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# The 2000 Presidential Election: Archetype or Exception?

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# THE 2000 PRESIDENTIAL ELECTION: ARCHETYPE OR EXCEPTION?

Michael C. Dorf\*

WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000. By Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes. New York: Foundation Press. 2001. Pp. iv, 172. Paper. \$9.95.

## I. INTRODUCTION

The day after the Supreme Court's decision in *Bush v. Gore*,<sup>1</sup> a colleague who specializes in tax law approached me with mock sympathy. "It must be very discouraging trying to teach constitutional law," he said, "when it's so obviously made up." This view of the Court's decision remains widely held, at least within the academy and among those who did not vote for President Bush. Unlike many of my fellow Democrats and academic colleagues, however, I see no reason to question the motives of the majority (or dissenting) Justices in *Bush v. Gore*. I certainly do not think that the case casts doubt upon the very possibility of principled constitutional adjudication. Nonetheless, I share the widespread view that the justifications the Court offered for its decision were quite unconvincing, and for that reason I have difficulty believing that the case will, as it were, have legs. *Bush v. Gore* is an important case because of the stakes of the controversy it resolved, not because of the legal principles it announced.

By contrast, Samuel Issacharoff,<sup>2</sup> Pamela Karlan,<sup>3</sup> and Richard Pildes<sup>4</sup> take the case seriously as a source of legal doctrine. They use it as the centerpiece of a legal primer on the difficulties surrounding af-

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\* Vice Dean and Professor of Law, Columbia University School of Law. — Ed. I am very grateful to Benjamin Alpers, Richard Briffault, Neil Buchanan, and Sherry Colb for comments on a draft of this Review, and to Scott Chesin for research assistance. Parts of the Introduction to this Review are adapted from a column that first appeared on Findlaw's Legal Commentary, at <http://writ.findlaw.com> (last visited May 10, 2001).

1. 531 U.S. 98 (2000).

2. Harold R. Medina Professor in Procedural Jurisprudence, Columbia University School of Law.

3. Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School.

4. Professor of Law, New York University School of Law.

ter-the-fact judicial review of election procedures. In its fair and balanced exposition of prior precedent and the legislative history of the key provisions upon which the Supreme Court purported to rely in *Bush v. Gore*, *When Elections Go Bad* provides the Court with all the rope it needs to hang itself.<sup>5</sup>

Yet the book's very structure implies that *Bush v. Gore* reflects the dilemmas that generally and inevitably arise when courts are asked to adjudicate election disputes. It does not. *Bush v. Gore* is *sui generis*. Because of its remarkable role in deciding a remarkable election, however, the case is clearly worth studying closely, apart from any general lessons one might choose to draw from it. Although *When Elections Go Bad* presents the courts as struggling with recurring dilemmas, its real strength is the light it sheds on the performance of the U.S. Supreme Court in the Presidential election of 2000.

In *Bush v. Gore*, the Court's most conservative Justices announced an interpretation of the Equal Protection Clause so broad that, if generally applied, it would sweep aside election procedures in a majority of American states. A manual recount of punch card ballots was held unconstitutional because the statutory phrase "intent of the voter" was deemed insufficiently precise to constrain the discretion of vote counters.<sup>6</sup> Yet three fundamental errors marred the Court's analysis.

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5. But perhaps not all the rope that one might want. In my view, the book edits *Bush v. Gore* a bit too severely. This is my only quibble about the editing, and, happily, the authors will correct the defect in a second edition of *When Elections Go Bad*, already nearly complete as this Review goes to press.

6. 531 U.S. at 105 ("The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the 'intent of the voter.' This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application."). The Florida Supreme Court's holding, *Gore v. Harris*, 772 So. 2d 1243, 1257 (2000) ("[W]e conclude that a legal vote is one in which there is a 'clear indication of the intent of the voter.'"), derived its standard from FLA. STAT. ch. 101.5614(5) (2000) ("No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."). Manual recount statutes are in place in at least twenty-one states other than Florida. See, e.g., CAL. ELEC. CODE § 15627 (West 1996); COLO. REV. STAT. § 1-10.5-102(3) (2000); 10 ILL. COMP. STAT. § 5/24A-15.1 (2000); IND. CODE § 3-12-3-13 (1998); IOWA CODE ANN. § 50.48(4) (1999); KAN. STAT. ANN. § 25-3107(b) (2000); MD. CODE ANN., ELEC. § 13-4 (1957); MASS. GEN. LAWS ch. 54, § 135B (2000); MINN. R. 8235.1000 (West 2001); MONT. CODE ANN. § 13-16-414(3) (1999); NEB. REV. STAT. § 32-1119(6) (1998); NEV. REV. STAT. § 293.404(3) (2000); N.J. STAT. ANN. § 19:53A-14 (1999); 25 PA. STAT. ANN. tit. 25, § 3031.18 (1994); S.D. ADMIN. R. 5:02:09:05(5) (West 2001); TEX. ELEC. CODE ANN. § 212.005(d) (1986); VT. STAT. ANN. § 26011 (1982); VA. CODE § 24.2-802(C) (1950); W. VA. CODE § 3-4A-28(4) (1999); WIS. STAT. § 5.90 (1997-1998). See Respondent's Brief at 41 n.19, *Bush*, 531 U.S. 98 (No. 00-949). In most of these states, "intent of the voter" standards are the norm. See, e.g., IND. CODE § 3-12-1-1; TEX. ELEC. CODE ANN. § 127.130(d)(4), (e) (requiring vote to be counted if "indentation" on chad or other mark indicates clearly ascertainable intent of the voter); *Stapleton v. Bd. of Elections*, 821 F.2d 191 (3d Cir. 1987); *Democratic Party v. Bd. of Elections*, 649 F. Supp. 1549, 1552 (D.V.I. 1986); *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996); *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Hickel v. Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright v. Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981).

First, the majority Justices apparently assumed that the alternative to an imperfect manual recount was a perfect measure of the will of the Florida electorate. Yet intercounty variations in the accuracy with which different forms of balloting recorded voters' intent dwarfed the variations introduced by the ambiguity of the recount standard.<sup>7</sup> The Court brushed aside this concern through pure *ipse dixit*.<sup>8</sup>

Second, the Justices themselves bore substantial responsibility for the Florida Supreme Court's failure to specify substandards for gauging "intent of the voter." In its first foray into the 2000 Presidential election, the U.S. Supreme Court cautioned the Florida Supreme Court that the latter should hew closely to the letter of Florida statutes, lest it be found to usurp the role of the Florida legislature under Article II, section 1, clause 2 of the Constitution and 3 U.S.C. § 5.<sup>9</sup> By the time the case made it back to the U.S. Supreme Court less than a week later, only three Justices were willing to endorse this view,<sup>10</sup> but by then the damage had been done. The Florida Supreme Court had been intimidated into ordering a recount under the unembellished statutory standard of "intent of the voter." This time the Florida court was reversed for failing to gloss the statute. Heads Bush wins; tails Gore loses — or so it appeared.

Third, and perhaps least justifiably, the U.S. Supreme Court determined that the counting had to cease at midnight, December 12, 2000, barely two hours after it issued its decision. The Court located this deadline in what it termed the Florida Supreme Court's statement "that the [state] legislature intended the State's electors to 'participat[e] fully in the federal electoral process,'"<sup>11</sup> by taking advantage of the safe harbor 3 U.S.C. § 5 provides against challenges in Congress. Yet Florida's statutes nowhere stated a preference for the safe harbor deadline over an accurate count, nor did the Florida Supreme Court ever attribute such a preference to it.<sup>12</sup> Even Florida Supreme Court Justice Shaw, who dissented from his court's December 8 decision or-

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7. For example, the optical-scanner vote-counting system used in forty-one of Florida's sixty-seven counties resulted in only a 0.3% undervote rate, compared to a 1.5% rate in counties using punch card ballots. See Brief for Respondent at 43, *Gore*, 531 U.S. 98 (No. 00-949); Pet. App., Exh. A, submitted with petition in *Touchston v. McDermott* (Dec. 8, 2000); *Touchston v. McDermott*, 234 F.3d 1133, 1140 n.16 (11th Cir. 2000).

8. See *Gore*, 531 U.S. at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.").

9. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

10. See *Gore*, 531 U.S. at 112 (Rehnquist, C.J., joined by Scalia and Thomas, JJ.).

11. *Id.* at 113 (per curiam opinion) (quoting *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000)); see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

12. The language quoted by the U.S. Supreme Court appeared in a discussion of the Florida Secretary of State's authority to reject late election returns.

dering manual recounts, later opined that “December 12 was not a ‘drop-dead’ date under Florida law.”<sup>13</sup> Thus, on the question of recount standards, three of the Justices in the 5-4 *Bush v. Gore* majority were unwilling to accord the Florida Supreme Court anything like the deference state courts customarily receive as expositors of state law. On the critical deadline question, however, they were willing to defer to a decision the Florida Supreme Court never made, interpreting Florida statutory text that did not exist.

The high stakes and the unpersuasiveness of the reasons given by the Supreme Court for its decision in *Bush v. Gore* have led many observers to conclude that the case cannot be understood in anything but political terms.<sup>14</sup> By “political,” the Court’s critics do not merely mean that the Justices voted on the basis of their values or ideologies rather than in accord with neutral principles. There are, after all, numerous instances of Justices adopting one principle in one set of cases and its opposite in another. Most prominently, the Court’s conservatives attack judicial activism in the service of reproductive rights,<sup>15</sup> gay rights,<sup>16</sup> and church-state separation,<sup>17</sup> while practicing judicial activism in the service of states’ rights,<sup>18</sup> colorblindness,<sup>19</sup> and associational freedom.<sup>20</sup> And the liberals practice judicial activism in cases involving the first set of issues while attacking it in cases involving the second set.<sup>21</sup> But it is at least possible to articulate a vision of the Constitution that sanctions greater judicial solicitude for one constellation of values than for another. By contrast, in *Bush v. Gore*, the Justices appeared to strain legal logic in the service of a particular candidate for office rather than in the service of a larger constitutional vision.

Many difficult questions of constitutional law have no single, obviously correct answer. Should the limits on Congress’s power be enforceable by courts, and if so, what are those limits? Do courts have

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13. See *Gore v. Harris*, 773 So. 2d, 524 (Fla. 2000). *When Elections Go Bad* does not include the Florida Supreme Court’s response to the U.S. Supreme Court’s remand in *Bush v. Gore*.

14. See 673 *Law Professors Say*, at <http://www.the-rule-of-law.com/statement.html> (last visited July 11, 2001) (accusing the *Bush v. Gore* majority of “acting as political proponents for candidate Bush, not judges”).

15. See *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

16. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

17. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting); *Mitchell v. Helms*, 530 U.S. 793 (2000).

18. See *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Printz v. United States*, 521 U.S. 898 (1997).

19. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

20. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

21. See Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 *RUTGERS L.J.* 741, 746-48 (2000).

the power to enforce rights not expressly spelled out in the Constitution's text, and if so, which rights? (The right to choose abortion? The right to exclude homosexuals from private associations?) Does affirmative action remedy violations of the Equal Protection Clause, or does it actually violate the Clause? In the wake of legal realism, it would be foolish to suggest that anyone could answer such questions without relying in some measure on his or her own somewhat subjective value judgments.

Yet, as I often tell my students as they are studying for exams, the fact that a question has no single right answer does not mean that it has no wrong answers. Constitutional provisions, statutes, and precedents rule out certain results, even as they leave open a range of legitimate results. The constitutionality of some forms of affirmative action and school vouchers are open questions; the constitutionality of slavery and an official church of the United States are not. The problem with *Bush v. Gore* is not that the Court made a poor choice among a range of legitimate options. The problem is that the Court appeared to choose a result from almost completely outside that range. For this reason, the case is an awkward vehicle for exploring the general problem of judicial review of elections, or anything else.

To reiterate, I am not adding my name to the list of those who have accused the Court of partisanship. Who can ever know another's true motives, or even his own? Intriguingly, two of the authors of *When Elections Go Bad* have written separate essays that locate *Bush v. Gore* in lines of cases with a less partisan bent,<sup>22</sup> and undoubtedly the Justices saw themselves as simply performing their duty. Yet the pure heart defense only goes so far. Ultimately, the Court must be judged by its deeds, not its motives.

## II. ORGANIZATION

*When Elections Go Bad* fills a gap in the authors' casebook, *The Law of Democracy*.<sup>23</sup> The latter "focused more on institutional arrangements than on the nuts-and-bolts of casting votes and having them counted" (p. 2). The organization of *When Elections Go Bad* suggests that it is intended either as an extended supplement for a course in election law or as a stand-alone work on the law of the casting, counting, and litigating of votes. But the book's content and its timing — published less than a month after the Supreme Court's rul-

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22. See Pamela S. Karlan, *Nothing Personal: The Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 34 N.C. L. REV. (forthcoming 2001); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

23. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998). A second edition of the principal casebook will be available soon. It incorporates an updated version of *When Elections Go Bad* as a single chapter:

ing in *Bush v. Gore* — make the book especially useful as a tool for understanding the legal issues in the 2000 Presidential election.

Nevertheless, the authors have followed the usual course for case-books, organizing the material thematically. The book consists of a short foreword followed by four chapters: (1) The Federal Interest in Election Procedures; (2) When Should Federal Courts Intervene?; (3) The State Interest in Federal Elections; and (4) Remedial Possibilities for Defective Elections.

Throughout the book, the authors use the 2000 Presidential election to illustrate more general points about election law, but this seems backwards. Ordinarily, the case method of legal instruction uses individual cases to illustrate general propositions, because it is understood that the general propositions are more important than any particular application. Not so here, where one application dwarfs all others. For example, even assuming that punch card ballots remain in use for some substantial period, any future dispute over whether dimpled chads should count as votes is extremely unlikely to have anything like the significance it had in the 2000 Presidential election. The same is true of nearly every hotly contested issue in the postelection controversy.

For telling the legal story of the 2000 Presidential election, a chronological organization might have served better.<sup>24</sup> For one thing, it would have revealed just how much of the problem in Florida was due to the U.S. Supreme Court's mishandling of the case. In light of what came next, the Court's worst move may have been its initial decision to deny *certiorari* on then-Governor Bush's proposed third question: "Whether the use of arbitrary, standardless and selective manual recounts" violates the Fourteenth Amendment.<sup>25</sup> Nearly three weeks elapsed between the *certiorari* denial and the Court's eventual ruling in Bush's favor on just that question.<sup>26</sup> Had the Court handled the case more expeditiously from the start, there might have been time for a recount, even under the Court's stringent standard and made-up deadline.<sup>27</sup>

There is a certain logic to the postelection litigation as presented in *When Elections Go Bad* that belies the wild unpredictability of the postelection litigation process as it was experienced in real time. As I

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24. The second edition will be organized more or less chronologically.

25. *Palm Beach County Canvassing Bd. v. Katherine Harris*, 772 So. 2d 1220 (Fla. 2000), *petition for cert. filed sub nom. George W. Bush v. Palm Beach County Canvassing Bd.*, 2000 U.S. Briefs 836 (LEXIS) (U.S. Nov. 22, 2000) (No. 00-836).

26. *George W. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004, 1004 (2001) ("Petition for writ of certiorari to the Supreme Court of Florida granted on Questions 1 and 2 as presented by the petition.").

27. See Michael C. Dorf, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11.



have just noted, the Court's initial denial of review on the third *certiorari* question was, at the time, a partial defeat for Bush, although by dragging matters out it ended up immensely aiding him. Likewise, when the Florida Supreme Court ruled that Florida Secretary of State Katherine Harris lacked the discretion to exclude delayed returns from the certified total,<sup>28</sup> the decision was viewed as a major victory for Gore.<sup>29</sup> Yet that decision ended up proving ruinous to his case for two reasons. First, by extending the protest phase of postelection challenges, the decision necessarily shortened the contest phase, thus enabling the U.S. Supreme Court to invoke the December 12 "deadline" at a point at which it was too late for anything to be done. Second, in order to find that Harris was obligated to accept late returns, the Florida Supreme Court needed to construe Florida statutes creatively — and its willingness to do so may have led five Justices of the U.S. Supreme Court to view all of the output of the Florida high court with extreme suspicion.<sup>30</sup>

### III. HIGHLIGHTS OF WHEN ELECTIONS GO BAD

The two greatest strengths of *When Elections Go Bad* are the authors' illuminating notes and questions and the primary materials the book collects, including some marvelous tidbits.

My favorite passage is a quotation of Senator Sherman, the principal supporter of the 1886 Electoral Count Act, which includes the now-infamous 3 U.S.C. § 5. Explaining why Congress was the appropriate body to resolve a future dispute of the sort that arose in the Presidential election of 1876, Senator Sherman stated that he had considered lodging this power in the Supreme Court, but concluded that this would be unwise. He presciently explained:

It would be a very grave fault indeed and a very serious objection to refer a political question in which the people of the country were aroused, about which their feelings were excited, to this great tribunal, which after

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28. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1237 (“[W]e conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances.”).

29. See, e.g., Dan Balz & Peter Slevin, *Fla. Justices Say Vote Totals Must Include Hand Recounts: Court Sets Deadline, Overrules Harris*, WASH. POST, Nov. 22, 2000, at A01; Joe Battenfeld & David R. Guarino, *Count On! Court OKs Hand Recounts, Boosting Gore's Chances*, BOSTON HERALD, Nov. 22, 2000, at 001; Jim Drinkard, *Florida Supreme Court Allows Hand Recounts: Momentous Ruling a Victory for Gore: Bush May Appeal*, USA TODAY, November 22, 2000, at 1A; Jan Crawford Greenburg, *Florida Judges Put People's Right to Vote Above All Else*, CHI. TRIB., Nov. 22, 2000, at N1.

30. Another surprising turn of events came after President Bush took office, when one of the early journalist-conducted recounts revealed that he would have won a recount conducted under the Florida Supreme Court's standard, whereas Gore would have won under the standard advocated by Bush, albeit by only three (three!) votes. See Martin Merzer, *Review Shows Ballots Say Bush*, MIAMI HERALD, Apr. 4, 2001, at A1.

all has to sit upon the life and property of all the people of the United States. It would tend to bring that court into public odium of one or the other of the two great parties.<sup>31</sup>

To similar effect is Fourth Circuit Judge Wilkinson's explanation in a 1986 case denying a civil RICO claim for damages brought by unsuccessful candidates for state and federal offices in West Virginia. After noting that the House of Representatives had then recently exercised its power to resolve a dispute concerning the election of one of its members, he stated:

The partisan and acrimonious nature of that debate only reaffirms the wisdom of avoiding judicial embroilment and of leaving disputed political outcomes to the legislative branch. Had the framers wished the federal judiciary to umpire election contests, they could have so provided. Instead, they reposed primary trust in popular representatives and in political correctives.<sup>32</sup>

Through their notes and questions, Issacharoff, Karlan, and Pildes sometimes suggest that they agree with Senator Sherman, Judge Wilkinson, and the original Framers that federal courts should not adjudicate after-the-fact election disputes, except perhaps as a last resort. Yet that proposition is hardly obvious. As Senator Sherman himself observed, even in the nineteenth century, other democratic countries routinely assigned this function to their courts.<sup>33</sup> In modern times, most democracies have seen fit to insulate the electoral process itself from politics by granting extensive powers to independent commissions and courts.<sup>34</sup> As a matter of first-order institutional design, this may well be the better approach.

31. P. 62 (quoting 17 CONG. REC. 817-18 (1886) (statement of Sen. Sherman)).

32. P. 165 (quoting *Hutchinson v. Miller*, 797 F.2d 1279, 1284 (4th Cir. 1986)).

33. P. 62 (quoting 17 CONG. REC. 817-18 (1886) (statement of Sen. Sherman) ("I believe, however, that it is the provision made in other countries.")).

34. Consider four examples, from the dozens that could be cited:

1) Elections Canada is "an independent, non-partisan agency reporting directly to Canada's Parliament." The agency "is . . . responsible for conducting federal general elections, by-elections and referendums." *What We Do*, at <http://www.elections.ca/content.asp?section=eca&document=abo&lang=e&textonly=false> (last modified Nov. 22, 2000).

2) India's 1947 Constitution created the Election Commission of India, an independent body whose members are appointed by parliament, serve for fixed, six-year terms, and are removable only through impeachment. The Commission oversees voter and candidate eligibility, party registration, funding, balloting, and vote counting for the world's largest democracy. See *Election Commission of India*, at [http://www.eci.gov.in/infoeci/about\\_eci/abouteci\\_fs.htm](http://www.eci.gov.in/infoeci/about_eci/abouteci_fs.htm) (last visited July 18, 2001).

3) The Australian Electoral Commission is another independent body charged with the oversight of democratic elections. The Commission

is responsible for conducting all aspects of a national election. It maintains the electoral rolls and enforces the compulsory enrolment; promotes public awareness of electoral and parliamentary matters; conducts research into electoral matters; publishes materials relating to the election procedures; and reports to the Minister on electoral matters. . . . The regulation of elections and election campaigns by the commission is for the purpose of not only producing

As a descriptive matter, however, Issacharoff, Karlan, and Pildes are surely correct. Our Federal Election Commission is a very weak body with jurisdiction limited to enforcement of ineffective campaign finance laws,<sup>35</sup> and, *Bush v. Gore* notwithstanding, Congress, rather than the Supreme Court, has primary responsibility for refereeing disputes over the outcome of federal elections.

This is not to say that American courts previously played no role in resolving elections. State courts in particular played a substantial one, even in federal elections. In its chapter on remedies, *When Elections Go Bad* gives two spectacular examples.

In one, the Massachusetts Supreme Judicial Court examined the punch card ballots in a Congressional primary, counted dimpled chads under an intent-of-the-voter standard, and concluded that the candidate who had trailed by 175 votes after a machine count netted 376 votes, thus winning the election.<sup>36</sup> In another, a California appellate court overruled a trial court because the latter had erroneously approved the inclusion in the total balloting of the vote of one citizen who had recently moved. Because that citizen had testified that he had voted in favor of the contested ballot initiative, his vote was subtracted from the total yes vote. Where the machine count had produced a two-vote defeat of the initiative, and the trial court had converted that re-

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equitable distribution with regard to representation, but also to encourage fairness in the competition process. This involves providing for neutral election officials, enforcing the laws against bribery, and misleading advertisements, and the regulation of financing for elections.

Robert L. Nay, *Australia*, in CAMPAIGN FINANCING OF NATIONAL ELECTIONS IN FOREIGN COUNTRIES, 25, 25-38 (Law Library of Congress ed., 1991) [hereinafter FOREIGN COUNTRIES].

4) Japan's electoral laws are arguably the strongest of any modern democracy, but there is no independent agency charged with enforcing those laws. Sung Yoon Cho, *Japan*, in FOREIGN COUNTRIES, *supra*, at 126 ("Japanese election campaigns, including campaign financing, are governed by a set of comprehensive laws that are the most restrictive among democratic nations."). Japan's courts, however, are given wide latitude to enforce election laws. See The Political Funds Control Law of 1948, Law No. 194 of 1948, as last amended by Law No. 81 of 1982; Public Office Election Law of 1950, Law No. 100 of 1950, as last amended by Law No. 94 of 1988.

35. See BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 2 (1990) ("The FEC's weak enforcement has made the campaign finance laws a fraud on the public."); GREG D. KUBIAK, *THE GILDED DOME: THE UNITED STATES SENATE AND CAMPAIGN FINANCE REFORM* 229 (1994); Carol Mallory & Elizabeth Hedlund, *CENTER FOR RESPONSIVE POLITICS, ENFORCING THE CAMPAIGN FINANCE LAWS: AN AGENCY MODEL* 1-5 (1993) (criticizing current FEC enforcement for weak and ineffective procedures and presenting alternative model campaign finance enforcement agency); Colloquy, *Election Campaign Finance Reform: Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. AM. U. 223 (1994) (discussing shortcomings of FEC processes); Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279 (1991) (criticizing current FEC compliance mechanisms and providing recommendations for improving FEC enforcement); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEXAS L. REV. 1705, 1711 (1999).

36. See *Delahunt v. Johnston*, 423 Mass. 731 (1996), *reprinted at* pp. 126-28.

sult into a one-vote victory, the appeals court found a tie, meaning the initiative failed.<sup>37</sup>

Although elections this close are no doubt unusual, it is precisely the close elections that lead to calls for recounts, and Issacharoff, Karlan, and Pildes describe the Massachusetts case, at least, as “fairly typical” (p. 126). They also describe manual recounts performed by the United States Senate that aimed to discern “the true intent of the voter,” including a partial recount in 1974 (p. 27). Given such precedents, the *Bush v. Gore* majority’s consternation in the face of unguided discretion in the counting of punch card ballots is rather mystifying. Were all of these prior recounts under similarly general criteria also unconstitutional? The Court did not say.

While much of the material presented in *When Elections Go Bad* undermines the arguments made by the Supreme Court in *Bush v. Gore*, the book opens with a line of precedent that arguably supports the Court. The first principal case is a 1995 Eleventh Circuit decision in which the court found a violation of due process where, in an election for state offices, an Alabama court counted absentee ballots that had not been notarized or properly witnessed as required by Alabama election law.<sup>38</sup> The court ruled that such a “retroactive change” violated “fundamental fairness.”<sup>39</sup> As Issacharoff, Karlan, and Pildes observe, this very broad view of the role of federal courts with respect to state election law explains “why lawyers for the Bush campaign pressed so ardently to draw the Eleventh Circuit into the Florida dispute” (p. 10). Yet even as the case casts light on the Bush litigation strategy, it poses a puzzle about the Supreme Court’s behavior: Why did those Justices who ruled for Bush rely on unprecedented (and unpersuasive) views of equal protection and Article II, when they might have invoked seemingly apposite due process precedent from the very circuit that encompasses Florida?

Through their questions and comments, Issacharoff, Karlan, and Pildes suggest an answer: the Eleventh Circuit’s own rule would be untenable if generally applied because it would threaten to federalize every question of state election law. In the Alabama case itself, the federal district court and Eleventh Circuit detected a clear break with prior consistent practice; by contrast, prior to the 2000 election, Florida’s election laws had not been applied to a statewide electoral contest in over eighty years (pp. 17-20). Thus, a federal court judgment that Florida had departed from its own laws would have rested on nothing but a disposition to read Florida statutes differently from

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37. See *Escalante v. City of Hermosa Beach*, 241 Cal. Rptr. 199 (1987), reprinted at p. 128.

38. See *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), reprinted at pp. 11-15.

39. *Id.* at 581, reprinted at p. 12.

the Florida courts. As Issacharoff, Karlan, and Pildes ask rhetorically, “if the federal courts can do no more than simply issue their own interpretations of how best to read state law, can such a difference of view ever rise to the level of the ‘patent’ unfairness that is required for a federal constitutional interest in the process?” (p. 20).

This is a fair criticism. A U.S. Supreme Court opinion relying on the Eleventh Circuit’s due process rule would have been unjustifiable. Yet it would have been no more unjustifiable than the actual decision in *Bush v. Gore*, for the equal protection standard the majority announced also threatens to inject a federal issue into every state election. Similarly, it is no less arbitrary for a federal court to substitute its reading of state law for that of the state courts under the nominal auspices of Article II — as three Justices did in *Bush v. Gore* — than under the Due Process Clause.

Perhaps the majority Justices relied on Article II and equal protection rather than due process because of the haste with which they needed to decide the case and issue their opinion. *Bush v. Gore* was handed down less than two days after it was argued. By way of comparison, even working at lightning speed, Issacharoff, Karlan, and Pildes took nearly two weeks from the date of the decision until they submitted their final manuscript to the publisher, whereas I spent a leisurely two and a half months working on this Essay, and the editors of the *Michigan Law Review* spent a still longer period editing it and checking citations. Given this upside-down allocation of time, it is not surprising that the Court’s chosen legal theories do not survive close scrutiny.

In any event, to fault the Supreme Court in *Bush v. Gore* for picking one rather than another unconvincing doctrinal explanation for its decision misses the point. By December 12, 2001, five Justices apparently believed that the Florida Supreme Court was determined to throw the nation into chaos rather than to let a Bush victory stand, and that they alone could rescue us. But the Court’s conventions did not permit it to invoke such frankly pragmatic considerations, leaving it only inadequate doctrinal grounds to justify its action.<sup>40</sup>

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40. I do not mean to suggest that the Court’s hypothesized concern about stability was warranted. Had a recount left Bush in the lead, that would have been the end of the matter. Had Gore overtaken Bush, political pressure might have forced a Bush concession, and if it had not, there is no reason to think that Congressional resolution of the election would have threatened the nation’s stability. My point is that if the Court was “taking a bullet” for the country, it should have said so. *But cf.* RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001) (justifying *Bush v. Gore* on pragmatic grounds wholly unexpressed by the *per curiam* or concurring opinion).

## IV. LESSONS

What lessons can we learn from the 2000 Presidential election? In the heat of the moment, many legal commentators viewed the post-election saga as merely confirming their prior views.

For Cass Sunstein, the Supreme Court's initial unanimous per curiam remand to the Florida Supreme Court was a wisely "minimalist" decision.<sup>41</sup> This was a spectacularly poor assessment. By papering over internal divisions with an opinion that falsely suggested there were five Justices prepared to base their decision on a nonretroactivity principle rooted in Article II and 3 U.S.C. § 5, the minimalist character of the opinion wasted precious time and trapped the Florida high court.<sup>42</sup>

For Jeffrey Toobin, the postelection litigation confirmed his view that the legal system and the political system had merged — for the worse.<sup>43</sup> Toobin had previously identified that merger as the root problem with the events leading up to President Clinton's impeachment.<sup>44</sup> Yet in an important respect, the phenomena are almost polar opposites. In the impeachment saga, the Supreme Court stood by while politically motivated actors used the legal system for political gain.<sup>45</sup> In the postelection litigation, the Supreme Court prevented both the state legal system and the state and national legal and political systems from performing the roles assigned to them. Far from the culmination of a longstanding trend, *Bush v. Gore* was a shock to many of the most seasoned Court-watchers precisely because it appeared to be political. Had law and politics really already merged in the way that Toobin claims, *Bush v. Gore* would have been understood as simply business as usual.

In some sense, of course, *Bush v. Gore* was consistent with prior Rehnquist Court opinions. As Larry Kramer wrote in the wake of the Court's 5-4 decision to stay the manual recount but before its final ruling, "conservative judicial activism is the order of the day. The Warren Court was retiring compared to the present one."<sup>46</sup> The point

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41. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996); see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *The Broad Virtue in a Modest Ruling*, N.Y. TIMES, Dec. 5, 2000, at A29; Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

42. See *supra* text accompanying notes 9-10; see also Dorf, *supra* note 27.

43. See Jeffrey Toobin, *The Counting House: Have the Presidency and Litigation Become Permanently Entwined?*, NEW YORKER, Dec. 4, 2000, at 42.

44. See JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* (1999).

45. See *Clinton v. Jones*, 520 U.S. 681 (1997).

46. Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33.

is a fair one,<sup>47</sup> but neither the initial stay nor the ultimate disposition in *Bush v. Gore* was conservative in the conventional sense. By contrast, some of the Court's most activist, conservative decisions have actually frustrated the institutional interests of the Republican Party. Most prominently, the majority-minority districts that were invalidated by *Shaw v. Reno*<sup>48</sup> and its progeny were frequently created with the blessing of southern Republicans who hoped to "pack" African Americans into such districts, thereby diluting the strength of the Democratic Party in the remaining districts.<sup>49</sup> Whatever one thinks of the Rehnquist Court's activist pursuit of colorblind electoral districting, it is activism in the service of a principle, not a party.

The authors of *When Elections Go Bad* do not entirely escape the tendency of other commentators to see in the 2000 Presidential election a confirmation of their previously held views. The tendency is less pronounced, however, because the substantive views of the book's authors — who undoubtedly disagree among themselves on some key questions — are not entirely obvious. Indeed, writing in these pages two years ago, Burt Neuborne criticized Issacharoff, Karlan, and Pildes for failing to develop a normative account of democracy.<sup>50</sup>

Yet, as Neuborne's own review illustrates, the authors' first book did embrace a more limited theory, one of the proper role of courts in policing the democratic process. Neuborne thought that too much of the first book was devoted to the legal mechanisms by which minority voters may challenge electoral practices.<sup>51</sup> This focus on the rights of minority voters is hardly disproportionate given the theory implicit in both *The Law of Democracy* and *When Elections Go Bad* — broadly speaking, the theory of the *Carolene Products* footnote,<sup>52</sup> the Warren

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47. In my view, conservative and liberal judicial activism is the order of the day. See Michael C. Dorf, *They Are All Activists Now*, at <http://writ.news.findlaw.com/dorf/20000501.html> (May 1, 2000).

48. 509 U.S. 630 (1993).

49. See ISSACHAROFF ET AL., *supra* note 23, at 582: ("Republicans were delighted to pack pro-Democratic minority voters into new majority-minority districts, thereby drawing away from the electoral strength of Democratic incumbents."). For a more cynical view of most of the output of the Rehnquist Court, see Mark V. Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990) (reviewing SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* (1989)) ("One could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the United States Reports, but rather at the platforms of the Republican Party.").

50. Burt Neuborne, *Making the Law Safe for Democracy: A Review of "The Law of Democracy Etc."*, 97 MICH. L. REV. 1578, 1589-90 (1999) (book review) (complaining that the book "purports to deal with the law of democracy without engaging in a normative inquiry as to what conception of democracy the courts should seek to defend").

51. See *id.* at 1584-85 (discussing the pre-clearance mechanism of section 5 of the Voting Rights Act).

52. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Court, and John Hart Ely's *Democracy and Distrust*.<sup>53</sup> In a nutshell, courts can and should take action to assist democracy, but only when the democratic process cannot cure its own defects. And that circumstance is most likely to obtain when political divisions reflect racial ones.

Seen from this vantage point, the Supreme Court's decision in *Bush v. Gore* was wrong because it was unnecessary. The Electoral Count Act meant that Congress could have resolved the matter without judicial interference. Although Issacharoff, Karlan, and Pildes do not say so explicitly, their account also suggests that the Florida Supreme Court erred in ordering manual recounts given they believe that the Florida legislature was prepared to resolve the issue.

#### V. AN ALTERNATIVE INTERPRETATION

Like the classical process theory of *Carolene Products*, Earl Warren, and John Hart Ely, the implicit process theory of *The Law of Democracy and When Elections Go Bad* envisions a circumscribed role for judges. It is not that Issacharoff, Karlan, and Pildes trust politicians. As they state very early in *When Elections Go Bad*, "[t]here is little reason to believe that partisan officials will cease to be that if they are given the chance to interpret or even alter the rules of the game after the election has occurred" (p. 3).

The problem for the authors of *When Elections Go Bad* is that "just as the partisan effects of all potential courses of action are known to partisan political officials, so too are they known to judges who must adjudicate electoral challenges. The adjudication of claims that will alter the outcomes of high-profile elections threatens significant damage to the integrity of courts" (p. 3). Given the choice between two flawed sets of institutions, why not have a strong presumption that matters should be left to the politicians, whose judgments are at least subject to review in the political process? That rhetorical question is the subtext of *When Elections Go Bad*.<sup>54</sup>

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53. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Of course, the authors of *When Elections Go Bad* disagree with Ely on various particulars, see, e.g., Samuel Issacharoff & Pamela S. Karlan, *Commentary: Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998), but on the whole their work is sympathetic to the project of selectively using judicial power to bolster democracy. See, e.g., ISSACHAROFF ET AL., *supra* note 23, at 11-12 ("When politicians who have been elected under one set of rules are asked to change the existing rules, there might be good reason to distrust their incentives."); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 709-10 (1998) (extending "Ely's pioneering work").

54. The authors' skepticism of federal judicial intervention is most apparent in their notes and questions on the demise of abstention doctrines in federal court decisions involving elections. Pp. 57-62.



But do the facts of the 2000 Presidential election controversy really support the view that politicians are no worse than judges in refereeing electoral disputes? From the very beginning of the Florida recount imbroglio, elected officials consistently took whatever positions would advance the interest of their party's candidate. The Democratic Attorney General supported the Gore campaign.<sup>55</sup> The Republican Secretary of State supported the Bush campaign: first she denied that she had any discretion to accept late votes;<sup>56</sup> then when instructed that she had such discretion, she categorically declined to exercise it;<sup>57</sup> and finally, when instructed that the categorical denial was abusive, she rigidly enforced a deadline so as to minimize Gore votes.<sup>58</sup>

More ominously, the Florida legislature was fully prepared to take a party-line vote that would have given the state's electors to Bush, regardless of the result of any court-ordered recount.<sup>59</sup> We do not know to a certainty that Congress would have acted in a similarly partisan

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55. See, e.g., Don Van Natta, Jr. & David Barstow, *Counting the Vote: The Canvassing Boards: Election Officials Focus of Lobbying From Both Camps*, N.Y. TIMES, Nov. 18, 2000, at A1 (“[I]n Volusia County, the only Florida county to complete a full hand recount, the state’s attorney general, Robert A. Butterworth, placed an unsolicited phone call a week ago to elections officials, advising them that they had the legal authority to go forward with a manual recount.”); Mireya Navarro, *Counting the Vote: The Attorney General: A Staunch Gore Ally Influences Florida Ballot Fight*, N.Y. TIMES, Nov. 16, 2000, at A27.

56. Press Release, Katherine Harris, Statement of Katherine Harris, Secretary of State (Nov. 13, 2000), available at <http://election2000.stanford.edu/fl11-14deadline.pdf> (last visited May 11, 2001) (“In order to effectuate the public’s right to clarity and finality, the law unambiguously states when the process of counting and recounting the votes cast on election day must end.” Ms. Harris claimed that the only discretion provided by the law is for emergencies such as hurricanes. An unusually close election, she said, is not an emergency.); see also Alan Judd, *Florida Official Refuses to Extend Vote Deadline: Gore Team Decries “Arbitrary” Decision*, ATLANTA J. & CONST., Nov. 13, 2000, at 1A.

57. Katherine Harris, Remarks denying county requests to add hand-counted ballot totals (Nov. 15, 2000), available at [http://election2000.stanford.edu/harris11\\_15\\_deny.html](http://election2000.stanford.edu/harris11_15_deny.html) (last accessed May 11, 2001); see also Richard L. Berke, *Counting the Votes: The Overview: Republican Rejects Offer that 2 Sides Accept a Count by Hand*, N.Y. TIMES, Nov. 16, 2000, at A1 (“Ms. Harris . . . announced . . . that it was ‘my duty under Florida law’ to reject requests from several counties to update their totals.”).

58. After ten days of counting over 400,000 ballots, Palm Beach County submitted its amended returns to Secretary Harris 78 minutes late. She refused to accept them, in a move characterized by canvassing board chairman Charles Burton as a “slap in the face.” Todd J. Gillman, *Palm Beach Comes up Just Short: Recount 78 Minutes Late: Vote Rejection Called “Slap,”* DALLAS MORNING NEWS, Nov. 27, 2000, at 1A; Jeff Shields & Brad Hahn, *Palm Beach County Misses Deadline*, FT. LAUDERDALE SUN-SENTINEL, Nov. 27, 2000, at 1A.

59. JOHN MCKAY & TOM FEENEY, THE FLORIDA LEGISLATURE JOINT PROCLAMATION (Dec. 6, 2000), available at <http://election2000.stanford.edu/proclamation.pdf> (last accessed May 11, 2001); see also David Barstow, *Contesting the Vote: The Florida Legislature: Florida Lawmakers Moving to Bypass Courts for Bush: Judge Bars a Quick Recount*, N.Y. TIMES, Nov. 29, 2000, at A1. Candidate Bush’s brother, Governor Jeb Bush, soon expressed his support for the plan. David Barstow & Somini Sengupta, *Contesting the Vote: The Florida Legislature: Florida Governor Backs Lawmakers’ Efforts to Bypass Courts and Select Electors*, N.Y. TIMES, Nov. 30, 2000, at A27 (quoting Florida Governor Bush saying it would be an “act of courage” for the state legislature to name its own slate of electors).

fashion, but perhaps that is only because the Supreme Court denied Congress the opportunity.

Although hardly above reproach, in general the courts did not act in quite so partisan a fashion as the politicians during the 2000 Presidential election controversy. The Democratic trial judge who initially ruled that Secretary of State Harris had the discretion to certify late returns handed the Bush campaign a victory by subsequently ruling that she did not abuse her discretion in excluding those returns.<sup>60</sup> The heavily Democratic Florida Supreme Court was accused of partisanship for its decision reversing that judgment,<sup>61</sup> but the Florida Supreme Court itself later split on whether to order manual recounts in the contest phase, and that split was not on party lines.<sup>62</sup> Even the Florida Supreme Court Justices who sided with Gore ordered a remedy that was hardly certain to result in a victory for him — manual counting of “under-votes” in counties that went for Bush as well as those that went for Gore.<sup>63</sup>

It is also worth noting that the U.S. Supreme Court Justices did not divide strictly on party lines. Republican appointees Stevens and Souter sided with Gore. In addition, although he would have ruled for Gore with respect to the remedy, Democratic appointee Breyer found some merit in Bush’s equal protection argument.<sup>64</sup> But even if one were willing to condemn the Court’s majority for partisanship in *Bush*

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60. Compare *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713 (Fla. Cir. Ct. Nov. 14, 2000) (order granting in part and denying in part motion of temporary injunction), available at <http://election2000.stanford.edu/McDermottHarris.pdf> (last accessed May 11, 2001), with *McDermott v. Harris*, No. 00-2700, 2000 WL 1714590 (Fla. Cir. Ct. Nov. 17, 2000) (order denying emergency motion to compel compliance with and for enforcement of injunction), available at <http://election2000.stanford.edu/2700af.pdf> (last accessed May 11, 2001).

61. Bush spokesman (and former Secretary of State) James Baker was particularly harsh: “Two weeks after the election, [the Florida Supreme Court] has changed the rules, and has invented a new system for counting the election results,” he said at a news conference on November 22. Remarks by James Baker (Nov. 22, 2000), available at [http://www.foxnews.com/election\\_night/112200/baker\\_statement.sml](http://www.foxnews.com/election_night/112200/baker_statement.sml) (last accessed May 11, 2001) (criticizing Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000) (per curiam), reprinted at pp. 78-89).

62. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000). The Florida Supreme Court split 4-3, with Justices Anstead, Pariente, Lewis, and Quince in the majority, see *id.* at 1247, and Chief Justice Wells, and Justices Harding and Shaw dissenting. See *id.* at 1262 (Wells, C.J., dissenting); *id.* at 1270 (Harding, J., dissenting). All seven justices were appointed to the Florida Supreme Court by Democratic governors: Chief Justice Wells and Justices Harding, Anstead, Pariente, Lewis, and Quince by Gov. Lawton Chiles, and Justice Shaw by Governor Bob Graham. (Quince’s appointment was also sponsored by Governor Bush, whose term began shortly after the appointment.)

63. *Gore*, 772 So. 2d at 1247. The U.S. Supreme Court subsequently criticized the Florida Supreme Court for not also ordering recounts of “overvotes.” See *Bush v. Gore*, 531 U.S. 98, 109 (2000).

64. *Bush*, 531 U.S. at 145-46 (Breyer, J., dissenting) (“The majority’s [equal protection] concern does implicate principles of fundamental fairness . . . I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem.”).

*v. Gore*, it would not follow that courts lack any systematic advantage over politicians. Federal judges are insulated from political pressure by life tenure and salary protection, while independence is a cardinal judicial virtue at all levels. Of course, any institutional arrangement can be subverted by human failings. The key question is what are the odds.

## VI. CONCLUSION

The United States Constitution was flawed from the outset — not just morally flawed because it condoned slavery, but institutionally incomplete because of the Framers' failure to anticipate the development of political parties. The two-party system arose in the United States partly as a response to Duverger's Law,<sup>65</sup> but also to fill a practical need. The Madisonian strategy of dividing power to prevent tyranny carries with it a well-known concomitant danger of government paralysis,<sup>66</sup> as each institution frustrates the will of the others. By facilitating coordination among the branches and levels of government, political parties reduce the risk of gridlock.<sup>67</sup>

The original Constitution's mechanism for selecting a President quickly broke down in the face of political parties, leading to the deadlocked election of 1800. Although the Twelfth Amendment remedied the particular problem that had caused the deadlock, political parties continue to fit awkwardly in our constitutional system. This awkwardness is apparent in cases involving the institutional interests of parties as such,<sup>68</sup> as well as in the 2000 Presidential election controversy.

If elected bodies are assigned the task of adjudicating high-stakes partisan contests, there is a substantial risk that the political parties will capture the organs of government, converting the latter into mere agents of the former. Even if varied constituencies and shifting coalitions lead to bipartisan compromise on other issues, with respect to after-the-fact adjudication of close elections, party discipline will be the order of the day. The risk of capture appears to have been realized

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65. Maurice Duverger postulated "that systems in which office is awarded to a candidate who receives the most votes . . . in a single-ballot election will produce a two-party political system, rather than a multi-party one." ISACHAROFF ET AL., *supra* note 23, at 715.

66. See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 200 (1908) ("[T]he danger of coordinate and coequal powers such as the framers of the Constitution had set up was that they might at their will pull in opposite directions and hold the government at a deadlock which no constitutional force could overcome.").

67. Larry Kramer nicely illustrates how political parties coordinate policy between the state and federal levels. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

68. For example, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), self-declared textualist Antonin Scalia found himself relying on an unenumerated right of political association to invalidate California's blanket primary.

in Florida, and likely would have also been realized at the national level, if given the chance.

The resulting battle of institutions was not, however, a classic instance of Madisonian checks and balances, but more nearly its opposite. The Madisonian system of checks and balances depends upon government bodies pursuing discrete institutional interests rather than the interest of whichever party happens to control a given body. For example, even when the same party controls the Senate and the House, legislation frequently passes one body but founders in the other, because House and Senate members are elected for different terms, serve different constituencies, and develop cross-party working relationships with different colleagues. When parties capture the institutions, however, the only question that matters is which party controls the institution with the final move. In the case of the 2000 Presidential election, the answer to that question was almost certainly the Republican Party.<sup>69</sup>

That answer is not in itself distressing, except to partisans. If party loyalty is ever going to take priority over institutional loyalty, it will be during partisan political contests. The problem arises because neither our Constitution nor our laws expressly provide for a neutral referee of partisan political contests.

Given this gap, it was understandable that a clear majority of Americans thought that the United States Supreme Court was the only institution with the detachment and prestige to resolve the election dispute impartially.<sup>70</sup> That it proved incapable of doing so con-

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69. The Electoral Count Act provides that in the event that a state names more than one slate of Presidential electors, each House of Congress must make a choice. *See* 3 U.S.C. § 15 (2000). The Republican-controlled House almost certainly would have chosen the Bush electors while, assuming strict party discipline, the evenly divided Senate would have chosen the Gore electors by virtue of Gore's own tie-breaking vote. At that point, the election would have turned on which slate of electors bore the signature of the Florida executive, Jeb Bush. *See id.*

70. In a Gallup poll conducted between August 29 and September 5, 2000, 62% of Americans claimed they "approve[d] of the way the Supreme Court is handling its job." Forty seven percent of those surveyed claimed to have a "great deal" or "quite a lot" of confidence in the Supreme Court, compared to 46% for organized religion, 64% for the U.S. Military, 24% for Congress, 42% for the presidency, and 36% for the television news. *Public Opinion of the Supreme Court*, GALLUP NEWS SERVICE, at <http://www.gallup.com/poll/releases/pr001201b.asp> (Dec. 1, 2000). Interestingly, Gallup noted a sharply increased partisan divide in public perception of the Supreme Court following the decision in *Bush v. Gore*:

Those who identify as Democrats showed a slight drop in confidence in the Supreme Court between June and December, from 44% with 'a great deal' or 'quite a lot' of confidence during June, to 40% during December. Independents also showed a very slight loss of faith in the Supreme Court as well, from 48% to 45%. Republicans, however, showed a large increase in confidence, from 48% during June to 67% during the days following the Supreme Court's decision in *Bush v. Gore*. In short, views of the nation's highest court became more politicized — at least in the short term — during the time period in which the court made the highly controversial decision that gave George W. Bush the presidency.

vincingly is not, as *When Elections Go Bad* perhaps implies, the product of some institutional defect. The Supreme Court has, at other important junctures in history, played an important role in safeguarding American democracy.<sup>71</sup> It can and will do so again. In the meantime, let us not throw out the baby with the bathwater.

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Jeffrey M. Jones, *Opinion of the U.S. Supreme Court has Become More Politicized*, GALLUP NEWS SERVICE, at <http://www.gallup.com/poll/releases/pr010103b.asp> (Jan. 3, 2001).

71. The unanimity of the desegregation decisions provides one important example. *See, e.g., Brown v. Bd. of Educ.* 347 U.S. 483 (1954). The Nixon tapes case is another. *See United States v. Nixon*, 418 U.S. 683 (1974).