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INSTITUTIONAL LESSONS FROM THE 2000 PRESIDENTIAL ELECTION

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Although scholarly and media attention in the wake of the presidential election of 2000 has focused primarily on its unusual aspects, such extraordinary events also lead us to analyze aspects of our legal and political systems that we tend to take for granted when elections run smoothly.[1] Among the latter set of lessons that can be drawn from the contest between George W. Bush and Al Gore are conclusions about the dynamic and complex relationships among our institutions of governance. In this Essay, I will discuss two related issues of institutional design and institutional choice that have applicability beyond the most recent presidential contest.

First, the Bush-Gore election concretely illustrates that institutional design is a crucial consideration in determining which part of the government is best suited to render particular decisions. When institutions must become involved in majoritarian political decisions such as the selection of a President, it may be better to rely largely on the political branches than on the judiciary for several reasons. This allocation of decisionmaking authority is preferable because of the greater democratic credentials of Congress. As Justice Breyer put it in the context of the 2000 election, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about."[2]

In addition, there is a less-often recognized advantage of institutional design enjoyed by the legislature. In some cases presenting highly charged political questions, the legislature can adopt procedural frameworks to shape decisionmaking and restrain partisan opportunism before a particular controversy arises. In the case of the 2000 election, the United States Congress actually had a framework in place that would have allowed it to handle any challenges to the

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1. The authors of both lead articles in this section of the symposium have drawn attention to elements of a presidential election usually overlooked. Luis Fuentes-Rohwer and Guy-Uriel Charles relate the design of the Electoral College to democratic principles. Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879 (2001). Sanford Levinson and Ernest Young pay close attention to an overlooked constitutional amendment and discuss the appropriate roles for various institutions of governance in the selection of a president. Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001).

2. Bush v. Gore, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting).

Florida election that lingered after state institutions had played their parts. Long before the country learned that the race between George W. Bush and Al Gore would be too close for the electoral system to handle smoothly, Congress had passed the Electoral Count Act.[3] This set of procedures would have structured political discourse and decisions so as to channel and constrain partisanship and opportunistic behavior. More importantly, the framework would have ensured that decisions were made transparently so voters could have held politicians accountable both for their ultimate decision and for the manner in which they reached it.

In contrast, careful study of the Supreme Court's early intervention into the 2000 election reveals the greater possibility for strategic behavior when an institution acts ex post with relatively full information about how its decisions will affect particular and concrete interests. The presidential election thus provides on the federal level both an example of ex ante rules—the Electoral Count Act—and an example of ex post decisionmaking—the judicial interventions into the political process. While the former contained gaps because its drafters did not foresee all the problems that could arise in a presidential election, the latter provided substantial leeway for opportunistic behavior designed to advance the Justices' preferences. In the second portion of this Essay, I will describe the interplay between the United States Supreme Court and the Florida Supreme Court, where the Federal Court decisively outmaneuvered the state supreme court in order to advance the outcome preferred by a majority of the U.S. Supreme Court Justices.

I

Rules that shape decisionmaking are seldom neutral in their effects; in many cases, the selection of one procedure rather than another will significantly affect and sometimes determine which outcome will emerge from the process. Once an issue becomes concrete enough for participants to be fully aware of their interests, they will work to choose rules that will advance their substantive interests. In contrast, if procedures can be specified before it is clear what issues will be considered and how participants will be affected, then the rules can be designed to further longer-term, more public-regarding objectives. Because decisionmakers act behind a partial veil of ignorance when they adopt ex ante procedural frameworks, their incentive to behave in self-interested ways is reduced.[4] So, for example,

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3. *See* 3 U.S.C. §§ 1-18 (1994); *see also* John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633 (1888) (explaining the Act and discussing its legislative history).

4. For the classic statement of the veil of ignorance concept, see JOHN RAWLS, A THEORY OF JUSTICE 118-23 (rev. ed. 1999); *see also* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions,* 88 MICH. L.

the congressional budget process framework—which is adopted before any particular spending or taxing decisions are made and applies for several years into the future—works to facilitate macro-budgetary goals like smaller federal deficits or better priority-setting.[5] Agreement on such collective goals is more difficult if interested groups concretely understand, at the time an overarching budget framework is adopted, how reductions in federal spending will affect the government benefits they enjoy.

The partial veil of ignorance strategy is especially likely to succeed in reducing self-interested behavior when those affected are repeat players whose interests are likely to change over time. In the budget process, some interest groups may seek to enact subsidies in some years and to block enactment of subsidies for competitors in other years. Or they may hope to repeal laws in the short-term but to protect some laws from repeal in the longer-term. Thus, a particular set of rules may advance their objectives in some cases but hinder them in others. Under such conditions of uncertainty, players are more likely to favor relatively neutral procedures that do not skew outcomes in one direction.

On the other hand, special rules that structure deliberation in the House of Representatives of particular identified bills are usually written by the majority party to ensure the defeat of hostile amendments and to make passage of the legislation more likely—perhaps by protecting members from politically difficult votes.[6] Thus, the special rule might require a certain order of amendments, not because the process would be fairer to all parties, but because the process is very likely to result in enacting a bill favored by majority party leaders. Even with ex post procedures like these, however, strategic behavior is somewhat constrained. The Rules Committee, the parliamentarians, and both houses of Congress make procedural decisions in the context of a system of precedents, which are not as binding as judicial precedents but which do act as restraining norms and guidelines. Past precedents rule some decisions out of bounds, and the realization that current decisions will act as precedents in the future

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REV. 917, 966-68 (1990) (applying a concept similar to the one I use here in analysis of the political process); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (discussing how ex ante constitutional rules can prevent self-interested decisionmaking that arises when the decisionmaker knows both his own identity and "the distribution of [future] benefits and burdens that will result from a decision").

5. *See* Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 409-12 (1998).

6. *See* STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES 38-87 (1988) (discussing rise of special rules in the House); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 2-3 (2d ed. 2000) (describing how special rules and omnibus legislation are designed to insulate members from politically difficult votes).

provides them some flavor of ex ante decisionmaking. Furthermore, lawmakers must publicly explain their procedural decisions in politically palatable terms, and the "civilizing force of hypocrisy"[7] reduces the ability of lawmakers to give into naked opportunism that cannot be explained plausibly in other terms.

Of course, the line between decisionmaking structures constructed ex ante and procedures adopted ex post is not entirely clear. As the discussion above reveals, some ex post decisions have elements of ex ante decisionmaking because they will determine not only the outcome of the immediate dispute, but they will also serve as precedents that will shape the future. As long as parties are not certain of their interests and positions in the future, they cannot be sure how the precedent they establish will affect them, nor how easy it will be to persuasively distinguish future situations from the current controversy. Similarly, ex ante frameworks will inevitably face some amount of ex post influence. No ex ante procedural framework will be fully specified, and the necessity of applying the general framework to specific decisions that must be made under it allows for strategic behavior. The more general or vague the ex ante procedure, the more room there is for ex post manipulation. For example, politicians and interest groups can interpret and apply the congressional budget rules in a number of self-interested ways once they have a clear picture of how their concrete interests will be affected. Legislative provisions can be written to evade the discipline of the budget rules, or the rules can be waived or ignored when they would prohibit legislators from reaching outcomes they strongly favor.[8] But the procedures nonetheless act to channel partisan and strategic behavior and to constrain it somewhat.

Although ex ante procedures may improve decisionmaking and policy outcomes in some circumstances, they suffer from limitations. Most seriously, ex ante rules must be constructed when drafters have incomplete information about the circumstances in which they will be applied. A partial veil of ignorance hides not only the information relevant to discerning self-interest, but it also denies drafters a great deal of helpful information necessary for precise tailoring.[9] Thus, ex ante procedures are often vague and open-textured relative to rules adopted ex post when more complete data is available. In all cases,

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7. Jon Elster, *Alchemies of the Mind: Transmutation and Misrepresentation*, 3 LEGAL THEORY 133, 176 (1997).

8. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 437-60 (3d ed. 2001) (discussing timing gimmicks to evade discipline and recent provisions adopted to waive spending caps and other rules entirely).

9. *See* Vermeule, *supra* note 4, at 428-29 (discussing information-neutrality trade-off).

institutions must balance the need to guard against strategic behavior through use of the partial veil of ignorance and the need to draft more specific and detailed rules. In some cases, the ex ante guidelines are necessarily so general that all the key decisions are postponed until after a controversy arises, and therefore the benefits of ex ante rules are lost.

The choice between ex ante frameworks to constrain future decisions and structures that allow more discretion after facts and circumstances are fully known depends upon several considerations. The greater the specificity that is possible when drafters operate behind the partial veil of ignorance, the greater the likelihood that such rules will reduce self-interested behavior in future deliberation and decisionmaking. However, the information that allows drafters to craft more detailed ex ante frameworks may also allow them to discern their self-interest and to act strategically. In addition, the specificity provided in the rule may deny policymakers needed flexibility when they face problems that were not accurately anticipated.

In short, there are inherent tensions in the choice between ex ante and ex post rulemaking. One tension derives from the need for an opaque partial veil of ignorance to protect against self-interest and the competing need for sufficient information to allow drafters to devise effective and specific rules. Another tension arises from the need for ex ante specificity to avoid opportunism in the future and the competing need for flexibility to take account of unforeseen developments in the future. These tensions must be resolved in each case, considering the amount of information, the possibility of significant changes in the future that cannot be anticipated beforehand, the intensity of the preferences of the players, and the likely effects of decisions driven by self-interest.

A presidential election, along with any ensuing protests, contests, or other disputes, is a prototypical example of a decision that is best made according to rules and procedures determined long before the identities of the two candidates are known.[10] Otherwise, decisions will inevitably be seen by the public as partisan. This perception is apt to be accurate in some cases because many decisions relating to a contested presidential race will doubtlessly result from partisanship rather than from principle. In this context, then, the likelihood of

10. *See* Fuentes-Rohwer & Charles, *supra* note 1, at 902 ("If the rules of the game are described ex ante and the parties play by these rules, then any outcome is by definition legitimate."). *But see* John Harrison, *Nobody for President*, 17 J.L. & POL. (forthcoming Nov. 2001) (manuscript at 23) (concluding that a "non-norm" would create "enormous pressure to devise a mechanism that will garner widespread acceptance" and encourage "compromise, consensus, and the pursuit of legitimacy"). It is worth noting that although Harrison and I reach different conclusions about the wisdom of adopting an ex ante procedure rather than relying on ad hoc mechanisms, we share a conviction that politicians could have risen to the challenge of a contested presidential election.

self-interested behavior is virtually guaranteed, but it can be reduced if institutions adopt fairly specific ex ante rules using information about what can go wrong in elections. We have even had experience with contested presidential elections and disputes over votes in the Electoral College, so the general information about elections is fairly complete without threatening to undermine the partial veil of ignorance. Notwithstanding the possibility and promise of decisionmaking shaped by the rules, in the 2000 presidential election the Supreme Court selected the President by formulating and applying a new rule of decision at a time when the Justices were well aware how each of their decisions would affect the fates of the Republican and Democratic candidates.

Although the Constitution's equal protection guarantee was adopted long before the presidential dispute in 2000, it is so open-textured and vague that virtually all the specification occurs when it is applied to particular cases. As an ex ante framework, it is essentially all gap to be filled in the future. Not only did the Court articulate its specification of equal protection for the first time in this case, but it also explicitly limited the doctrine's applicability to the case before it, evading the protection against self-interested decisionmaking that generality in rules can provide.[11]

The Supreme Court's eagerness to become involved in the election contest is particularly unfortunate because the institution arguably charged with determining the outcome of a disputed presidential election[12]—the United States Congress—actually had an ex ante framework in place that would have shaped its deliberation had objections to Florida's electors been made on January 6, 2001. I have described that framework previously:

> The Electoral Count Act is designed to provide a framework to structure debate, deliberation, and decisionmaking to avoid the debacle of the Hayes-Tilden election of 1876. . . . Adopting a structure for deliberation and decisionmaking before it will be used and at a time when it is not clear what particular interests will benefit from certain procedural choices and what interests will be harmed is a strategy often relied on to reduce partisanship and opportunistic behavior. One of the difficulties in 1876 was that Congress es-

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11. *See* Vermeule, *supra* note 4, at 418.

12. *See* Levinson & Young, *supra* note 1, at 954-64 (discussing whether the power to resolve elections is constitutionally committed to Congress). *Compare* Burgess, *supra* note 3, at 633-34 (stating view of Congress's role in settling presidential disputes), *and* Richard D. Friedman, *Trying to Make Peace With* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 859 (2001) (noting and accepting that "Congress has always understood that the sole responsibility for determining the electoral vote is lodged within it"), *with* Harrison, *supra* note 10, (manuscript at 3-12) (arguing that the Constitution does not grant Congress the authority to judge electoral votes—and indeed that no institution is given that authority in the Constitution).

> tablished the Election Commission after the election dispute had arisen and the stakes were clear and concrete. Each decision was suffused with partisanship because supporters of Hayes worked to advance his interests, as the supporters of Tilden worked to advance his. In the aftermath of that controversy, legislators wisely sought to avoid a repeat by ex ante specification of procedures that would channel political behavior.[13]

The legislators who worked to pass the Electoral Count Act, with its ex ante specification of the rules of any future presidential election contest, were aware of the benefits of such a procedural framework. Senator Sherman observed that one advantage of ex ante specification is that the design could be constructed "upon some basis of principle" because Congress was acting long before another contested presidential election and at a time that the makeup of the House and Senate ensured that neither of the parties would have disproportionate influence over the legislation.[14]

The preference for using rules determined before a particular contest ensues is reflected in the provisions of the Electoral Count Act. For example, section 5, the safe harbor provision, gives special weight to "laws enacted prior to the day fixed for the appointment of the electors."[15] One representative explained this requirement in terms consistent with my analysis: "I think that it would be wise if the contest should be made in the face of existing law rather than that the law should be made in the face of the existing contest."[16]

The adoption of the Electoral Count Act illustrates that legislators will sometimes resort to the partial veil of ignorance strategy, which they know will deny them opportunities for self-interested behavior in the future, after a crisis has convinced them and their constituents that the restrictions of an ex ante framework are required to avert similar difficulties in the future. To put it another way, self-interested actors came to believe that a pre-commitment device was the lesser of two evils. Adding to the attraction of the partial veil of ignorance approach in this particular case was the fact that the politicians involved in drafting and enacting the Electoral Count Act knew they were unlikely to face a contested presidential election again during their careers. Thus, they were constraining the behav-

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13. Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 50-52 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (footnotes omitted).

14. 17 CONG. REC. 815 (1886).

15. 3 U.S.C. § 5 (1994).

16. 18 CONG. REC. 47 (1886) (remarks of Rep. Cooper); *see also* Samuel Issacharoff, *Political Judgments*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 13, at 65 (suggesting that section 5 can be understood "as codifying an important principle of electoral democracy requiring the rules of engagement to be explicated ex ante and to be fairly immutable under the strain of electoral conflict").

ior of their successors, and probably of successors far in the future, who would be dealing with a presidential election contest long after those who passed the Act had retired or died.

The Electoral Count Act's framework is by no means perfect; it has gaps that could have undermined its effectiveness and that would have required some ex post amplification. Some of its gaps were probably inadvertent, caused by the limited ability of its drafters to anticipate all of the problems that might arise in an election contest. For example, how should Congress react to the following set of circumstances that might well have emerged from Florida? The Governor certifies the slate of electors for the Republican candidates on the basis of the certified results of the election. The state supreme court orders a recount. The Democratic party's electors win after the recount,[17] which causes the state supreme court to order the Governor to withdraw the first slate and send the second slate of electors to Washington, D.C. The Governor refuses—perhaps risking being held in contempt or some other sanction by the state supreme court. Finally, the state legislature enters the picture by ordering the Governor not to comply with the court order and to maintain his certification of the Republican electors. Which slate of electors should be considered as "the electors whose appointment shall have been certified by the executive of the State,"[18] in a case in which the House and Senate cannot agree after an objection has been lodged?[19] Other gaps in the Electoral Count Act are the result of doubts concerning how far the Act could go constitutionally in influencing the internal state electoral processes.[20] And some gaps are intentional because the drafters wanted to preserve some domain for partisanship and politics, albeit in a more structured setting.

Thus, the 2000 election provides a concrete example of the possibility of Congress taking advantage of its institutional capabilities and turning to a structure that had been passed previously to shape decisionmaking about a very difficult political issue. It was preparing to conduct what would surely have been a highly charged and often partisan debate within this framework that could not be repealed or ignored without political cost. What broader lessons can be drawn

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17. It now appears that under most recount standards, Bush would have continued to win the Florida election. *See* John M. Broder, *Counties Can't Account For All Ballots Reported in 2000*, N.Y. TIMES, Apr. 5, 2001, at A16.

18. 3 U.S.C. § 15 (1994) (providing the final decision rule).

19. *See* Friedman, *supra* note 12, at 863-66 (describing how he thinks this scenario would have been resolved under the Electoral Count Act).

20. *See, e.g.*, Erika V. Wayne, Robert Crown & Pamela Karlan, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER'S MAG., May 2001, at 31, 32 (interview with Richard Posner, who calls the Electoral Count Act "an ambiguous statute . . . which is itself of dubious constitutionality").

from this example? First, as I have argued elsewhere,[21] the presence of the ex ante framework, among other things, would have averted any political or constitutional catastrophe had the dispute lingered on until January 6, 2001. Others have defended the Supreme Court's repeated intervention into the election contest as a courageous move to save the country from crisis—courageous because the Justices adopted an aggressive role at some risk to the reputations of their institution and themselves. Such fears of a political disaster are overstated, and they reflect an elitist distrust of the relatively messy arena of politics. Congress would not have discharged its responsibility to determine any election contest without some amount of heated rhetoric, opportunistic behavior, and partisan wrangling. However, having long ago made the trade-off between the advantages and disadvantages of adopting an ex ante procedural framework in favor of enacting a fairly specific Electoral Count Act to provide the rules of decision, Congress had the ability to apply that framework in a transparent and accountable way.

While others, including the dissenting Justices,[22] have worried that the Court's decision to play a substantial role in the selection of the forty-third President will damage its long-term reputation, my concern focuses on the damage to the legislative branch. When judges work so hard to keep a case away from our elected representatives, using a novel legal rationale that is not supported with the kind of argument and analysis of precedent that similar holdings have been, their distrust of the political branches is palpable. Furthermore, when those who harshly criticize the Court's opinion as lawless and unprincipled nonetheless defend it as a necessary protection against the chaos that they predict would have consumed the country,[23] this analysis feeds the distrust of Congress already prevalent.

Congress is the least admired branch of government,[24] and the signals that Justices and commentators are sending reinforce voters' sense of alienation. We may well find that our distrust of politics has led to a self-fulfilling prophecy as fewer qualified people seek the office and those who do have little incentive to transcend the public's

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21. *See* Garrett, *supra* note 13, at 39-40.

22. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting) ("[W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation."). *But see* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming Dec. 2001) (manuscript at 32-52) (arguing that the case does not have the characteristics that would cause long-term damage to the Court's legitimacy).

23. *See, e.g.*, Cass R. Sunstein, *Order Without Law*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 13, at 206-07.

24. *See generally* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995) (summarizing recent literature on voter dissatisfaction with Congress).

perception of them. As Congress becomes less important, more policies will be left to unelected judges who work in an institution poorly designed to make the choice between ex ante and ex post procedures or to craft comprehensive policies that can be modified and improved over time.

Second, this analysis suggests that institutions that are likely to play roles in political disputes, such as election contests, should adopt detailed ex ante frameworks before actual controversies arise. This lesson is an important one because, although political institutions are increasingly using ex ante procedures (such as the federal budget process), they are still unusual even in circumstances where lawmakers have sufficient information to construct a relatively specific process before any actual controversy arises.

In the election context, election codes provide an ex ante blueprint to govern disputes. The additional information generated during the 2000 election can help policymakers improve the rules governing elections without eliminating the advantage of the partial veil of ignorance. We discovered in November 2000 that current election codes have gaps or inconsistencies that should be resolved, if possible, through regulations and guidelines formulated by state officials before the identities and partisan affiliations of disputants are known. For example, many dismissed Secretary of State Harris' interpretation of Florida election law governing extensions of the deadline for counties to submit vote totals because her ruling occurred in anticipation of litigation and when it was clear that her interpretation would benefit the candidate she had actively supported.[25] Furthermore, it seems very unlikely that, until now, state legislatures had given a great deal of thought to the interaction of state election codes and the Electoral Count Act, including its safe harbor provision. Given the abbreviated time period for any contest of a presidential election, states should consider revising their laws to allow for expedited procedures. Not only will moving quickly on these issues allow state institutions to act behind a partial veil of ignorance and thus avoid the temptation to advance the cause of particular candidates, it will also make clear to all who plan to run for office what the rules of the game will be so that they can plan their strategies accordingly. Modern campaigning is sufficiently sophisticated that changes in election laws are taken into account when allocating financial and human resources.

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25. The new Florida election law passed in the wake of the 2000 election requires the Secretary of State to promulgate standards for manual reviews of ballots before the next election. *See* Florida Election Reform Act of 2001, 2001 Fla. Laws ch. 40, § 42, at 149, 152 (codified at FLA. STAT. § 102.166(6)(c) (2001)); Dana Canedy, *A Ban on Punch Cards and a Lull in Division*, N.Y. TIMES, May 5, 2001, at A8.

For all elections, including presidential ones, legislatures and administrative officials must consider how the new equal protection right recognized by *Bush v. Gore* implicates the standards for discerning voter intent in election recounts, as well as how it affects other election processes that may vary from county to county.[26] Although the per curiam decision attempted to limit the holding only to the case before the Court (without much analysis justifying the limitation), lawsuits are already being filed claiming that certain election practices result in unacceptable arbitrary and disparate treatment of the electorate.[27] More broadly, all levels of government should take advantage of the increased salience of the issue of election reform to update their voting machines, analyze ballot design, and improve the system. Unfortunately, large-scale reform seems unlikely. Although Congress seems likely to pass legislation to encourage states to improve election procedures and to provide money for upgrading voting systems,[28] current efforts in most states have been characterized as "tinkering" rather than wholesale reform.[29] Perhaps ironically, judicial involvement may actually retard legislative reform as lawmakers are tempted to delay making difficult and costly choices until they can blame an activist judiciary for requiring extensive reforms.

Similarly, judicial intrusion into the 2000 election contest may have also reduced the chances for thoughtful reevaluation of the Twelfth Amendment along the lines suggested by Levinson and Young. They question the wisdom of requiring the House to vote by state when selecting a President; indeed, they argue that this "ultimate stupidity" or "dysfunctionality" might well prompt a constitutional crisis in the future.[30] Had the 2000 contest wound up in Congress, or gotten closer to that stage, the country might have focused on this problem, as well as on other troubling aspects of the constitutional and statutory structure. Thus, it would have been more likely

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26. *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001).

27. For example, a class action suit in Florida challenged the voting machines used by some counties using the rationale from *Bush v. Gore*. *See* Coyner v. Harris, (Fla. 2d Cir. Ct. 2001), *discussed at* 69 U.S.L.W. 2408 (2001). This is only one of several such lawsuits that have been filed in the weeks following the Supreme Court's decision.

28. *See* David E. Rosenbaum, *Ending Impasse, Senate Leaders Agree to Overhaul Nation's Voting Systems*, N.Y. TIMES, Dec. 14, 2001, at A33.

29. *See, e.g.*, Will Pinkston, *Major Election Reform Falters as States Settle for Tinkering*, WALL ST. J., Apr. 18, 2001, at B17. Perhaps not surprisingly, Florida was one of the first states to pass comprehensive election reform and did so unanimously in the legislature and with the support of the Governor. The Florida reform bans butterfly ballots and punch cards and provides funds to counties for new voting equipment. *See* Canedy, *supra* note 25, at A8. In addition, Georgia has enacted comprehensive reform. *See* Paul M. Schwartz, Voting Technology and Democracy 46-51 (2001) (unpublished manuscript, on file with the *Florida State Law University Review*) (discussing Florida and Georgia Legislation).

30. *See* Levinson & Young, *supra* note 1, at 970-72.

that support for change would have developed. The impetus for the Electoral Count Act was the debacle of the Hayes-Tilden election and the strong desire to avoid designing structures of deliberation and decisionmaking in an ex post way; the more controlled ending to the Bush-Gore contest denies reform movements' necessary vitality.

II

The 2000 election provides a telling example of the opportunities for self-interested behavior in the absence of a relatively detailed ex ante framework that could constrain discretion and channel partisanship. The Court took (or at least appeared to take) advantage of the opportunity provided to it by both an environment of vague standards—the Equal Protection Clause and Article II, Section 1, Clause 2—and its fairly complete knowledge of how each decision would affect the fortunes of Bush or Gore. Institutions of governance operate in a complex system of related institutions that act sequentially and simultaneously to shape outcomes. These institutions react to one another, and their reactions are anticipated and manipulated by other savvy political players. Manipulation can occur when later players in the political game signal how they will react, seeking to influence the moves of earlier players. Sometimes, these signals are truthful ones; in other cases, sophisticated players work to fool others with false signals that appear credible and that will influence the game in a particular direction. If the signals are credible, early players are likely to take account of them; in all cases, earlier players will try to anticipate the reactions of subsequent players so that the ultimate resolution is closer to their policy preferences.[31]

This kind of institutional analysis allows us to reevaluate the influence of the first Supreme Court decision, *Bush v. Palm Beach County Canvassing Board*.[32] It suggests that far from being an admirable minimalistic intrusion early in the election dispute,[33] this opinion may have profoundly affected subsequent play so that the state institutions of Florida were effectively denied a chance to settle this contest.[34] In part, this manipulation was possible because of the wide

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31. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 102-14 (2000) (describing institutional theory and applying it to a case study of legislation).

32. 531 U.S. 70 (2000) (per curiam).

33. For an argument that the first opinion was minimalistic, see Sunstein, *supra* note 23. Others have viewed the opinion as more activist. *See, e.g.*, John C. Yoo, *In Defense of the Court's Legitimacy*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 13, at 223, 224-25 (approving of the Court's decision to become involved).

34. Of course, no single decision was the sole determinant of the outcome in the 2000 election. The decision of the state supreme court to extend the protest phase of the dispute had the effect of abbreviating the contest phase and allowed the majority in *Bush v. Gore* to halt any further recounts because so little time remained before the safe harbor date.

latitude provided by the doctrines that the Court could apply and the absence of any partial veil of ignorance or other mechanism (such as political accountability) that could reduce self-interested behavior.

Following the Florida Supreme Court's decision to postpone the date of certification of vote totals,[35] George W. Bush petitioned the Supreme Court to grant certiorari on three questions. The Court granted the petition with respect to two of the questions:[36] "whether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated . . . [the Electoral Count Act], and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2 of the United States Constitution."[37] In addition, the Court asked the parties to consider the consequences of a decision that the state supreme court's decision did not comply with the federal safe harbor provision.[38] The Court declined to hear Bush's claim that the manual recounts violated the Equal Protection or Due Process Clauses of the U.S. Constitution.[39] The Court's decision not to hear the equal protection and due process claims did not surprise many lawyers watching the proceedings; the constitutional claim was a novel one, concerning the "nuts-and-bolts" of election law that courts in the past had refused to entertain.[40]

The Court did not need to render any decision in this initial challenge to the 2000 presidential election. By the time of the argument in *Bush v. Palm Beach County Canvassing Board*, it was clear that the additional votes that were counted during the several days when certification had been delayed had not changed the outcome of the vote in Florida. Bush remained the winner. Although he had lost 393 votes in his certified total, it was not clear whether this fact would have made a difference in the long run. If it did matter in a subse-

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The Gore team's strategic decisions to ask for the extension of the protest period and to emphasize the importance of the December 12 date, which was only relevant to the safe harbor that would shape congressional consideration of objections to electors, were also crucial in shaping the way this event developed and concluded. My argument is only that the Court's first decision—one that was unnecessary—played a substantial role in determining that Bush would be the forty-third President.

35. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1239-40 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

36. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004, 1004 (2000) (granting writ of certiorari).

37. Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 73.

38. Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 1004.

39. *Id.*

40. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 85-94 (rev. ed. 2001); Hasen, *supra* note 26, at 377-78; *see also* Siegel v. LePore, 120 F. Supp. 2d 1041, 1048-50 (S.D. Fla. 2000) (holding that the manual recount did not violate Equal Protection or Due Process Clauses).

quent election contest, perhaps because the certified vote totals were given a presumption of correctness that votes found in subsequent recounts were not, courts could address the issue then. The best decision for the Court at this stage was to dismiss the petition for certiorari as improvidently granted and issue no opinion on the matter. But the Court did not choose this minimalistic route; instead it issued a nine to zero per curiam opinion, full of heavy-handed hints about the Justices' views on the substantive issues.[41] This unfortunate opinion shaped the rest of the judicial proceedings and, combined with the refusal to grant certiorari on the equal protection claim, put the Florida Supreme Court in an untenable position.

A close reading of the per curiam opinion reveals several passages seemingly indicating how the Court might decide subsequent challenges based on Article II and the Electoral Count Act. First, the Court suggested that the context of a presidential election might require a change in its traditional deference to a state court's interpretation of a state statute.[42] Citing *McPherson v. Blacker*,[43] an opaque and hoary precedent without direct application to the question before the Court, the Court demanded clarification from the state supreme court "as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2."[44] In a presidential election, the "direct grant of authority [to the state legislature] made under Art. II, § 1, cl. 2, of the United States Constitution"[45] might change the permissible bounds of judicial interpretation. The tone of the opinion suggests that the Court did not believe that a state constitution can circumscribe the behavior of a state legislature when it enacts laws governing presidential elections. Therefore, a state court cannot legitimately rely on state constitutional principles to interpret unclear statutory language and might be limited in other ways that would affect its interpretive task. Certainly, the Florida Supreme Court could have reasonably viewed these passages as warnings that its traditional approach to interpreting vague and ambiguous laws might be overly aggressive here and ultimately lead to a reversal by the United States Supreme Court.

The per curiam opinion discussed the safe harbor provision in the Electoral Count Act in the same ominous terms. The Justices appeared to identify a "legislative wish to take advantage of the [Act's] 'safe harbor' [that] would counsel against any construction of the

41. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 70.
42. *Id*. at 76.
43. 146 U.S. 1 (1892).
44. Bush v. Palm Beach County Canvassing Bd., 531 U.S. at 78.
45. *Id.* at 76.

Election Code that Congress might deem to be a change in the law."[46] The Court noted that the safe harbor provision assured finality to a state's decision regarding electors if that decision was made "pursuant to a state law in effect before the election."[47] The intimations of this passage are less clear than those found in the Court's discussion of Article II. On the one hand, the Court placed great weight on section 5 of the Electoral Count Act and referred to the Florida Legislature's intent to take advantage of the safe harbor. Such an intent is probably fictive because it is very unlikely that those who drafted the state election code knew about the federal provision; indeed, the Federal Act was not mentioned in the state election code. The Supreme Court's emphasis on the Electoral Count Act—which is better understood as a rule of decision for Congress, not a mandate on state institutions—would make the Florida Supreme Court wary in subsequent opinions of any statutory interpretation that might be characterized as a change in law. On the other hand, the passage from the per curiam opinion suggests that Congress would determine whether a state court decision violated the Electoral Count Act. This reference to congressional involvement could be understood as an acknowledgment by the Court that Congress would be the key player in the rest of the election drama and a signal of reduced involvement by the federal judiciary in future developments.

How credible are all these signals? In hindsight, the clues about the Court's view on the Article II issue led a majority of the state supreme court justices to draw inaccurate conclusions. Notwithstanding the per curiam opinion's hints that Article II would play a decisive role in any subsequent decision, only three U.S. Justices were willing to sign an opinion deciding the case in favor of Bush on that ground.[48] But the fact that nine Justices joined the first per curiam opinion, when the Court had the option of dismissing the case without opinion, led to the reasonable conclusion that the Article II argument had some persuasive power. At the least, the state supreme court justices, who did not want their decisions to be reversed by the United States Supreme Court, believed that they had to tread warily and should refrain from their traditional methods of filling statutory gaps and interpreting a complex, sometimes contradictory state election code.

It is evident from reading the two subsequent state court opinions that the U.S. Justices successfully bluffed the Florida jurists, at least on the Article II ground. In the revised decision extending the time for certification, the state supreme court wrote:

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46. *Id.* at 78.
47. *Id.*
48. Bush v. Gore, 531 U.S. 98, 111-15 (2000) (Rehnquist, J., concurring).

> [O]ur construction of the above statutes results in the formation of no new rules of state law but rather results simply in a narrow reading and clarification of those statutes, which were enacted long before the present election took place. We decline to rule more expansively in the present case, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it, the Legislature.[49]

More crucially for the final outcome of the 2000 election, the state supreme court did not feel comfortable specifying standards to discern voter intent in a manual recount, even though justices at oral argument had expressed concerns about the varying standards used by the counties and the general level of expertise of those who would conduct and oversee the recount.[50] Instead, the Florida Supreme Court adhered closely to the text of the statute, finding that the sole standard for a legal vote was based on a "clear indication of the intent of the voter."[51] Its opinion gave no guidance to the lower court or to county officials regarding how to treat hanging, dimpled, or pregnant chads. More precise standards were surely possible; other states have enacted more detailed statutes governing manual recounts, although most also include a catch-all provision that allows those counting the votes to consider other evidence of voter intent.[52] But the Florida justices clearly worried that judicially-crafted guidelines would conflict with Article II and perhaps the federal statute, and it appeared that nine Justices credited these arguments. The equal protection analysis implicated by a failure to articulate standards was not deemed worthy of certiorari before, it was not an argument taken seriously by most knowledgeable commentators, and it seemed inconsistent with the ideology of a majority of Justices.

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49. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1291-92 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

50. *Arguments Before the Florida Supreme Court on the Presidential Recount*, N.Y. TIMES, Dec. 8, 2000, at A34.

51. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d at 1283 (quoting FLA. STAT. § 101.5614(5)-(6) (2000)).

52. *See, e.g.*, TEX. ELEC. CODE ANN. § 127.130 (Vernon 2001). Such provisions are common ways to accommodate needs for flexibility when ex ante frameworks are applied to circumstances that drafters did not foresee. Interestingly, and perhaps understandably, the new Florida election code forbids the Secretary of State from including a catch-all provision in new regulations to govern manual recounts. Florida Election Reform Act, 2001 Fla. Laws ch. 40, § 42(5)(b)(2), at 151-52 (amending FLA. STAT. § 102.166 (2000)). In his remarks at this symposium, Steve Bickerstaff expressed doubt that the standard for a manual recount could ever be entirely specified and offered his opinion that the ultimate standard was always a "clear indication of voter intent." *See also* Schwartz, *supra* note 29, at 38. Nonetheless, it *seems* indisputable that more detailed instructions were possible and could have ensured greater uniformity across counties and across voting teams within counties.

Thus, it was rational for the state justices to forego specifying standards for the manual recount, tailoring their opinion to survive review by the U.S. Supreme Court. Ironically, further specification of standards would not have been plagued by many of the problems that usually face ex post formulation of decision rules because it was not entirely clear which standards benefited which of the candidates. Clearly, any recount benefited the loser because it provided him the only chance to change the outcome. However, the effects of decisions structuring the manual review of the ballots were more uncertain. The results from the recounts were ambiguous; Gore did not seem to be picking up as many votes as his supporters had hoped for. Moreover, the state supreme court had ordered a statewide recount, not a manual recount limited to the counties Gore's lawyers had cherry-picked. There was a much more credible partial veil of ignorance with regard to determining the additional standards to govern a recount than would be possible at any subsequent stage in the judicial proceedings.

Had the state supreme court disregarded the signals in the first per curiam opinion and ordered that a recount conducted according to more rigorous standards be completed before December 12, the safe harbor date, or before December 18, the date on which electors cast their ballots, the decision in *Bush v. Gore* might have been unnecessary. Perhaps the five Supreme Court Justices who joined the per curiam opinion were determined to end the election contest and short-circuit the political process and thus would have ruled for Bush no matter what the state supreme court did. (Indeed, the most experienced, and possibly more realistic, state supreme court justices dissented[53] and would have halted the manual recounts, perhaps because they anticipated a loss in the United States Supreme Court regardless of the state court's analysis.) But in the absence of an equal protection or due process rationale, the Federal Justices would have had to base their decision on Article II or the Electoral Count Act. While those arguments are not compelling,[54] a decision based on this reasoning would truly have been minimalistic, applying only in the

53. Justice Shaw is the most senior member of the state supreme court, appointed in 1983; he is followed in seniority by Justice Harding, appointed in 1991, and Justices Wells and Anstead, both appointed in 1994. Anstead joined the majority, which otherwise consisted of justices appointed in 1997 or later.

54. For excellent analysis of the Article II argument, see Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1413-25 (2001); James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections,* 29 FLA. ST. U. L. REV. 625 (2001). Other commentators have been more persuaded by the Article II argument. *See, e.g.*, Richard A. Epstein, "*In such Manner as the Legislature May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 13, at 13; Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 48-53.

context of presidential elections. Thus, the first intervention by the Supreme Court was decisive, shaping the subsequent play of state and federal actors and, perhaps, a spate of cases that will be brought and decided under the new equal protection rationale of *Bush v. Gore*.

The bottom line of this analysis is an institutional one. Players in the political process, unlike players in hypothetical games set up by scholars, act with imperfect information, and therefore they sometimes miscalculate. Such was the fate of the Florida Supreme Court. The state justices, as well as the four dissenting Federal Justices, may have been outsmarted by some wily Justices who included misleading signals in the first per curiam opinion. Or, the Supreme Court may have acted too quickly and with too little analysis in the first per curiam opinion, not thinking how its decision would be understood by subsequent state actors.[55] Whatever the reason—whether as part of a strategy or as part of sloppiness brought on by haste—this episode in our political history provides a case study of the dynamic interactions of institutions of governance. It also demonstrates what can happen when the decision environment allows players to act with substantial knowledge of their self-interest, rather than forcing them to act within a previously determined structure that reduces the influence of self-interest and requires political decisions to be made transparently by politically accountable representatives.

CONCLUSION

The real tragedy of the institutional miscalculations was not that the Florida Supreme Court was reversed but that Congress, the institution most suited to make any final determination in the event that the Florida dispute lingered through January 2001, was prevented from playing that role. The one hint in the first per curiam opinion that was ignored by all—and correctly so—was that it would be the responsibility of Congress to determine whether Florida could take advantage of the Electoral Count Act's safe harbor provision. Watching legislative deliberation on that issue would have been fascinating because it might have revealed how members of Congress view the appropriate role of the judiciary in interpreting complex and poorly drafted statutes. Legislators, who have a more sophisticated understanding of the legislative process and legislative drafting than most judges, have distinct views on the appropriate interpretive

55. David Strauss seems to suggest that the errors in the Court's early reasoning were due to haste, rather than strategy. *See* David A. Strauss, Bush v. Gore: *What Were They Thinking?, in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 13, at 184-85.

method, and this debate, as well as other deliberation, would have been illuminating for the country, for judges, and for politicians.

The Court's aggressive stance in the 2000 election denied us the opportunity to learn how Congress—if congressional involvement had been necessary—would have behaved in an environment shaped by an ex ante framework for decisionmaking. It may well also deny us the chance, in light of new information from the 2000 election, to formulate and refine other ex ante structures that could head off election contests at all levels. Instead, the Court's analysis and actions reinforced the unfortunate tendency of our political branches to rely on the unelected federal judiciary to step in and save us from the "chaos" of democracy. A more responsible judiciary would act so as to invigorate the political system, not marginalize it.