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## Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors

Peter M. Shane  
pms1@pms1.com

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# FLORIDA STATE UNIVERSITY LAW REVIEW



DISAPPEARING DEMOCRACY: HOW *BUSH V. GORE* UNDERMINED  
THE FEDERAL RIGHT TO VOTE FOR PRESIDENTIAL ELECTORS

*Peter M. Shane*

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DISAPPEARING DEMOCRACY: HOW *BUSH V. GORE*  
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 FOR PRESIDENTIAL ELECTORS

PETER M. SHANE\*

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Imagine, as you may already wish, that it is 2004. Despite flickers of opposition from Senator John McCain and former Nebraska Senator Robert Kerrey, George W. Bush and Al Gore appear to have sown up their respective renominations by mid-spring. In some state with, say, twenty-five electors, the Democratic legislature and the Democratic governor are worried. Polls predict a razor-thin Gore victory in the state, but, if voting machines malfunction or if inclement weather depresses the senior citizen vote, the state could be lost to Bush. No one wants a repeat of Florida’s 2000 travails. The solution? The legislature enacts a bill, eagerly signed by the Governor, providing that the state legislature itself, by a majority vote of each house, shall choose the state’s electors in 2004 for President and Vice President of the United States.

Under *Bush v. Gore*,<sup>1</sup> my hypothetical statute is constitutional. A state legislature’s authority to disenfranchise the entire citizenry is the very premise with which the majority in *Bush v. Gore* commences its legal analysis.<sup>2</sup> But this premise is wrong. Its cavalier utterance by the majority exemplifies one of the opinion’s most extraordinary aspects, its obliviousness to the values of democracy.

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\* Distinguished Service Professor of Law and Public Policy and Director of the Institute for the Study of Information Technology and Society, H. John Heinz III School of Law and Public Policy, Carnegie Mellon University; Professor of Law, University of Pittsburgh School of Law.

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

2. *Id.* at 104.

On any account, *Bush v. Gore* marked an astonishing event in the history of democratic governance. Never before in the history of democratic government has an unelected judicial organ chosen the head of state by preventing the counting of votes. Such an event cuts entirely against the grain of our political history. The past 200 years have witnessed a broadening of the franchise in the United States (and throughout the world) in terms of both eligibility and applicability. The right to vote has become central to our conception of citizenship. It is hard to imagine any modern-day Western theory of governmental legitimacy that does not rest in some essential aspect on “the electoral connection.” Thus, it was startling to witness the Supreme Court’s incautious embrace of a theory of the world’s most important elected office that treats its democratic character as merely discretionary.

*Bush v. Gore* is antidemocratic in more than its ordination of a particular electoral outcome. It is oblivious to the democratic character of our Constitution in every aspect of its analysis. Its very starting point—the asserted authority of the states to disenfranchise voters altogether from participation in the selection of presidential electors—is unpersuasive in the face of the text and history of the Fourteenth Amendment, and Part I below explains why the Constitution ought now be interpreted to protect the rights of individuals to vote for state electors for President and Vice President of the United States. This analysis points to what should have been the foundational premise of *Bush v. Gore*: namely, the conspicuous trajectory of our constitutional development toward more democracy. And, it explains why the Florida Legislature would have been acting unconstitutionally in December 2000 had it proceeded to authorize its own slate of electors in lieu of those chosen on Election Day.

Part II explores how the Fourteenth Amendment should have been deployed in light of democratic values to resolve the questions actually presented by *Bush v. Gore*. The majority purported to address an equal protection problem in *Bush v. Gore*, although none of the practices being challenged amounted, under anyone’s account, to a form of explicit or otherwise intentional discrimination against Bush voters—the sort of harm typically addressed through an equal protection rubric.<sup>3</sup> By contrast, the importance of procedural due process in elections as an essential bulwark of democracy was utterly overlooked. Vote tabulation is a species of administrative adjudication, and voters should be deemed minimally entitled under the Fourteenth Amendment to voting tabulation systems rationally calculated to ascertain their intent accurately. A due process analysis of the Florida election supports the conclusion that hand recounts in

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3. See *Washington v. Davis*, 426 U.S. 229 (1976).

challenged counties should have been deemed a constitutional prerequisite to the casting of Florida's electoral votes. There was no legal or practical impediment to conducting a statewide recount consistent with the Fourteenth Amendment, and, compared to the Court's assault on due process, the equal protection issue raised by the majority and accepted as nontrivial by Justices Souter and Breyer<sup>4</sup> pales as insubstantial.

Part III considers whether the issues presented in *Bush v. Gore* should have been considered political questions. The most compelling demand of democratic principle in *Bush v. Gore* may well have been that the Court defer to Congress, as an elected federal institution, for the resolution of a wholly political contest. Both the textual and the institutional arguments for deferring to Congress would have been stronger in *Bush v. Gore* than they were in *Nixon v. United States*.<sup>5</sup> In that earlier case, Chief Justice Rehnquist, writing for himself and for Justices Stevens, Scalia, Kennedy, O'Connor and Thomas, held it to be a political question whether the Senate was constitutionally required to hold a full evidentiary hearing before the entire Senate in order to convict and remove an impeached judge.<sup>6</sup> The abandonment by the *Bush v. Gore* majority of this jurisprudential commitment, as well as others, helped to create the distressing impression that five Justices were determined to ordain a Bush victory, regardless of the legal merits. It is a measure of the Court's imprudence in deciding *Bush v. Gore* both that such a possibility cannot be dismissed out of hand and that the Court could have responsibly deferred to Congress as the more accountable and constitutionally appropriate decisionmaking institution to resolve the Florida controversy.

#### I. THE FEDERAL RIGHT TO VOTE FOR PRESIDENT

*Bush v. Gore* commences its legal analysis by addressing a problem not actually at issue in the case: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."<sup>7</sup> This is an odd starting place because, of course, there was no question in *Bush v. Gore* regarding Floridians' entitlement to vote. One would have thought the more important premise would have been the fundamental status of the right to vote once conferred by state law, a legal proposition that the Court recognizes just a few sentences later: "When the state legisla-

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4. 531 U.S. at 134 (Souter, J., dissenting); *id.* at 145 (Breyer, J., dissenting).

5. 506 U.S. 224 (1993).

6. *Id.* at 226.

7. 531 U.S. at 104.

ture vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”<sup>8</sup> From this utterance, it sounds as if the Court is prepared to focus on democracy after all. But the rhetorical mood reverts immediately to reemphasize the contingent character of national democracy. The Court stresses in its very next sentence: “The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”<sup>9</sup> The Court thus founds its analysis on the presumptive right of legislators to exclude citizens from presidential elections.

Why start the opinion this way? In retrospect, the gambit looks obvious. The majority is about to apply the Equal Protection Clause in a way that will disenfranchise thousands of Florida voters. The majority anticipates that such may be the case.<sup>10</sup> Yet, the majority is prepared to treat another issue as more important, namely, what the majority takes to be a threatened procedural error in the addition of hand-counted votes to Florida’s machine-tallied county vote totals. The suggestion implicit in the opening paragraph, foreshadowing the end game to come, is that any disenfranchisement that the Court inflicts should not be perceived as a harm more serious than the procedural infirmity that the Court is prepared to remedy. That is, the majority wants the country to believe that any improper diminishment of a ballot actually counted by Florida’s voting machines amounts to a more serious harm than the wholesale rejection of valid ballots that the voting machines have failed to register. Why? Because “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States.”<sup>11</sup> The Court’s implicit stance is that voters whose votes are counted but improperly weighted lose something that the Constitution protects, but that disenfranchised voters do not. There is no other sensible reason for starting where the Court starts.<sup>12</sup>

But this message is wrong. It is wrong, in part, because it could not possibly be the case in law or in reality that a voter whose ballot

8. *Id.*

9. *Id.*

10. *Id.* (“This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.”).

11. *Id.*

12. Actually, if one were yet more cynical about the majority than even I, there would be yet another explanation. The reiteration that state legislatures cannot only disenfranchise the electorate *ex ante* from the selection of presidential electors but may also take back the franchise once granted could be read as a message to the Florida Legislature: “If Gore does not concede following this opinion, you have the right to intervene.” For reasons described in the text below, I believe this message, if intended, would be wrong as to the Constitution. Its utterance would also embody so profound a corruption of the judicial role that I would prefer to think that the Court did not intend such a message.

is marginally devalued is worse off than a voter whose ballot is utterly discarded. Even more fundamentally, it is wrong because the Fourteenth Amendment, persuasively read, does guarantee individual citizens the right to vote for presidential electors.

The straightforward argument for this position begins with Section 2 of the Fourteenth Amendment, which provides:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election *for the choice of electors for President and Vice President of the United States*, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>13</sup>

It is the italicized reference to “the choice of electors for President and Vice President of the United States” that most obviously ratifies this process as one in which individual citizens must be allowed to participate.

Section 2 of the Fourteenth Amendment was drafted with a transparent aim. With the abolition of slavery, each African American living in a formerly Confederate state would now count as five-fifths and not merely three-fifths of a person for purposes of congressional apportionment.<sup>14</sup> Congress was not yet ready in 1866 to approve a constitutional amendment guaranteeing suffrage regardless of race. But neither did the Republicans in control of Congress want to award the Confederate states an enlarged population, and thus additional seats in the House,<sup>15</sup> if the constituency most likely to support the Republicans—namely, newly freed African Americans—were not going to be allowed to vote. Black suffrage, at least in theory, was to be the price of an enlarged congressional delegation.

The original wording of Section 2, as reported to the House of Representatives by the Joint Committee of Fifteen on Reconstruction, had actually been significantly different in a critical respect:

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13. U.S. CONST. amend. XIV, § 2 (emphasis added).

14. *See id.* art. I, § 2, cl. 3.

15. The enlargement of any state’s House delegation would also increase its number of votes in the Electoral College. *See id.* art. II, § 1, cl. 2 (each state shall have “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”).

Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age.<sup>16</sup>

The important difference in this version, as compared to the Amendment as finally transmitted by Congress, is that the second sentence of the original version did not specify the elections to which it would apply. That is, this version would have reduced a state's right of representation proportionally if, in *any* election, the state disenfranchised any portion of its male citizenry, twenty-one years of age or older, for reasons other than "participation in rebellion or other crime." The House approved this version of the Amendment on May 10, 1866.<sup>17</sup>

In the Senate, however, the question was raised whether the scope of the second sentence was too great. Senator Henderson of Missouri raised the issue:

Now, we have in our State an election for school directors, a general election held in every municipal township throughout the State of Missouri, at a certain time. At that election there are qualifications prescribed that we deem absolutely essential to keep up the common-school system in our State. For instance, property holders only vote for school directors. . . . There is an election also for school trustees. Those trustees are elected by the persons who have children to send to school. Now, if it be intended to exclude all persons who cannot vote at those elections from the basis of representation, I apprehend that not only will the negroes of my State be excluded under the proposed amendment, which will lose us a member in Congress, but it will exclude two thirds of the whites of the State of Missouri. I desire to know whether any such construction can be given to this proposition.<sup>18</sup>

There followed a brief colloquy in which there was agreement that the amendment would not cover school directors and trustees, but during which sponsors suggested that the language would cover "municipal officers."<sup>19</sup> Henderson suggested rewriting the disputed

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16. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (remarks of Rep. Stevens).

17. *Id.* at 2545.

18. *Id.* at 3010 (remarks of Sen. Henderson).

19. *Id.* (remarks of Sens. Fessenden and Henderson).

sentence to cover elections only for “Governor, judges, or members of either branch of the Legislature.”<sup>20</sup>

Senator Fessenden objected immediately that this would not cover elections for the House of Representatives.<sup>21</sup> Senator Henderson responded that it would. The Constitution provides that “the Electors in each State [for the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>22</sup> Hence, Senator Henderson reasoned, regulating state electoral qualifications for the state legislature would necessarily have the desired impact on House of Representatives elections, as well. Anything more than that, according to Senator Henderson, should be beyond the purview of the new amendment. According to Henderson:

The only election that can be held under the Constitution and laws of the United States is for members of Congress. *Electors [for President and Vice President], as now provided by the Constitution, are to be elected by the State in any manner it chooses. . . . [U]nless you alter the Constitution on the subject the State Legislatures will yet have the power to regulate that matter entirely as they please, and this amendment will not change it at all. There is, therefore, but one election that can be held under the Constitution and the laws of the United States, and that is the election of members of the lower branch of Congress, because Senators are elected by the legislatures.*<sup>23</sup>

Because Senator Howard of Michigan then raised questions, however, regarding the precise impact of the proposed Henderson amendment, the Senate was adjourned for the day so that Henderson and Howard might work out their differences.<sup>24</sup>

The next morning, Senator Williams of Oregon proposed that Section 2 be amended to apply to elections “held under the Constitution and laws of the United States, or of any State.”<sup>25</sup> Objection was made immediately that this formulation was yet more confusing. Senator Johnson of Maryland suggested as an alternative:

[T]hat the phraseology of this amendment, if it is to prevail, shall be so changed as to leave it beyond doubt that all that is meant is to except out of the whole number of inhabitants of the age of twenty-one years or upward, who are citizens of the State, those

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20. *Id.* at 3011 (remarks of Sen. Henderson).

21. *Id.* (remarks of Sen. Fessenden).

22. U.S. CONST. art. I, § 2, cl. 1.

23. CONG. GLOBE, 39th Cong., 1st Sess. 3011 (1866) (remarks of Sen. Henderson) (emphasis added).

24. *Id.*

25. *Id.* at 3026 (remarks of Sen. Williams).

who are denied the right to vote at any State election, as distinguished from any municipal or local election.<sup>26</sup>

He then proceeded to attack Section 2 for a variety of allegedly perverse results he believed would follow from its application.<sup>27</sup>

Senator Williams interrupted, however, to concede only the point that Section 2 should specify with complete precision the elections that the amendment was intended to cover. He replaced the suggested phrase from the first version of his amendment to Section 2—“election held under the Constitution and laws of the United States or of any State”—with the phrase: “any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of the Legislature thereof.”<sup>28</sup> The Senate subsequently adopted this language,<sup>29</sup> which was accepted also by the House.<sup>30</sup>

The substitution offered by Senator Williams and ultimately ratified as part of the Fourteenth Amendment embodied a critically important move, and it is intriguing that the point elicited no further discussion on the floor of either the Senate or the House. It must be recalled that, as Senator Henderson had expressly noted, the original Constitution provided three separate modes for the election of federal officials. The House of Representatives was to be chosen by “Electors in each State [who] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>31</sup> In contrast, the Senate would be composed of “two Senators from each State, chosen by the Legislature thereof.”<sup>32</sup> The President and Vice President would be chosen by electors that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct.”<sup>33</sup> As Senator Henderson insisted, only one of these electoral processes guaranteed some form of franchise directly to individual citizens of the several states, namely, elections for the House. A popular franchise was precluded altogether by the constitutional provisions regarding the Senate and permitted, but not required, with regard to the selection of presidential electors. And yet, in translating his original formulation, “election[s] held under the Constitution and laws of the United States,”<sup>34</sup> into a more specific articulation, Senator Williams included among the elections covered by Section 2 “any

26. *Id.* at 3027 (remarks of Sen. Johnson).

27. *Id.* at 3026-29 (remarks of Sen. Johnson).

28. *Id.* at 3029 (remarks of Sen. Williams).

29. *Id.* at 3040.

30. *Id.* at 3149.

31. U.S. CONST. art. I, § 2, cl. 1.

32. *Id.* art. I, § 3, cl. 1.

33. *Id.* art. II, § 1, cl. 2.

34. CONG. GLOBE, 39th Cong., 1st Sess. 3029 (1866) (remarks of Sen. Williams).

election for the choice of electors for President and Vice President of the United States, [or] Representatives in Congress.”<sup>35</sup> The issue is how to interpret this translation.

If what counts in interpreting text are subjective states of mind, then, of course, we cannot know with certainty either Senator Williams’s thought processes or those of the legislators who had the chance to review his handiwork. One possibility is that Senator Williams did not intend Section 2 as implying state compulsion to hold *any* particular elections. Section 2, that is, may provide only a limited rule of nondiscrimination in elections that are guaranteed by some law other than Section 2 itself, whether that law is another federal constitutional provision or, in most cases, a state law. On this hypothesis, he included elections for presidential and vice-presidential electors only to recognize that many such elections are held under laws of the respective states, and, to the extent they are held, he wanted them held, among men at least, on a racially nondiscriminatory basis.

The strongest argument in support of this reading is that Section 2 applies to “any election for . . . Judicial officers of a State”<sup>36</sup> but has not been interpreted to require state judicial elections. This might be read likewise to leave elections in connection with the choice of presidential electors optional. The reason would be that, if the reference to “any election for the choice of electors for President and Vice President”<sup>37</sup> compelled the use of some popular vote, then referring to “any election for . . . Judicial officers of a State”<sup>38</sup> would have to compel the use of a popular vote to choose judges, as well. Both clauses, to this extent, ought to be read in the same way.

This argument, however, is hardly conclusive. It might make perfect sense on federalism grounds to read Section 2 as embodying a background guarantee that the federal offices to which it refers are mandatorily subject to popular votes, while selection systems for the state offices to which it refers remain discretionary with the states.

Indeed, a devastating problem for the more limited interpretation regarding presidential elections is that, if the use of the popular vote in presidential elections remains discretionary under Section 2, then it would be easy for state legislatures to undermine the Republicans’ aim of making black suffrage the price of reempowering the Southern states. Imagine that Section 2 is read to cover House elections but not to require popular votes for presidential electors. Imagine further that a Southern state subsequently enfranchised all propertied male

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35. *Id.*

36. U.S. CONST. amend. XIV, § 2.

37. *Id.*

38. *Id.*

adult citizens in House elections but barred black men from voting for President. The consequence of allowing all men to vote for House seats would likely be an enlarged congressional delegation for the state in question because the entirety of the state's black population would now be counted as part of its proper apportionment base. The enlarged House delegation would necessarily increase the size of the state's presidential elector delegation because the number of a state's electors is equal to the total of its senatorial delegation (always two) and its House delegation. Disenfranchising black voters in such a state from presidential elections would defeat the objectives of congressional Republicans because white voters in this hypothetical Southern state would then have managed to achieve a larger voice in the Electoral College without permitting blacks to vote for President. This would subvert a significant portion of what Section 2 was intended to achieve.

So long as we interpret the Constitution as making popular involvement in presidential elections no more than a state legislative prerogative, Section 2 cannot prevent white Southerners from doing just this very thing. Senator Henderson made precisely this point with regard to an earlier formulation of Section 2.<sup>39</sup> All that need happen in a Southern state intent on maintaining white control of presidential elector appointments is for the majority-white legislature to institute or maintain a practice of having itself select slates of presidential electors without any popular vote involvement. In other words, Section 2 can effectively impose black suffrage as the price of increased Southern strength in the Electoral College only if each state is required to include a popular vote mechanism in the process of choosing its presidential electors. Thus, whatever his subjective intentions, Senator Williams's textual revision makes purposive sense only if the Constitution, as altered by the Fourteenth Amendment, is deemed to signal a background understanding that individual citizens in the several states would now be guaranteed some form of franchise in presidential elections, as well as in House contests.<sup>40</sup>

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39. CONG. GLOBE, 39th Cong., 1st Sess. 3011 (1866) (remarks of Sen. Henderson).

40. My argument thus does not rest on the supposition that, because of their denotational meaning and Section 2's syntax alone, the words of Section 2 must be interpreted as commanding popular involvement in presidential elections. It is rather the *purpose* behind the inclusion of those words that commands popular involvement in presidential elections just as, say, it is Article I, Section 2 that provides the requirement that a popular vote be staged in order to select members of the House of Representatives. On the same basis, unless there is something in the Federal Constitution other than the syntax of Section 2 that compels state judicial elections, then the mere linguistic reference to state judicial elections in Section 2 would not be enough to deprive states of discretion to prefer appointed judiciaries. That "something" would have to be either another clause in the Constitution or a demonstration that eliminating appointed state judiciaries is implicit in the history or design of Section 2.

For these reasons, one need not look further than Section 2 for a constitutional guarantee that individual citizens of the several states shall be entitled to participate in the selection of presidential electors. The near-complete consistency of post-Fourteenth Amendment state practice with this reading also validates it.<sup>41</sup> On only two occasions since ratification has a state legislature taken upon itself the authority to appoint an entire slate of presidential electors. Florida did so in 1868, presumably because the process was already in place prior to the ratification of the Fourteenth Amendment on July 21, 1868.<sup>42</sup> Colorado's legislature did the same in 1876, apparently because the grant of statehood that year was deemed to leave too little

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41. On the far more frequent appointment of presidential electors by state legislatures prior to the Fourteenth Amendment, see *McPherson v. Blacker*, 146 U.S. 1, 29-33 (1892):

At the first presidential election the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina . . . .

Fifteen States participated in the second presidential election, in nine of which electors were chosen by the legislatures . . . .

Sixteen States took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine States the electors were appointed by the legislatures . . . .

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least 'until some uniform mode of choosing a President and Vice-President of the United States shall be prescribed by an amendment to the Constitution.' Laws Va. 1799, 1800, p. 3. Massachusetts passed a resolution providing that the electors of that State should be appointed by joint ballot of the senate and house. . . . Pennsylvania appointed by the legislature, and upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17 . . . .

. . . Massachusetts . . . chose electors by joint ballot of the legislature in 1808 and in 1816. . . . The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont, and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the States excepting South Carolina, where the legislature chose them up to and including 1860. . . . And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166) and by Colorado in 1876, as prescribed by § 19 of the schedule to the constitution of the State, which was admitted into the Union, August 1, 1876, Gen. Laws Colo. 1877, pp. 79, 990.

*McPherson* upheld a challenge to Michigan's appointment of presidential electors based on the popular vote in each congressional district. Although language in the case is strongly supportive of the legislature's plenary power to employ any mode of appointment whatever, *McPherson*, 146 U.S. at 10, the case simply did not present the question I am discussing here. The Michigan legislature had not purported to appoint presidential electors through a process independent of a popular vote.

42. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1440 (6th. ed. 2000).

time to put a popular vote for electors into place.<sup>43</sup> As Justice Frankfurter wrote in another legal context:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.<sup>44</sup>

Popular votes for presidential electors are a “deeply embedded traditional way” of conducting presidential elections, and this history should be decisive in resolving any ambiguity in Section 2.

There is, however, yet another route to recognizing a Fourteenth Amendment right for voters to participate in the selection of presidential electors. It would start with accepting as a premise that Section 2 has only the more limited meaning suggested above, namely, that Section 2 embodies a limited nondiscrimination rule in certain categories of elections, so long as the popular franchise in such elections is guaranteed by some law other than Section 2 itself. In the case of presidential electors, it is possible to infer such a guarantee outside Section 2—specifically, from the Privileges or Immunities Clause in Section 1. That clause provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>45</sup> Prospects for establishing a robust jurisprudence of individual rights based on “privileges or immunities” were shattered by the Court’s 5-4 decision in the 1872 *Slaughterhouse Cases*.<sup>46</sup> That decision rejected a Fourteenth Amendment challenge by New Orleans butchers to a monopoly granted by the Louisiana Legislature to the Crescent City Live-Stock Landing and Slaughter-House Company to operate a slaughterhouse in New Orleans. The butchers based their challenge on a variety of grounds, including protections assertedly embodied in the Privileges or Immunities Clause against arbitrary laws in violation of inalienable fundamental rights.<sup>47</sup> The majority rejected this analysis. According to the majority, the “privileges or immunities” to which the Fourteenth Amendment referred were exclusively “privileges or immunities” of national, rather than state citizenship. These, the Court said, em-

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43. Colorado was admitted to the Union on August 1, 1876. *McPherson*, 146 U.S. at 9-10.

44. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

45. U.S. CONST. amend. XIV, § 1.

46. 83 U.S. 36 (1872).

47. *Id.* at 66.

braced only those rights that owed “their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>48</sup>

However meager this interpretation of the Privileges or Immunities Clause, it is still sufficient to ground an individual right to participate in the selection of presidential electors.<sup>49</sup> Although chosen through processes that states design and administer, presidential electors hold a federal office that is rooted entirely in the national Constitution. This point was not lost in the Fourteenth Amendment debates. During floor discussion immediately prior to the House adoption of the Fourteenth Amendment, Representative Bingham stated, without contradiction: “The franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives in Congress or presidential electors. They are both provided for and guaranteed in your Constitution.”<sup>50</sup> It is thus entirely sensible, especially in light of Section 2 of the Fourteenth Amendment, to interpret the Privileges or Immunities Clause also as embracing a right of individual citizens to participate in the choice of presidential electors.<sup>51</sup>

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48. *Id.* at 79.

49. In urging this interpretation, I am plainly giving little or no weight to *Minor v. Happersett*, 88 U.S. 162 (1874), which considered whether the Privileges or Immunities Clause of the Fourteenth Amendment conferred a right of state suffrage upon women. In reaching its negative conclusion to this inquiry, the Court held that neither the Privileges or Immunities Clause, nor any other clause of the Constitution, creates voters per se.

*Happersett* is of little consequence, however, to modern voting rights questions. Despite the Court’s repeated insistence that the Constitution does not vest suffrage directly, the Court has also characterized the right to vote as “fundamental.” *E.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). It is on that basis that the Court has further held that classifications limiting the franchise must be subject to a “close and exacting examination.” *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969). The consequences of requiring such an examination are generally indistinguishable from what would be the consequences of holding that the Constitution does directly confer suffrage rights, which, in turn, may not be subjected to unreasonable burdens.

In other words, it would hardly matter if the Privileges or Immunities Clause did not directly vest rights in anyone to help choose presidential electors, so long as the clause is read to bar a state legislature from excluding the entire citizenry from any elector selection process that the legislature decides to authorize. It would be sensible to conclude, that is: (1) that the “privileges or immunities” of citizenship include freedom from arbitrary limitations on those whom the state, at its discretion, enfranchises to choose presidential electors, and (2) that any classification that eliminates from the process all members of the electorate who are not also state legislators is constitutionally impermissible. Those more respectful than I of *Happersett* might prefer to attach such conclusions to the Equal Protection Clause rather than the Privileges or Immunities Clause. Of course, such a result would be equally congenial to the democratic values of our present-day Constitution.

50. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

51. It may be questioned whether the history of the Fifteenth Amendment casts doubt on my reading of the Fourteenth. That is because, in deliberations leading to the latter amendment, the Senate initially approved an additional constitutional reform that would have expressly required that presidential electors in each state be chosen by a popular vote in which the franchise would extend to all those qualified in the respective states to vote for members of the House of Representatives. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1042 (1869). At first blush, it might seem implausible that such a proposal would have surfaced

There is, of course, a perhaps even more compelling reason to read the Fourteenth Amendment as supportive of democracy: namely, the plain democratic trajectory of constitutional development since 1868. Since the ratification of the Fourteenth Amendment, we have added thirteen other amendments to the U.S. Constitution. Six of these were specifically intended to further our constitutional commitment to the democratic process: extending the vote to persons of all races,<sup>52</sup> providing for the direct election of Senators,<sup>53</sup> extending the franchise to women,<sup>54</sup> permitting District of Columbia voters to choose electors,<sup>55</sup> eliminating federal poll taxes,<sup>56</sup> and lowering the voting age to

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in 1869 if the Fourteenth Amendment had already required that state legislatures incorporate a popular vote mechanism into the selection of presidential electors.

In fact, however, my reading of the Fourteenth Amendment would not have made this additional proposal superfluous. The 1869 proposal would have gone beyond the Fourteenth Amendment in constraining the role of state legislatures in the appointment of presidential electors. It would have eliminated that role altogether. This move would have left to Congress the decision whether to provide winner-take-all systems in every state or to permit electors to be chosen by congressional district. So marked a diminution in state authority might itself have been a sufficient reason to support or oppose the proposal, regardless of what the Fourteenth Amendment had already accomplished. So democratizing a move was consistent with the breadth of radical Republican proposals for the Fifteenth Amendment, which envisioned an end not only to racial restrictions on the franchise but also an end to restrictions based on property holding, taxpayer status, nativity, and literacy. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 95 (2000) (discussing proposals by Representative Samuel Shellabarger of Ohio and Senator (later Vice President) Henry Wilson of Massachusetts). The fact of the 1869 proposal, therefore, casts little light on what its supporters or opponents understood to be the proper interpretation of either the Privileges or Immunities Clause or Section 2 of the Fourteenth Amendment.

Of course, even if we assume that its drafters would not have consciously anticipated that the Fourteenth Amendment created an individual right of participation in choosing presidential electors, that is hardly conclusive as to the most compelling reading of the text. The inference now of such a right would follow a well-established jurisprudence that extends the Fourteenth Amendment to applications unanticipated in 1868. Prominent examples include *Brown v. Board of Education*, 347 U.S. 483 (1954) (invalidating the government-imposed racial segregation of public schools), and *Kramer*, 395 U.S. 621 (invalidating restriction of school district franchise to voters who were parents of children enrolled in district's schools or otherwise owners or lessors of taxable property). Especially because so little discussion occurred to illuminate the drafters' subjective intentions, interpretation of the Fourteenth Amendment with regard to presidential elections should rest on the most plausible implications of its wording and not on the subjective expectations of the members of the Thirty-ninth Congress. And, as compared to the innovative equal protection cases of the past half century, a decision to interpret the Fourteenth Amendment as assuring the right to vote in presidential elections would rest on textual clues more specific and, to that limited extent, more compelling than the text available to guide a number of such earlier cases. See, for example, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), which managed to invalidate state poll taxes under the Constitution despite a constitutional amendment just two years earlier that had eliminated the poll tax explicitly only with regard to federal elections.

52. U.S. CONST. amend. XV.

53. *Id.* amend. XVII.

54. *Id.* amend. XIX.

55. *Id.* amend. XXIII.

56. *Id.* amend. XXIV. I am grateful to attorney Vasan Kesavan for pointing out to me that the wording of the Twenty-fourth Amendment would seem especially odd if the Con-

eighteen.<sup>57</sup> It is unthinkable, against this history of constitutional development, that a state legislature should still be deemed authorized to usurp the people's role in choosing presidential electors.

What difference does this make? Had the Supreme Court not decided *Bush v. Gore*, the Florida Legislature stood poised to test these very principles. On December 12, 2000, the Florida House of Representatives named a slate of twenty-five electors for candidate Bush, anticipating that judicial processes for certifying the state's presidential vote might extend beyond December 18, the date for federal electoral balloting.<sup>58</sup> The Florida Senate abandoned the measure only after Gore conceded the election in the wake of the Supreme Court's decision, thus averting the possibility of constitutional crisis.<sup>59</sup> But this near-miss clearly highlights the legal question: What should have been the result had the legislature gone ahead with its slate and Florida Gore voters sought to enjoin balloting by a legislatively chosen set of electors?

Such a move would plainly have deprived the voters of Florida of their Fourteenth Amendment right to participate in the selection of presidential electors. As of the time of the Florida House vote, proceedings in the Florida courts had every prospect of reaching a timely conclusion. Federal law provides: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."<sup>60</sup> As of December 12, however, it had not been established that the people of Florida had "failed to make a choice on the day prescribed by law." Moreover, any legislative authority to direct the appointment of electors on a day subsequent to Election Day would still have to be exercised in a manner consistent with the Fourteenth Amendment requirement for including a process of popular voting in the selection of presidential voters.<sup>61</sup> Giving the Four-

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stitution does not require state legislatures to include a popular vote mechanism in the selection of electors.

57. *Id.* amend. XXVI.

58. Marego Athans, *Florida House OKs Bush Elector Slate—Measure is Passed Along Party Lines 79-41, After 5½ Hour Debate*, BALT. SUN, Dec. 13, 2000, at 22A, available at 2000 WL 4886822.

59. *Florida Legislature Passes Up Naming Slate of Electors*, COM. APPEAL (Memphis, Tenn.), Dec. 15, 2000, at A11, available at 2000 WL 27945697.

60. 3 U.S.C. § 2 (1994).

61. It would additionally have been offensive to the Constitution to undo Florida's legally authorized November 7 balloting retroactively. As the Bush brief argued in the Supreme Court (in a far less persuasive context): "[C]onstitutional principles of due process and fundamental fairness preclude the States from adopting 'a post-election departure from previous practice' and applying that post-election rule retroactively to determine the outcome of an election." Brief For Petitioner at 28, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836) (citing *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir.

teenth Amendment its most compelling reading would have rendered Florida's attempted legislative appointment of electors unconstitutional.

But a proper reading of the Fourteenth Amendment with regard to the popular franchise in presidential elections should have been influential in *Bush v. Gore* itself. As noted earlier, the question whether Floridians were constitutionally entitled to participate in the appointment of presidential electors was technically not an issue presented in this case.<sup>62</sup> Imagine, however, that the majority's legal analysis had started as follows: "The Fourteenth Amendment has granted Americans, as individual citizens, a federal constitutional right to vote for electors for the President of the United States." It is implausible that a decision so starting could have ended with the judicially compelled disenfranchisement of thousands of Florida voters. This constitutional premise, diametrically opposed to the Court's actual starting point, would have required that every ambiguity be resolved and every presumption indulged in favor of a comprehensive count of all Florida ballots. Thus, it is hardly a surprise that the Florida Supreme Court's first opinion in this episode begins with that state's fundamental legal commitments to the right to vote and to a determination of electoral outcomes that reflects "the will of the people."<sup>63</sup> It is shameful that the Supreme Court of the United States spurned those commitments.

## II. *BUSH V. GORE* AND VOTE TABULATION AS MASS ADJUDICATION

### A. *Equal Protection and Due Process in Bush v. Gore*

The issue that the Court did have to face in *Bush v. Gore* was the consistency with federal law of the manual recount of Florida ballots that had been ordered by the Florida Supreme Court in response to Gore's contest of the certification of Bush electors. Five Justices held that "[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum re-

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1995)), available at <http://election2000.stanford.edu/briefforpetitioner.pdf>. Nothing in Florida's law made the November 7 election merely advisory to the state legislature.

Second, in purporting to adjudicate the actual outcome of the November 7 election, the Florida Legislature would have been grabbing judicial authority in violation of due process. It was state legislative usurpation of judicial power during the 1780s that motivated the Philadelphia drafters to provide the nation with an independent federal judiciary and to oust Congress from adjudication except with regard to impeachment and judging the qualifications and conduct of its own members. *I.N.S. v. Chadha*, 462 U.S. 919, 961-962 (1983) (Powell, J., concurring in the judgment). Now that the Fourteenth Amendment imposes due process obligations upon the states, state legislatures should be deemed to have identical limits on their capacity to assert adjudicatory power.

62. See *supra* text accompanying note 7.

63. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1228 (Fla. 2000), *rev'd sub nom.* *Bush v. Palm County Canvassing Bd.*, 531 U.S. 70 (2000).

quirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to equal protection].”<sup>64</sup> Although the majority suggested a variety of respects in which the recount mechanisms fell short of constitutional requirements, the essential infirmity of the ordered recount was ostensibly the absence of a uniform standard to be followed in each county for the discernment of voter intent. Because, based on this infirmity, “it [was] evident that any recount seeking to meet [a] December 12 [deadline] will be unconstitutional,” the Court “reverse[d] the judgment of the Supreme Court of Florida ordering a recount to proceed.”<sup>65</sup>

I think the Court’s analysis was wrong on its own terms—its remedial holding is especially indefensible. But one of the more unfortunate aspects of the opinion is not just that it is wrong, but that it focuses on the wrong, or at least the less compelling, thing—equal protection—rather than due process.<sup>66</sup> This may seem an odd complaint. I do not mean to suggest that, if the majority had simply decided *Bush v. Gore* under the “right” clause, five Justices would have come out the right way. As a rhetorical matter, however, the focus on equal protection rather than due process tends to obscure the real is-

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64. *Bush v. Gore*, 531 U.S. 98, 105 (2000). Justice Souter, while dissenting from the Court’s remedial order (and, indeed, from its grant of review), agreed that “no legitimate state interest” justified the imposition of different standards in different counties for measuring voter intent. *Id.* at 134 (Souter, J., dissenting). Justice Breyer took a more nuanced position. He implied that the availability in Florida of judicial review to examine disputed ballots would, in ordinary times, suffice to permit recounts to proceed under an administrative standard no more specific than the general “intent of the voter” standard imposed by the Florida Supreme Court. *Id.* at 145 (Breyer, J., dissenting). Because “time was, and is, too short,” however, “to permit the lower courts to iron out significant differences through ordinary judicial review,” and because the Florida Supreme Court’s order had already included tabulations from counties employing different standards, Breyer agreed that, “in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem.” *Id.* at 145-46. “In light of the majority’s disposition” of the case, Breyer did not discuss “whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.” *Id.* at 146.

65. *Id.* at 110.

66. The per curiam opinion is actually somewhat careless in identifying the constitutional clause on which it hangs its analysis. At the outset, the majority seems pointed in resting its conclusions on equal protection. It foreshadows its discussion as follows: “The petition presents the following questions: . . . whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.” *Id.* at 103. This framing of the issues seems to leave due process out of the equation. Yet, after describing the alleged procedural defects of the judicially mandated recount, the Court simply tosses in, without any analysis, due process as an additional ground for its conclusion. “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.” *Id.* at 110. Because the reference to “the requirements of . . . due process” occurs without any specification of what they might be, I think it a fair statement that the majority gave no sustained thought to the Florida election from a due process standpoint.

sues confronting Florida in designing and implementing a fair vote tabulation system.

The Equal Protection Clause may seem at first the more natural lens through which to view an election contest. Equal protection challenges generally involve the differential treatment of persons, implicit or explicit, because of groups to which they belong, for example, groups of Bush supporters or Gore supporters. Unlike typical equal protection cases, however, *Bush v. Gore* does not exhibit any obvious link between a challenged classification or criterion for treatment and any group's systematic advantage or disadvantage.<sup>67</sup> The majority opinion identifies three sources of differentiation in the treatment of voters by different counties: differential standards for evaluating contested ballots,<sup>68</sup> differences between recounts limited to undervotes and recounts that reexamined all of the ballots cast,<sup>69</sup> and differences between tabulations based on partial recounts versus tabulations based on completed recounts.<sup>70</sup> Legally speaking, these may be phenomena worth noting, but it is hard to predict who will be hurt by them. There was no allegation that any amounted to an intentionally invidious discriminatory practice—the kind of practice that the Court normally requires before it elevates the intensity of its constitutional scrutiny of state practices under the Equal Protection Clause.<sup>71</sup>

Due process, by contrast, focuses on the adequacies of a governmental process for making adjudicatory decisions, whether formal or informal. Adjudicatory decisions are what vote tabulation, most obviously manual vote counting, is all about. That is, when an administrative body counts votes, it is discerning on the basis of a formal piece of evidence—a ballot—the intent of the voter regarding the outcome of a political contest. Analytically, due process provides the more helpful framework for assessing the fairness of an adjudicatory system to all those affected by its outcomes. It also is directly supportive of the democratic principle. There would plainly be little significance to the practice of voting if voters were not assured rational treatment in the counting of their votes.

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67. Bush was clearly being hurt by the Florida recount only in the sense that, having been certified the statewide winner by 537 votes on November 26, see *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* xiii (E.J. Dionne Jr. & William Kristol eds., 2001), he would clearly have been better off if he could have prevented any further counting at all, regardless of the procedures used. There is no obvious way in which the kinds of disparities mentioned by the Court could be said to favor Democrats or Republicans. From all the Court knew on December 12, Bush would have been threatened as much by the constitutionally most exacting recount as he would by any other.

68. *Bush v. Gore*, 531 U.S. at 106-07.

69. *Id.* at 107.

70. *Id.* at 108-09.

71. See *Washington v. Davis*, 426 U.S. 229 (1976).

To make that assessment comprehensively, however, I would like to look at two cases: a hypothetical *Gore v. Harris* and the actual *Bush v. Gore*. The point of the first inquiry is both to establish the amenability of the Florida election to a sound due process analysis and to point out that, with regard to the issue of procedural fairness, the per curiam opinion again ignores the proper constitutional baseline from which it should have judged the Bush challenges. That is, *Bush v. Gore* should have been resolved against a baseline understanding of Gore's constitutional entitlement to a manual recount in four disputed counties. Even if the Privileges or Immunities Clause and Section 2 of the Fourteenth Amendment conferred no right on Florida voters to participate in the appointment of presidential electors, the voters were still entitled to an adjudication of voter intent consistent with due process. The Supreme Court effectively deprived them of that right.

*B. Applying Due Process I: The Hypothetical Case of Gore v. Harris*

To see the implications of due process from the position of Democratic voters, it is helpful to start a chapter or two back from the actual decision in *Bush v. Gore* and to consider how due process would have looked in the week after Election Day from the Gore perspective. To do so requires us to recall where matters stood legally about a month before the Supreme Court's final decision. To make that recollection possible, a brief review of Florida law in effect at the time of the election<sup>72</sup> is necessary.

In Florida, vote counting within each county was the initial responsibility of so-called election boards, which include inspectors and clerks for every precinct who are appointed to their positions by the Supervisors of Elections in each of the respective counties.<sup>73</sup> The boards in each county were required to prepare certified tallies, which were delivered, in turn, to the Supervisor of Elections and to the county court judge.<sup>74</sup> In addition, each Supervisor of Elections sat on a so-called county canvassing board, along with two other members—the county court judge, who acted as chair of the canvassing board, and the chair of the board of county commissioners.<sup>75</sup> It was the primary duty of each county canvassing board to canvass absentee ballots, and then prepare a canvass of the entire election result within each county, “as shown by the returns . . . on file in the office of the supervisor of elections and the office of the county court

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72. The Florida Legislature passed wholesale amendments to its election procedures in the 2001 session. See Florida Election Reform Act of 2001, 2001 Fla. Laws ch. 40, at 117-73.

73. FLA. STAT. § 102.012 (2000) (amended 2001).

74. *Id.* § 102.071.

75. *Id.* § 102.141(1).

judge.”<sup>76</sup> The county canvassing board was then charged with certifying the county’s results to the Secretary of State, who was required ultimately to certify the results of any statewide election.<sup>77</sup>

Florida law vested county canvassing boards with essential responsibilities in the event of challenged elections. The relevant statute permitted “[a]ny candidate whose name appeared on the ballot” to file within seventy-two hours of an election “a written request with the county canvassing board for a manual recount.”<sup>78</sup> It also permitted “[a]ny candidate . . . to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest . . . prior to the time the canvassing board certifies the results for the office being protested or within 5 days” thereafter.<sup>79</sup>

The statute provided that a county canvassing board that had been asked for a manual recount “may” authorize such a process, provided that the “[t]he manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue.”<sup>80</sup> Although Florida law specified no criteria for proceeding with such a preliminary manual recount, it did mandate a particular course of events should such a preliminary recount be directed:

If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.<sup>81</sup>

In counties using paper ballots that cannot be read properly because of uncorrectable problems with the tabulation devices involved, only the third option—manually recounting all ballots—was available to fulfill what appears to be a statutory duty under this section.

Within forty-eight hours of election day, a machine recount required under Florida law for close elections narrowed Bush’s initial 1784-vote lead to 327 votes.<sup>82</sup> There was no mechanism available to Gore at that point to trigger a unified statewide recount. He could

76. *Id.* § 102.141(2) (amended 2001).

77. *Id.* §§ 102.151, 102.155.

78. *Id.* § 102.166(4)(a) (amended 2001).

79. *Id.* § 102.166(1)(2) (amended 2001).

80. *Id.* § 102.166(4)(d) (amended 2001).

81. *Id.* § 102.166(5) (amended 2001).

82. *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at xi.

have sought manual recounts in every county in Florida, but his advisers believed that such a strategy would be both chaotic and unnecessary and might appear too impolitic—too much the desperate move of a sore loser.<sup>83</sup> The decision was made on November 9 to pursue recounts in only four heavily Democratic counties from which numerous complaints of irregularities had emerged—Broward, Miami-Dade, Palm Beach, and Volusia. The Gore team hoped that recounts in these counties would suffice to overcome the tissue-thin Bush lead.<sup>84</sup>

By this time, it became equally clear that the Bush campaign and Republican election officials in Florida would try to prevent the outcomes of hand recounts from affecting the certification of Florida's statewide vote. In particular, Katherine Harris, Florida's Secretary of State and co-chair of the Bush campaign in Florida, announced that she would not waive the apparent November 14 statutory deadline for the submission to her of county vote totals for certification.<sup>85</sup> On Saturday, November 11, the Bush campaign sought from the U.S. District Court for the Southern District of Florida an injunction to block any hand recounts.<sup>86</sup>

I refer to November 14 as the “apparent” deadline because, as the Florida courts would soon discuss, Florida statutes were resolutely ambiguous on the issue of deadlines. On one hand, section 102.111, *Florida Statutes*, stated in seemingly unequivocal terms: “If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.”<sup>87</sup> This provision was echoed by section 102.112(1), *Florida Statutes*, which appeared to obligate county canvassing boards to submit county returns within seven days:

The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary.<sup>88</sup>

These two provisions seemed to dictate that the 2000 county returns would have to be returned by November 14, the seventh day following the general election.

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83. See Dave Von Drehle et al., *In Florida, Drawing the Battle Lines: Big Guns Assembled as Recount Began*, WASH. POST, Jan. 29, 2001, at A01.

84. *Id.*

85. *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at xi.

86. *Id.* at xii.

87. FLA. STAT. § 102.111(1) (amended 2001).

88. *Id.* § 102.112(1) (amended 2001).

That very same paragraph of section 102.112, however, stated equally explicitly that the decision whether or not to include in statewide totals any county returns that are submitted after the specified deadline was within the discretion of the Department of State: "If the [county] returns are not received by the department by the time specified, such returns *may* be ignored and the results on file at that time *may* be certified by the department."<sup>89</sup> The confusion was compounded in the next subsection, which provided: "The department shall fine each board member \$200 for each day such returns are late, the fine to be paid only from the board member's personal funds."<sup>90</sup> Under this provision, it was plainly the policy of the Florida Legislature that county canvassing boards should be encouraged to submit even late returns as early as possible. This would be a puzzling concern if county returns even an hour or a day late were mandatorily to be ignored.

Notwithstanding Secretary Harris's insistence on the November 14 deadline, both Volusia and Palm Beach Counties readied to do the preliminary hand recounts authorized by section 102.166(4), *Florida Statutes*. Palm Beach County, home of the controversial butterfly ballot, presented the threshold question of how to discern voter intent from a punch ballot that had not been read by the vote tabulation machine. That is, how should a ballot be interpreted if the ballot, with regard to a particular office, did not exhibit a single unambiguous hole from which the perforated rectangle—the now notorious "chad"—had been completely and successfully removed? On Saturday morning, November 11, the Palm Beach County Canvassing Board (PBCCB) agreed on a "sunshine rule," under which a vote would be tallied if the impression made on an imperfectly removed chad nonetheless allowed light to pass through the ballot in the proper place.<sup>91</sup> Based on that standard, at 2 a.m. on Sunday, November 12, the PBCCB voted two to one that a net gain for Gore of nineteen votes from a sample of four precincts warranted a complete manual recount of the entire county.<sup>92</sup>

Before proceeding further, County Judge Charles Burton, chair of the PBCCB, nonetheless wanted an official opinion from the Florida Department of State Division of Elections on two issues: First, he wanted to know if vote totals based on the recount were to be certified to the Secretary of State after Tuesday, November 14, at 5 p.m.—whether they would be counted in the certification of statewide

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89. *Id.* (emphasis added).

90. *Id.* § 102.112(2) (amended 2001).

91. Von Drehle et al., *supra* note 83.

92. *Id.*

results.<sup>93</sup> Second, Burton wanted to know if the undercount for Gore detected by the preliminary manual recount over the weekend really triggered a mandatory recount under section 102.166(5) as a matter of law.<sup>94</sup> That is, he wanted to know whether the apparent undercounting of Gore votes amounted to what section 102.166 calls “an error in voting tabulation that could affect the outcome of an election,” which would obligate the PBCCB to conduct a countywide hand recount.<sup>95</sup>

On Monday, November 13, L. Clayton Roberts, the director of the Division of Elections of the Florida Department of State, issued a negative response to both questions. Roberts noted the apparent discrepancy between section 102.111, which seemed to make mandatory the exclusion from statewide totals of any county votes certified after the statutory deadline, and section 102.112, which seemed to render their inclusion or exclusion discretionary.<sup>96</sup> He nonetheless deemed any discretion conferred by section 102.112 to be irrelevant to the problem presented. In his judgment, whatever discretion section 102.112 allowed to the Department of State was intended only “[for] unforeseen circumstances not specifically contemplated by the legislature. Such unforeseen circumstances might include a natural disaster such [sic] Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance.”<sup>97</sup> In a separate opinion, Roberts denied that an undercount would trigger a mandatory recount where the undercount was a result of “[t]he inability of a voting systems [sic] to read an improperly marked marksense or improperly punched ballot . . . .”<sup>98</sup> Instead, “An ‘error in the vote tabulation’ [that would trigger a mandatory recount] means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots.”<sup>99</sup> The obvious implications of these opinions were that the undercount for Gore that the PBCCB detected did not require a countywide recount and that such a recount might be pointless because it might not be possible to complete one before the statutory deadline of November

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93. 00-10 Fla. Op. Div. of Elec. (2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 9.

94. *Id.*

95. 00-13 Fla. Op. Div. of Elec. (2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 12.

96. 00-10 Fla. Op. Div. of Elec. (2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 9-10.

97. *Id.* at 10.

98. 00-11 Fla. Op. Div. of Elec. (2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 11.

99. *Id.*

14, 2000, at 5 p.m., which, according to Clayton, the Department had no authority to waive.

The PBCCB responded to the Clayton opinion on the mandatory recount issue by seeking an advisory opinion on the same question from Florida Attorney General Robert A. Butterworth, who like Secretary Harris was a campaign co-chair for one of the presidential candidates—in Butterworth’s case, for Gore.<sup>100</sup> Butterworth disagreed vehemently with Clayton’s conclusion on this issue. He noted first that the error that, under section 102.166, triggers a mandatory countywide recount, is not an error in “the vote tabulation *system*,” a phrase used elsewhere in the statute, but “an error in the vote tabulation” or enumeration itself.<sup>101</sup> It was Butterworth’s view that, when referring to a tabulation system rather than to a vote count, the Florida Legislature consistently used the terms “vote tabulation system” and “automatic tabulating equipment.”<sup>102</sup> Having rejected on plain language grounds the notion that “an error in vote tabulation” meant only an error in the vote tabulation system, Butterworth argued: “[An] error in vote tabulation might be caused by a mechanical malfunction in the operation of the vote counting system, but the error might also result from the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots.”<sup>103</sup> Butterworth buttressed his conclusion by observing that section 102.166 dictates recount procedures that include a process for discerning voter intent from visually inspected ballots.<sup>104</sup> Moreover, Clayton’s distinction between failures to count “properly” marked or punched ballots and failures to count ballots that were “improperly marked” could not be sustained because Florida election law does not specify how a ballot is to be punched or marked; rather, it contemplates that the discernability of “voter intent” shall be the sole legal standard that renders a ballot countable.<sup>105</sup> Butterworth demonstrated that a substantial line of Florida Supreme Court decisions dating to early in the twentieth century confirmed his reading.<sup>106</sup> In short, the PBCCB’s discovery of a substantial number of Gore votes that were plainly intended by the voters, but not read by the mechanical system meant that an “error in vote tabulation” had oc-

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100. David Von Drehle et al., *A “Queen” Kept Clock Running: Harris and Allies Stalled Recounts, and Then Ran Into Fla. High Court*, WASH. POST, Jan. 30, 2001, at A01.

101. 00-65 Fla. Op. Att’y Gen. (Nov. 14, 2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 14-15. The opinion is also available at [http://legal1.firn.edu/ago.nsf/\\$defaultview](http://legal1.firn.edu/ago.nsf/$defaultview).

102. *Id.*

103. *Id.*

104. *Id.* at 16.

105. *Id.*

106. *Id.* at 17.

curred, triggering the Board's obligation to conduct a comprehensive recount.

In the meantime, the Volusia County Canvassing Board had gone to Florida Circuit Court to seek a temporary injunction against Secretary Harris and the Department of State that would require them to consider—even after 5 p.m. on November 14—the certified results from counties that could not complete by that deadline the county-wide recounts they were legally required to hold. On November 14, Circuit Judge Terry P. Lewis granted the requested relief, in part.<sup>107</sup> According to Judge Lewis, Secretary Harris erred in insisting that only an “Act of God” would permit her legally to consider the inclusion in state totals of county returns that were submitted after the seven-day deadline. In Judge Lewis's view, Harris's insistence on early finality ignored the legislature's countervailing interest in vote count accuracy.<sup>108</sup> Florida law appeared to anticipate a number of situations in which a manual recount would be called for even if it could not be completed within seven days. “It is unlikely,” he wrote, “that the Legislature would give the right to protest returns, but make it meaningless because it could not be acted upon . . . .”<sup>109</sup>

To give effect to the legislature's interests in both finality and accuracy, as well as the language of the statute, Judge Lewis concluded that counties were required to report existing vote totals by 5 p.m. on the seventh day following an election.<sup>110</sup> Counties were also entitled, however, to decide to file late returns, which would be included or not within the state count, as the Secretary of State would be entitled to determine within her discretion:

[T]he Secretary of State has the authority to exercise her discretion in reviewing that decision [to submit late returns], considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner. . . . [T]he Secretary cannot decide ahead of time what late returns should or should not be ignored . . . .<sup>111</sup>

Judge Lewis determined, however, that he could not direct Secretary Harris as to how to exercise her discretion.<sup>112</sup> He could go no further than indicate that “the exercise of discretion, by its nature, contem-

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107. *McDermott v. Harris*, No. CV-00-2700, 2000 WL 1693713 (Fla. 2d Cir. Ct. Nov. 14, 2000), *rev'd sub nom.* *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

108. *See id.* at \*1.

109. *Id.* at \*2.

110. *Id.* at \*3.

111. *Id.*

112. *Id.*

plates a decision based upon a weighing and [a] consideration of all attendant facts and circumstances.”<sup>113</sup>

Secretary Harris’s response to this decision was audacious. One might have thought that among “all attendant facts and circumstances” worthy of consideration in determining whether to include late filed returns would be the substance of those returns. Yet, the afternoon of Judge Lewis’s order, Secretary Harris responded by instructing all counties to report no later than 2 p.m. the following day a statement of those facts and circumstances that, in the views of the respective counties, would justify her inclusion of their late filed returns.<sup>114</sup> She wrote an additional letter the following day, specifying the criteria under which she intended to exercise her discretion:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election.
2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters.
3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters.
2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates’ names, but is otherwise in substantial compliance with the election laws.
3. Where there is nothing “more than a mere possibility that the outcome of the election would have been effected.”<sup>115</sup>

Following this advice, four counties—Broward, Miami-Dade, Palm Beach, and Volusia—all filed letters expressing an intention to submit late-filed returns.<sup>116</sup> That afternoon, Secretary Harris announced her rejection of each of these requests.<sup>117</sup> When Volusia

113. *Id.*

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

115. *Id.* at 1226 n.5 (citations omitted).

116. *Id.* at 1226.

117. *Id.* at 1227.

County protested this decision to Judge Lewis, he determined, on Friday, November 17, that Harris had “exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision.”<sup>118</sup> This, he concluded, fulfilled his prior order.

In the meantime, the U.S. District Court for the Southern District of Florida had refused the Bush request to block any manual recounts, a decision he appealed on November 15.<sup>119</sup> On November 16 and 17, the Florida Supreme Court denied a request by Harris to block the recounts,<sup>120</sup> agreed to resolve the dispute between Harris and Attorney General Butterworth regarding the hand counts’ legal basis,<sup>121</sup> and stayed any certification of the election by Secretary Harris while it heard the case.<sup>122</sup> On Friday, November 18, the final day for the counting of overseas ballots, new statewide totals were announced, expanding the Bush lead to 930.<sup>123</sup>

With these events, the ground had been laid for the first of four utterly critical judicial events—a decision on the merits by the Florida Supreme Court about the legality of hand recounts prior to a certification of a statewide winner in the presidential race. After hearing oral arguments on Monday, November 20, the Court issued on November 21 its unanimous ruling that (a) the hand counts could continue, and (b) that Secretary Harris was obliged to include in the state totals any returns submitted by the counties involved by November 26, 2000.<sup>124</sup>

Now, to get a full perspective on the implications of the Due Process Clause for the Florida vote, let us imagine a course of events that did not occur. Imagine that the Florida Supreme Court had decided differently and upheld Secretary Harris’s opinion that candidates could secure manual recounts only if the tabulation errors alleged were the result of fraud, noncompliance with statutory procedures, or an Act of God. Imagine further that, in the wake of that opinion, Al Gore had sued to demand a manual recount as an imperative of due

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118. *McDermott v. Harris*, No. CV-2700, 2000 WL 1714590, at \*1 (Fla. 2d Cir. Ct. Nov. 17, 2000), *rev’d sub nom.* *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

119. *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at xii.

120. *Palm Beach County Canvassing Bd. v. Harris*, No. SC00-2346, 2000 WL 1708520 (Fla. Nov 16, 2000).

121. *Palm Beach County Canvassing Bd. v. Harris*, No. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1716481 (Fla. Nov 17, 2000).

122. *Palm Beach County Canvassing Bd. v. Harris*, No. SC00-2346, SC00-2348, SC00-2349, 2000 WL 1716480 (Fla. Nov. 17, 2000).

123. *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at xii.

124. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

process in Broward, Miami-Dade, Palm Beach, and Volusia Counties. This is my hypothetical case of *Gore v. Harris*.<sup>125</sup>

The law to be applied in my hypothetical case is the now well-routinized due process doctrine that the Court crystallized in the 1970s into an oft-cited, even if academically criticized, two-step analysis. The first question presented in procedural due process cases is whether the individual interest at stake qualifies as “liberty” or “property” entitling the interest holder to due process protection.<sup>126</sup> The second is whether, in light of the competing individual and governmental interests at stake, additional decisionmaking procedures promise a sufficient likelihood of increased accuracy as to warrant their mandatory imposition.<sup>127</sup>

Gore would certainly have had no trouble establishing that the Due Process Clause protects the right to vote as a form of “liberty” or “property.” At one time, this might have seemed a difficult question because an obvious implication of the debates leading to the Fourteenth Amendment and of the subsequent adoption of the Fifteenth Amendment is that Congress, in 1866, did not anticipate that Section 1 of the Fourteenth Amendment would protect voting rights. Such was Justice Harlan’s position in his dissents in *Reynolds v. Sims*<sup>128</sup> and *Carrington v. Rash*.<sup>129</sup>

Beginning with the reapportionment cases, however, the Court has taken a consistent position that Section 1 does protect voting rights, resting chiefly on the “fundamental rights” strand of equal

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125. In so naming the case, I have elided—as did the Florida Courts—the question of a candidate’s standing to vindicate the rights of voters. In my hypothetical case, as in the genuine litigation, there was no question that, in their respective suits, candidates Bush and Gore had each alleged sufficiently concrete injury to meet the federal constitutional requirements for standing. See Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11,081, 11,085-89 (2000) (reviewing the Supreme Court’s standing decisions with regard to the injury requirement). The issue that a federal court might have stopped to consider is whether it would nonetheless have been appropriate to invoke the prudential rule against so-called third-party standing, which ordinarily bars even injured parties from seeking federal judicial intervention where the cause of their alleged injury is a violation not of their own rights but of another person’s. See *Singleton v. Wulff*, 428 U.S. 106 (1976). In this case, at least three factors argue persuasively for permitting the candidates to litigate their supporters’ rights: the close interrelationship of the candidate’s and voters’ interests, the certainty that the candidates would be vigorous proponents of the voters’ rights, and the possibility that direct voter suits might be deterred by uncertainty among the voters as to which of them were specifically affected by the state tabulation practices in dispute. Cf. *Touchston v. McDermott*, 234 F.3d 1133, 1151 (11th Cir. 2000) (Tjoflat, J., dissenting).

126. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

127. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

128. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

129. 380 U.S. 89, 97 (1965) (Harlan, J., dissenting).

protection analysis.<sup>130</sup> It is hardly a leap from acknowledging the status of voting rights as fundamental for equal protection purposes to recognizing voting as a protected form of liberty under the Due Process Clause.

The question is made even easier, however, because of the Court's current approach to the identification of protectible property interests under the Fourteenth Amendment. Since the early 1970s, it has been the Court's consistent position that an individual's benefits or interests that are created by state law are protected "property" if they are subject to "rules or understandings that secure [such] benefits and that support claims of entitlement to those benefits."<sup>131</sup> That is, there must be "rules or mutually explicit understandings that support [a] claim of entitlement to the benefit and that [the beneficiary] may invoke at a hearing" involving the benefit in question.<sup>132</sup> Well-known examples of such protected interests include many government jobs,<sup>133</sup> public assistance payments,<sup>134</sup> government disability insurance,<sup>135</sup> public education,<sup>136</sup> and state licenses.<sup>137</sup>

The right to vote in Florida—and the implicit concomitant right of having one's vote counted—is supported by explicit rules under Florida law. Section 97.041, *Florida Statutes*, prescribes the state's qualifications to register and vote in categorical and nondiscretionary terms.<sup>138</sup> There can be no doubt that Section 97.041 creates a protectible property interest for Fourteenth Amendment purposes.

130. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

131. *Roth*, 408 U.S. at 577.

132. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

133. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 352 (1985).

134. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

135. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

136. *Goss v. Lopez*, 419 U.S. 565 (1975).

137. *Barry v. Barchi*, 443 U.S. 55 (1979).

138. Section 97.041 reads:

(1)(a) A person may become a registered voter only if that person:

1. Is at least 18 years of age;
2. Is a citizen of the United States;
3. Is a legal resident of the State of Florida;
4. Is a legal resident of the county in which that person seeks to be registered; and
5. Registers pursuant to the Florida Election Code.

(b) A person who is otherwise qualified may preregister on or after that person's 17th birthday and may vote in any election occurring on or after that person's 18th birthday.

(2) The following persons, who might be otherwise qualified, are not entitled to register or vote:

(a) A person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.

(b) A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law.

(3) A person who is not registered may not vote.

FLA. STAT. § 97.041 (2000).

The task a Gore suit would thus have presented, as the Supreme Court has put it, would be “identif[ying] . . . the specific dictates of due process”<sup>139</sup> with regard to having one’s vote counted. The hypothetical suit by Gore voters demanding a manual recount in selected counties would be based on the following claim regarding the adjudicatory process of vote tabulation. Florida has in place an array of mechanical and electromechanical systems for discerning voter intent. As interpreted by Secretary Harris, these mechanical and electromechanical systems provide the exclusive means for discerning voter intent absent fraud, noncompliance with statutory procedures, or an Act of God. Due process, according to Gore, would demand a manual review of the ballots in an additional category of circumstances: namely, whenever a candidate could establish a prima facie likelihood that some failure had occurred, for whatever reason, for a county’s automatic tabulation system to count legally valid ballots of sufficient number to have swayed the electoral outcome.

The Court’s due process decisions have articulated a balancing rubric to assess what is reasonable in just this sort of procedural due process contest. As first crystallized in *Mathews v. Eldridge*:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>140</sup>

In other words, a due process challenge of the kind I am hypothesizing requires a court to compare the decisionmaking procedures sought by a plaintiff with the presumably more summary procedures offered already by the state authority being challenged. The court is to award the additional procedures sought (a) only if existing procedures run the risk of erroneous results and (b) only if there is sufficient value to the additional procedures, while (c) taking into account the relevant—and often competing—interests of the individual plaintiff and of the government.<sup>141</sup>

Despite widespread scholarly theoretical dissatisfaction with this particular three-part test,<sup>142</sup> its application to my hypothetical Gore

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139. *Mathews*, 424 U.S. at 335.

140. *Id.*

141. *See id.*

142. The seminal critique is Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

suit is straightforward. In the wake of Florida's electoral experience, there is no serious doubt that the state's mechanical and electromechanical systems run the risk of substantial error. Punch-card voting, in particular, appears to pose the danger of significantly inaccurate tabulation. Florida law essentially concedes this risk because it provides expressly for manual recounting as a check on the error of mechanical and electromechanical systems. On this point, there is truly no contest.

That conclusion, however, simply moves us to the next step of the inquiry. What would be the value of additional procedures, in light of the competing interests involved of Florida's voters and of the state government? As a general proposition, it can hardly be gainsaid that a manual inspection is valuable in addressing the erroneous tabulation of ballots by mechanical and electromechanical systems. Again, this proposition is a major premise of the Florida law that applies to election protests—and is consistent with the laws of at least twenty-seven other states that expressly contemplate the availability of manual counting.<sup>143</sup> Especially in a state such as Florida, in which

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143. Laws in the following twenty-eight states contemplate manual recounts expressly or by necessary implication: Alaska, ALASKA STAT. § 17-15-7(1) (Michie 2000) (court to hold hearing “to determine the procedures to be used for the examination” of ballots when “person or candidate seek[s] to examine the ballots”); California, CAL. ELEC. CODE § 15270 (West 2001) (providing for manual vote counts); Colorado, COLO. REV. STAT. § 1-10.5-102(3) (2000) (canvass board to select “a test number of ballots on which to conduct a machine count and hand count”; recount to be “conducted in the same manner as the original ballot count” if machine and hand counts prove “identical”); Florida, FLA. STAT. § 102.166 (2001) (authorizing manual recounts); Georgia, GA. CODE ANN. § 21-2-495(a) (2000) (providing for recounts where paper ballots or vote recorders have been used); Indiana, IND. CODE ANN. § 3-12-11-17.5 (Michie 2000) (permitting petitions for manual recounts); Kansas, KAN. STAT. ANN. § 25-4412(c) (2000) (ballots to be manually counted if ballot card damaged or defective and cannot be counted properly by automatic tabulating equipment); Maine, ME. REV. STAT. ANN. tit. 21-A, § 737-A (West 1999) (permitting candidate's representatives or counsel actually to conduct the recount); Massachusetts, MASS. ANN. LAWS ch. 54, § 135 (Law Co-op. 2001) (providing for manual recount procedure); Michigan, MICH. STAT. ANN. § 6.1871 (Michie 2000) (authorizing manual recounts); Minnesota, MINN. STAT. § 204C.21 (2000) (procedure for manual counts); Missouri, MO. REV. STAT. § 115.585 (2000) (providing for manual inspection of votes cast on paper ballots); Montana, MONT. CODE ANN. § 13-16-412 (2000) (providing for manual inspection of votes cast on paper ballots); Nebraska, NEB. REV. STAT. § 32-1114 (2000) (procedure to open and inspect ballots); Nevada, NEV. REV. STAT. § 293.423 (2001) (providing for opening and recount of ballots); New Hampshire, N.H. REV. STAT. ANN. § 660:5 (2000) (providing for manual recounts); New Jersey, N.J. STAT. ANN. § 19:53A-8 (West 2001) (providing for manual recounts when a count by tabulating equipment “becomes impracticable”); North Dakota, N.D. CENT. CODE § 16.1-16-01 (2000) (county auditor to review all ballots for recount); Ohio, OHIO REV. CODE ANN. § 3515.04 (Anderson 2001) (procedure for manual recounts); Oklahoma, OKLA. STAT. tit. 26, § 8-114 (2000) (procedure for manual recounts); Pennsylvania, PA. STAT. ANN. tit. 25, § 3261 (West 2001) (providing for opening of ballot boxes and recounting of votes by persons designated by specified courts or judges); Rhode Island, R.I. GEN. LAWS § 17-19-37.1 (2001) (authorizing candidate requests for manual recounts); Texas, TEX. ELEC. CODE ANN. § 214.049 (Vernon 2000) (procedure for manual recounts); Vermont, VT. STAT. ANN. tit. 17, § 2602 (2001) (providing detailed manual recount procedures); Virginia, VA. CODE ANN. § 24.2-802 (Michie 2001) (authorizing manual inspection of all ballots); Washington, WASH.

any ballot is lawful that expresses the intent of the voter in a discernible way, a manual count is the only means of discovering intentions left unread because of either machine or voter error.

Whether or not the burden of such additional procedures is warranted, however, depends upon the Supreme Court's mandatory interest balancing. With regard to the demand for recounts I have hypothesized, that balance overwhelmingly favors Gore. Insofar as Gore's rights were inextricably intertwined with the rights of those voters who supported him, Gore would have been invoking an individual interest that the Supreme Court has characterized repeatedly as being of the highest order. As early as 1886, the Supreme Court described voting "as a fundamental political right, because preservative of all rights."<sup>144</sup> The Court's modern equal protection voting jurisprudence is founded on this premise.

What, then, would be the state's countervailing interests? A state's usual interests in avoiding increased procedural formality are cost-savings, time-savings, and achieving finality in administrative decisionmaking. In this case, the financial interest, although genuine, is hardly forbidding. The Court has never permitted cost-savings, by itself, to be a deciding factor in a case involving substantial individual rights. The time factor, of course, is potentially compelling in an electoral context. With regard to the appointment of presidential electors, states surely have a critical interest in resolving disputes early enough to permit actual balloting in the Electoral College. *Bush v. Gore* was careless in its analyses of key deadlines, but, for purposes of my hypothetical, its mistakes are irrelevant. There is no real reason to doubt that manual counts in disputed counties could have occurred in timely fashion had they commenced promptly after election day. In assessing the state's interest in promptness, moreover, as well as its closely related interest in finality, it is worth recalling that, in any event, the state could not have certified final victors in the November 7 poll until November 17 because of the time legally required for the counting of overseas ballots.<sup>145</sup> Had hand counts proceeded expeditiously, it is probable they

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REV. CODE § 29.64.015 (2001) (providing for manual recount unless candidates agree on alternative procedure); West Virginia, W. VA. CODE § 3-6-9 (2001) (manual inspection procedures); Wisconsin, WIS. STAT. § 9.01(1)(b) (2000) (providing for manual inspection of ballots). These do not include states in which manual recounting would appear to be within a state official's broadly granted discretion, for example, Oregon, OR. REV. STAT. § 258.150 (1999) (Secretary of State to determine most appropriate recount method), or in which manual recounting is authorized only upon a demonstration that automatic vote count technologies had failed, for example, Wyoming, WYO. STAT. ANN. § 22-11-107 (Michie 2001) (recount made by alternate method if automatic tabulating equipment fails).

144. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

145. See FLA. ADMIN. CODE ANN. r. 1S-2.013(7).

With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is post-

could have been completed by November 17. In short, the state's interests in avoiding a manual count appear to be notably less singular and fundamental than the interest of each Florida voter in having his or her intentions accurately ascertained.

But even this does not tell the entire story. Any accounting for the state's interests must take notice also of those state interests that actually favor a manual recount. It should hardly have required our current fiasco to remind us that any government stands to pay a dire price in lost legitimacy should its citizenry begin to lose faith that electoral results actually reflect the expressed intentions of the voting public. That risk would plainly loom largest in just that category of cases in which Gore would be insisting on the constitutionally mandatory status of manual recounts, that is, cases in which a candidate or voter had established a *prima facie* likelihood that a county's automatic tabulation system had failed to count legally valid ballots of sufficient number to have potentially swayed the electoral outcome. These insights counsel powerfully for a state's adoption of procedures that provide citizens a reasonable guarantee that the electoral connection between the people and their officials is a genuine one. Where, as in this matter, a state's own interests, fully accounted for, militate in favor of additional procedural protections, the Supreme Court has deemed that fact relevant to the implementation of its due process calculus.<sup>146</sup>

Based on this analysis, the proper resolution to the hypothetical case of *Gore v. Harris* is plain: had the Florida Supreme Court upheld Secretary Harris's view of the law and had Vice President Gore demanded the recounts he sought under the Due Process Clause, he should have won his case. He had shown the challenged tabulation to be significantly in error. There was no doubt that a manual count had substantial potential to remedy the problems presented. A manual count could have proceeded without compromising Florida's in-

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postmarked or signed and dated no later than the date of the federal election shall be counted if received no later than 10 days from the date of the federal election as long as such absentee ballot is otherwise proper.

*Id.*

146. See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970):

[W]elfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

*Cf. Goss v. Lopez*, 419 U.S. 565, 583 (1975) ("In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.").

terest in a timely, final certification. The financial interest of the state in summary procedures would not have justified the risk that obviously existed of disenfranchising a significant number of those Floridians who cast intelligible ballots on November 7. Moreover, Florida's interest in maintaining the confidence of the electorate in the accuracy and fairness of the state's electoral system would actually have supported a Gore suit.

Of course, Al Gore did not seek to require manual counts in the four disputed counties under the Due Process Clause. Florida law promised him the very result he sought. The Florida Legislature—without constitutional prodding by the federal courts—had already designed an electoral procedure that effectively tracks the requirements of due process. Florida statutes provided genuine opportunities for the administrative correction of tabulation error, including the possibility of manual recounts where necessary. They made such recounts mandatory upon a *prima facie* showing from sample precincts that “indicates an error in the vote tabulation which could affect the outcome of the election.”<sup>147</sup> The administrative process is subject to independent judicial review. Because the Florida Supreme Court upheld Gore's view of the law, no other federal litigation may have seemed necessary. But reviewing the hypothetical case of *Gore v. Harris* provides a helpful demonstration of three things. The first is the amenability of the Florida electoral controversy to conventional due process analysis. The second is the importance of procedural due process in the tabulation of votes as a bulwark of democratic government. The third is that Gore was entitled to mandatory recounts in at least four counties not only because of Florida statutes, but also because of the Fourteenth Amendment. The Supreme Court effectively undercut democracy and deprived Gore voters of their constitutional rights.

### C. *Applying Due Process II: The Real Case of Bush v. Gore*

That brings us to the issue actually addressed by the *per curiam* opinion in *Bush v. Gore*: the threatened lack of uniformity in different counties' implementation of their manual recounts. A complex series of events had transpired since the Florida Supreme Court opinion rejecting Secretary Harris's view of Florida's election protest law. On November 26, Harris certified Bush the winner in Florida, including in her totals the results of recounts in Broward and Volusia Counties. She refused to include the Palm Beach recount totals, which had reached her office about two hours after the court-imposed deadline. There was also no comprehensive recount from Miami-

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147. FLA. STAT. § 102.166(5) (2000) (amended 2001).

Dade County, where the county canvassing board, through a torturous process, had finally decided that a countywide recount was appropriate, but that the count could not be completed by the court-imposed date. Harris refused to make adjustments based on the partial recount of sample precincts.<sup>148</sup>

Following Harris's certification, Gore filed a contest of the election in Leon County, which, under Florida law, is the proper venue for election contests involving more than a single county.<sup>149</sup> The case was tried before Leon County Circuit Judge N. Sanders Sauls while the U.S. Supreme Court had under advisement Bush's challenge to the Florida Supreme Court decision that had allowed the precertification recounts to continue. On December 4, both the Supreme Court and Judge Sauls acted. The Supreme Court refused to address Bush's supposed federal issues on the merits, but nonetheless vacated and remanded the Florida Supreme Court's November 21 opinion for clarification with regard to two questions of dubious legal relevance.<sup>150</sup> Judge Sauls rejected Gore's contest on the ground that he had failed to prove a "reasonable probability" that the election would have turned out differently if not for the problems he identified in counting ballots.<sup>151</sup> On December 6, the Eleventh Circuit rejected Bush's request for an injunction against manual recounts.<sup>152</sup> The next day, the Florida Supreme Court heard oral arguments in the Gore appeal from Judge Sauls's ruling. On December 8, the Florida Supreme Court decided, four to three, not only to grant Gore the relief he requested, but also to direct the circuit court to order the relevant officials "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith . . ." <sup>153</sup> Judge Sauls recused himself from implementing the court's mandate<sup>154</sup> and was replaced by Leon County Circuit Court Judge Terry Lewis. Despite Judge Lewis's immediate steps to implement the mandate, the U.S. Supreme Court stayed the recount by a five to four vote on December 9.<sup>155</sup> After oral arguments on De-

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148. *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000); Tim Collie & Mark Hollis, *Bush Claims Win, Gore Fights Count*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Nov. 27, 2000, at 1A, available at 2000 WL 28992947.

149. FLA. STAT. § 102.1685 (2000).

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

151. *Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000), *rev'd* 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000), *reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*, *supra* note 67, at 53, 55.

152. *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000); *Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied* 531 U.S. 1061 (2001).

153. *Gore v. Harris*, 772 So. 2d at 1262.

154. *Gore v. Harris*, No. 00-2808, 2000 WL 1801773 (Fla. 2d Cir. Ct. Dec. 8, 2000).

155. *Bush v. Gore*, 531 U.S. 1046 (2000).

ember 10, the Supreme Court decided *Bush v. Gore* on December 12.<sup>156</sup>

What the Bush suit effectively asked the Supreme Court to do was to judge the fairness of the system of mass adjudication that the Florida Supreme Court had put into place in order to determine the resolution of the Gore election contest. That process, in essence, was to consist of seven elements:

1. All counties that had not conducted a manual recount or tabulation of the undervotes since Election Day were to conduct such tabulations in the respective counties.<sup>157</sup>
2. Miami-Dade would tabulate by hand approximately 9,000 ballots, which its counting machine had registered as non-votes, but which not been manually reviewed as part of its earlier partial recount.<sup>158</sup>
3. Ballots would be counted (and thus treated as legal) throughout the state if they revealed a "clear intent of the voter."<sup>159</sup>
4. The recounting would be done by as many two person teams in each county as would be required to complete the respective recounts in timely fashion.<sup>160</sup>
5. If questions arose with regard to any ballot, they would be reviewed in each county by two circuit judges who, if they could not agree, would refer the matter for determination to Judge Lewis, who would preside over the statewide recount.<sup>161</sup>
6. Both the Gore and Bush campaigns would be entitled to have observers watching every counting team. Objections to the treatment of any ballot could be registered in writing by either observer and filed with the Clerk of the Leon County Circuit Court for Judge Lewis's review.<sup>162</sup>
7. A new statewide total would be certified to include the results from all recounts that occurred prior to November 26, the results from Palm Beach, the results from Miami-Dade's pre-November 26 partial recount, results from the recounts of the remaining Miami-Dade undervotes plus recounted results in all remaining counties, and any adjustment Judge Lewis might order based on his review of any objections forwarded to him.<sup>163</sup>

156. 531 U.S. 98 (2000).

157. *Gore v. Harris*, 772 So. 2d at 1252-55. Statewide totals would be adjusted to include the additional votes in Palm Beach County for Gore that had been submitted within hours of the court's earlier deadline, plus 168 votes from Miami-Dade County that had resulted from that county's earlier partial recount. *Id.* at 1260.

158. *Id.* at 1258-59.

159. *Id.* at 1257.

160. See *Gore v. Harris*, No. 00-2808, at 2 (Fla. 2d Cir. Ct. Dec. 9, 2000) (Florida Recount General Instructions), available at <http://election2000.stanford.edu/CV-00-2808-61.pdf>.

161. *Id.* at 5.

162. *Id.* at 2-3.

163. *Gore v. Harris*, 772 So. 2d at 1262.

The majority per curiam opinion, in turn, identified the five following aspects of the foregoing process as equal protection “problems”:

1. “[T]he absence of specific standards to ensure . . . equal application” of the “clear intent of the voter” standard;<sup>164</sup>
2. The inclusion in the final statewide total recount results from Broward, Palm Beach, and Miami-Dade that were based on a comprehensive review of all ballots and not limited, as would be the recounts in other counties, to a review of so-called “undervotes”;<sup>165</sup>
3. The possibility that the final statewide totals would be allowed to include only partial recount results from some counties, but complete totals from others;<sup>166</sup>
4. The failure of the Florida courts to specify more precisely who would recount the ballots, while relying for dispute resolution on ad hoc teams of state judges who lacked training in handling and interpreting ballots;<sup>167</sup> and
5. Limiting the objection process to written objections to be adjudicated after the recount, rather than during it.<sup>168</sup>

In his dissent, Justice Souter agreed that the first problem resulted in “wholly arbitrary” differences in different counties’ treatment of ballots, and thus violated equal protection’s fundamental requirement of rationality.<sup>169</sup> Justice Breyer stated that “principles of fairness should have counseled the adoption of a uniform standard” because of the election’s “very special circumstances.”<sup>170</sup> The “very special circumstances” Breyer identifies are these:

[T]he use of different standards could favor one or the other of the candidates since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and . . . the relevant distinction [between strict and lenient standards] was embodied in the order of the State’s highest court . . . .<sup>171</sup>

Because the majority, however, had called the recount off, he declined to “decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.”<sup>172</sup>

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164. *Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

165. *Id.* at 107-08.

166. *Id.* at 108.

167. *Id.* at 109.

168. *Id.*

169. *Id.* at 134 (Souter, J., dissenting).

170. *Id.* at 146 (Breyer, J., dissenting).

171. *Id.* at 145-46 (Breyer, J., dissenting).

172. *Id.* at 146 (Breyer, J., dissenting).

Of the five infirmities identified by the majority, it is difficult even to articulate how the reliance on unnamed volunteers and untrained judges or the limitation of the candidates' protest to written objections to be decided by a single judge could amount to an equal protection problem. Truly, if these features compromised the fairness of the recount at all, they would be matters of due process, not equal treatment.<sup>173</sup> That leaves as articulable equal protection problems the disparate treatment of ballots in different counties because of how different counties might implement the "clear intent of the voter" standard, the comprehensiveness of recounting in some counties as compared to those that would re-inspect only "undervotes," and the possible inclusion in the statewide total of some counties' recounts that were only partial, rather than complete.

Except for the fact that these are, of course, differences, it is hard to see how they implicate "equal protection." The per curiam opinion states: "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."<sup>174</sup> The majority does no more to explain this conclusion than simply to point to differences in the indicia of voter preference deemed to suffice as a matter of demonstrating voter intent in Miami-Dade, Palm Beach, and Broward Counties. At most, there is a possible implication that the different practices identified—in the case of partial versus total recounts, a hypothetically different practice—might result in a different weighting of the votes in different counties.

The mere fact of differences among counties cannot plausibly be enough, however, to establish an equal protection violation. Different practices by different counties in implementing the law probably exist for every state administrative program in the country that states delegate to counties for implementation. There are undoubtedly discernible differences in county-administered adjudicatory programs in every state as varied as driver licensing and the certification of foster homes. With regard to the Florida election itself, there is no doubt that the biggest difference in the likelihood of registering voter intent in one county versus another was the variation in the voting machinery employed. It is a safe bet that differences existed also among different counties in the degree of assistance afforded to confused vot-

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173. The majority's implicit thought regarding equality might be as follows: Judge Lewis's remedial scheme would have left voters in counties with untrained but adept judges with some unspecified unjust advantage in comparison with voters in those counties whose untrained judges were also bad at their job. If this distinction were of constitutional magnitude, the Court would conceivably have found a reason to find the entire civil and criminal justice system of the United States unconstitutional.

174. *Bush v. Gore*, 531 U.S. at 105.

ers, the inspectors' willingness to provide new ballots to voters who inadvertently defaced theirs, and in the waiting times to cast votes—all of which would surely produce differences in voter treatment that could have significant electoral impact.<sup>175</sup> If the majority perceived it to be a constitutional problem that different vote count procedures could not be justified by any nonarbitrary rationale, then the Court was doubly misled. It was misled because none of the other differences I have articulated in election practice could be justified by any less arbitrary a rationale, and, in fact, all of them are justified on the same rational basis: namely, the state's preference for empowering locally accountable officials with important local functions.

Nor is it at all clear how to apply the equality demands of the Court's reapportionment jurisprudence. The race for presidential electors is statewide; every vote counts the same toward the final result, namely,  $1/N$ , where  $N$  is the total number of legal ballots cast. The only intercounty difference on which the Court could be focusing is a marginal difference in the likelihood between counties that a particular voter's ballot will be deemed to convey a "clear indication of voter intent." The differences resulting, however, from the alleged infirmities identified by the Court are overwhelmed by the statistical differences imposed by the differences in voting machinery. And, in any event—even if this sort of difference is of the same constitutional seriousness as a departure from "one person, one vote"—the fact is that the Court does not demand perfect adherence to "one person, one vote" even in districted elections. The Court, for example, once approved an apportionment plan for the Virginia House of Representatives in which there existed among districts a maximum percentage variation from ideal equality of 16.4%.<sup>176</sup> It approved a similar plan for Wyoming in which the average deviation from equality was 16% and the maximum deviation 89%.<sup>177</sup> The rationales behind these plans were hardly more compelling than the rationality of delegating

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175. Cf. Marcia Coyle, *Gauging 'Bush v. Gore' Fallout*, NAT'L L.J., Dec. 25, 2000-Jan. 1, 2001, at A4:

In Iowa, where [University of Iowa Law] Prof. [Randall] Bezanson lives, optical scanners are used to tabulate votes, he said. Some counties program the scanners to reject "overvotes," or double voting in a race. When the ballot is rejected, the machine spits it out and the voter, who is still present, is given a new ballot to correct the error. But other counties, he said, program the scanners simply to reject the overvotes with no chance for correction.

"Is the inequality between those counties that follow a different set of programming instructions a violation of the equal protection clause because there's a systematic difference in the kinds of votes that are counted?" asked the professor. Looking at the Bush-Gore per curiam, he added, "It's very hard to explain why, as a matter of principle, that isn't every bit as unconstitutional as the different recounting standards applied in different counties in Florida."

176. *Mahan v. State Bd. of Elections*, 410 U.S. 315, 319 (1973).

177. *Brown v. Thomson*, 462 U.S. 835, 839 (1983).

to local officials in Florida the discretion to decide how best to determine the “clear intent of the voter.” The resulting departures from equality were dramatically greater than anything that could have resulted from the problems asserted to exist by the majority in *Bush v. Gore* with regard to the Florida statewide recount.

But the unpersuasiveness of the Court’s analysis should not end the inquiry into electoral fairness. The fairness of any recount process in a presidential election is plainly critical to its legitimacy. As it happens, however, employing due process doctrine as the better framework for analysis would have shown that Florida law, not the Supreme Court majority opinion, embodied the sounder view of what fairness should have entailed.

Let me start with the two supposed equal protection problems that plausibly implicate the *accuracy*, as opposed to the *consistency*, of the recount. These are the failure of the Florida courts to rely exclusively on officials trained in handling and interpreting ballots, and Judge Lewis’s determination to limit the objection process to written objections to be adjudicated after the recount rather than during it. Applying to these problems the *Mathews v. Eldridge* due process calculus, it is obvious that neither is a problem of constitutional magnitude. It is speculative at best that some measure of training in handling and interpreting ballots would lead to more reliable results than depending on volunteers under constant vigilance by representatives of the two parties, circuit judges whose good faith and professionalism could surely be presumed, and the watchful eye of Judge Lewis. As for the process of relying on written objections, rather than contemporaneous oral objections, it is hard to see why this would have any impact at all on the accuracy of ultimate determinations. In any event, neither practice would seem to threaten any significant prospect of disenfranchising Florida voters. And, the state’s rationale for these practices is a strong one, namely, finishing the electoral contest in time for Florida’s electors to vote.

The due process objections to the other alleged infirmities are of a different order. They do not actually address the putative accuracy of the court-ordered recount. They are better viewed as substantive due process objections to the alleged irrationality of the practices at issue. Two of these objections can be dealt with all but summarily.

First, the Court objected that “[t]he Florida Supreme Court’s decision thus gives no assurance that the recounts included in a final certification must be complete.”<sup>178</sup> It might equally be said, however, that nothing in the Florida Supreme Court’s decision suggested that anything else would be the case. The Court’s mandatory inclusion in

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178. *Bush v. Gore*, 531 U.S. at 108.

the statewide certified totals of the precertification partial recount in Miami-Dade was simply consistent with its decision to include the results from all the precertification recounts. It was emphatically not the case, however, that the Miami-Dade partial recount was the end of the matter for Miami-Dade County. With regard to the remaining undervotes in Miami-Dade, Miami-Dade was to complete its recount in the same manner as every other county: by reviewing all the undervotes. There would, in other words, be a complete and not a partial total in Miami-Dade.

A second objection was that the Broward, Palm Beach, and partial Miami-Dade totals were included based on a comprehensive review of the ballots in question, while the recounts under Judge Lewis's supervision would be limited to undervotes in all other counties not recounted prior to certification.<sup>179</sup> There was, however, an obvious rationale for this difference. The counties that completed comprehensive recounts prior to certification were directed to do so by the statutory provisions governing precertification election protests.<sup>180</sup> The Florida Supreme Court recognized, however, that counties subject to the court's December 8 order could not, as part of the post-certification contest process, produce comprehensive recounts quickly enough to take whatever advantage the state might wish with regard to the safe harbor provision in federal law for the certification of state electors—a provision that required the Florida Supreme Court to complete the adjudicatory process by December 12. Given the importance that the United States Supreme Court—however misguided—urged the Florida Supreme Court to attach to the federal safe harbor provision,<sup>181</sup> it would be implausible to dismiss the Florida court's attentiveness to that statute as unconstitutionally irrational.

That leaves only the variability within and among counties in the implementation of the “clear intent of the vote” standard as a possible source of objection. Examined in context, however, this variability is hardly a defect of constitutional magnitude.

As the majority notes, all relevant officials were aware of a single general standard governing the recount procedure; that is the “clear intent of the voter.” The majority conceded: “This is unobjectionable as an abstract proposition and a starting principle,” but added, “[t]he problem inheres in the absence of specific standards to ensure its equal application.”<sup>182</sup> This thought was perhaps more helpfully summarized by Justice Breyer:

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179. *Id.* at 107-08.

180. FLA. STAT. § 102.166(5) (2000) (amended 2001).

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

182. *Bush v. Gore*, 531 U.S. at 106.

The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the “clear intent of the voter,” but also by uniform *subsidiary standards* (for example, a uniform determination whether indented, but not perforated, “undervotes” should count).<sup>183</sup>

The problem, that is, lay not with the absence of a uniform standard, but with the absence of sufficiently precise and uniform subsidiary standards.

If that were so, of course, the fault would lie not with the Florida Supreme Court, but with the Florida Legislature because it specified no standard other than “the clear intent of the voter” as pertaining under Florida law to the evaluation of uncertain ballots. Had the Florida Supreme Court promulgated “uniform subsidiary standards” to define the legislative standard more precisely, it would surely have been accused of violating due process by changing the rules of vote counting after the election. Earlier judicial opinions gave no grounds for divining any subsidiary standards, and the court’s caution could only have been greater because the Supreme Court, in *Bush v. Palm Beach County Canvassing Board*, had intimated the rather unlikely proposition that any judicial elaboration upon the state’s statutory law might even violate Article II.<sup>184</sup>

But there are three more fundamental objections to the Supreme Court’s disparagement of Florida’s lack of subsidiary standards. The first is that there would likely be so many ways in which an inspector, reasonably and in good faith, could believe she had discerned a clear voter intent or the absence of it that any precise subsidiary standard would itself involve some degree of arbitrariness. Complicating the process through the imposition of arbitrary sub-rules may not have seemed necessary to achieve reasonably accurate results. It would not have been a surprising experience for officials involved in the recounting efforts that, after reviewing some substantial number of ballots, they would find themselves with shared and well-understood common sense norms sufficient to produce relatively consistent results for each counting team and county canvassing board.<sup>185</sup> It is not clear that subsidiary standards would have improved accuracy and fairness to any real extent—at least if “the clear intent of the voter” were to remain the governing primary standard.

That point brings up the second critical objection to the Supreme Court’s analysis of standards. Because “clear intent of the voter” was

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183. *Id.* at 145 (Breyer, J., dissenting) (emphasis added).

184. 531 U.S. at 76-77.

185. *Cf.* Tom Collins, *Absent a Clear Statute, Broward Judge Says He Turned to Common Sense to Consider Chads*, MIAMI DAILY BUS. REV., Feb. 2, 2001, at C1, available at Westlaw MIAMIDBR database.

the legislatively prescribed standard, a good argument exists under Florida law that any subsidiary standard could operate as no more than a burden-shifting device. In other words, subsidiary standards consistent with the law might have provided, for example, that dimpled chads, in and of themselves, should not automatically be deemed conclusive as to voter intent. It might well have violated Florida law, however, to deny either party the possibility, even under subsidiary standards, of arguing that a dimpled chad *on a particular ballot* did meet the Florida statutory standard of “clear intent of the voter.” To deny that possibility would have been to amend Florida’s statutory standard.

The third, and perhaps most important point, is that Judge Lewis sat at the anticipated end of the recounting process to iron out any unjustifiable inconsistencies. That is, the availability of a single adjudicator to determine whether one ballot was treated too easily as evidencing clear intent or another was excluded too stringently offered a structural assurance of consistency across counties. So long as the state’s attempt at insuring consistency is reasonably meaningful, as this was, the demands of due process are satisfied.

None of this is to apologize for the ways in which Florida’s system departed from ideal administrative justice. The state would surely have been better served had all relevant decisionmakers simply ignored the federal safe-harbor provision and pursued comprehensive statewide recounts with yet more time for judicial review as the instrument of achieving tolerable consistency. But the level of inconsistency alleged with regard to Florida’s vote tabulation is of no different order than we live with regularly under virtually every system of mass adjudication.

In a famous study of social security adjudication in the 1970s, Jerry Mashaw discovered variations among federal administrative law judges in granting social security disability awards at rates ranging from under ten to over eighty percent of their respective caseloads. Moreover, and quite startlingly, he was not able to find through statistical analysis any systematic differences in the cases or caseloads confronting the Administrative Law Judges that accounted for these different rates of award. In other words, the only good predictor of a litigant’s likelihood of recovering a social security award in a social security hearing was the identity of the Administrative Law Judge.<sup>186</sup> This may have been a deplorable feature of the social security system, but there was and there is no well-founded theory of due

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186. JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* 21 (1978); JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 411-12 (4th ed. 1998).

process law under which it could have been judged unconstitutional. The same statement is equally true of Florida's aborted recount.

In short, despite the Court's identification of real and potential variations among counties and their vote counters in their treatment of ballots, the majority did not provide an analytic framework under either equal protection or due process that justified terminating the recount on grounds of unconstitutionality. None of the differences in vote counting process identified by the majority as an equal protection problem represented an intentional effort to disenfranchise any identifiable group. All were the by-product of a feature of state governance long treated as reasonable, namely, state deference to county administrative discretion in the implementation of statewide administrative mandates. Of course, even in such circumstances, if some fundamental question of *unfairness* to individual voters were to arise, then the ground would exist for judicial intervention in the name of due process. But the effect of the Supreme Court's intervention was not to remedy unfairness to individual voters; it was to prevent the State of Florida from undertaking a good faith effort to ascertain the intentions of as many of its voters as possible.

The *Bush v. Gore* majority ignored a lesson made abundantly clear from the hypothetical case discussed above of *Gore v. Harris*: the importance of procedural due process in the tabulation of every voter's ballot as a bulwark of democratic government. In that spirit, the one thing due process should have guaranteed in Florida was a manual recount in those counties where either candidate could make out a *prima facie* showing that, for whatever reason, some failure had occurred for for a county's automatic tabulation system to count legally valid ballots of sufficient number to have swayed the electoral outcome. Gore had effectively made such a showing in four counties. Florida's judicial system was well on its way to fulfilling the demands of due process. It is the Supreme Court of the United States that was the primary agent of unfairness in this episode.

### III. REAL DEMOCRACY: *BUSH V. GORE* AND INSTITUTIONAL RESTRAINT

Upon his elevation to the Supreme Court, Justice Lewis Powell decided to refrain from voting in presidential elections lest it compromise, however indirectly, the appearance or reality of his obligation to remain impartial.<sup>187</sup> By contrast with that display of heroic self-restraint, the current Supreme Court's conservative majority has created an unsettling appearance of wanting to vote for President not only on Election Day, but to do so as often as necessary thereafter.

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187. Telephone Interview with John C. Jeffries, Jr., Dean, University of Virginia School of Law, Justice Powell's biographer and former clerk (July 2, 2001).

The arrogance of five Justices in bringing a presidential election to a halt by a one-vote judicial majority will likely haunt history's appraisal of every other bit of this right-wing faction's jurisprudential corpus—and it should. If any value should be paramount in constitutional review of a presidential election, it is the value of democracy. Democracy's nonappearance among the concerns of the *Bush v. Gore* majority is stunning, especially in light of the Rehnquist Court's ordinary solicitousness toward protecting political processes against judicial intervention, especially at the state and local level.

There is ample evidence of the majority's tendentiousness.<sup>188</sup> The seriousness with which the Court's earlier opinion in *Bush v. Palm Beach County Canvassing Board* treated Bush's near-frivolous Article II argument,<sup>189</sup> Justice Scalia's reasons in support of the decision to stay the judicially ordered recount in Florida,<sup>190</sup> and the utter im-

188. An especially disturbing feature of the lack of restraint in *Bush v. Gore* is the apparently close alignment of various Justices with conservative electoral politics. One much-reported and especially distressing incident in this vein was recounted in the press as follows:

[A]t an election night party on Nov. 7, surrounded for the most part by friends and familiar acquaintances, [Justice Sandra Day O'Connor] let her guard drop for a moment when she heard the first critical returns shortly before 8 p.m.

Sitting in her hostess' den, staring at a small black-and-white television set, she visibly started when CBS anchor Dan Rather called Florida for Al Gore. 'This is terrible,' she exclaimed.

She explained to another partygoer that Gore's reported victory in Florida meant that the election was 'over,' since Gore had already carried two other swing states, Michigan and Illinois.

Moments later, with an air of obvious disgust, she rose to get a plate of food, leaving it to her husband to explain her somewhat uncharacteristic outburst. John O'Connor said his wife was upset because they wanted to retire to Arizona, and a Gore win meant they'd have to wait another four years.

Dave Zweifel, *Ruling for Bush Fits Justice's Plans*, THE CAPITAL TIMES (Madison, Wis.), Dec. 27, 2000, available at 2000 WL 24299725. That a Supreme Court Justice would attend a social gathering for watching the presidential returns alone suggests an insensitivity to the appearance of impartiality that ought govern the members of the Court.

189. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 76-77. There is no evidence, in originally granting legislatures the authority to determine how presidential electors would be appointed, that the Framers intended to restrict the authority of states to delimit the powers of their respective legislatures through state constitutions or judicial review. See 5 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 338 (1996).

190. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring). Compare the Eleventh Circuit's analysis three days earlier:

At this time, Plaintiffs cannot demonstrate a threat of continuing irreparable harm. At the moment, the candidate Plaintiffs (Governor Bush and Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have been certified as the winners of Florida's electoral votes notwithstanding the inclusion of manually recounted ballots. Moreover, even if manual recounts were to resume pursuant to a state court order, it is wholly speculative as to whether the results of those recounts may eventually place Vice President Gore ahead. . . .

Nor are the voter Plaintiffs (all of whom allege that they voted for Governor Bush and Secretary Cheney) suffering serious harm or facing imminent injury.

plausibility of the majority's remedial opinion in *Bush v. Gore* all suggest a Court not merely wrong, but reckless.<sup>191</sup> Also, and perhaps most telling, is the dissonance between the per curiam opinion and its authors' previously articulated jurisprudential commitments. This particular majority's disregard for federalism and its sudden embrace of equal protection analysis at its most fastidious is only rendered more suspect by the self-declaration that the Justices may be writing a ticket for one ride only: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."<sup>192</sup>

Among the jurisprudential commitments abandoned is these Justices' prior commitment to the political question doctrine. *Bush v. Gore* can be usefully compared, for example, to *Nixon v. United States*,<sup>193</sup> in which the Court confronted a challenge by an impeached

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No voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice. Nor does any voter claim that his vote was rejected or not counted. . . . Even assuming Plaintiffs can assert some kind of injury, they have not shown the kind of serious and *immediate* injury that demands the extraordinary relief of a preliminary injunction. Additionally, any alleged voter injury, unrelated to the outcome of the election certified by the Florida Secretary of State, can be adequately remedied later. And although these Plaintiffs assert that Florida's existing manual recount scheme must be invalidated for now and in the future, no one suggests that another election implicating those procedures is underway or imminent.

Plaintiffs' other allegations of irreparable injuries to justify a preliminary injunction are unconvincing. The candidate Plaintiffs contend that if the manual recounts are allowed to proceed, simply rejecting the results of those recounts after the conclusion of this case will not repair the damage to the legitimacy of the Bush Presidency caused by "broadcasting" the flawed results of a recount that put Vice President Gore ahead. *But . . . we reject the contention that merely counting ballots gives rise to cognizable injury.*

Siegel v. LePore, 234 F.3d 1163, 1177 (11th Cir. 2000) (second emphasis added) (citations omitted).

191.

In the interest of finality, . . . the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees."

*Bush v. Gore*, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting) (citations omitted).

192. *Id.* at 109.

193. 506 U.S. 224 (1993).

and convicted federal judge to the procedures by which the Senate had removed him from office. Rather than taking evidence in plenary session, the Senate delegated that function to a committee.<sup>194</sup> The Senate as a whole met only to review the Committee's report and to hear such arguments as Judge Nixon was prepared to offer on his own behalf.<sup>195</sup> Nixon argued to the Supreme Court that this procedure denied him his constitutional right to be tried by the Senate.<sup>196</sup>

The Supreme Court unanimously determined that it would not intervene in the matter. The majority, speaking through Chief Justice Rehnquist, held that the constitutional sufficiency of Senate procedures for adjudicating impeachment controversies was a matter to be resolved exclusively by the Senate itself. The constitutional vesting in the Senate of "the sole Power to try all Impeachments"<sup>197</sup> was deemed "a textually demonstrable commitment of the issue to a coordinate political department."<sup>198</sup> Moreover, the majority said, the word "try" in Article I was too general to engender "judicially manageable standards" for what would amount to a constitutionally sufficient trial.<sup>199</sup> It is unmistakably dramatic testimony to the Court's determination to respect Congress's impeachment authorities that the Court was prepared to hold that, for purposes of enforcing Article I, Article III judges could not determine in a sufficiently rigorous way what ought to count as a trial.<sup>200</sup>

*Nixon v. United States* rests on sound institutional judgment. Impeachment is the sole constitutionally designated process for achieving judicial accountability for wrongdoing. It would have appeared an unseemly conflict of interest for the Court to have reserved to the judiciary the power to oversee that very process. But the argument for eschewing involvement in the 2000 presidential election is surely even more compelling. For sitting Supreme Court Justices to adjudicate which person shall be entitled to name their successors does unmistakable violence to constitutional checks and balances. Article II and the Twelfth Amendment are readily interpretable as embodying a textually demonstrable commitment to Congress of the power to resolve all issues related to the proper tabulation of electoral

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194. *See id.* at 227.

195. *Id.* at 227-28.

196. *Id.* at 228.

197. U.S. CONST. art. I, § 3, cl. 6.

198. *Nixon*, 506 U.S. at 228.

199. *Id.* at 230.

200. *Nixon* was not the first occasion on which now-Chief Justice Rehnquist has been prepared to find a "political question" in the face of constitutional text that would seem susceptible to fairly conventional judicial interpretation. *See Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring) (arguing that the issue whether the Constitution authorizes Presidents to abrogate treaties unilaterally presents a political question).

votes. Indeed, Congress has enacted a detailed statutory scheme to make just that process possible.<sup>201</sup>

In making this point, I do not wish to suggest for a moment that Congress, like the Court, would not have felt the pull of the most blatant partisan politics. The Clinton impeachment episode is a cautionary tale with regard to relying on Congress to abide by long-standing constitutional norms. The national experience with congressional involvement in resolving the Hayes-Tilden presidential contest in 1876 is not heartening.<sup>202</sup> But there are at least three reasons why deference to Congress's authority in this matter would have been far preferable to the Supreme Court's adventure of December 12, 2000.

The first is that, partisan pressure or not, Congress in 2001 would likely have had to deport itself with a degree of openness or "transparency" that did not exist in 1876 for Congress and which does not exist in 2001 for the Supreme Court. To that extent, hope for Congress to adopt a sound approach to the resolution of the Florida controversy, if need be, would have had some rational basis.

Second, Congress—unlike the Supreme Court—if it discerned infirmities in Florida's counting process, could have provided a resolution consistent with the fundamental objective of ascertaining Florida's actual vote. That is, Congress could have provided by statute for a statewide recount under appropriate standards and procedures to which Congress could then have bound itself. This may have required compromises—Gore would probably have had to give up on "dimpled" chads; Bush would have had to concede the legality of intelligible ballots rendered unreadable to machines due to voter error. But the result would have provided at least a reasonable and publicly acceptable answer to the question, "For whom did Floridians vote?"

But the third reason is the most compelling. Even if Congress messed up, even if it cut deals behind closed doors, and even if it failed to deal reasonably with Florida's difficulties in achieving an accurate count, a simple fact remains: if the people of the United States were unhappy with Congress on any such account, those members of Congress deemed responsible could have been voted out of office. One could hardly imagine a set of decisions in which democratic accountability is more important than those involved in the legitimate political resolution of an election contest. By contrast, despite the ineffable odor of partisanship that hangs over the Court's opinion in *Bush v. Gore*, there is no politically appropriate response

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201. 3 U.S.C. §§ 1-15 (1994).

202. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 575-87 (1988); EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY 357-93 (1898).

to be levied against the responsible Justices themselves. The Court that decided *Nixon v. United States* should surely have known better.

The only counterargument I can think of is that the 2000 presidential election might have seemed to present a profoundly significant moment for the articulation of constitutional law. Had the Court used its authority to articulate the federal right to vote for presidential electors or had the Court engaged in an analysis of Florida's vote count procedures that was grounded seriously in its well-established due process jurisprudence, then at least the Court might have claimed to be advancing the causes of fairness and of democracy in a manner true to the trajectory of our constitutional commitments to those values. Instead, it betrayed both.

I have written on other occasions that judicial activism can be constructive.<sup>203</sup> For that to happen, however, two conditions must prevail. First, there must be a genuine defect in the political process that renders judicial intervention necessary to preserve constitutional values. Second, there must be available to the judiciary a means of persuasively translating its commitment to constitutional values into sound law. That is, judicial creativity is constructive only if amenable to rendition as professionally credible constitutional doctrine based on acceptable forms of good faith legal argument. The doctrine has to be able to do the work of advancing its animating values as an articulation of adequately neutral principle to be persuasively applicable to foreseeable future cases.<sup>204</sup>

The activism of the *Bush v. Gore* majority plainly fails the second test. The Court's prior equal protection jurisprudence does not sustain the stringency of its scrutiny of intrastate procedural variations in the administration of elections. And, it will be interesting, to put it mildly, to see if the Supreme Court is willing to follow the holding of *Bush v. Gore* in any other case.

But, more to the point, the 2000 election did not trigger the first justification for judicial activism. It did not suggest the existence of any defect in our national political process that required creative judicial intervention. Justice Scalia's line, "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires,"<sup>205</sup> puts the matter exactly backward. Counting is precisely what democracy re-

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203. See, e.g., Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 228-29 (2000).

204. Contrary to the conclusions of Professor Pushaw, see Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603 (2001), these criteria provide a fully principled basis for applauding the activism of *Baker v. Carr*, 369 U.S. 186 (1962), while deploring the Court's decision in *Bush v. Gore*.

205. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring).

quires, and the Court's implicit doubts about the capacity of Congress to act responsibly in assessing the counting process expresses an astonishing distrust of political institutions to resolve essentially political disputes. Given the shallowness of the majority's analysis, and the Court's obliviousness to the genuine stakes in the controversy before it, it is possible to say at least this much about what would have been Congress's resolution of the Florida controversy—Congress could have done no worse than the Court. In ignoring this possibility—as in ignoring the imperatives of due process for Florida voters and the impact of the Fourteenth Amendment on the right of citizens to participate in choosing presidential electors—the *Bush v. Gore* majority betrayed democracy.

#### CONCLUSION

In resolving *Bush v. Gore*, the Supreme Court had two democratic paths open to it. It could have deferred to Congress under the political question doctrine, holding that the detailed textual provisions of the Constitution concerning presidential elections commit to Congress the final resolution of the question whether any state has properly administered its appointment of presidential electors. Such a decision would have furthered the cause of democracy by placing in the hands of elected officials the determination of our most important political contest. Alternatively, the Court could have adjudicated the constitutional issues before it with an eye to insuring that, to the maximum extent possible, the votes of all Florida voters actually counted in the presidential election. That would have required no more than the application of the due process clause to uphold the Florida Supreme Court's judgment below—or, even more modestly, the simple rejection on grounds of insubstantiality of the Bush challenges to the Florida hand count process.

Unlike the majority's cut-from-whole-cloth equal protection analysis, either of these approaches would have required nothing other than the conventional application of precedent. *Nixon v. United States* would have amply justified deference to Congress. The entire line of procedural due process jurisprudence since the 1970s would have supported affirmation of the Florida Supreme Court's approach to vote counting.

But, whatever the majority's concerns, adhering to conventional approaches to constitutional application was not among them. Without even a glance at the Fourteenth Amendment, the majority commenced its legal analysis with an assertion and reiteration that the citizens of each state have no constitutional entitlement to participate in the appointment of presidential electors. The majority's premise takes no serious account of the text of the Fourteenth

Amendment, its history, nearly universal practice since 1868, and the conspicuous deepening of our constitutional commitment to democracy in the ensuing 132 years. The failure even to address these issues mocks the majority's supposed commitments to textualism and originalism in other contexts.

History will record that, in resolving a dispute over the world's most important elected office, the Supreme Court penned an opinion in which our national commitment to democracy—indeed, the very word, “democracy”—does not appear. Those who hope that a decent presidential performance by the Court's designated victor will minimize the harm to the Court's reputation and legitimacy are whistling in the dark. The precedent of such judicial usurpation poses grave long-term peril to both democracy and the rule of law that is not susceptible to ready eradication in the short run—surely not by a law-abiding nation's prudent resignation to the formality, at least, of government by the winner. Only future courts' repudiation of *Bush v. Gore* can begin to erase the stain.