vote in protest of the District of Columbia's lack of statehood status. Bush carried thirty states, while Gore carried twenty-one. See *id.*

6. See, e.g., *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000); Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1; Linda Kleindienst, *Justices: Standardize Voting*, SUN-SENTINEL (Fl. Lauderdale), Dec. 23, 2000, at 8B; see also George Bennett, *Media's Florida Recounts Fodder for Both Camps; Differing Standards: Depending on Which Is Applied, Tight Presidential Race Swings Either Way*, ATLANTA J. CONST., Apr. 5, 2001, at A13 (reporting media coordination for recounts).

7. *The Wildest Election in History*, TIME, Nov. 20, 2000, at cover.

8. George Will, *Florida Legislature Must Act to Counter State's Lawless Court*, RECORD (Bergen County, N.J.), Nov. 23, 2000, at L7. George W. Bush's briefs in the United States Supreme Court were only slightly more muted in tone, calling its decision an "unconstitutional arrogation of power." Brief for Petitioner at 48, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), available at <http://jurist.law.pitt.edu/election/briefforpetitioner.pdf>.

9. ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 174 (2001); see also Richard Briles Moriarty, *Law Avoiding Reality: Journey Through the Void to the Real*, 50 DEPAUL L. REV. 1103, 1104 (2001) ("The majority . . . unnecessarily drained the Court's deep reservoir of public respect."); Dave Zweifel, *Court's Decision Still Rankles Law Profs*, CAP. TIMES (Madison, Wis.), Jan. 24, 2001, at 6A (reprinting text of ad from many law professors decrying the decision).

dangerous branch of government.”¹⁰ In her fall 2000 address to that Association, Professor O’Connor urged her political science colleagues “to rediscover the politics inherent in the judicial process” and then highlighted potentially fruitful areas for inquiry “through the lens of the neglected role of the South in setting the agenda of the Supreme Court of the United States.”¹¹

The 2000 presidential election controversy was a remarkable story, but it is not the “unique” event journalists and many commentators have pronounced.¹² Once upon a time, not so long ago, there was an election story paralleling the 2000 presidential election story. Neither the advocates for our presidential candidates nor “presidential historians” apparently found these parallels worth noting contemporaneously—in their briefs, oral arguments, or commentaries.¹³ It, too, is a remarkable story about a statewide election involving a nationally known governor. As Professor

10. Karen O’Connor, *The Supreme Court and the South*, 63 J. POL. 701 (2001).

11. *Id.* at 702.

12. The day after the election, CBS’s Dan Rather gushed:

This is the CBS Evening News. Straight to the biggest election story of our lifetimes. Dan Rather reporting from CBS News election headquarters in New York, good evening. The presidency of the United States is just beyond the reach of two men tonight after an election unique in American history.

Media Research Center, *CyberAlert* (Nov. 9, 2000), at <http://www.mediaresearch.org/news/cyberalert/2000/cyb20001109.asp>.

Boston College’s Senior Vice President remarked, “It’s absolutely unique . . . There’s been nothing like this in the history of the country.” Mark Sullivan, *Lessons Learned from Election 2000*, B.C. CHRON., Nov. 16, 2000, formerly available at http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v9/n16/election.html.

13. Neither did the Florida Supreme Court nor the United States Supreme Court. This is not to say that Supreme Court Justices are unfamiliar with the cases discussed below, including *Fortson v. Morris*, 385 U.S. 231 (1966). Justice Scalia, for example, has sharply criticized Justice Fortas’ dissent in that case for Fortas’ misuse of Justice Marshall’s old chestnut, “we must never forget that it is a *constitution* we are expounding.” See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Arguing forcefully that Justice Marshall did not mean that the Constitution “must be given different content, from generation to generation,” Scalia found Fortas’ dissent in *Morris* to be an example “that is perhaps not the best, but that does conform to the principle *de viventibus nil nisi bonum*.” Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 594 (1990). Scalia opined: “It does seem to me that a constitution whose meaning changes as our notions of what it *ought* to mean change is not worth a whole lot.” *Id.* The principle Scalia attributes to Fortas roughly translates “speak nothing but good of the living,” a Scalian twist on the ancient maxim, *De mortuis nil nisi bonum* (“Speak nothing but good of the dead”). See DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* (Circa 200 A.D.), quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* (10th ed. 1919), available at <http://www.bartleby.com/100/720.10.html>.

O'Connor intuits, it is a Southern story. Thirty-four years before, in 1966, the United States Supreme Court intervened in an election dispute, resolving critical issues of state constitutional and election law, and in the process named Lester G. Maddox the Governor of Georgia.¹⁴

Thirty-four years is not that long ago. The principal politicians from the 1966 Georgia battle are still alive. The candidate who carried the cities and suburbs enroute to the popular vote, but lost the rural areas and most counties, was Howard “Bo” Callaway.¹⁵ In a recent interview, former Attorney General Griffin Bell, Jr.—the lower-court judge overruled by the Supreme Court in 1966—immediately saw the analogy between the 1966 Georgia election and the 2000 presidential election stating, “Callaway would have been Gore.”¹⁶ The candidate who swept rural Georgia, carrying 128 of Georgia’s 159 counties, was Lester Maddox.¹⁷ Maddox would have been Bush.¹⁸ The liberal minor candidate who took votes away from Callaway and denied him a majority was Ellis Arnall.¹⁹ Arnall would have been Nader.²⁰

Most of the Supreme Court Justices involved in the 1966 controversy are dead. *De mortuis nil nisi bonum.*²¹ Seats now held by Justices Souter and Ginsburg were then held by Justices Douglas and Fortas.²² In 1966, Douglas and Fortas wrote dissents—“one man, one

14. See *Fortson v. Morris*, 385 U.S. 231 (1966). Many of the principals in the Georgia controversy are still alive: Lester G. Maddox, Democratic candidate for Governor; Maddox’s campaign manager, Agricultural Commissioner Thomas Irvin; Howard “Bo” Callaway, the Republican candidate; and Griffin Bell, then a member of the federal district court that struck down Maddox’s potential election by the state legislature as Governor only to be reversed by the United States Supreme Court; Bell was later the United States Attorney General under President Jimmy Carter. The political similarities between 1966 and 2000 were not lost on these participants. See Mark Sherman, *Georgia’s Disputed Election: Similarities Noted in State’s 1966 Governor’s Race: Election 2000: Presidential Race*, ATLANTA J. CONST., Nov. 30, 2000, at A16.

15. See *infra* notes 133, 175 and accompanying text.

16. Sherman, *supra* note 14, at A16.

17. See *infra* note 175 and accompanying text.

18. See *infra* note 190.

19. See *infra* notes 121, 131-33 and accompanying text.

20. See *infra* note 183 and accompanying text.

21. See *supra* text accompanying note 13.

22. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW xcvi-ciii (3d ed. 1996).

vote.”²³ In 2000, Souter and Ginsburg wrote dissents—let every vote count.²⁴ In 1966, Justice Black held the “Southern seat,” the swing vote that made the difference.²⁵ Justice Kennedy, who now holds this seat, followed suit in 2000.²⁶ The lower-court decision in 1966 was *per curiam*.²⁷ *Per Curiam* also wrote for the Florida Supreme Court.²⁸ It is a road less traveled, but both states walked it.

This Article responds to Professor O’Connor’s call and “rediscovers” judicial history and politics relevant to the 2000 election controversy. Although Professor O’Connor noted that *Bush v. Gore* “originated in a Southern state,”²⁹ neither she nor other commentators have directly explored the Southern origins of the judicial doctrines and the regional political backdrop of this controversy. I remedy this glaring omission here.

Part I provides the necessary background on Georgia’s Constitution and its Governors to understand the 1966 Georgia gubernatorial election controversy.³⁰ Parts II and III describe the dawn of two-party politics in the Peach State: the 1966 gubernatorial election and its resolution in the United States Supreme Court.³¹ Part IV brings together the many parallels between the 1966 and 2000 stories.³² Part V looks to Maddox’s future after 1966 for a glimpse into what may lie in store for Bush after 2000.³³ This is followed by some concluding thoughts on legitimacy—judicial and political.³⁴

23. See *infra* notes 155-66 and accompanying text.

24. See *infra* notes 222-24 and accompanying text.

25. See *infra* note 183 and accompanying text.

26. See *infra* note 206 and accompanying text.

27. See *infra* notes 139-41 and accompanying text.

28. See *infra* note 213 and accompanying text.

29. O’Connor, *supra* note 10, at 701.

30. See *infra* notes 35-108 and accompanying text.

31. See *infra* notes 109-82 and accompanying text.

32. See *infra* notes 183-216 and accompanying text.

33. See *infra* notes 217-37 and accompanying text.

34. See *infra* notes 238-75 and accompanying text.

I. THE GEORGIA CONSTITUTION OF 1945 AND THE
“COUNTY UNIT” SYSTEM

Since this is a legal story, let me begin with a law—the Georgia Constitution of 1945.³⁵ Problems relating to the electoral provisions of that document dated back almost to the date of its adoption. In 1947, Georgia voters elected former Governor Eugene Talmadge to his old job, but the Governor-elect died before he was inaugurated.³⁶ Article V, section 1, of the Georgia Constitution provided:

The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this state; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor *viva voce*.³⁷

Altogether, three persons claimed to be the Governor of Georgia in 1947.³⁸ Pursuant to the above provision, the Georgia General Assembly elected the late Governor-elect’s son, Herman E. Talmadge, who had received a number of write-in votes for Governor from voters fearing for his father’s health.³⁹ Lieutenant Governor-elect M.E. Thompson and previous Governor Ellis Arnall each also

35. Technically, the Georgia Constitution of 1945 was a single amendment ratified by Georgia voters on August 7, 1945, replacing all articles and amendments of the prior 1877 document. *See GA. CONST. OF 1945, available at <http://www.cviog.uga.edu/Projects/gainfo/con1945.htm>.*

36. *See* NUMAN V. BARTLEY, FROM THURMOND TO WALLACE: POLITICAL TENDENCIES IN GEORGIA 1948-1968, at 25-26 (1970); VLADIMIR ORLANDO KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 109-10 (1949).

37. GA. CONST. art. V, § 1, ¶ 4 (1945).

38. *See infra* notes 39-40 and accompanying text.

39. *See* BARTLEY, *supra* note 36, at 25.

claimed to be the chief executive.⁴⁰ Talmadge operated out of the Governor's office at the State Capitol in Atlanta.⁴¹ Georgia's cautious Secretary of State, handicapped Ben Fortson, actually hid the Great Seal of Georgia from Talmadge and the other contenders for several weeks by sitting on it while in his wheelchair.⁴² Eventually, the Georgia Supreme Court ruled in *Thompson v. Talmadge*⁴³ that the selection of a governor by the legislature when the candidate who received a majority of the votes cast died before taking office was invalid.⁴⁴ Thompson became Governor.⁴⁵

Georgia's electoral procedures during and following this episode in Georgia history were controversial. Georgia had what it called a "county-unit system," similar in some respects to the electoral college under the United States Constitution.⁴⁶ Used in Georgia primary elections for many years, the system allocated a number of county-unit votes based roughly on the county's population.⁴⁷ The gubernatorial candidate who received the majority of the vote in a county claimed all the county-unit votes from that county.⁴⁸ This system originally weighted the popular vote from rural areas more heavily than the popular vote from urban areas because each of Georgia's 159 counties—even a very small rural county—received at least one full county unit vote.⁴⁹ Large urban counties such as Fulton (in which most of Atlanta is located) received only three unit votes.⁵⁰

40. *See id.* at 25-26.

41. "Under a technicality in Georgia state law, Herman Talmadge actually took over occupancy of the governor's office by armed force for 67 days after his father's death, but the Georgia Supreme Court ruled against him." JACK BASS & WALTER DEVRIES, *THE TRANSFORMATION OF SOUTHERN POLITICS: SOCIAL CHANGE AND POLITICAL CONSEQUENCE SINCE 1945*, at 137 (1976).

42. Secretary of State Fortson confirmed this Georgia legend for me during a tour of the Georgia State Capitol for members of my elementary school class in the early-1960s.

43. 41 S.E.2d 883 (Ga. 1947).

44. *See id.* at 895.

45. *See* BARTLEY, *supra* note 36, at 26. In a 1948 special gubernatorial primary election, Herman Talmadge won a majority of both the popular and the county unit vote over Thompson. *See id.*

46. *See* U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

47. *See* KEY, *supra* note 36, at 117-24.

48. *See id.* at 119.

49. *See id.*

50. *See id.* (noting that under the county-unit system, the eight most populous counties received three representatives, the next thirty counties received two representatives, and the remaining counties had one representative).

The system was changed several times to make it more palatable to urban areas.⁵¹

The last change, which occurred in 1962, allocated unit votes to counties using the following criteria: Counties with populations not exceeding 15,000 received two units; an additional unit for populations of 15,001-20,000; an additional unit for the next 10,000; an additional unit for each of the next two brackets of 15,000; and, thereafter, two more units for each increase of 30,000.⁵² The practical effect of this system, like the United States electoral college, was that each citizen's vote counts for less and less as the population of his county increases. Even under the 1962 amended system, a combination of the unit votes of the smallest counties in the state could muster a clear majority of the unit votes while representing only about one-third of the total population of the state.⁵³

In *South v. Peters*,⁵⁴ Georgia voters and members of the Democratic Party from Fulton County sued Georgia's Secretary of State and officials of the Georgia Democratic Party, challenging the "county unit" system under the Fourteenth and Seventeenth Amendments.⁵⁵ The United States Supreme Court refused to interfere with the operation of Georgia's county unit system, at least as it operated in 1951.⁵⁶ Following the Court's precedent in *Colegrove v. Green*,⁵⁷ the Court ruled that the question of the equity of such an electoral system was a political question and not subject to review by

51. See *id.* at 117-24. One may see a glimpse of the rural Georgian's attitude toward its great metropolitan center in H. L. Mencken's comment that Atlanta is to Georgia as Paris is to France; as "a great capital like any other" compared to its environs, it is "epicurean and sinful." H. L. MENCKEN, *The Hills of Zion*, in *THE VINTAGE MENCKEN* 153-61 (Alistair Cooke ed., 1996), available at <http://www.santafe.edu/~shalizi/Mencken/the-hills-of-zion>.

52. See 1962 Ga. Laws 1217, 1217-19, at § 1 (codified in GA. CODE ANN. §§ 34-3212, -3213 (1962)).

53. See *Sanders v. Gray*, 203 F. Supp. 158, 170 n.10 (N.D. Ga. 1962).

54. 339 U.S. 276 (1950).

55. See *id.* at 276-77; see also *South v. Peters*, 89 F. Supp. 672, 674 (N.D. Ga. 1950).

56. See *South*, 339 U.S. at 277.

57. 328 U.S. 549, 553-54 (1946) ("Nothing is clearer than that this controversy [over malapportionment of Illinois congressional districts] concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people.").

the courts.⁵⁸ Interestingly, in *Colegrove*, Justice Frankfurter had noted that the remedy “for unfairness in [congressional] districting is to secure State legislatures that will apportion properly.”⁵⁹ Of course, Georgia’s urban citizens would have regarded the application of *Colegrove* in *South v. Peters* with some degree of skepticism, as it was the means of “securing State legislatures” which was under questioning in the latter case. The *South* Court ruled, nonetheless, that “a state’s geographical distribution of electoral strength among its political subdivisions” was a political question and not justiciable.⁶⁰

Subsequent to *South*, however, the Warren Court gradually began to find the protection of voting rights justiciable. In *Gomillion v. Lightfoot*,⁶¹ for example, the Court interfered with the Alabama gerrymandering of city limits in Tuskegee, which had been designed to dilute the impact of the black vote by drawing city lines so as to exclude African-American precincts from city jurisdiction.⁶² *Baker v. Carr*⁶³ was the landmark decision in which the Court struck down the arbitrary districting procedures employed by Tennessee in apportionment of its state legislature.⁶⁴ There, the Equal Protection Clause was used to protect political rights of citizens whose votes were diluted on grounds not necessarily racial in origin.⁶⁵

After *Baker*, the Supreme Court’s new activist attitude in matters of the protection of political rights reached Georgia’s county-unit system. In the 1962 case of *Sanders v. Gray*,⁶⁶ a Fulton County voter again sued Georgia’s Secretary of State and Democratic Party

58. See *South*, 276 U.S. at 277.

59. *Colegrove*, 495 U.S. at 556.

60. *South*, 339 U.S. at 277. Professor Erwin Chemerinsky has argued that *Bush v. Gore* should not have been justiciable, which essentially supports Justice Breyer’s dissenting opinion in *Bush v. Gore*. See generally Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001) (arguing that the Court should have dismissed the case as non-justiciable for the following reasons: George W. Bush lacked standing; the case was not ripe for review because the counting was not completed; the case involved a political question; and the Florida Supreme Court should have been the one interpreting Florida law).

61. 364 U.S. 339 (1960).

62. See *id.* at 347-48.

63. 369 U.S. 186 (1962).

64. See *id.* at 237.

65. See *id.*

66. 203 F. Supp. 158 (N.D. Ga. 1962).

officials.⁶⁷ The United States Supreme Court's change in perspective was so obvious by this time that the federal district court in Atlanta felt itself free enough to rule that Georgia's county-unit system violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁸ The district court was not so brazen as to suggest, however, that the United States Constitution precluded any sort of county-unit or electoral college system.⁶⁹ Rather the court sought to distinguish between "equitable" systems and "invidiously discriminatory" systems.⁷⁰ Judge Griffin Bell fixed the distinction according to the following formula:

[A county] unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, . . . or to the whole vote for electors of the party in a recent Presidential election; provided no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral [sic] college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years.⁷¹

Clearly, the district court was unwilling to contend that all electoral colleges were invidiously discriminatory.⁷² It nevertheless recognized the difficulty in setting up an "equitable" system of electoral college

67. *See id.* at 160.

68. *See id.* at 170-71.

69. *Id.* at 168 ("[W]e hold that a political party may use a county unit system in primary elections for the nomination of candidates in the general election if the system, as we shall point out, does not run afoul of constitutional inhibitions.").

70. *Id.* The court decided that a county-unit system was not *per se* invidious as might be the case with a racial classification. *See id.* at 170. The court looked to the rationality and non-arbitrary nature of state policy, the historical basis of the system similar to that of the national electoral college, the presence or absence of a political remedy, and the "delicate relationship" between the federal and state governments. *Id.* at 168-70.

71. *Sanders*, 203 F. Supp. at 170.

72. *See id.* ("We do not strike the county unit system as such. We do strike it in its present form.").

votes in primary elections.⁷³ The court-suggested plan for allocating electoral votes in a party primary to areas of a state on the basis of votes for a party in previous presidential elections was designed to avoid the problems that would be created when two party politics came to Georgia.⁷⁴ For example, in the 1970 Georgia Republican primary practically the entire Republican vote was concentrated in the metropolitan Atlanta area.⁷⁵ Thus, had the county-unit system survived until that year, “electoral” or “county unit” votes allocated to counties on the basis of total population would have thrown the election to a candidate who received only thirty-four percent of the popular vote.⁷⁶

On appeal, the United States Supreme Court abandoned the district court’s attempt to define an “equitable” county-unit system, vacating the lower court’s decision.⁷⁷ Upholding the district court’s verdict against the 1962 county-unit system, however, the Court went on to say in essence that *no* “electoral college” system was constitutional in state elections.⁷⁸ The Court opined, “[w]e think the analogies to the electoral college, to districting and redistricting, and to other phases

73. *Id.* at 169.

Here we are not dealing with legislative apportionment but with the management of the state Democratic Party. Plaintiff as a Democrat is complaining of treatment received by him at the hand of other Democrats through the medium of a state statute, sponsored by a governor from his party and enacted by a legislature consisting in the main of members of his party. A political remedy encompasses the give and take within the political arena, but we must consider it, and whether there is substantial likelihood under the existing system of plaintiff’s obtaining such relief measures as may be needed to accord him his constitutional rights. We hold that there is not.

Id.

74. *See id.* at 170 (“This is a ‘judicially manageable standard’ contemplated in *Baker v. Carr*.”).

75. Alfred R. Light, *The Politics of Personality: The Georgia Gubernatorial Race 1970*, at 46-60 (1971) (unpublished Senior Honors Thesis, The Johns Hopkins University) (on file with the Carter Presidential Library, Emory University, Atlanta, Ga.).

76. Republican gubernatorial candidate James Bentley would have easily defeated Republican Hal Suit, though Suit had many more popular votes. The Republican primary turnout outside Atlanta was very, very light. *See id.* For example, there was only one Republican voter in the Republican primary from one of Georgia’s smallest counties, Quitman. Georgia published a county-by-county tally of the vote and a list of voters participating in the Republican primary in accordance with state law. Thus, this man’s ballot was not really secret. Bentley carried Quitman County 1-0. *See id.* at 51. Under the county-unit system, this man’s ballot would have been worth a full county unit.

77. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963).

78. *Id.* at 378.

of the problem of representation in state or federal legislatures or conventions are inapposite.”⁷⁹ It distinguished the national electoral college as a result of “specific historical concerns” that “implied nothing about the use of an analogous system by a State in a statewide election.”⁸⁰ Since no specific accommodation for numerical inequality in the counting of votes in such an election had been made, no validation of any such numerical inequality existed in the Constitution.⁸¹

States may limit the number of voters by placing specific qualifications for the franchise in both state and federal elections.⁸² Although certain classes of voters may be excluded from the vote, such as minors, felons, and other “classes,” each person who votes must have his vote counted as much as any other vote.⁸³

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.⁸⁴

Thus, once the entire state is designated as the area to be represented by the Governor, for example, and once every qualified voter casts a ballot, then each voter must have equal voting power. The Court further declared, “The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President.”⁸⁵ Thus, the Court essentially

79. *Id.*

80. *Id.*

81. *See id.*

82. *See id.* at 379 (noting that states can dictate voters’ qualifications in both state and federal elections because the Constitution makes such qualifications dependent on state law, even in federal elections).

83. *See id.*

84. *Id.*

85. *Id.* at 380.

overruled *South v. Peters*.⁸⁶ Distribution of electoral strength was now justiciable.

Gray says nothing, however, about representation. It is “only a voting case.”⁸⁷ In other words, the case does not say anything about how the geographical units for representation within a state may be chosen. Thus, the question arose whether population disparities in congressional districts or state legislative districts deprived some Georgia voters of a right to have their votes given the same weight as the votes of other Georgians. This question was directly addressed in *Wesberry v. Sanders*,⁸⁸ in which an Atlanta voter asked that the Georgia congressional districting statute be declared invalid and that Governor Sanders and the Secretary of State be enjoined from conducting elections under it.⁸⁹ The federal district court, relying on *Colegrove*, declared the question “political” in nature and therefore nonjusticiable.⁹⁰ The United States Supreme Court reversed and held there was “no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”⁹¹ A tumultuous session of the Georgia General Assembly followed *Wesberry*, in

86. *See id.* at 383 (Harlan, J., dissenting) (“[O]nly the guileless could fail to recognize that the prevailing view then was that the validity of this County Unit System was not open to serious constitutional doubt.”). Justice Harlan commented that the majority neglected to note that four previous challenges to Georgia’s County Unit System, including *South v. Peters*, failed. *See id.*

87. *See Fortson v. Morris*, 385 U.S. 231, 233 (1966) (quoting *Gray*, 372 U.S. at 378).

88. 376 U.S. 1 (1964).

89. *See id.* at 3.

90. *Wesberry v. Vandiver*, 206 F. Supp. 276, 285 (N.D. Ga. 1962), *rev’d sub nom. Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

We do not deem [*Colegrove*] to be a precedent for dismissal based on the non-justiciability of a political question involving the Congress as here, but we do deem it to be strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.

Id.

91. *Wesberry*, 376 U.S. at 18.

which the legislature divided Atlanta into two congressional districts and Georgia “lost” one rural congressional district.⁹²

The federal courts were not finished with Georgia. Shortly thereafter, in *Toombs v. Fortson*,⁹³ the district court, following the *Baker v. Carr* precedent, ruled that Georgia’s legislature was malapportioned.⁹⁴ The lower court issued a declaratory judgment stating that “so long as the legislature of the state of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements.”⁹⁵ The lower court subsequently enjoined state election officials

from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor [sic] shall be adopted.⁹⁶

The Georgia General Assembly could submit “separate” amendments to the Georgia Constitution and could call for a Constitutional Convention, as provided for in the State Constitution, but it could *not* submit a constitutional amendment which substituted a new constitution for the old one so long as the legislature was not apportioned according to “constitutional standards.”⁹⁷

Subsequent to the 1964 elections and after the constitutional referendum was to have been held, the United States Supreme Court

92. See ROCCO J. TRESOLINI & MARTIN SHAPIRO, *AMERICAN CONSTITUTIONAL LAW* 77 (3d ed. 1970). For a brief summary of the current state of Equal Protection doctrine in the context of reapportionment, see J. GERALD HEBERT ET AL., *THE REALISTS' GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 50-65 (2000); see also Note, *Federal Court Involvement in Redistricting Litigation*, 114 *HARV. L. REV.* 878 (2001).

93. 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part*, 379 U.S. 621, *judgment amended by* 380 U.S. 929 (1965).

94. See *id.* at 256-57.

95. *Id.* at 257.

96. See *Toombs v. Fortson*, 379 U.S. 621, 621-22 (1965) (describing lower court disposition).

97. *Id.* at 622 (quoting *Toombs v. Fortson*, 205 F. Supp. 248 (1962)).

reviewed *Toombs v. Fortson* in November 1964.⁹⁸ Because the new Georgia legislature was recently elected and had not yet submitted a new constitution for referendum, the Court remanded the case back to the district court for a determination of whether its injunction of the legislature's submission of a new state constitution should be lifted.⁹⁹ Because of these judicial proceedings, in 1966, Georgia still operated under its 1945 constitution.¹⁰⁰

One provision of the proposed 1964 Georgia Constitution that was the subject of the federal court's injunction related to electoral procedures for statewide offices. This "new" constitution would have eliminated the old constitutional provisions providing that the General Assembly would select the Governor in the event no candidate received a majority of the vote in a general election.¹⁰¹ Instead, the new constitution would have authorized a runoff between the top two vote getters in a general election where no candidate received a majority, as was the practice with Democratic primaries.¹⁰²

98. *See id.* at 621-22.

99. *See id.* Justice Harlan opined in a partial dissent, joined by Justice Stewart, that he would have disapproved the portion of the district court's decree that forbade the malapportioned legislature from initiating a process for approval of Georgia's new constitution. *See Toombs*, 379 U.S. at 623-26.

As to the provision forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a "malapportioned" legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern?

Id. at 626 (Harlan, J., concurring in part and dissenting in part).

Justice Goldberg would also have vacated that portion of the court's injunction. *See id.* at 638 (Goldberg, J., dissenting).

I believe that the proper result in this case would be to sustain the appellees' motion to dismiss for mootness and to enter an order vacating paragraph (2) of the District Court's order of June 30, 1964, prohibiting submission of a wholly new constitution to the voters by the legislature at the 1964 election or "at any subsequent election until (it) . . . is reapportioned in accordance with constitutional standards."

Id. (alterations in original).

100. *See* GA. CONST. art. V, § 1 (1945), available at <http://www.cviog.uga.edu/Projects/gainfo/con1945.htm> (last visited Aug. 29, 2001).

101. *See* proposed GA. CONST. art. V, § 1 (1964).

102. *See id.*

Ironically, the legislature's malapportionment prevented this reform from being submitted to Georgia's citizens in an election in which every vote would have counted equally.¹⁰³

It seems highly unlikely that either the United States Supreme Court or the lower federal courts in 1964 anticipated the electoral repercussions of their perpetuation of Georgia's 1945 Constitution.¹⁰⁴ Having eliminated the state's "electoral college" in primary elections and found the state's apportionment of the state legislature to violate Equal Protection, the federal courts nonetheless prolonged another aspect of Georgia's electoral system modeled after the presidential electoral college—election by the state legislature upon failure of an election to elect the winner by majority vote.¹⁰⁵ This anomaly resulted from the intersection of the Court's "only a voting case" ruling in *Gray* with its "legislative apportionment" rulings in *Wesberry* and *Toombs*.¹⁰⁶ Reasonable people would not have worried too much, because Georgia's legislature would soon be reapportioned, thus allowing the new constitution to be submitted and ratified. In the interim, there still would be no problem unless there was a two-party general election with no majority winner—a novelty indeed in previously one-party Georgia.

103. See *Fortson v. Morris*, 385 U.S. 231, 245 (1966) (Fortas, J., dissenting).

Indeed, the irony of the matter is that a three-judge federal court held that the Georgia Legislature was so malapportioned that it could not properly submit to the voters a new Constitution, adopted by both houses of the Georgia Legislature, which would have abolished the provisions for legislative selection of a Governor and have substituted a runoff or special election. . . . But now the Court holds that this same unreformed legislature is not so malapportioned that it cannot itself select the Governor by its direct action! I confess total inability to understand how the two rulings can be reconciled.

Id. at 245-46.

104. See *id.* at 245 (Fortas, J., dissenting).

If this Court had foreseen that events would place the Georgia Legislature in a position to override the vote of a plurality of the voters and to select as Governor of the State the loser at the polls, I expect that it would have included this power as one of the "exceptions," forbidden to this legislature which, this Court has held, functions only by judicial sufferance despite its constitutional infirmity.

Id.

105. See U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII (electoral college); see also 3 U.S.C. § 2 (2000) (providing that state legislature may appoint electors where an election has failed to produce a winner).

106. See *Gray v. Sanders*, 372 U.S. 368, 378 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1963); *Fortson v. Toombs*, 379 U.S. 621, 622 (1965).

“Murphy’s Law” struck in the 1966 Georgia gubernatorial election—before the state legislature could be reapportioned.¹⁰⁷ Although “one man, one vote” meant no “electoral college” for a state, did this principle preclude a state legislature’s selection of a governor? The Georgia Supreme Court had already invalidated the legislature’s selection of the Governor under one special set of circumstances.¹⁰⁸ Moreover, even if “one man, one vote” did not always preclude such selection, would the United States Supreme Court sanction selection by a legislature already judicially-determined to be “unrepresentative?”

II. “OL’ PICKRICK” AND THE 1966 GEORGIA GUBERNATORIAL ELECTION

In 1966, the nation knew Lester Maddox as a flamboyant segregationist.¹⁰⁹ Owner of the “Pickrick” Restaurant just off the Georgia Tech campus in Atlanta, Maddox and his patrons, armed with pick handles, confronted civil rights activists seeking to integrate his restaurant in 1964.¹¹⁰ Eventually, Maddox closed his restaurant rather than serve blacks against his will.¹¹¹ Except for this episode,

107. “Anything that can go wrong will go wrong.” Murphy’s Law, available at <http://quotations.about.com/library/weekly/aa040799.htm?once=true&>.

108. See *Morris*, 385 U.S. at 242 n.1 (Fortas, J., dissenting) (discussing *Thompson v. Talmadge*, 201 Ga. 867, 880 (1947)); see also *supra* note 45.

109. BOB SHORT, *EVERYTHING IS PICKRICK: THE LIFE OF LESTER MADDOX* 67-81 (1999) (discussing Maddox’s entry into the 1966 Georgia Governor’s race).

110. See *id.* at 52-66. Maddox came up with the unique name “Pickrick” for the fried-chicken restaurant.

I found the word “pick” which means to fastidiously pick out, to choose or select, and “rick,” which means to pile up, to heap or to amass, like a hay rick. And so, I named my restaurant “Pickrick,” advertised it as such and said, “[I]f you’ll picnic at the Pickrick, you pick it out and we’ll rick it up,” and that’s what we did.

Id. at 191.

Pick handles, which the media called “ax handles,” were part of the restaurant’s decor. See *id.* at 57. During the first few weeks after the Pickrick closed, Maddox set up a souvenir stand at the front door, including red-painted pick handles stamped with the words “Pickrick drumsticks,” bumper stickers, political pamphlets, American flags and cans of a carbonated drink Maddox called “Gold Water.” *Id.* at 63.

111. The Georgia Institute of Technology bought the Pickrick Restaurant building, which became the Georgia Tech Placement Center. See *id.* at 66. Later, after serving as Governor, Maddox returned to the

Maddox was much better known in Atlanta than in the rest of Georgia. In 1957, for example, Maddox challenged Atlanta's "Bourbon-Negro" ruling electoral coalition in a nonpartisan mayoral contest. Although he drew considerable support from the poorer white areas of the city such as Cabbagetown and southwest Atlanta, Maddox fell short of the needed votes. Center-city African-Americans and Atlanta's northside affluent whites delivered overwhelming support to incumbent mayor William B. Hartsfield, running on the Atlanta motto "the city too busy to hate."¹¹²

In 1961, Maddox once again challenged the Atlanta establishment, this time in a mayoral contest with Hartsfield's successor, Ivan Allen, Jr., heir to an office supply company fortune.¹¹³ Once again, Maddox's bid fell short as the "conservative" alliance of African-Americans and affluent whites remained intact.¹¹⁴ Using campaign themes later heard by all Georgians, Maddox appealed for honesty in government, support of the little people, and, most of all, strict segregation of the races.¹¹⁵ Maddox received majority support in middle income and semi-affluent areas; nonetheless, Hartsfield's, and later Allen's, careful annexation of only the most affluent areas of suburbia into the city seems to have helped preserve the power of the much-heralded coalition in city elections during the late 1950s and

restaurant business briefly at Underground Atlanta near the State Capitol, but closed after the Georgia State Building Authority expanded its cafeteria in a park across from City Hall. *See id.* at 152-53.

112. In 1957, Maddox received the following percentages of support: "Poor White" - 67%; "Working Class White" - 69%; "Middle Income White" - 65%; "Semi-Affluent White" - 57.4%; "Affluent White" - 29%; "Poor Black" - 3%; "Non-Poor Black" - 2%. *See* BARTLEY, *supra* note 36, at 47. Overall, Maddox received 42% of the vote in his contest with Mayor Hartsfield. The classification scheme used in this Article aggregates Atlanta precincts into relatively homogeneous "neighborhoods." Calculations concerning Lester Maddox's electoral base in Atlanta for 1957, 1961, and 1966 are extracted from BARTLEY, *supra* note 36. For the years 1962 and 1970, my own precinct analysis paralleled Bartley's categories as near as possible but collapsed the middle-income and semi-affluent categories because of precinct boundary changes.

113. *See* SHORT, *supra* note 109, at 44-47.

114. *See* BARTLEY, *supra* note 36, at 47. Maddox's electoral base in the 1961 runoff election for mayor with Ivan Allen was as follows: "Poor White" - 75%; "Working Class White" - 62%; "Middle Income White" - 72%; "Semi-Affluent White" - 62%; "Affluent White" - 26%; "Poor Black" - 1%; "Non-Poor Black" - 0.4%. Overall, he received 43% of the votes. *See id.* at 47 tbl. 3-2.

115. *See* BRUCE GALPHIN, *THE RIDDLE OF LESTER MADDOX* 25-34 (1968).

early 1960s.¹¹⁶ For example, the “new” northside Atlanta precincts delivered overwhelming support to Allen in 1961.¹¹⁷

In 1962, Maddox launched his first drive for statewide office, seeking what many Georgians then considered a somewhat superfluous office—Lieutenant Governor. In the first Democratic primary that year, amongst a wide field of Democratic candidates, Maddox squeezed out a spot in the runoff election by placing second behind Peter Zack Geer, a rural south Georgia legislator. According to political scientist Numan V. Bartley, at that time “Maddox was relatively unknown in south and central Georgia . . . Maddox ran surprisingly well [in the runoff] in the Atlanta area and in north Georgia, however, and again, as he had done in his mayoralty races, he demonstrated a charismatic appeal to lower status white voters.”¹¹⁸

The 1966 Democratic gubernatorial primary featured six contenders. Competing for the segregationist-conservative-rural vote were Maddox; James Gray, an Albany publisher; and Garland Byrd, a former Lieutenant Governor. Moderates in the race included former Governor Ellis Arnall, who was trying to make a comeback in Georgia after twenty years out of office, and Jimmy Carter, a state senator from southwest Georgia, largely unknown outside of the state Senate. The sixth candidate, Hoke O’Kelley, was a perennial contender, not taken seriously. Likewise, Maddox was not taken seriously by many opinion leaders.¹¹⁹ Some contend that Republican

116. See generally M. KENT JENNINGS, *COMMUNITY INFLUENTIALS: THE ELITES OF ATLANTA* (1964) (analyzing roles of specific political powerhouses in Atlanta and Georgia governance).

117. See BARTLEY, *supra* note 36, at 48-50.

118. *Id.* at 69. Precinct returns from Atlanta revealed that local boy Maddox received considerable support in the runoff with Geer from the affluent white areas of the city which had previously been instrumental in his defeat in the mayoralty races. Indeed, the only strongly anti-Maddox precincts in 1962 were African-American precincts, which also voted in a bloc for challenger Charles Weltner during his successful bid to unseat incumbent Democratic Congressman James C. Davis. Upper and middle-income whites shifted away from moderate Weltner to the more conservative Republican James O’Callaghan in the general election. See *id.* at 52-53; see also M. Kent Jennings & L. Harmon Zeigler, *A Moderate’s Victory in a Southern Congressional District*, 28 PUB. OPINION Q. 595, 595-603 (1964).

119. See BARTLEY, *supra* note 36, at 69.

By 1966 Maddox’s reputation as a segregationist par excellence was well established, as was his image as an “irresponsible” white supremacy fanatic. Maddox attracted almost no endorsements from established politicians, and compared to most of the other major

Howard “Bo” Callaway, who decided to put the GOP on the general election ballot through a party caucus and the difficult petition route, wanted Maddox to win the 1966 primary on the theory that Maddox would be easier to beat than the more moderate candidate Arnall.¹²⁰ Analysts still debate whether Republicans crossed over to vote for a weak Democratic candidate.¹²¹ Maddox’s support in Atlanta followed the same pattern established in 1957 and 1961.¹²² Maddox suffered heavy losses in affluent white areas—the most Republican areas in the State—where he had fared somewhat well in the Geer-Maddox contest in 1962.¹²³ Given the alternative of a moderate, respectable candidate in Arnall, wealthy Atlantans as well as African-Americans voted against Maddox.¹²⁴

contenders, his campaign was pathetically financed and virtually devoid of organizational support.

Id.

Neither was Maddox taken seriously by high school students attending the 1966 Governor’s Honors Program at Wesleyan College in Macon, Georgia that summer. Coincidentally, as a high school student in the program’s political science class, I had the privilege of introducing the unknown State Senator Jimmy Carter to the group. Carter was well-received, as he had been a principal sponsor of the Honors Program while a state senator. At a reception for all the Democratic gubernatorial candidates (Callaway appeared separately on a different day), students ignored Maddox and clustered around Arnall and Carter.

120. See SHORT, *supra* note 109, at 67-81 (Callaway was eager to launch his campaign against Maddox).

121. See BARTLEY, *supra* note 36, at 75.

The statistics clearly suggest that some voters who opted for Maddox in the runoff primary joined with Callaway in the general election . . . It is doubtful, however, that a purposive Republican cross-over vote had much effect on the outcome of the election. More probable is the supposition that numerous conservative voters preferred Maddox to Arnall but ultimately favored the more “respectable” conservatism of Bo Callaway.

Id.; see also SHORT, *supra* note 109, at 80 (Ivan Allen, Jr., is reported to have said: “It is deplorable that the combined forces of ignorance, prejudice, reactionism and the duplicity of many Republican voters have thrust upon the state of Georgia Lester Maddox, a totally unqualified individual, as the Democratic nominee for governor.”). The Georgia Secretary of State’s website on Georgia Governors reports: “The Callaway forces were delighted that Lester G. Maddox, Georgia’s most fanatical defender of racial segregation, had won the nomination, and many Republicans probably voted for him in the runoff, assuming that he would be easier to beat than Ellis Arnall.” Georgia Secretary of State, *Georgia Governors* (2001), available at <http://www.sos.state.ga.us/archives/rs/governors.htm>.

122. In the 1966 Democratic Primary Runoff against former Governor Arnall, Maddox’s electoral support in Atlanta was as follows: “Poor White” - 74%; “Working Class White” - 68%; “Middle-Income White” - 62%; “Semi-Affluent White” - 52%; “Affluent White” - 31%; “Poor Black” - 2%; “Non-Poor Black” - 1%. Overall, Maddox received 42% of the Atlanta vote. BARTLEY, *supra* note 36, at 75 tbl. 5-6.

123. See *id.* at 73-77.

124. See *id.*

Had Atlanta's electoral decision carried the day in the Democratic primary and primary runoff elections, Lester Maddox would have never had the opportunity to oppose Republican Callaway in November 1966. In 1962, white voters in the south Georgia "black belt" voted overwhelmingly for Geer for Lieutenant Governor; but in 1966, when the choice narrowed to Maddox and Arnall, they chose the segregationist Maddox.¹²⁵ The stage was thus set for one of the most unusual election stories in American history.

In many ways, the election was a first for Georgia. It was the first general election to signify anything more than a stamp of official approval on the electoral results of the Democratic primary.¹²⁶ Following the 1964 vote, in which Republican presidential candidate Barry Goldwater carried Georgia by a substantial margin, significant interest arose in running a Republican candidate for Governor.¹²⁷ Howard "Bo" Callaway, who rode into his Third District seat on Goldwater's coattails, decided to take the plunge.¹²⁸ Because the almost nonexistent Georgia GOP lacked enough funds to mount a statewide primary, Callaway used the difficult petition route to get his name on the Georgia ballot. This signified the first major effort by a Republican for statewide office since Reconstruction.¹²⁹ Republicans were optimistic of Callaway's chances given Goldwater's recent breakthrough; Republicans believed that with the county-unit system out of the way with urban votes counting as much as rural votes, all that one needed to become Governor was to win the popular-vote election.¹³⁰ Or so it appeared!

125. Arnall led Maddox in the first primary but received only 29.4% of the total vote. See BARTLEY, *supra* note 36, at 73. In the runoff, Maddox handily defeated Arnall with over 54%. See *id.* at 74.

126. Georgia's first Republican Governor was Rufus B. Bullock, who served in 1868-71; Georgia's last Republican Governor was Benjamin A. Conley, who served in 1871-72. See Georgia Secretary of State, *Georgia Governors* (2001), available at <http://www.sos.state.ga.us/archives/rs/governors.htm>.

127. See BARTLEY, *supra* note 36, at 75-76. Goldwater received 54.1% of the presidential vote in Georgia in 1964. See *id.* at 6. Goldwater's victory in Georgia marked the first time since Reconstruction that a Democrat lost in a presidential election. See BASS & DEVRIES, *supra* note 41, at 141.

128. Callaway "carried Muscogee County (Columbus) and won 11 of the 16 rural and small town counties in the Third Congressional District." BARTLEY, *supra* note 36, at 61-62.

129. See BASS & DEVRIES, *supra* note 41, at 141.

130. As indicated, *supra* notes 78-86, the "county unit system" ended with *Gray v. Sanders*, 372 U.S. 368 (1963). Technically, a pre-1966 Republican could never have won a majority of the county-unit

There had been rumblings of unusual things to come. A group of disenchanted “liberals” in Atlanta decided to launch a write-in campaign for a candidate whose ideology was more compatible with theirs.¹³¹ “Write-in, Georgia,” or WIGS as they called themselves, touted the candidacy of former Governor Ellis Arnall, the man Maddox overwhelmed in the runoff election of the Democratic gubernatorial primary in September.¹³² Whatever their motivation, the WIGS’ effect was to deny a majority of votes cast to either Callaway or Maddox. Callaway received the most votes, 47.07% of the total; Maddox received almost as many, 46.88%; and Arnall received 6.05%.¹³³

In many states, Republican Callaway would have been elected Governor because he won a plurality of the votes cast.¹³⁴ However, the Georgia Constitution called for the state legislature to select the Governor in the event no candidate received a majority of the votes cast in a general election.¹³⁵ Conversely, the Georgia Election Code provided for a runoff election in any case where no candidate received a majority of the popular vote in a general election.¹³⁶ Any conflict between the state constitution and the statute was a matter for the state courts.¹³⁷

vote, since this applied only to primary elections and the Republican Party had never mounted a primary election in Georgia.

131. “Founded by Norman Shavin, an *Atlanta Constitution* columnist, and Betty Platt, a Savannah public relations consultant, the WIGS were basically a collection of blacks, white liberals, Jews and others who could not stomach the choice between Maddox and Callaway.” SHORT, *supra* note 109, at 89.

132. See BARTLEY, *supra* note 36, at 76-77. Arnall led the first primary with 29.4% of the vote to Maddox’s 23.6%. See *id.* at 69. In the runoff, Maddox received 54% to Arnall’s 46%. See *id.* at 74.

133. See *Fortson v. Morris*, 385 U.S. 231, 236 (1966) (Douglas, J., dissenting).

134. See FLA. STAT. ch. 103.011 (2000) (“The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.”).

135. See GA. CONST. art. V, § 1, ¶ V (1945).

136. 1970 Ga. Laws 347, § 30, at 382 (formerly codified at GA. CODE ANN. § 34-1515).

137. The district court in *Morris* did not reach this question. See *Morris v. Fortson*, 262 F. Supp. 93, 95 (N.D. Ga.) (per curiam), *rev’d*, 385 U.S. 231 (1966). The week before Maddox’s election by the legislature the Georgia Supreme Court found, pursuant to the state constitutional provision, that the statutory provision did not apply to the gubernatorial election. *Jones v. Fortson*, 152 S.E.2d 847, 853 (Ga. 1967).

III. FORTSON V. MORRIS

In *Morris v. Fortson*,¹³⁸ a class action brought by Georgia voters in connection with the November 1966 election, the federal district court in Atlanta held unconstitutional the legislature election procedure for selecting the Governor in case no candidate received a majority of the popular vote.¹³⁹ Relying on *Gray*, the court found the election by the legislature violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁰ However, the United States Supreme Court, in a 5-4 decision, did not agree.¹⁴¹

First, the Court noted that *Gray* was not dispositive. That decision simply required the elimination of “the county-unit machinery” and therefore the 1966 election satisfied the decree in that case.¹⁴² The State had not employed any county-unit method of counting votes. In the Court’s view, Georgia held an election compatible with *Gray* even though it was an election “that resulted in the election of no candidate.”¹⁴³ In fact, the Court endorsed the wisdom of Georgia’s people in providing for an alternative to popular election in the event no candidate received a majority of the vote. Justice Black wrote:

138. 262 F. Supp. 93 (N.D. Ga. 1966).

139. *See id.* at 96.

140. *See id.* at 95.

The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. This would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored. In addition, each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.

Id.

The district court did not consider whether a runoff election might be available under the Georgia Election Code. *See id.* at 95-96 n.2 (“We do not now consider the applicability of this run-off method to the contest between the two candidates for Governor who received the highest number of votes.”).

141. *Fortson v. Morris*, 385 U.S. 231, 236 (1966).

142. *Id.* at 235.

143. *Id.*

It would be surprising to conclude that, after a State has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate. Statewide elections cost time and money and it is not strange that Georgia's people decided to avoid repeated elections.¹⁴⁴

One wonders whether the citizens of Georgia of the 1960s would have repudiated this court-sanctioned wisdom of their fathers if the federal courts had not prohibited them from voting on the new Georgia Constitution.¹⁴⁵ In any case, the Court added that the Georgia provision for legislative election was not unique to Georgia; it was also found in the constitutions of Mississippi and Vermont.¹⁴⁶ In addition, numerous states provided for gubernatorial selection by state legislature in the event of a tie vote in a general election.¹⁴⁷ Justice Black concluded, “[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its governor.”¹⁴⁸ In fact, the United States Constitution allows a state to dispense with the popular election of a governor altogether if it wishes; for example, it may choose a governor or other state officer through selections by appointment or elections by the state assembly.¹⁴⁹

The Georgia case was more complex, however, because of the malapportionment problem. Even if it was typically legitimate to select a governor by legislative vote where the legislature involved is dysfunctional because the Court declared it to be malapportioned, may the legislature nonetheless select the governor? The Court said yes, simply declaring that it had previously decided that the Georgia

144. *Id.* at 234.

145. *See supra* notes 93-101.

146. *See Morris*, 385 U.S. at 234 (citing MISS. CONST. art. 5, §§ 140, 141; VT. CONST. ch. II, § 39).

147. *See id.* at 234-35.

148. *Id.* at 234.

149. *See id.*

Assembly should be allowed to continue to operate “with certain exceptions, not here material” until May 1, 1968—even though the Assembly was malapportioned.¹⁵⁰ Consequently, the Court held that the Georgia Assembly was not disqualified to elect a governor as required by article V of the Georgia Constitution.¹⁵¹

The case contained an additional complication. Georgia’s Democratic Party required all its 1966 nominees to proclaim a loyalty oath. Many politicians took this oath quite seriously. For example, Congressman Charles Weltner, an incumbent from Atlanta duly nominated by the people in the Democratic primary, refused to compete in the general election because he could not support the Democratic nominee for Governor.¹⁵² Would the selection of a governor by legislators bound by oath to support the Democratic nominee be a “fair” election? The Court ruled that because the election of November 8, 1966, was over (even though no candidate had been elected Governor), the loyalty oath ended.¹⁵³ Therefore, the Democratic members of the General Assembly were free of any obligation incurred as a result of such an oath.¹⁵⁴

In summary, the United States Supreme Court held in *Morris* that the state legislature could select the Governor in 1966 as provided by state law despite (1) the Georgia Election Code provision providing

150. *Id.* at 235.

151. *See id.*

152. Charles L. Weltner, congressional candidate in Atlanta’s Fifth District and a “moderate liberal,” found himself unable to support Lester Maddox, so he withdrew from the Congressional race. *See BASS & DEVRIES, supra* note 41, at 144. “[M]any voters apparently judged that Weltner’s action [withdrawing from the 1966 congressional race because Maddox headed the ticket] reflected a lack of political maturity.” *Id.* Maddox felt the real reason Weltner resigned was because it was a “way out of certain defeat” in his reelection effort. *SHORT, supra* note 109, at 84. Weltner was defeated in a bid to return to Congress in 1968, receiving only 44.4% of the vote against incumbent Republican Congressman Fletcher Thompson. *See Light, supra* note 75, at 30 n.27. At the end of Maddox’s term, Weltner praised Maddox’s progressive record while in office. *See Charles Longstreet Weltner, Editorial, On to the Senate Now, Lester, ATLANTA J., Jan. 15, 1971.* However, in 1991, Weltner received the Profiles in Courage award from the John F. Kennedy Library Foundation for his decision to withdraw rather than to ignore the loyalty oath or to appear to support a segregationist. *See John Fitzgerald Kennedy Library, The John F. Kennedy Profile in Courage Award (2001), available at http://www.jfklibrary.org/fn_pica.htm.* Weltner served as Chief Justice of the Georgia Supreme Court from June 1992 until his death in August of that year. *See id.*

153. *See Morris*, 385 U.S. at 235-36.

154. *See id.* at 236.

for a runoff election in the event no one received a majority of the vote, (2) malapportionment of the state legislature, and (3) the Democratic loyalty oath signed by all Democratic members of the state legislature.¹⁵⁵

Justices Douglas and Fortas penned vigorous dissents.¹⁵⁶ Both dissenters viewed election of the governor by the legislature as a step in Georgia's electoral process, i.e., as part of the election process starting with the Democratic primary, primary runoff, and the general election.¹⁵⁷ As such, they saw election by the legislature as a violation of Equal Protection and its "one man, one vote" principle embodied in *Gray*.¹⁵⁸ Justice Fortas wrote: "It is . . . a denial of equal protection of the laws for the result of an election to be determined, not by the voters, but by the legislature on a basis which is not related to the votes cast."¹⁵⁹ To the dissenters, the Georgia Constitution's legislative election procedures were void—thus, the runoff election provided by the Georgia Election Code was the proper route.¹⁶⁰ Additionally, for the dissenters the vices of the county-unit system were apparent in the election of a governor by the state legislature. "A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority."¹⁶¹ Finally, the dissenters argued that since the election of November 8, 1966 was not over until a candidate won the office of governor, the Democratic loyalty oath should still be binding, limiting nominees' freedom to vote according to conscience or according to the majority vote of any constituents.¹⁶²

155. See *supra* notes 142-54 and accompanying text.

156. See *Morris*, 385 U.S. at 236-51.

157. See *id.*

158. See *id.*

159. *Id.* at 243 (Fortas, J., dissenting).

160. The Georgia Attorney General previously opined that such a runoff election could not be held because of article V of the Georgia Constitution. See *id.* at 237 (Douglas, J., dissenting).

161. *Morris*, 385 U.S. at 240 (Douglas, J., dissenting).

162. *Id.* at 241-42 (Douglas, J., dissenting).

In short, the *Morris* dissenters considered this decision a retreat from the Court's prior protection of the individual's right to vote under the Equal Protection Clause, which ensured that each vote would be counted to "fully serve its purpose."¹⁶³ Only the people themselves, in a "runoff or some other type of election," can properly and regularly reverse the decision made in an election.¹⁶⁴ "The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis" or unless the people themselves change their verdict in a subsequent election.¹⁶⁵

In retrospect, it seems clear that the United States Supreme Court, when it decided its "one man, one vote" decisions affecting Georgia politics in *Gray*, *Wesberry*, and *Toombs*, did not foresee the political and structural repercussions of the first etchings of two-party politics in this Deep South state.¹⁶⁶ In *Toombs*, the complexities of governing

What is approved today can, moreover, be the instrument to perpetuate a "one party" system in like derogation of the principle of "one person, one vote." The pledge that every Democratic member of the Georgia Legislature took provides in part: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia." That election has not been completed. We are, as I have said, in the second stage of it. The Democrats control 183 seats in a 205-member House and 46 seats in a 54-member Senate. We would be less than naive to believe that the momentum of that oath has now been dissipated and that the predominantly Democratic legislature has now become neutral.

Id. (references omitted).

163. *Id.* at 250 (Fortas, J., dissenting).

In short, we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws from nullification except by the voters themselves.

Id.

164. *Id.*

165. *Id.*

166. In 1970, Republicans held a primary election in Georgia and ran several candidates for statewide office. All lost. Thirty years later, although Republican Paul Coverdell was elected to the United States Senate, no Republican has been elected Governor since Rufus B. Bullock in 1868. See Georgia Secretary of State, *Georgia Governors* (2001), available at <http://www.sos.state.ga.us/archives/rs/governors.htm>. Georgia's other Republican Governor, Benjamin Conley, took over the position as President of the Senate when Bullock abruptly resigned in 1871. See *id.* Republican gubernatorial candidate Johnny Isakson received 44.54% in 1990. See Georgia Secretary of State, *1990 General Election Results: Governor*, available at <http://www.sos.state.ga.us/elections/results/1990/gov.htm> (last visited Aug. 23, 2001). Republican

four million Georgians convinced the Court to suffer some sort of legislature to continue to operate despite that legislature's "constitutional infirmity."¹⁶⁷ The Court, however, sought to draw a line precluding the exercise of certain important powers by such a malapportioned, unrepresentative state legislative body.¹⁶⁸ Among these powers was the initiation of procedures for the people to adopt a new state constitution. The *Toombs* Court did not include among such important powers "select[ing] as Governor of the State the loser at the polls."¹⁶⁹ Ironically, a legislature decreed to be so malapportioned that it could not even submit a new constitution to the people was not so malapportioned as to select a governor by its direct action.¹⁷⁰

The federal courts, seeking to protect the voting rights of Georgia's citizens, actually prohibited two elections from being held in the State.¹⁷¹ The Court in effect forced this electoral responsibility on the Georgia legislature by refusing to allow the Constitutional referendum.

When the *Morris* Court acted, however, the immediate political implications were clearly foreseeable. The heavily Democratic legislature selected Lester Maddox as Governor.¹⁷² Politically at least, the decision moved in the opposite direction of its earlier interventions in Georgia's electoral process. The "one man, one vote" decisions provided Georgia's urban areas, and particularly Atlanta,

gubernatorial candidate Guy Millner received 48.95% in 1994. See Georgia Secretary of State, *1994 General Election Results: Governor*, available at <http://www.sos.state.ga.us/elections/results/1994/gov.htm> (last visited Aug. 23, 2001). In 1998, Millner received 44.1% of the votes cast. See Georgia Secretary of State, *Official Results of the November 3, 1998 General Election: Governor*, available at http://www.sos.state.ga.us/elections/results/1998_1103/0000200.htm (last visited Aug. 23, 2001).

167. *Morris*, 385 U.S. at 245 (Fortas, J., dissenting).

168. See *id.* at 245-46.

169. *Id.* at 245.

170. *Id.*; see also *Fortson v. Morris*, 385 U.S. 231, 245 (1966) (Fortas, J., dissenting); *supra* text accompanying note 103.

171. The courts prohibited the constitutional referendum on the new Georgia Constitution in *Toombs* and the gubernatorial runoff election in *Morris*. See *supra* notes 97, 150.

172. The Georgia legislature elected Maddox over Callaway by a vote of 182 to 66, with eleven abstentions despite a ruling from the presiding Lieutenant Governor that all must vote. See BASS & DEVRIES, *supra* note 41, at 143.

with a greater share of electoral strength within the State in relation to predominantly rural areas.¹⁷³ In *Wesberry*, for example, the almost immediate result of the decision was a doubling of metropolitan Atlanta's representation in the United States Congress and a reduction in the number of "rural" Georgia congressmen.¹⁷⁴ In the 1966 gubernatorial race, the political influence of the urban areas that *Wesberry* and *Gray* had concentrated was diluted in the legislature's selection of the loser Maddox. Republican Callaway's support, especially outside his home area, came from Georgia's urban areas.¹⁷⁵ Rural areas that traditionally benefited from the county-unit system to reverse the popular verdict also benefited from *Morris*. Georgia's rural areas again overcame the numerical superiority of the urban candidate.¹⁷⁶

There was an even greater impact for African-American voters. Many of the "one man, one vote" decisions remedied dilution of the black vote.¹⁷⁷ African-American voters in 1966 preferred Callaway to Maddox.¹⁷⁸ In Atlanta, where the "Write-In Georgia" campaign was active, voters split between Callaway and Arnall, with Maddox receiving only about 3% of the tally.¹⁷⁹ In Macon, one area of the state where reported returns did not include write-ins, Callaway bested Maddox 87% to 13% among African-American voters.¹⁸⁰ In short, by allowing the Georgia legislature to select Lester Maddox as

173. See BARTLEY, *supra* note 36, at 11-12.

174. See *supra* note 92 and accompanying text.

175. Maddox carried 128 of Georgia's 159 counties. See Sherman, *supra* note 14, at A16. While Maddox received 46.2% of the statewide popular vote overall, he received only 34.3% of the vote in 14 urban counties and only 28.3% in Fulton County (Atlanta). See BARTLEY, *supra* note 36, at 77.

176. See BARTLEY, *supra* note 36, at 77-78. In 1966, Maddox carried two extreme south Georgia congressional districts by wide margins while Callaway carried the two Atlanta area congressional districts by wide margins. See KEY, *supra* note 36, at 117-29.

177. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340-48 (1960). In *Gomillion*, the Court ruled that the district court erred in dismissing a complaint brought by black Alabama citizens who challenged an Alabama Act that changed the boundaries of Tuskegee and effectively eliminated black voters from the city. See *id.* The Court remarked that if the allegations were true, the Act would be unconstitutional in violation of the Fifteenth Amendment because it deprived African-Americans of the right to vote because of their race. See *id.*

178. See BARTLEY, *supra* note 36, at 77 tbl. 5-7.

179. See *id.* at 77 tbl. 5-8.

180. See *id.*

Governor, the United States Supreme Court reversed the overwhelming verdict of Georgia's African-American population as well as the close verdict of all Georgia's voters.

A final irony lay in the 5-4 split of the Court in *Morris*. Justice Black authored both the *Wesberry* and the *Morris* decisions. Siding with the liberal members in *Wesberry* and the conservatives in *Morris*, Black was the key swing vote in each of these 5-4 decisions.¹⁸¹ The incongruity and incompatibility of the two decisions is the result of the "switch" of just one Justice, the "strict constructionist" from Alabama, Justice Hugo Black.¹⁸²

IV. PICKRICK TO "DUBYA": THE MANY PARALLELS

It is hard to imagine that *Fortson v. Morris* could have escaped the attention of Governor Bush's and Vice President Gore's advocates in the 2000 presidential election dispute in Florida. Though minor party candidates attracted percentages in single digits, the presence of a liberal dissatisfied with the nominee of the Democratic Party denied a majority of the popular vote to either candidate statewide.¹⁸³ The

181. The majority in *Wesberry* included Justices Black, Brennan, Douglas, Goldberg, and Warren; dissenting were Justices Clark, Harlan, Stewart, and White. See *Wesberry v. Sanders*, 376 U.S. 1 (1964). The majority in *Morris* included Justices Black, Clark, Harlan, Stewart, and White; dissenting were Justices Brennan, Douglas, Fortas, and Warren. See *Fortson v. Morris*, 385 U.S. 231 (1966).

182. See STONE ET AL., *supra* note 22, at lxxvii-lxxviii.

Although frequently characterized as an "activist" because of his willingness to subject to intensive review legislation that arguably violated express constitutional provisions, Black himself thought that literalism was necessary to confine judicial power. . . . Black rejected the notion that the Constitution contained general guarantees of "privacy" or "natural rights" beyond those expressly articulated in the text.

Id.

More to the point was Callaway's recent political assessment; he called Justice Black a "staunch Southern Democrat." Sherman, *supra* note 14, at A16.

183. Liberal Green Party candidate Ralph Nader received 97,488, or 1.6% of the vote, while Pat Buchanan received 17,484, or 0.3% of the vote. See Florida Division of Elections, *November 7, 2000 General Election*, available at <http://election.dos.state.fl.us> (last visited Sept. 20, 2001). Of Buchanan's votes, Palm Beach County tallied 3407 votes, or 19.5% of Buchanan's total in Florida. See Palm Beach County Supervisor of Elections, *General Election*, available at http://pbcelections.org/ElectionResults/2000/GEN/CUM_PRE.HTM (last visited Aug. 23, 2001). In Palm Beach, there were 461,988 votes cast in the presidential election out of the 5,963,110 statewide total; this accounted for 7.7% of Florida's total votes. See *id.* Palm Beach County voters were two and one-half times more likely to vote for Buchanan than the average Florida voter. Palm Beach County also had an abnormally high number of disqualified ballots in which voters either chose no candidate or

Florida Legislature expressed fear that it would have to exercise its constitutional duty under a long-ignored statute to appoint a winner because the election seemingly had failed to do so.¹⁸⁴ No additional inquiry to the State's voters in a further election seemed available or advisable.¹⁸⁵ To the Florida Supreme Court, failure to inquire further into the popular will also appeared to violate principles at the very core of the State's constitution, requiring it to strain interpretation of the State's obtuse election statutes.¹⁸⁶ Moreover, judicial inquiry into the specifics of the Florida voters' expression of the popular will

more than one presidential candidate as recorded by machines—6.43% in Palm Beach County as opposed to 2.93% statewide. See *Disqualified*, SUN-SENTINEL (Ft. Lauderdale), Nov. 15, 2000, at 16A. These anomalies produced litigation over the so-called "butterfly ballot," which ultimately proved unsuccessful. See *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000) ("[W]e conclude as a matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with the statutory requirements mandating the voiding of the election.").

184. THE FLORIDA LEGISLATURE JOINT PROCLAMATION 1 (Dec. 6, 2000), available at <http://jurist.law.pitt.edu/election/proclamation.pdf>.

[F]ailure of the Florida legislature to prepare for the possibility that the results of the 2000 General Election may still be in doubt on December 12, 2000, may disenfranchise and deny the citizens of Florida any voice in the selection of the 43rd President of the United States of America.

Id.

Ironically, in the early 1990s, Florida's Legislature considered a proposal that would have replaced the winner-take-all system of distributing electoral votes with the congressional district-by-district system presently in effect in Maine and Nebraska. See Larry Rohter, *Florida Is Rethinking the Way Presidents Are Elected*, N.Y. TIMES, June 7, 1992, at A25. Had the Florida Legislature adopted this reform prior to the 2000 presidential election, all of Florida's twenty-five electoral votes would not have turned on the "dimpled chad." Of course, this might have only shifted the campaign's focus to election irregularities in other close states such as New Mexico or Iowa. See, e.g., Mark Sherman, *Beyond Florida: Bush Camp Weighing Backup Strategy*, ATLANTA J. CONST., Nov. 13, 2000, at A6; *The Other States: Al Gore Still Leads in New Mexico, Oregon*, ABCNews.Com (Nov. 20, 2000), available at http://www.abcnews.go.com/sections/politics/DailyNews/ELECTION_otherstates001115.html.

185. See *Fladell*, 772 So. 2d at 1242 (denying substantial noncompliance mandating the voiding of an election based on the Palm Beach "butterfly ballot"); cf. *Blackburn v. Hall*, 154 S.E.2d 392, 400 (Ga. Ct. App. 1967) (discarding over-votes where voter punched "straight party ticket" chad and individual candidate chads for candidates of the other party in first votomatic card use by DeKalb County, Georgia, in 1966 congressional race).

186. See *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) (the Florida Supreme Court's first opinion concerning the 2000 election). The court stated: "Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited." *Id.* at 1239. These comments were abrogated after the United States Supreme Court vacated the decision. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1290-92 (Fla. 2000).

found troubling inequities.¹⁸⁷ The combination of imperfect institutions and the officials administering them threatened the “one man, one vote” principle embodied in the Equal Protection Clause of the United States Constitution.¹⁸⁸ Voters in one county seemed more likely to have ballots counted than in other counties similarly situated.¹⁸⁹ The candidate supported in overwhelming numbers by African-American voters in the state’s urban areas seemed disadvantaged by the structural failures of the electoral process.¹⁹⁰ Parties even feared that their officials might violate loyalty oaths to support the candidates to whom they were pledged.¹⁹¹

Ultimately, the United States Supreme Court intervened to resolve the election contest. Applying the Court’s own special gloss to the

187. For example, the court found that the Secretary was placing “blind faith in machines.” *Harris*, 772 So. 2d at 1284.

188. *Bush v. Gore*, 531 U.S. 98, 108 (2000) (“The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.”).

189. *Id.* at 107 (“Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.”).

190. On December 5, 2000, Jesse Jackson’s Rainbow Coalition/PUSH and Florida voters in Duval County (the Jacksonville area) initiated an election contest, complaining of an illegal ballot and other election irregularities. See generally Plaintiff’s Complaint to Contest Election, *Brown v. Stafford*, No. 00-2878 (Leon Co. Circuit Ct. 2000). Voting instructions in Duval County indicated that a voter should “vote all pages” of the ballot, but the presidential ballot spanned two pages, possibly leading many voters to vote twice for presidential candidates (once on each page). See *id.* at 5, ¶ 14. Duval County had an unusually high number of disqualified ballots (6909 or 9.23%) in contrast to the statewide average of 2.93%. See *Disqualified*, SUN-SENTINEL (Ft. Lauderdale), Nov. 15, 2000, at 16A. The complaint alleged that “of the more than 26,000 ballots not counted [in Duval and elsewhere with this particular ballot], more than 16,000 occurred in precincts carried by the Gore/Lieberman ticket and approximately 9,000 occurred in mainly African-American precincts carried by the Gore/Lieberman ticket by a vote of 90 percent or more.” See Plaintiff’s Complaint, *supra*, at 7, ¶ 22. A similar analysis by the Ft. Lauderdale *Sun-Sentinel* indicated “a disproportionate number of rejected presidential votes in South Florida came from African-American and Caribbean neighborhoods.” See Stacey Singer et al., *Minority, Senior Votes Are Most Rejected*, SUN-SENTINEL (Ft. Lauderdale), Dec. 1, 2000, at 1A. These phenomena are not limited to Florida. According to Election Data Services, Inc., although punch-card and datavote punch-card ballots are used in only 20.2% of counties, this represents use by 34.1% of the nation’s registered voters; punch-card use occurs mainly in urban areas. See Election Data Services, *Type of Voting Equipment by County* (representational map on file with the *Georgia State University Law Review*).

191. See, e.g., William G. Ross, “Faithless Electors”: *The Wild Card*, JURIST (Dec. 9, 2000), at <http://jurist.law.pitt.edu/election/electionross4.htm>. The only elector to defect from the candidate to whom he was pledged in the 2000 presidential election was a Gore elector from the District of Columbia protesting lack of statehood status for the District of Columbia. *Electors Remain Faithful to Bush; Gore Is Denied One Vote in D.C.*, SUN-SENTINEL (Ft. Lauderdale), Dec. 19, 2000, at 11A.

law of a state, pragmatic concerns over the difficulty of further proceedings under state law led it to stop those proceedings.¹⁹² The effect was to finally resolve the controversy in favor of the protagonist who held a lead prior to the Florida Supreme Court's ordering of a manual recount.¹⁹³

The controversial 5-4 ruling in *Bush v. Gore* parallels *Morris* in many respects.¹⁹⁴ Each decision ended one of the closest statewide elections in American history.¹⁹⁵ Like Ellis Arnall, third-party candidate Ralph Nader attracted liberals dissatisfied with the Democratic Party nominee, thereby denying a majority of the popular vote to either major party candidate statewide.¹⁹⁶ Like the Georgia legislature with its perceived constitutional duty under the 1945 Georgia Constitution to select the Governor, the 2000 Florida Legislature solemnly found that it had a constitutional duty under a long-ignored federal electoral college statute to appoint a winner if the election had "failed" to do so by the state's December 12 deadline.¹⁹⁷ Although Georgia's 1966 Election Code called for a runoff election where there was no clear winner, the United States

192. See *Bush v. Gore*, 531 U.S. 98, 110 (2000).

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work

...

. . . Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, [which requires completion of a contest by December 12] . . . 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 "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).

Id. at 110-11.

193. See *supra* note 3.

194. Had the Florida Legislature intervened to appoint electors, the parallels would have been "downright eerie" according to Maddox's most recent biographer, Bob Short. See Sherman, *supra* note 14, at A16. Griffin Bell, among the legions of lawyers representing Bush in the 2000 post-election controversy, commented before the Supreme Court's December decisions, when Florida legislative action seemed more likely: "It sounds like the same thing and if it comes to pass, we'll be right back in the Supreme Court citing the Georgia case." *Id.* This would have been no small irony since Bell had served on the three-judge panel disallowing election of Georgia's Governor by the legislature, which the United States Supreme Court reversed in *Morris*. See *supra* notes 68-81 and accompanying text.

195. See *Bush*, 531 U.S. at 102; *supra* note 183 and accompanying text.

196. See *supra* notes 133, 183 and accompanying text.

197. See *supra* notes 172, 184 and accompanying text.

Supreme Court found no such election available.¹⁹⁸ Similarly, the Florida Supreme Court found no additional election available to address the electoral infirmities of Palm Beach County's "butterfly ballot" and associated irregularities.¹⁹⁹ The *Morris* dissenters objected to the majority's cavalier attitude toward the suffrage.²⁰⁰ Similarly, both the Florida Supreme Court majority and the United States Supreme Court dissenters found popular will to be at the very core of the electoral process, requiring the state's highest court to strain its interpretation of the state's seemingly somewhat contrary state election statutes and urging the nation's highest court to provide additional procedures for evaluating Florida's vote.²⁰¹

The *Morris* majority struggled to reconcile its intervention to prevent further electoral process in Georgia with the "one man, one vote" principle in its then freshly-minted Equal Protection jurisprudence.²⁰² Its dissenters objected to the imperfect reflection of that will through state representatives.²⁰³ In 2000, judicial inquiry into the specifics of the Florida voter's expression of its popular will revealed troubling inequities.²⁰⁴ Both the nation's and the state's highest courts called upon legislatures "to improve the mechanisms and machinery for voting."²⁰⁵ The combination of imperfect

198. See *supra* notes 138-55 and accompanying text.

199. See *supra* note 183 and accompanying text.

200. See *supra* notes 156-65 and accompanying text.

201. See *supra* note 166 and accompanying text.

202. Commentators have noted this seeming dilemma:

Gray and [*Morris*] are in one sense difficult to reconcile with one another. On one level they appear directly contradictory. *Gray*, on the one hand, seems to hold that where the voters are asked or required to participate, equal protection mandates that each vote be counted equally. [*Morris*], on the other hand, upholds the selection of a state official by what had earlier been ruled to be a malapportioned legislature. On another level, however, [*Morris*] sanctions a representative process in the performance of a nonlegislative task, after the voters have exercised untrammelled their right to choose first-tier spokesmen. [*Morris*] and *Gray* together thus appear to permit selection of an officer through indirect "election"—i.e., appointment—by a state legislature, but not by a mechanical unit system.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.36, at 966-67 (6th ed. 2000) (footnotes omitted).

203. See *Fortson v. Morris*, 385 U.S. 231, 245 (1966) (Fortas, J., dissenting).

204. See *supra* note 190 and accompanying text.

205. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

institutions and the officials administering them again threatened the “one man, one vote” principle embodied in the Equal Protection Clause of the United States Constitution.

Gray, the county-unit system case from Georgia, took center stage in both *Morris* and *Bush*.²⁰⁶ In both situations, voters in one county seemed more likely to have ballots counted than in other similarly-situated counties.²⁰⁷ In *Morris*, a single state representative might choose to follow or ignore the majority vote of his or her constituents.²⁰⁸ In *Bush*, the majority complained of the “varying standards” to determine a legal vote, with Broward County using a “more forgiving” standard than Palm Beach County.²⁰⁹ In both 1966 and 2000, parties even feared that their officials might violate their proclaimed loyalty oaths to support candidates to whom they were pledged. In 1966, Justice Black dismissed the oath as not binding on legislatures in their gubernatorial votes, while Republicans in 2000 feared that “faithless electors” might not feel bound by a Supreme Court 5-4 vote for Bush in lieu of a more complete recount in Florida or elsewhere.²¹⁰

In the end, the United States Supreme Court intervened in both cases to resolve the election contests. Putting the Court’s own special gloss on the law of Georgia in 1966, Justice Black found that the State’s “pragmatic concerns” about the difficulty of further elections

206. See *id.* at 107; *Morris*, 385 U.S. at 233 (discussing *Sanders*).

207. See *Morris*, 385 U.S. at 241 (Douglas, J., dissenting) (“[T]he substitution of the Georgia Legislature for a runoff vote is an unconstitutional weighting of votes, having all the vices of the county unit system that we invalidated in *Gray v. Sanders*.”).

208. *Morris*, 385 U.S. at 240-41 (Douglas, J., dissenting).

A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority. He would not be under a mandate to follow the majority or plurality votes in his constituency, but might cast his single vote on the side of the minority in his district. Even if he voted for the candidate receiving a plurality of votes cast in his district and even if each Senator and Representative followed the same course, a candidate who received a minority of the popular vote might receive a clear majority of the votes cast in the legislature.

Id. (footnotes omitted).

209. See *Bush*, 531 U.S. at 107.

210. See *supra* notes 152-54, 191 and accompanying text.

served as a constitutionally adequate justification for allowing state legislative election of the governor.²¹¹ Putting the Court's own special gloss on the law of Florida in 2000, the Court's per curiam opinion found the federal December 12 date set forth in 3 U.S.C. § 5 to be an absolute deadline for resolution of election controversies under the Florida Election Code.²¹² The effect of both United States Supreme Court decisions was to make the loser of the popular vote, Maddox in Georgia and Bush in the U.S. presidential election, the winner of the office sought.²¹³

The political implications of *Bush* are also quite similar to *Morris*. The structural failures of the electoral process, i.e., the use of the state legislature as an "electoral college" in 1966 Georgia and the use of punch-card ballots in 2000 Florida, disadvantaged an "urban" candidate supported in overwhelming numbers by African-American voters: Republican Bo Callaway in 1966 Georgia and Democrat Al Gore in 2000 Florida.²¹⁴

Even the timetables and the split on the Court in the two controversies have eerie parallels. The Supreme Court accepted the 1966 election case on appeal, but Thanksgiving passed with no resolution. On December 12, 1966, the same calendar day the Supreme Court rendered its controversial decision in 2000, the Court split 5-4.²¹⁵ A Southern state's election—the Court's "Southern seat,"—Hugo Black in 1966 and Anthony Kennedy in 2000, cast the deciding vote.²¹⁶

211. See *supra* notes 141-49 and accompanying text.

212. See *Bush*, 531 U.S. at 111 ("[R]emanding 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 'appropriate' order authorized by Fla. Stat. Ann. § 102.168(8) (Supp. 2001).").

213. See *supra* notes 5, 133, 172 and accompanying text. Before the United States Supreme Court decision in December 2000, Callaway told *Atlanta Journal-Constitution* reporter Mark Sherman that the most important lesson he took from the experience was to not challenge the legitimacy of the court ruling or Maddox's hold on the Governor's office. "I was enormously disappointed, crushed you could say. I understand what Gore is thinking, but it doesn't do any good after a certain point to challenge it . . . Whatever the court rules and whoever it is that wins, let's get behind and support him. If it's Gore, he's my president." Sherman, *supra* note 14, at A16.

214. See *supra* notes 176-80, 190 and accompanying text.

215. See *supra* notes 181-82 and accompanying text.

216. See *supra* note 181 and accompanying text.

V. THE AFTERMATH OF THE ELECTION

The 2000 presidential election is over, and the Bush Presidency has begun. Because Bush's road to the White House so resembles Maddox's road to the Governor's mansion, it may be worthwhile to follow Maddox's path on the off chance that these parallels continue. Under Georgia law at the time, a Governor could not serve consecutive terms.²¹⁷ Many pundits noted after *Bush* that each previous President elected through the electoral college without the support of more popular votes than his opponent only served one term.²¹⁸ Any parallel here is not illuminating. Bush can run for reelection.

On the legal side, Georgia's reapportioned General Assembly proposed a new Constitution on March 31, 1976; Georgia's voters ratified it on November 2, 1976, with an effective date of January 1, 1977.²¹⁹ The 1976 Georgia Constitution provided for a runoff election in the event no candidate received a majority of the votes cast.²²⁰ Interestingly, the 1976 Constitution declared the runoff to be a "continuation" of the "general election," perhaps reacting to language in the *Morris* opinion and its dissents.²²¹ Thus, the chance that the

217. GA. CONST. art. V, § 1, ¶ 1 (1945).

218. The three Presidents were John Quincy Adams in 1824, Rutherford B. Hayes in 1876, and Benjamin Harris in 1888. Wayne Drash, *Tight Election Puts Electoral College Under Microscope: An 'Odd Institution'*, CNN.com (Nov. 13, 2000), at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/13/electoral.college/index.html>.

219. See GA. CONST. (1976), available at <http://www.cviog.uga.edu/Projects/gainfo/con1976.htm>. Maddox had supported such a change while Governor. See SHORT, *supra* note 109, at 237 (referencing the Governor's State of the State Address, Jan. 9, 1968).

220. See GA. CONST. art. V, § 1, ¶ 4 (1976). Georgians called the amendment the Callaway law. In 1992, the law cost Democratic United States Senator Wyche Fowler a second term; Fowler had led Republican Paul Coverdell, 1,108,416 to 1,073,282 on election day (49.23% to 47.67%), failing to obtain a majority. See Georgia Secretary of State, *1992 General Election Results: U.S. Senate*, available at <http://www.sos.state.ga.us/elections/results/1992/senate.htm> (last visited Aug. 23, 2001). Coverdell won the runoff three weeks later, 635,114 to 618,877, or 50.6% to 49.4%. See Georgia Secretary of State, *1992 General Runoff Results: U.S. Senate*, available at http://www.sos.state.ga.us/elections/results/1992/senate_r.htm (last visited Aug. 23, 2001). While over two million Georgians participated in the first election, which included a presidential contest, only about 1.2 million participated in the runoff. Compare *1992 General Election Results: U.S. Senate, supra*, with *1992 General Election Results: U.S. Senate, supra*.

221. GA. CONST. art. V., § 1, ¶ 4 (1976).

legislature will ever again be the avenue through which Georgia selects a Governor seems remote. There could be a prophecy here for punch-cards. Maddox was a progressive Governor.²²² His widely-praised inaugural address disclaimed "extremism or violence in any form."²²³ He brought in professional staff, made progressive penal and welfare reforms and instituted a "Little People's Day" to allow anyone to visit the Governor.²²⁴ He appointed many African-Americans to state boards and commissions.²²⁵ His style was populist.²²⁶

Maddox mounted several legal challenges to Georgia's prohibition on a Governor succeeding himself.²²⁷ When these failed, Maddox

It is said that the general election is over and that a new, and different, alternative procedure is now about to be used. But that is belied by the realities. The primary election selected the party candidates, the choices of the two parties are still in balance, and the legislative choice is restricted to those two candidates. The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office. Up to then the vacancy which occasioned the election has not been filled.

Fortson v. Morris, 385 U.S. 231, 238 (1966) (Douglas, J., dissenting).

The 1976 Constitution was replaced in 1983, and later amended in 1988. University of Georgia, Georgia Constitution Web Page, available at <http://www.cviog.uga.edu/Projects/gainfo/gacontoc.htm> (last visited Aug. 23, 2001). The present Constitution also provides for a runoff election. GA. CONST. art. II, § 2, ¶ 2.

222. A recent biography concludes: "His tenure as the state's chief executive is given high marks by most political observers. He acted forthrightly to correct many of the abuses and misconduct in state government, made excellent appointments to various offices and judgeships which pleased many critics and astounded others." SHORT, *supra* note 109, at 197.

223. *Id.* at 102.

224. *Id.* at 105-13; BASS & DEVRIES, *supra* note 41, at 143.

225. SHORT, *supra* note 109, at 123-24; BASS & DEVRIES, *supra* note 41, at 143.

226. Maddox fought speed traps and clip joints in south Georgia with unusual approaches such as the erection of huge billboards in the offending counties guarded by state troopers and personal unannounced visits to the offending establishments. See SHORT, *supra* note 109, at 119-22. In 1970, incumbent Lieutenant Governor George T. Smith complained: "When Maddox does something that if I did it would be considered ridiculous, people just say 'Well, that's Ol' Lester.'" Light, *supra* note 75, at 7. Dick Cavett admitted on December 18, 1970, during his nationally-televised talk show, that he found Maddox likeable even at his most outrageous moments. See *id.* at 22, 30 n.26. On January 4, 1971, Maddox rode his wife's bicycle seven miles to work from the Governor's mansion to the State Capitol complaining that he would not have access to a car after he left the Governor's office. On January 5, at an appreciation dinner for Maddox, the soon-to-be former Governor received the keys to a new car. *Id.* at 12 n.16.

227. First, Maddox tried to get the state legislature to amend the state constitution. See GA. CONST. art. V, § 1, ¶ 1 (1945). Additionally, he tried to get the state courts to find the provision inapplicable to him or to be discriminatory and a violation of equal protection. See, e.g., Maddox v. Fortson, 172 S.E. 2d 595, 599 (Ga. 1970) ("We do not give any weight to the contention that the provision of the

decided to run for Lieutenant Governor.²²⁸ He won easily in a no-runoff primary and scored a 2-1 margin over his Republican opponent in the general election.²²⁹ The Atlanta electorate's image of Maddox changed from 1966 to 1970; African-Americans and affluent whites demonstrated in the 1970 Democratic Primary that they still preferred moderates such as incumbent Lieutenant Governor George T. Smith to Maddox.²³⁰ In the general election against Republican State Senator Frank Miller, however, Maddox finally put together his strongest and widest electoral base. African-Americans for the first time ever selected Maddox in large numbers over a conservative Republican alternative.²³¹ This represented a dramatic shift from the 1966 gubernatorial election, in which Maddox received virtually no support in African-American Atlanta precincts against Callaway.²³²

In 1970, poor whites endorsed Maddox in even more overwhelming percentages than in the past, and working class whites and middle income whites flocked to Ol' Lester in landslide proportions.²³³ Even former Congressman Charles Weltner, who in 1966 refused to run on a ballot with Maddox, praised Maddox's performance as outgoing Governor in 1971.²³⁴ So did many other

Constitution under attack does not apply to the incumbent Governor because he was elected by the General Assembly and not by the people of Georgia.”).

228. Atlanta attorneys counterattacked and tried to deny Maddox the opportunity to serve as the Lieutenant Governor because he was ineligible to serve as Governor; Maddox won this last legal battle. *See Henderson v. Maddox*, 179 S.E.2d 770, 772 (Ga. 1971) (“The Lieutenant Governor does not succeed to the office of Governor in the event of a vacancy. Rather the executive power devolves upon the Lieutenant Governor so that the State Government can continue to function until a Governor is chosen by the people as provided by law.”).

229. *See* SHORT, *supra* note 109, at 125-26.

230. Among Atlanta precincts, in the 1970 Lieutenant Governor primary, Maddox's overall support was 43%, although he won a majority statewide. *See* Alfred R. Light, *The Political Metamorphosis of Lester Maddox* 19 (1972) (unpublished seminar paper) (on file with author). His electoral base broke down as follows: “Poor White” - 76%; “Working Class White” - 66%; “Middle Income/Semi-Affluent White” - 46%; “Affluent White” - 23%; “Poor Black” - 5%; “Non-Poor Black” - 5%. *Id.*

231. Among Atlanta precincts, in the 1970 Lieutenant Governor general election, Maddox's overall support was 61%. *See id.* His electoral base broke down as follows: “Poor White” - 86%; “Working Class White” - 76%; “Middle Income/Semi-Affluent White” - 64%; “Affluent White” - 46%; “Poor Black” - 60%; “Non-Poor Black” - 60%. *Id.*

232. *See supra* notes 170-80 and accompanying text.

233. *See supra* text accompanying note 230.

234. *See supra* note 152 and accompanying text.

affluent Atlantans.²³⁵ Although Maddox did not receive majorities among the “community influentials,” he received nearly as much support against a metropolitan Atlanta Republican as he had in 1962 against a south Georgia rural Democrat.²³⁶ For the first time in his life, Lester Maddox actually won the majority public endorsement in a bid for public office, both statewide and in his hometown of Atlanta, where he had run and lost so many times before.²³⁷

CONCLUSION

In the immediate aftermath of *Bush v. Gore*, there was much discussion of the decision’s grievous implications for the legitimacy of our judicial system.²³⁸ After the Florida Supreme Court’s

235. In October 1970, Fifth District Democratic congressional candidate Andrew Young told a state convention of the Democratic Forum, a liberal faction of the party, that he and Lester Maddox both had a place in the Democratic Party because of their divergent views and had warm praise for Jimmy Carter for his ability to bring liberals and conservatives together. See Hugh Merrill, *Young Says Carter Can Unite Demos*, ATLANTA J. CONST., Oct. 4, 1970, at 19A. Carter praised Maddox during the campaign, saying, “Governor Maddox is a friend of mine and a good governor. He is the essence of what the Democratic Party is all about and I am proud to be on the ticket with him and am looking forward to serving with him if you elect me your governor.” SHORT, *supra* note 109, at 126.

236. Maddox received 46.3% of the vote against his Republican opponent in the “affluent white” precincts in Atlanta in the 1970 Lieutenant Governor’s election; he received 51.1% of the vote in those same precincts in the Lieutenant Governor’s Democratic primary runoff with south Georgia conservative Peter Zack Geer. See Light, *supra* note 230, at 19.

237. Lester Maddox and Governor Jimmy Carter frequently struggled during the next four years. “Maddox quickly became a constant critic and obstructionist and the tool of a few shrewd, rural traditionalist Senate leaders.” BASS & DEVRIES, *supra* note 41, at 145; see also SHORT, *supra* note 109, at 126-37. After his term as Lieutenant Governor, Maddox ran for Governor again in 1974 but lost. See SHORT, *supra* note 109, at 139-49. Maddox faded from the Georgia political scene, running on a minor third-party ticket against his bitter state rival Carter in the 1976 presidential race and without virtually any support in the 1990 gubernatorial race. See SHORT, *supra* note 109, at 151-80.

238. See, e.g., Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001); John C. Yoo, *Bush v. Gore: In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775 (2001); Note, *Non sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2178 (2001); Akil Reed Amar, *The Supreme Court: Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at M1 (“[T]his is not the rule of law: It is the rule of subjective sensibility.”); William Hershey, *Bush Will Start His Presidency Under a Cloud*, DAYTON DAILY NEWS, Dec. 14, 2000, at 1A (“[T]his action on the part of the court was an inexcusable manifestation of judicial activism of the worst kind.”); Neil Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35; Anthony Lewis, *A Failure of Reason: The Supreme Court’s Ruling Isn’t Convincing*, PITTSBURGH-POST GAZETTE, Dec., 18, 2000, at A13 (“Courts have an obligation to persuade. Their power is legitimate only if they give reasoned arguments for what they do. By that standard, the decision in *Bush vs. Gore* was a dismal failure.”).

unanimous decision to permit manual recounts to be concluded after November 14, normally respectable conservative pundits verbally assaulted the Florida high court as a partisan, renegade and outlaw institution.²³⁹ The Chief Justice of the Florida Supreme Court, dissenting from its majority's later ordering of a December recount, concluded, "there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution."²⁴⁰ Dissenting from the United States Supreme Court's decision reversing the Florida high court, Justice Breyer concluded that *Bush v. Gore* risked "a self-inflicted wound—a wound that may harm not just the Court, but the Nation."²⁴¹ Justice Stevens opined that "the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."²⁴² Public opinion polls, however, suggested that most Americans were more relieved than angry about the Court's intervention in the electoral process.²⁴³

In the final analysis, the *Bush v. Gore* saga is unlikely to have any more direct legal implications than did *Morris*. The initial unanimous Florida Supreme Court decision requiring Florida's Secretary of State to include manually recounted votes in tallies completed before November 26 by its own terms was to have no effect on future elections.²⁴⁴ The United States Supreme Court majority did not reach

239. See Will, *supra* note 8, at L7.

240. *Gore v. Harris*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting).

241. *Bush v. Gore*, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting).

242. *Id.* at 129 (Stevens, J., dissenting).

243. For example, a CNN/USA Today/Gallup Poll on December 13, 2000 reported that only 11% of Americans were "angry" with the United States Supreme Court's decision; a similar number (15%) were "thrilled" and the remainder either "pleased" (33%) or "disappointed" (34%). See CNN/USA Today/Gallup Poll, *Poll: Majority of Americans Accept Bush as Legitimate President*, at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/13/cnn.poll/index.html> (last visited Aug. 24, 2001).

244. The Florida Supreme Court required that the Secretary of State accept late filed returns because an erroneous reading of Florida law regarding the definition of an "error in vote tabulation" had delayed recounts. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1290 (Fla. 2000) ("As a result of this opinion, Palm Beach County, and potentially other counties, were thwarted in their efforts to complete the manual recount."). As the Florida Supreme Court explained on remand, its adjustment in certification timetables under Florida law only affected the November 8, 2000 election and did not have any implications for future Florida elections. See *id.* at 1290 ("The November 26, 2000 date was not a new "deadline" and has no effect in future elections.").

the concurrence's view that the Florida Supreme Court's interpretation of the Florida Election Code was "absurd."²⁴⁵ Both the United States Supreme Court and the Florida Supreme Court called for legislative revision, which would obviate future judicial intervention in similar cases.²⁴⁶

The United States Supreme Court's refusal to permit further recounts, like the Florida Supreme Court's initial order permitting them and its subsequent order requiring them, was narrowly grounded. Bush's partisans maintained that "machines are neither Republican nor Democrat,"²⁴⁷ and a trio of the Court's Justices found it "absurd" that any ballot, which a properly functioning machine does not read, might be a "legal vote" under Florida law.²⁴⁸ Four dissenters disagreed.²⁴⁹ Justices Kennedy's and O'Connor's views on this matter are unclear, though the per curiam opinion which included

245. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, opined:

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

Bush, 531 U.S. at 119 (Rehnquist, C.J., concurring).

The majority did not reach this conclusion, stating instead: "For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition." *Id.* at 105. Professor Richard Epstein defended the concurring views. See Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001). Other scholars strongly disagree. See Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, 48 FED. LAW. 27 (2001).

246. See *Harris*, 772 So. 2d at 1291-92 ("We decline to rule more expansively in the present case, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it, the Legislature."); see also *infra* note 250 and accompanying text.

247. Former Secretary of State James Baker, Bush's emissary in Florida, maintained throughout: "Machines are neither Republicans nor Democrats, and therefore can be neither consciously nor unconsciously biased." See, e.g., Bill Sammon, *Bush Files Lawsuit to Block Third Count in Florida: Polls Favor Concession After All Returns In*, WASH. TIMES, Nov. 12, 2000, at C1.

248. See *Bush*, 531 U.S. at 119 (Rehnquist, C.J., concurring).

249. *Id.* at 123 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 135 (Ginsburg, J., dissenting); *id.* at 144 (Breyer, J., dissenting).

them found it likely that “legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”²⁵⁰ Without a looming December 12 deadline, a majority of the Court, comprised of the four dissenters and the silent members of this per curiam opinion, might well have allowed a manual recount to proceed.²⁵¹ However, on the evening of December 12 when the Court issued its opinion, it was “evident that any recount seeking to meet the December 12 date [would be] unconstitutional.”²⁵² Thus, under the specific facts and circumstances of this election only, a 5-4 majority reversed the judgment of the Florida Supreme Court.²⁵³ From such a fractured Court, the value of the *Bush* decision toward clear equal protection jurisprudence is minimal at best.

Morris reminded Georgians of several features of the electoral process which sound odd to twenty-first century ears. Probably the most obvious is that states do not have to elect their officers by popular vote, even for an office as important as the governor. A state can elect a governor by appointment or through a vote of the state legislature.²⁵⁴ Similarly, the *Bush v. Gore* episode reminded Americans that state legislatures may appoint presidential electors without reference to an election, notwithstanding contrary state constitutional protections of the right to vote.²⁵⁵ *Morris* demonstrated

250. *Id.* at 104 (per curiam). In July 2001, a Commission, co-chaired by former Presidents Carter and Ford, issued recommendations for improvements in balloting, which included uniform closing times, and statewide balloting standards. See The National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, Aug. 2001, at 9, available at http://www.reformelections.org/data/reports/99_full_report.php.

251. Justices Souter and Breyer would have required that the Florida Supreme Court (or perhaps Secretary Harris) elaborate in more detail uniform ballot inspection and sorting criteria to identify a “legal vote” based on the “intent of the voter.” *Bush*, 531 U.S. at 134-35 (Souter, J., dissenting).

I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Id.; see also *id.* at 158 (Breyer, J., dissenting) (“I would repair the damage as best we now can, by permitting the Florida recount to continue under uniform standards.”).

252. *Id.* at 110.

253. See *id.* at 110-11.

254. See *supra* note 151 and accompanying text.

255. See *supra* notes 184-85 and accompanying text.

that even where a popular election is used, the election may not produce a “winner.”²⁵⁶ As a practical matter, *Bush* did the same.²⁵⁷ In *Morris*, Georgians learned that an alternative procedure after the election has “failed” may end up awarding the office to a candidate who did not receive the most votes.²⁵⁸ In *Bush*, Americans were reminded of this prospect when the Court halted further inquiry into the Miami-Dade ballots.²⁵⁹ Had Gore “won” the recount, the United States Congress also might have reminded America that at least one alternative presidential election procedure provided for in the United States Constitution is legislative election.²⁶⁰ Both states and the nation can “get around” the “one man, one vote” doctrine in elections by not providing a popular election at all and substituting instead some indirect means of election.²⁶¹

In 1966, to those who read and thought about it, *Morris* may have implied that the United States Supreme Court had begun to limit its role in state elections and politics. At first glance, it appeared a retreat from the Court’s interventionist attitude in *Gray* and *Wesberry*.²⁶² In *Morris*, the Court was not willing to dictate to a state how many

256. See *supra* note 105 and accompanying text.

257. See *supra* notes 2-7 and accompanying text.

258. See *supra* notes 133-37 and accompanying text.

259. See *supra* note 6 and accompanying text. Of course, even if Bush did win Florida, good arguments remain that he did not win the most votes nationwide. This “exception” to “one man, one vote” continues to be controversial in some quarters. See, e.g., Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1158 (1993); Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation’s Malapportioned, Undemocratic Presidential Election System*, 77 MARQ. L. REV. 201 (1994); Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526 (2001); Drash, *supra* note 218 (“With the issue hot among constituents, a few legislators, including New York senator-elect Hillary Rodham Clinton, have begun calling for the Electoral College’s abolition.”).

260. See U.S. CONST. amend. XII.

The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if 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.

Id.

261. See *supra* notes 156-65 and accompanying text.

262. See *supra* notes 66-92.

elections or how much democracy is required.²⁶³ In 2000, to some who read and think about it, *Bush* similarly might imply that the United States Supreme Court is more willing to intervene in state-run elections and politics. At first blush, *Bush* appears an expansion of the Court's interventionist attitude in *Gray* and *Wesberry*.²⁶⁴ More broadly, three "conservative" members of the Court seemed willing to dictate to a state the appropriate separation of powers between its legislative, executive, and judicial branches.²⁶⁵ Some might perceive this as a retreat from the Court's recent deferential attitude toward the States.²⁶⁶

The aftermath of *Morris* counsels caution regarding such speculation. Scholars will search in vain through the opinions of the state and federal courts and the briefs of the parties in the 2000 election dispute for any reference to *Morris*.²⁶⁷ The decision does not appear to have been viewed as relevant legal precedent. It is no longer of direct relevance in Georgia, either. The Georgia Constitution has been amended, and life goes on.²⁶⁸ Perhaps *Bush* will suffer the same fate. *Bush* does not seem an important legal precedent for Article II, as the Chief Justice only garnered three votes for his bold attempt to arbitrate Florida's separation of powers in the presidential election context.²⁶⁹ It may not even be very important to equal protection, with its fractured holding turning on such unusual fact-specific circumstances.²⁷⁰ Consequently, Congress and the state legislatures can abolish punch-card ballot systems, and life will go on.²⁷¹

263. See *supra* note 144 and accompanying text.

264. See *Siegel v. Lepore*, 234 F.3d 1163, 1190 (11th Cir. 2000) (discussion, in dissent, of infirmities in Florida's electoral system). See generally B.J. Palermo, *Rights Groups Latch onto Bush v. Gore*, NAT'L L.J., May 21, 2001, at A1 ("In lawsuits across the country, civil rights plaintiffs are seeking to use the legal reasoning that put George W. Bush into the White House to attack error-prone balloting procedures.").

265. See *supra* note 245 and accompanying text.

266. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

267. Oddly, there is also no reference to *Morris* in the treatise of Gore's principal Supreme Court counsel. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1978).

268. See *supra* note 220 and accompanying text.

269. See *supra* note 245 and accompanying text.

270. See *supra* notes 247-53 and accompanying text.

271. See *supra* note 250 and accompanying text.

This is not to say, of course, that either *Morris* or *Bush* was insignificant. The “loser” of the popular vote became the officeholder in both cases. After four years, many Georgia progressives viewed Maddox more favorably.²⁷² Lester Maddox even was able to change his image with African-American voters.²⁷³ Perhaps George W. Bush can do the same.²⁷⁴ In both situations, the nation’s highest Court only endorsed the candidate’s method of selection. Maddox got his chance to succeed as Governor. Bush got his chance to be President. What he makes of it depends on what happens now. And, of course, “time and chance happen to them all.”²⁷⁵

272. See *supra* notes 223-226 and accompanying text.

273. See *supra* notes 231-32 and accompanying text.

274. Two of Bush’s first appointments, Secretary of State Colin Powell and National Security Advisor Condoleezza Rice, are prominent African-Americans. See CNN.com, *Bush to Meet With Congressional Leaders, Greenspan* (Dec. 17, 2000), at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/17/bush.cabinet/index.html>. “[W]e know in part, and we prophesy in part.” 1 *Corinthians* 13:9 (New International Version).

275. “I have seen something else under the sun: The race is not to the swift or the battle to the strong, nor does food come to the wise or wealth to the brilliant or favor to the learned; but time and chance happen to them all.” *Ecclesiastes* 9:11 (New International Version).