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Election Disputes and the Constitutional Right to Vote

Joseph W. Little
University of Florida Levin College of Law, little@law.ufl.edu

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I. INTRODUCTION

This commentary is an enlargement of a talk delivered at the annual conference of the Socio-Legal Studies Association (United Kingdom) held in Bristol, England, in April 2001. The purpose was to raise questions about where the "right-to-vote" comes from in the Florida and U.S. Constitutions and whether the constitutional right-to-vote possesses useful legal force in the judicial resolution of a closely-contested election. The Gore-Bush Florida election controversy was the stimulus.

Among the subsidiary questions are: What should a written constitution for a democratic government say about the right to vote? And, how, if at all, should constitutional litigation play a role in adjudicating the outcomes of elections regularly administered under the election laws? I am hesitant to conclude that the celebrated 2000 United States presidential election — especially the Florida episode — provides much guidance for other constitutional democracies, except in terms of concrete defects to avoid. With unmistakable clarity, the Florida experience revealed two points that

* Joseph W. Little is a Professor of Law at the Univ. of Fla. Levin Coll. of Law.

a sound election system must be prepared to address:

1. Some elections may be so closely divided in vote totals that it is impossible to determine a true winner except arbitrarily. In short, the difference between the numbers of votes cast for the two leading candidates may be less than the error rates in the balloting and vote counting processes and machinery.[1]

This point conveys two sub-messages. First, the people should provide themselves with balloting procedures and counting machinery possessing the greatest accuracy and reliability they are willing to pay for. Nevertheless, no matter how good the election machinery, errors will occur, and constitutional exhortations cannot resolve disputes over vote totals so narrowly divided as to be within the margin of error of the system itself. Accordingly, a constitution might prudently prescribe that the results of regularly conducted elections must be accepted. To that end, perhaps this statement would serve:

> The person receiving the most votes in the initial tabulation of votes obtained by regular balloting and counting processes and machinery in any election shall be elected in the absence of machinery failure or fraud or other human misconduct in tabulating the votes.

In fact, this is essentially the argument Mr. Bush advanced in the Florida election dispute. But, the Florida Constitution contains no plain statement of that sort, and, in its absence, the Florida Supreme Court deemed itself free to reject the argument, which it did.

The second issue to confront is:

2. If no such constitutional standard exists and the outcomes of closely-divided election tabulations are subject to judicial review, the election laws must comprehensively address all elections whatever the dignity or status of the office (*i.e.*, from municipal council members to governors or even national presidents). The laws should also designate an administrative official with ample jurisdiction to resolve the entirety of any dispute presented.

The 2000 Florida election laws were well designed to resolve disputes arising in local, municipal, and county elections. What failed was the application of the local resolution model to a statewide election embracing

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1. *See* Alan Agresti & Brett Presnell, *Statistical Issues in the 2000 Presidential Election in Florida*, 13 U. FLA. J.L. & PUB. POL'Y 117-33 (2001).

many counties with separate election procedures and officials. Choosing presidential electors is a statewide matter and the Florida elections laws, as interpreted by the Florida Supreme Court, proved inadequate to resolve the Gore-Bush imbroglio efficiently.

The deficit was not in the jurisdiction of the Florida Supreme Court. That court possesses ample jurisdiction and power to resolve any disputed issue of law properly framed and submitted to it. What was lacking was an adequate administrative framework and responsible official with authority to treat all sixty-seven Florida counties as a unit. The Florida election system is governed by a state constitution that places authority for conducting all elections in elected county Supervisors of Elections.[2] It places administrative jurisdiction for resolving all election disputes at the local level and provides no administrative mechanism for treating statewide elections as a whole.[3] While proven competent for many decades in thousands of local elections, this mechanism failed in the extraordinary statewide election of 2000. The result was the judicial quagmire that captivated our nation and much of the world.

In short, Florida's laws and administration were inadequate in this unprecedented main event. The reason is understandable enough. In terms of the inherent fidelity, reliability, and capability of the voting and ballot tabulating machinery in place, the Florida Gore-Bush election was a statistical tie.[4] In short, the margin of difference between the total votes tabulated and compiled for each of the two candidates was smaller than the uncontrollable error rate in the balloting and counting machinery.[5]

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2. FLA. CONST. art. VIII, § 1.

3. Section 102.1685 of the Florida Statutes does place judicial venue of statewide election disputes in the circuit court of Leon County, Florida, but the laws then provide no practical mechanism for bringing all county elections results into issue simultaneously.

4. *See* Agresti & Presnell, *supra* note 1.

5. The U.S. Supreme Court acknowledged this factor as follows:

> The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. *See* Ho, More Than 2M Ballots Uncounted, AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only in a Very Close Election Do Mistakes and Mismarking Make a Difference, Omaha World-Herald (Nov. 15, 2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.
>
> This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way

Accordingly, no matter how many self-described impartial post facto recounts are conducted, the numerical difference between the Gore and Bush vote totals remains so small that no consensus of who was the *true winner* will ever emerge. The Florida laws did not anticipate this result and failed to provide an adequate arbitrary solution; at least, the Florida Supreme Court refused to accept that they did.

The message for election laws is plain. In an election contest that demands that a single person be selected to serve as winner, as in the selection of the President of the United States of America, you might best name as winner the person who winds up with at least one more vote than the next in line on the basis of a single count of the votes. If this does not satisfy, as it did not satisfy the Florida Supreme Court, then, as far as fidelity to the people's choice is concerned, you might as well choose the winner by the flip of a coin (or, as was once done somewhere, by a poker game between the competitors). This would be quicker, cheaper, and even surer than a more elaborate, but no more reliable system, such as the Florida 2000 litigation.

In fact, the law of Florida does (or did) prescribe that the candidate with one-more-vote wins.[6] But, for close elections, the Florida law also provides — not a coin toss or poker game — but recounts and judicial contests. The difficulty with these statutes is that they do not limit adjudication to testing mere clerical and machinery errors, but also permit challenges to the inherent fidelity of the balloting and vote-counting systems themselves, such as the frenetic Gore-Bush attempts to secure that "one-more-vote" margin. This is a prime example of de Tocqueville's early 19th century observation that, in America, every political dispute, sooner or later, becomes a legal dispute.[7] The closeness of the race, and not any major deficiencies in the laws themselves, created the context for this dispute.

> by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

Bush v. Gore, 531 U.S. 98, 103-104 (2000).

6. FLA. STAT. § 102.111(1) (2000) prescribing, in part:

> The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. . . . 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.

Id.

7. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96-103, 137-151 (Henry Reeve trans., 1889).

This fact occasions a return to the subject of embedding the "right-to-vote" in a written constitution. Most people acquainted with the law of written constitutions are familiar with the celebrated 1803 *Marbury v. Madison*[8] decision of the U.S. Supreme Court. Breaking with the British doctrine of parliamentary sovereignty, *Marbury* announced a new rule of constitutional sovereignty: The written U.S. Constitution overrules legislative enactments that conflict with constitutional dictates.[9] Within three years of Florida's having become the twenty-seventh state in the Union in 1845, the Florida Supreme Court had applied the rule of constitutional supremacy in Florida.[10] Thus, the groundwork for the 2000 Florida constitutional election crises was laid more than 150 years before.

A Florida election law appeared to resolve the contest on the seventh day after the election[11] and a Florida Election Canvassing Commission was prepared to apply it. Mr. Gore's partisans sued, claiming that to do this would infringe upon some Florida citizens' constitutional "right-to-vote."

The constitutional question was thus raised; does either the Florida Constitution or the United States Constitution explicitly guarantee Florida citizens a "right-to-vote" for presidential electors? If so, how is that right manifested in the documents? If the right does exist, may a candidate invoke it to advance partisan interests in a closely divided election? And, finally, may a candidate invoke the right, post-election, to test the inherent reliability of vote casting and counting machinery? The 2000 Florida election litigation attempted to answer these questions.

II. THE ISSUES

Shortly after the voting polls closed at 7:00 p.m. on November 7, 2000, Messieurs Gore and Bush and their partisans commenced filing lawsuits in Florida, raising numerous issues. Eventually, all these actions either withered away, were rejected by the courts, or were made irrelevant in the blaze of a late innings tag match between the Florida Supreme Court and the U.S. Supreme Court.

In Florida, as in many states, voting on statewide issues is conducted by local officials, county-by-county. These county officials prepare the ballots, locally, count the votes, locally, and submit the county tallies to a state agency called the Elections Canvassing Commission.[12] The laws also prescribe that any county votes not reported to the Elections Canvassing

8. 5 U.S. (1 Cranch) 137 (1803).

9. *Id.*

10. Flint River Steam Boat Co. v. Roberts, 2 Fla. 102 (1848).

11. FLA. STAT. § 102.111(1) (2000).

12. *Id.; see also* sources cited *supra* note 5. The members are the Governor, the Secretary of State, and the director of the Division of Elections within the Department of State.

Commission on the seventh day, post-election, are to be "ignored" and excluded from the certified tabulations.[13] The Commission collects and sums the county votes and certifies the winner on that seventh day.[14] Mr. Gore challenged the regular application of this procedure.

To the Florida Supreme Court, Mr. Gore's challenge framed this issue: Is the Elections Canvassing Commission legally bound to follow the plain mandates of the Florida elections laws and certify a winner on the seventh day? Or, must it ignore those mandates because of some superseding provision or tenet in the Florida Constitution? Mr. Bush maintained that the Commission was bound to apply the statutes faithfully, as written. By contrast, Mr. Gore advanced the position that right-to-vote tenets of the Florida Constitution bound the Commission to ignore the statutes, follow an ad hoc procedure, include late-arriving votes from court-ordered recounts, and then certify a winner.

The Florida Supreme Court generally accepted Mr. Gore's arguments, directed the Elections Canvassing Commission to ignore the statute temporarily, and set a massive statewide vote recount into play.[15] From the various rulings of the Florida Supreme Court, Mr. Bush, in his turn, invoked the jurisdiction of the U.S. Supreme Court to place the Florida decisions under the scrutiny of the U.S. Constitution.

Comprehending the ensuing tussle between the Florida Supreme Court and the U.S. Supreme Court requires a more sophisticated understanding of United States federalism than most observers possess or care about. At one point in the to-and-fro, the U.S. Supreme Court seemed to be captivated by an arcane point of constitutional federalism and jurisdiction,

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13. *Id.* This statute, plus this statement in section 102.112(1) of the Florida Statutes; "If the 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," created confusion in the mind of the Florida Supreme Court. To resolve the confusion, the Florida court held that "may be ignored" language found in section 102.112(1) of the Florida Statutes qualified the "shall be ignored" language of the preceding statutory section, as follows:

> Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute. In the present case, the provision in section 102.111 stating that the Department "shall" ignore returns was enacted in 1951 as part of the Code. On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1234 (Fla. 2000), *vacated by* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

14. FLA. STAT. § 102.111(1) (2000).

15. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

but, in the end, more-or-less abandoned it.[16] Instead, the U.S. Supreme Court finally put an abrupt stop to the Gore-Bush recount in Mr. Bush's favor, and did so on a curious U.S. constitutional right-to-vote basis, one which is entirely different from the basis of the Florida Supreme Court's decision.[17] In short, the resolution of the Florida election dispute finally came down to a contest between two rights-to-vote: the one found in the Florida Constitution by the Florida Supreme Court, and another found in the U.S. Constitution by the U.S. Supreme Court.

In its opening right-to-vote sally, the Florida Supreme Court held that the Florida constitutional right-to-vote could be vindicated only by conducting vote recounts throughout the state.[18] Then, in a preemptive counter-stroke, the U.S. Supreme Court held that the federal constitutional right-to-vote could be vindicated only by stopping the recount.[19] Under the supremacy tenet of U.S. federalism,[20] the federal right-to-vote trumped and neutralized the Florida right-to-vote. Thus ended the vote recounts and the election. A puzzled observer might reasonably inquire, "How could two constitutional rights-to-vote lead to exactly contradictory conclusions?"

III. THE PLAIN WORDS OF THE CONSTITUTIONS

Because both Supreme Courts made their Gore-Bush decisions on constitutional "right-to-vote" grounds, one might well inquire, "What exactly do these Constitutions prescribe on this subject?" Examining the texts may prove a disappointment.

Neither instrument includes a bold, inclusive statement such as, "Every person shall have a right to vote in all public elections within any jurisdiction in which the person is a citizen and resident and has qualified to vote." Nevertheless, both Constitutions do include multiple provisions that permit an inference that the right-to-vote is an implied right of citizenship. Most cogent is the Florida Constitution's predicate that "All

16. This was the jurisdictional question raised by the U.S. Supreme Court in its decision in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76-78 (2000). This point is touched upon lightly below.

17. Bush v. Gore, 531 U.S. 98, 104, 109 (2000). This decision is discussed briefly below.

18. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

19. Bush v. Gore, 531 U.S. 98 (2000).

20. U.S. CONST. art. VI, cl. 2. This provides that,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.
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> U.S. CONST. art. VI, cl. 2.

political power is inherent in the people."[21] That power is manifested through the exercise of the franchise. Numerous other provisions imply the same right.[22]

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21. FLA. CONST. art. I, § 1.
22. Pertinent provisions of the Florida Constitution include:

ARTICLE I. DECLARATION OF RIGHTS

§ 1. Political power

All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

§ 2. Basic rights

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be deprived of any right because of race, religion, national origin, or physical disability.

FLA. CONST. art. I, §§ 1, 2.

ARTICLE VI. SUFFRAGE AND ELECTIONS

§ 1. Regulation of elections

All elections by the people shall be by direct and secret vote. . . . .

§ 2. Electors

Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.

§ 3. Oath

Each eligible citizen upon registering shall subscribe the following: "I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and that I am qualified to register as an elector under the Constitution and laws of the State of Florida."

§ 4. Disqualifications

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability . . . .

FLA. CONST. art VI, §§ 1-4(a).

ARTICLE X. MISCELLANEOUS

§ 12. Rules of construction

Unless qualified in the text the following rules of construction shall apply to this constitution. . . . .
(d) "Vote of the electors" means the vote of the majority of those voting on the matter in an election, general or special, in which those participating are limited to the electors of the governmental unit referred to in the text.

FLA. CONST. art. X, § 12.

OFFICERS THAT THE CONSTITUTION MAKES ELECTIVE BY THE PEOPLE

1. Members, Florida Senate.

2. Members, Florida House of Representative.

FLA. CONST. art. III, § 15a, b.

3. Governor, Lieutenant Governor, Cabinet Members.

FLA. CONST. art. IV, §§ 4, 5 (statewide).

4. Justices of the Supreme Court (statewide) and judges of district courts of appeal (merit retention elections).

5. Circuit and county court judges (*i.e.*, trial judges).

6. State Attorneys.

7. Public Defenders.

FLA. CONST. art. V, §§ 10(a), (b), 17, 18.

8. County officers (county commissioners, sheriff, clerk of circuit court, supervisor of elections, property appraiser, and tax collector).

9. Municipal legislative officers.

FLA. CONST. art. VIII, §§ 1, 2(b).

10. Members of school boards.

11. Superintendents of Schools (voters may elect appointments by school boards).

FLA. CONST. art. IX, §§ 4(a), 5.

By contrast, the bases for the U.S. Constitution's right-to-vote are more diffusely scattered among its provisions. The preamble, "We the people of the United States . . . do ordain and establish this Constitution for the United States of America,"[23] is the only counterpart to Florida's "All political power is inherent in the people."[24] Although the people themselves never voted directly upon its adoption, the U.S. Constitution also purports to derive from the sovereignty of the people. Apart from the preamble's attestation of popular sovereignty, the text of the U.S. Constitution has

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FLORIDA VOTERS ARE GUARANTEED THE RIGHT TO APPROVE THESE ISSUES

1. Certain kinds of statutes enacted by the legislature (Special acts).

FLA. CONST. art. III, § 10.

2. Certain ad valorem taxes on real property and tangible personal property.

3. Certain state bonds (*i.e.*, instruments to borrow money).

4. Certain local bonds (*i.e.*, instruments to borrow money).

FLA. CONST. art. VII, §§ 9, 11, 12.

5. Changing form of county government and transferring powers among local governmental entities.

6. Local (county) option on legality of sale of intoxicating liquors.

FLA. CONST. art. VIII, §§ 1(g), 3-5(a).

7. Convening a constitutional convention.

8. Amendments and revisions to the Florida Constitution.

FLA. CONST. art. XI, §§ 4, 5.

23. U.S. CONST. pmbl. This provides that,

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

24. *Id.*

little to say about the subject. What is said includes a directive[25] that the people choose members of the House of Representatives and four prohibitions[26] against invidious infringements of the right-to-vote where it does exist. The rest of the story was supplied by the U.S. Supreme Court in is final Gore-Bush decision.

IV. DIFFERENT VIEWS OF THE ROLE OF THE JUDICIARY IN CONSTITUTIONAL ADJUDICATION

Exactly what powers do courts possess to impose constitutional standards on other branches of democratic governments formed under written constitutions? One of the major pre-revolutionary gripes against British colonial rule was the arrogance and overreaching decisions of colonial judges.[27] The Americans did not want to be ruled by judges. In an attempt to quiet fears that an independent federal judiciary might similarly usurp power from the popular branches of government, Alexander Hamilton defended the judicial article of the proposed U.S. Constitution by depicting the judiciary as the "least dangerous" branch of government. Here is Hamilton's famous statement:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the LEAST DANGEROUS to the political rights of the Constitution; because it will be least in a capacity to annoy or injure

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25. U.S. CONST. § 2, cl. 1. "The House of Representatives shall be composed of Members CHOSEN every second year by the people of the several states, ..." *Id.*

26. The four prohibitions are, "The right of citizens of the United States TO VOTE shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1 (universal male suffrage); "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX, § 1 (women suffrage);

> The right of citizens of the United States to vote in any primary or other election for president or vice president, for electors for president or vice president, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. CONST. amend. XXIV, § 1 (qualifications of electors); "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1 (eighteen year old voting rights).

27. This was touched upon in this complaint about George III lodged in the Declaration of Independence: "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

> them. The EXECUTIVE not only dispenses the honors, but holds the SWORD of the community. The LEGISLATURE not only commands the PURSE, but prescribes the RULES by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but MERELY JUDGMENT; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[28]

The Florida Supreme Court gives lip service to Hamilton's "merely judgment" admonition, but its own statements and rulings often aggressively exceed it. For example, that court has said:

> Courts are created (1) to enforce the laws and (2) to resolve disputes. Courts in the American legal system have a third distinct and extremely important responsibility; that is to safeguard the Constitution and protect individual rights. THE FEDERALIST No. 78 (Alexander Hamilton). What makes our legal system so different is the ability of lawyers to challenge the constitutionality of government conduct before a separate, independent judicial branch of government.[29]

That Court has also endorsed this exhortation: "In Florida, our judiciary likewise is the one branch that emphatically must protect the basic rights of individuals against governmental overreaching. We guard liberty's sanctuary. It is our greatest duty to the people of Florida."[30]

In keeping with this "greatest duty," the Florida Supreme Court deems itself to be burdened with a "sacred trust confided to [itself] of preserving the Constitution unimpaired."[31] According to that court, this "sacred trust" imposes a "painful duty" to invalidate any legislative act which "in its terms abridges" a "hallowed" constitutional right or that is "subversive of the principles of natural justice and against common reason and common

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28. THE FEDERALIST No. 78 (Alexander Hamilton).

29. *In re* Amendments to Rules, 598 So. 2d 41, 42 (Fla. 1992).

30. Krischer v. McIver, 697 So. 2d 97, 113 (Fla. 1997) (Kogan, C.J., dissenting), cited with approval in White v. State, 710 So. 2d 949, 954 n.7 (Fla. 1998) ("As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislature nor executive branches can modify."), *rev'd on other grounds*, sub nom., Florida v. White, 526 U.S. 559, 564-565 (1999).

31. Flint River Steamboat Co. v. Roberts, 2 Fla. 102 (1848).

right."[32] In short, the Florida Supreme Court deems itself to be clothed with the "heroic" mission of reining in the other branches of government when they fail to toe the constitutional line.

In vindicating this "sacred duty," the Florida Supreme Court has "not hesitated to accomplish by judicial fiat what other divisions of government have failed or refused to do in protecting, implementing, or enforcing constitutional rights."[33] At least once prior to the Gore-Bush dispute, a litigant asked that court to order the Florida Legislature to enact a particular law to protect constitutional rights. Although the Court refused to do such a heroic act as that, it did flatly warn the Legislature that if it did not enact an appropriate statute, then, in a proper case, the Court would issue a judicial decision prescribing rules to protect the constitutional rights at stake.[34] It was very much in the spirit of these brave conceptions of its role and duty that the Florida Supreme Court entered the Gore-Bush affray.

By contrast, although it was the author of *Marbury v. Madison*, the U.S. Supreme Court has ordinarily been a more faithful adherent to Hamilton's admonition. With a few notable exceptions, it too employs the Constitution primarily as a shield to block abusive governmental action and is less prone than the Florida Supreme Court to wield the Constitution as a sword to impose its version of constitutional policy directly upon the other branches of government.[35]

V. THE POLITICAL STAKES IN THE GORE-BUSH DISPUTE

Despite its strongly and proudly possessed view of itself as the ultimate guardian of the constitutional liberties of the people of Florida, the Florida Supreme Court, as an institution, had little or nothing at stake in the outcome of the Gore-Bush election dispute. The outcome would not affect the tenure or status in office of any justice sitting on the Florida Supreme Court. The structure and powers of that court and the selection and retention of its members are controlled wholly by the Florida Constitution and the people of Florida. Who should become the President of the United States was simply irrelevant to these affairs.

By contrast, justices of the U.S. Supreme Court are appointed by the President with the advice and consent of the U.S. Senate.[36] After initial appointment, absent impeachment, these justices serve for life or until

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32. *Id.* Recognition is owed here, to Lord Coke's dictum in Dr. Bonham's Case [1610] (Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1610)).

33. Dade County Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684, 687 (Fla. 1972).

34. *Id.* at 687-88.

35. Prime exceptions to this restraint are found in civil rights and voting rights cases, including the year 2000 Gore-Bush decisions.

36. U.S. CONST. art. II, § 2.

voluntary relinquishment of office.[37] Hence, who was elected President would no more directly affect the tenures of the incumbents on that court than it did those of the Florida Supreme Court. But personal tenure was not the whole picture; status was also at stake. If the office of Chief Justice should fall vacant, the new President would be the person with authority to nominate the successor.[38] In short, the leadership position on the Court was contingently at stake. In searching for a nominee, one may reasonably assume that Mr. Bush and Mr. Gore would be attracted to entirely different characters among eligible aspirants.

Moreover, the U.S. Supreme Court is sharply and closely divided on partisan grounds on a number of constitutional premises. These include the powers of Congress, limits on the powers of the federal and state governments, and the division of power between the United States and the individual states. Several justices are of advanced years and may soon be expected to depart by retirement or death; among them is Chief Justice Rehnquist. Thus, the Gore-Bush disputants might reasonably predict that the winner would appoint a new Chief Justice, and perhaps, one or more additional justices in a four-year term of office, and even more, if a second term should succeed it. The constitutional proclivities of this new line-up of justices is likely to shape constitutional adjudication for years to come.

With all of this occupying their minds, the incumbent federal justices may be presumed to have been "worried" in a quite literal sense about how the outcome of the election would affect future constitutional adjudication in the U.S. Supreme Court.[39] By contrast, the Florida justices were not directly[40] burdened with these concerns. Consequently, although the federal justices entered the Gore-Bush affray from the vantage point of a more restrained orthodoxy in constitutional adjudication, they also entered it with much more at stake in terms of institutional future. We may indulge a presumption that the federal justices came to the task in a state of higher internal agitation.

Courts are presumed to approach judicial disputes with strict partisan neutrality. Nevertheless, no principle is free of corrosive agents, and, the Gore-Bush dispute immersed the U.S. Supreme Court in a virulent

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37. U.S. CONST. art. III, § 1.

38. U.S. CONST. art. III, § 2.

39. Martha Barnett, Esq., of Tallahassee, Florida, was president of the American Bar Association at the time of the election. She also is a graduate of the University of Florida College of Law and a former student of this writer. Speaking at a University of Florida Law School commencement ceremony in December 2000, Barnett told the audience that she had been engaged in a telephone conversation with U.S. Supreme Court Justice O'Connor shortly before the November 7, 2000 election. Barnett reported that Justice O'Connor extolled her along these lines, "Martha, it's all going to be decided in Florida! You've got to get it right in Florida."

40. I include the word directly because one may also reasonably presume that the Florida Justices do consider themselves to have a stake in federal constitutional adjudication.

corrosive. In short, the Gore-Bush acid of practical politics attacked the political neutrality of the federal justices much more aggressively than it attacked the Florida justices.

Although all courts exhort lawyers not to question judicial motives, that exhortation holds weakest when partisan politics is the only issue. In Gore-Bush, my willingness to accept judicial impartiality is suspended. I believe that the performances of the two courts must be evaluated with this difference in mind. In my view, the Florida Supreme Court wanted to vindicate its self-proclaimed role as the ultimate protector of the constitutional rights of the people of Florida by getting it right for the people. By contrast, the U.S. Supreme Court wanted to get it right for the Court.[41]

VI. THE CONSTITUTIONAL DECISIONS

A. *The Florida Supreme Court*

As outlined above, the Florida election statutes mandated the Elections Canvassing Commission to tabulate votes submitted by sixty-seven Florida counties and certify a winner on the seventh day after the election, ignoring votes not yet submitted. The Commission announced that it would follow the plain mandates of the statutes.[42] Gore partisans sued, challenging certain vote tabulations and the Commission's interpretation of the statutory certification statute.[43] At that stage, without including unrecounted votes, it appeared that Mr. Bush would be the certified winner. When asked to decide whether the Commission must certify a winner on the seventh day, the Florida Supreme Court vindicated its "sacred duty," stating:

> The real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. . . . The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. . . . By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.[44]

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41. I am also quite willing to accept that members of the Court believed that getting it right for the Court was synonymous with getting it right for the people.

42. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227-28 (Fla. 2000) (citing Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)).

43. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

44. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227-28 (Fla. 2000) (citing Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)).

The Court continued: "The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished."[45] Thus, basing its opinion on its affirmation of this constitutional right-to-vote, but without an explicit textual source, the Florida Supreme Court concluded that the Commission must ignore the plain wording of the election statute and must permit late returns of recounted votes to be included in its final tabulation. Only if delay would "compromise the integrity of the electoral process"[46] would the Court's order permit the Commission to reject late filed votes.[47]

Under this and subsequent orders,[48] local Florida election officials immediately commenced a massive hand recount of so-called "under voted"[49] ballots. The Court's order directed them to employ the recount standard prescribed in the Florida election code; *i.e.*, "a vote shall be counted as a 'legal' vote if there is a 'clear indication of the intent of the voter.'"[50] As to rules of how to adjudge a voter's "clear indication," the

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45. *Id.* at 1236.

46. *Id.* at 1237 ("(1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process.").

47. In reviewing this decision, a critic should be mindful that the right-to-vote claim here was not made by an offended elector who had been excluded from the voting polls. Instead, it was claimed on behalf of a candidate who sought to supplant the lawful election machinery with a revised version, presumably more favorable to himself.

48. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000).

49. That is, those that the voting machinery had thrown out as not having properly identified an intended presidential vote.

50. Gore v. Harris, 773 So. 2d 524, 526 (Fla. 2000).

> [W]e ordered the Circuit Court of Leon County to tabulate by hand 9000 contested Dade County ballots. *See* Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000). This Court further held that relief would require manual recounts in all Florida counties where under votes existed which had not previously been subject to manual tabulation. *See id.* at 1253, 1261-62. The standard we directed be employed in the manual recount was the standard established by the Legislature in the Florida Election Code, i.e., that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." *See id.* at 1262 (citing FLA. STAT. § 101.5614(5) (2000)). The "intent of the voter" standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and § 3 U.S.C. 5 (1994).

Id.

Court would give no hint.[51] Ironically, the Florida court's strict adherence to this one statutory standard, *i.e.*, an unexplained "intent of the voter," while elaborating another,[52] incited the U.S. Supreme Count to quash Mr. Gore's quest to vindicate the Florida constitutional right-to-vote to gain his hoped-for victory.

In sum, the Florida Supreme Court distilled a substantive right-to-vote from various premises embedded in the Florida Constitution[53] and authorized partisans of a disappointed candidate to invoke this right-to-vote and demand a recount even after the time prescribed by the Legislature has expired. This was a mighty feat of constitutional embroidery.

B. *The United States Supreme Court*

Mr. Bush again sought relief in the U.S. Supreme Court. He argued that the Florida recount order failed to prescribe a uniform standard for evaluating disputed ballots, thus permitting arbitrary and unconstitutional variation among the decisions of local officials in many counties.[54] Taking Mr. Bush's bait, a majority of the justices on the U.S. Supreme Court rendered this decision:

> 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. . . . History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature 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. . . .
>
> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its

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51. Most likely, the Court was concerned that its prescription of a counting methodology at this point in the process would free Congress of its legislative commitment to accept state electoral court submissions when Congress exercised its ultimate authority to choose among competing slates that might be presented by a state.

52. That is, whether or not the Elections Canvassing Commissions must certify a winner on the seventh day.

53. Gore v. Harris, 772 So. 2d 1243, 1254 (Fla. 2000) ("The right to vote is the right to participate; it is also the right to speak, but more importantly, the right to be heard.").

54. This argument ignored the far greater differences among the inherent reliability of the various different balloting and counting systems in place within the counties.

> exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. . . .
>
> 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.* It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. . . .
>
> Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.[55]

In condemning the Florida statutory standard on equal protection grounds, this order ignored provisions of Florida law requiring public decision-making, partisan observers,[56] and judicial participation in the recounting process.[57] In short, the Court ignored the fact that the law was carefully designed to avoid partisan, arbitrary and capricious decisions. It also ignored the fact that this same "intent of the voter" standard had been used to evaluate hand-marked ballots without perceived constitutional impediment for many decades before machine balloting came into the picture. But that was then, and this is now.

The U.S. Supreme Court did follow the lead of the Florida Supreme Court in holding that a candidate could invoke, post-election, the electorates' right-to-vote to challenge the structure of a state's election laws. But, what the federal right-to-vote required Florida election officials to do was drastically different. The Florida court had held that a recount must occur to vindicate the right, and the U.S. Supreme Court held the recount must not occur.[58] In that particular conflict, the Florida voters' federal right-to-vote prevailed over the same voters' state right.

Almost exactly half the voters were made happy by the outcome.

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55. Bush v. Gore, 531 U.S. 98, 104-05, 110 (2000) (emphasis added).

56. FLA. STAT. § 102.166(7) (2000).

57. The work is undertaken by county canvassing boards, which are comprised of the county supervisor of elections, a county judge serving as the presiding officer, and a county commissioner. FLA. STAT. § 102.141(1) (2000).

58. For additional discussion of this point, see Mark Tushnet, *The History and Future of* Bush v. Gore, 13 U. FLA. J.L. & PUB. POL'Y 23-36 (2001).

VII. EPILOGUE

The final decision of the U.S. Supreme Court ended Mr. Gore's election hopes, and in time, Mr. Bush was sworn in as President of the United States. I once thought that both the Florida Supreme Court and the U.S. Supreme Court made decisions that got in the way of determining the true expression of Florida voters. I am no longer persuaded that the Florida Supreme Court was guilty of that failing. Instead, I believe it tried too hard; it over-extended the electors' "right-to-vote" in an election conflict that was too closely divided to be resolved by recounting even a large number of rejected ballots.

As to the ballots in question, no one advanced a credible argument that the State had set out to hinder voters in the exercise of the franchise.[59] Furthermore, the Florida court grossly undervalued the efforts of ninety-nine plus percent of the voters who voted exactly as they wished. Instead, the Court fixated upon the foibles of a very small percentage of voters who simply were not prepared to exercise their franchises effectively. A major share of the blame should be heaped upon the political parties and their candidates. They paid too little attention to examining proposed ballots and preparing voters in advance of election day. Similarly, many disappointed voters failed to prepare themselves adequately before going to the polls. Election officialdom might have adopted a less error-prone system, but failing to cater to a minuscule fraction of unprepared voters can hardly be deemed to be an infringement of the right-to-vote.

The Florida court also failed to acknowledge that the situation was one in which its orders could not produce the "true winner." No court order could produce a vote tabulation that accurately reflected the collective subjective state of mind of six million voters in a razor's-edge contest. Because the race ended in a virtual dead heat, the Florida court would have done well to have affirmed Judge Sauls' judgment,[60] which was that Mr. Gore had failed to prove a basis for the relief he was seeking.[61]

The most generous evaluation of the work of the U.S. Supreme Court is to speculate that it would never have been tempted into the affray if the Florida Supreme Court had merely applied Florida law as it stood on the morning of election day. Even so, the U.S. Supreme Court could have declined Mr. Bush's attempt to invoke review of the Florida court's initial order, then by giving county election officials more time to submit

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59. Several other actions challenged the propriety of administrative actions, but all were unsuccessful. Other actions raised questions of official improprieties, but none proved to be successful. *See, e.g.*, Taylor v. Martin County Canvassing Bd., 773 So. 2d 517 (Fla. 2000); Jacobs v. Seminole County Canvassing Bd., 773 So. 2d 519 (Fla. 2000).

60. Gore v. Harris, 772 So. 2d 1243, 1262, 1271 (Fla. 2000).

61. *Id.*

recounted votes than the Florida election code seemed to permit. After all, the U.S. Constitution assigns state legislatures unreviewable power to direct how presidential electors are to be appointed,[62] and assigns Congress unreviewable power to choose the President[63] from the aggregation of state electors so chosen.[64] Given this federal constitutional division of authority, the Court might have demurred stating, "It is for the States to determine a

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62. U.S. CONST. art. III, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . .").

63.

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. CONST. amend. XII.

64. Congress also sets the days upon which state electors are chosen and upon which the state electors then vote in the states. "The Congress may determine the Time of choosing the Electors, and which Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. CONST. art. II, § 1, cl. 2.

slate of state electors and it is for Congress to decide whether or not to count them."[65] Instead, in the guise of its expressed uncertainty as to whether the Florida court had thought its own decision was mandated by federal law,[66] it resorted to its jurisdiction[67] to review a decision of a state's

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65. The Court indeed paid lip service to this approach in *Bush v. Gore*, 531 U.S. 98, 104 (2000), noting "the State legislature's power to select the manner for appointing electors is plenary."

66. The federal law in question were the statutes found in 3 U.S.C. § 5 (2000) in which Congress has indicated what rules it will follow in counting the reports of electors submitted by the States. Foremost among these was this "Safe Harbor" provision pertaining to which set of electors Congress will credit in the event of some conflict in state submissions:

> Determination of controversy as to appointment of electors
>
> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (2000). The relevance of this statute would be limited to ascertaining whether the Florida Legislature might have intended to achieve in regard to satisfying the safe harbor requirement and not as a mandate to the States.

67. *See* Michigan v. Long, 463 U.S. 1032 (1983). The fundamental source of jurisdiction is the U.S. Constitution, which provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 1, 2. Congress has executed this provision by providing the U.S. Supreme Court jurisdiction to review decisions of state courts, as follows:

highest court that rests upon an interpretation of federal law or the U.S. Constitution. This "uncertainty"[68] empowered the U.S. Supreme Court to vacate the decision of the Florida court and remand with directions to clarify.[69]

Thereafter, the Florida court entered a second order reaffirming that the Commission must accept late-recounted ballot returns; it also directed county election officials to conduct a recount to ascertain the "intention of the voter"[70] in regard to disputed ballots.[71] Announcing new guidelines at this stage of the process could be seen as a revision of the statutory law as it stood on election day, thereby threatening Congress's "safe harbor" guarantee to accept a slate of state electors chosen by existing law. Fearing this, the Florida court deliberately declined to prescribe new non-statutory

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(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1257 (2000).

68. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 77 (2000) ("After reviewing the opinion of the Florida Supreme Court, we find 'that there is considerable uncertainty as to the precise grounds for the decision.'").

69. *Id.* at 70.

70. Gore v. Harris, 772 So. 2d 1243, 1261 (Fla. 2000), applying the "clear indication of the intent of the voter" standard prescribed by section 101.5614(5) of the Florida Statutes.

71. *Id.*

guidelines to determine voter intent.[72] No doubt, the Florida court also intended to rest its decision solely on Florida law and not federal mandates, thus closing the door on further review by the U.S. Supreme Court.

Much to the chagrin of Mr. Gore's supporters (and probably the members of the Florida Supreme Court), this "clarification" did not persuade the U.S. Supreme Court to bow out of the Florida controversy. Instead, upon Mr. Bush's second application, that court dropped its own right-to-vote bombshell.[73] No longer having "lack of clarity" as its jurisdiction handhold, the U.S. Supreme Court seized upon its own version of a constitutional "right-to-vote," as follows:

> The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter."[74] This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary . . . .
>
> The want of those rules here has led to unequal evaluation of ballots in various respects . . . . As seems to have been

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72. *See* 3 U.S.C. § 5. The Florida court indicated its intention not to rupture the safe harbor, as follows:

> Based on this Court's status as the ultimate arbiter of conflicting Florida law, we conclude that our 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.

Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1291 (Fla. 2000).

73. Bush v. Gore, 531 U.S. 98, 105 (2000).

74. *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1261.

> acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.[75]

This novel equal protection analysis has been controversial and the subject of extensive commentary, which I will not repeat. What this ironical decision incontestably did was to end the Florida election dispute and Mr. Gore's election hopes. The Florida voters' federal right-to-vote, favoring Mr. Bush at this particular stage of the contest, trumped the same voters' Florida right-to-vote, favoring whom we will never know.

What does all this mean for the future of the Republic and, perhaps, for democratic government "of the people, by the people and for the people?" Perhaps this was best expressed by Florida Supreme Court Justice Shaw who concluded:

> I commend the public officials, employees, and volunteers of this state — each election supervisor, judge, court clerk, board member, and all the others — who worked tirelessly in a star-crossed effort to count every vote. I commend the people of our state and nation who looked faithfully to the courts to interpret and apply the law. I also commend Vice President Gore for persevering in the labor of Sisyphus; each time he attempted to comply with the Code, he was forced to begin anew. And I commend President-elect Bush for remaining stalwart in the face of charges of suppressing the truth (i.e., of obstructing the counting of ballots) and disenfranchising the voters of this state. And finally, I especially commend the other justices of this court, each of whom approached this case with a sworn resolve to be objective, honorable, and fair.
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> Our nation has been through an ordeal, but we have learned from the experience. At this point, I know one thing for certain: The basic principles of our democracy are intact.[76]

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75. Bush v. Gore, 531 U.S. at 105-06.

76. Gore v. Harris, 773 So. 2d 524, 529-30 (Fla. 2000) (Shaw, J., concurring). Shaw also stated:

> Admittedly, the present scenario is surreal: All the king's horses and all the king's men could not get a few thousand ballots counted. The explanation, however, is timeless. We are a nation of men and women and, although we aspire to lofty principles, our methods at times are imperfect.
>
> First, although the untabulated Florida ballots may hold the truth to the presidential election, we still — to this day — cannot agree on how to count those ballots fairly and accurately. In fact, we cannot even agree on if they should be counted. Second, although the right to vote is paramount, we routinely

I think Judge Shaw is correct about the intactness of our democracies. Thoughtful voters may be understandably confused about the conflicting meanings of their constitutional rights-to-vote.

> installed outdated and defective voting systems and tabulating equipment at our polls prior to the present election. And finally, although the rule of law is supreme, the key legal text in this case — i.e., the Florida Election Code — is fraught with contradictions and ambiguities, and the key legal ruling — i.e., the United States Supreme Court's final decision in Bush v. Gore, . . . — was denigrated . . . and rejected by nearly half the members of that Court.

Id. at 529-30.