

Trying to Make Peace with *Bush v. Gore*

by Richard D. Friedman*

A. Introduction: The Setting and the Issues

The Supreme Court's decision in *Bush v. Gore*, shutting down the recounts of Florida's vote in the 2000 Presidential election and effectively awarding the election to George W. Bush, has struck many observers, including myself, as outrageous.¹ Decisions of the Supreme Court should be more than mere reflections of ideological or partisan preference thinly camouflaged behind legalistic language. It would therefore be pleasant to be able to believe that they *are* more than that. Accordingly, Judge Richard Posner's analysis,² in which he defends the result reached by the Court though not the path by which it got there, is particularly welcome. Though Judge Posner is a person of conservative political orientation, he is also fiercely independent-minded. Given that he sees merit in the *Bush* decision, then perhaps we can give more credence to the proposition that – whether ultimately we agree with the decision or not – it was a plausible response to a difficult situation, rather than a flagrant act of judicial usurpation.

Ultimately, indeed, I am not persuaded by Judge Posner's arguments. In this article I will explain why, notwithstanding those arguments, I still believe the Court was wrong, way wrong. But I believe that Judge Posner makes a better argument for the Court's result than the Court does itself. In particular, he is right that an argument under Article II of the Constitution, which only three members of the Court adopted, is stronger than the holding under the Equal Protection Clause that a majority of the Court adopted. I will attempt in this article to recast the Article II argument to make it even stronger; in my formulation, it is irrelevant whether the Florida Supreme Court relied exclusively on acts of the Legislature in ordering recounts, but significant whether that decision was a fair application of pre-existing law. I remain unpersuaded that even this reformulated argument should have led to a shutdown of the Florida recount, in part because I doubt that the Florida Supreme Court's recount order failed to meet this standard, but more fundamentally because I believe that the entire matter should have been left, so far as federal institutions are concerned, to the political process prescribed by the Constitution and by federal statute. And so I continue to believe that the Court's intervention was a terrible mistake inimical to our democracy – guided in part by a partisan motivation that I at least hope was not close to the surface of judicial consciousness and in part by a misplaced sense that the nation was on the verge of chaos. And yet my sense of outrage is ever so slightly muted. I can at least see how a justice with a perspective affected by a strong Republican rooting interest might in good faith have regarded the decision of the Florida Supreme Court as intolerable and so been tempted to step in.

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¹ See, e.g., Jeffrey Rosen, *Disgrace*, NEW REPUBLIC (Dec. 25, 2000); Richard D. Friedman, *Bush v. Gore: What was the Supreme Court Thinking?*, COMMONWEAL, p.10 (Jan.12, 2001).

² Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. xxx.

Understanding the issues related to *Bush v. Gore*, and the plan of this article, will be assisted by a brief summary of the situation as it stood on the evening of December 8, 2000. The Secretary of State had certified the Republican ticket as the winners of Florida's electors, but on December 8 the Florida Supreme Court ordered a statewide manual recount of the undervote – that is, of those ballots containing no marking that was registered by the counting machines in the vote for President. Gov. Bush immediately petitioned the United States Supreme Court to review that decision.

There was considerable doubt as to whether such a recount could be completed in time to determine Florida's electoral votes. A federal statute, 3 U.S.C. § 5, offered the state a "safe harbor" – if by December 12 it finally resolved its contest proceeding in the manner prescribed previously by state law, then the determination made by that proceeding should have been immune from challenge under state law. But the deadline for the safe harbor was only four days away. Six days after that, December 18, was the date prescribed by law for the casting of electoral votes, in accordance with the requirement of Article II of the Constitution that the electoral votes be cast on the same day in every state. A statute provided that the electoral votes would be counted on January 6, and under the Twentieth Amendment to the Constitution the new President was due to be inaugurated on January 20.

Beyond timing was the question whether the recount ordered by the Florida court was constitutionally valid. Governor Bush was raising two principal contentions. One was that the recount violated the Fourteenth Amendment, mainly because the court had failed to establish uniform standards more specific than the intent of the voter for determining whether a ballot recorded by the machines as an undervote should be deemed to have cast a valid vote. The other was that the state supreme court's decision ordering the recount was not based on a valid interpretation of Florida election law, as enacted by the Legislature, and therefore it violated Article II of the Constitution.

Meanwhile, complicating the situation, the Republican-dominated Legislature was prepared to step into the situation and designate its own slate of electors.

Section B of this essay will take up first (in large part because it is most easily detachable from other issues) Judge Posner's suggestion that at some point after Election Day the Florida Legislature could have picked a slate of electors or prescribed how electors were to be picked. I believe that the Legislature quite clearly had no such authority.

In Section C, I take up the question of deadlines. As others have recognized, Florida law did not clearly preclude the state from continuing any recount beyond December 12, whatever the circumstances. Beyond that, I contend that Judge Posner is incorrect in assuming, as apparently the dissenters in *Bush v. Gore* did, that determination of which slate of electors Florida voters had selected needed to be completed by December 18, the date prescribed by federal law for electors to vote. In fact, though a timely determination of that matter by Florida would have simplified matters, Florida did not have to make a determination at all; if the matter was unresolved before it

came to Congress, then resolution would have been Congress's responsibility.

Section D agrees with and amplifies Judge Posner's conclusion that the Fourteenth Amendment argument accepted by a majority of the Supreme Court was very weak and that it did not fit well with the shut-down of the recount ordered by the Court.

Section E examines the structure of the Article II argument, on which Judge Posner and other conservative jurists³ wish a majority of the Court had relied. I agree with them, and with the three members of the Court who would have decided the case on this ground, that a decision like that of the Florida Supreme Court requiring manual recounts does raise an Article II issue. But instead of emphasizing whether the Florida Supreme Court relied on sources other than legislation, or on whether the decision of that court was a usurpation of legislative authority, the critical Article II issue in this case depends on whether the decision of that court was a plausible one given the state of pre-existing law.

The Article II argument nevertheless should not have prevailed. In Section F, I contend that the Florida court's decision to order recounts did not fail to meet this standard. More fundamentally, in Section G I argue that the entire matter should have been left to the political process prescribed by the Twelfth Amendment to the Constitution and by federal statute.

B. The Post-Election Role of the Legislature

Article II of the Constitution provides that "[e]ach state shall appoint" electors "in such Manner as the Legislature thereof may direct." Furthermore, 3 U.S.C. § 2 provides:

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

As the post-election battle dragged on, the Florida Legislature was thus poised to select its own slate of electors, and presumably would have done so had the United States Supreme Court not put an end to the matter. Judge Posner believes that the Legislature may have had the authority to do so.⁴

³ Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, THE NEW CRITERION 4 (March 2001), available at <http://www.newcriterion.com/archive/19/mar01/bork.htm>; Charles Fried, Letter to the Editor, New York Review of Books, Feb. 22, 2001, available at <http://www.nybooks.com/nyrev/WWWarchdisplay.cgi?20010222008E#top>.

⁴ Posner, *supra* note 2, at Part I.A (speaking of "options that [Bush] possessed to thwart a recount that went against him, notably the Florida legislature's appointing its own slate of electors"). See also *id.* at n.69 ("If continued uncertainty about the result of the November 7 election were deemed a failure to have chosen electors on that day, then presumably the Florida legislature could select its own slate . . .").

In fact, however, there is no authority for such an intervention. Article II provides that Congress may determine a uniform date for all electors to be selected throughout the nation.⁵ Congress did so in 1845, for the first time providing for a national election day – then as now the first Tuesday after the first Monday in November.⁶ That provision is now codified as 3 U.S.C. § 1. In considering the statute, however, Congress realized it had a problem: At least one state, New Hampshire, then provided that a majority of voters was necessary to select a slate of electors. Thus, as a Congressman from that state pointed out, “it might so happen that no choice might be made” on Election Day.⁷ To preclude this result, Congress included in this one-paragraph statute the provision now codified immediately afterwards, as 3 U.S.C. § 2.⁸ If the state holds an election on the prescribed day but “fail[s] to make a choice,” it does not forfeit its electors; rather, it may hold a run-off on a later day.

The statute cannot reasonably be understood to have meant that if the state holds an election on Election Day but it turns out that the result is really, really close and takes some time to resolve then the Legislature may step in and choose a slate of electors without regard to what happened on Election Day.⁹ No one in Congress suggested that this was the intent or meaning of the statute. Elections are often very close and not resolved on Election Day; indeed, in 2000 Florida was not the only state in which the outcome remained in doubt until well after November 7. That the winner has not been determined conclusively by midnight on Election Day, only a few hours after the polls close, or even by a much later time, does not mean the state has failed to make a choice on that day. It only means that the responsible state officials have not yet ascertained what choice the people of the state made on Election Day.

Certainly the 1845 statute sets out no standard or procedure for determining whether an election is so close or difficult to determine that the people of the state should be deemed to have “failed to make a choice” on Election Day.¹⁰ Thus, any time a legislature picked a slate of

⁵ Art. II, sec. 1, cl. 4 (“The Congress may determine the Time of chusing the Electors . . .”).

⁶ Act of Jan. 23, 1845, 5 Stat. 721.

⁷ 14 Cong. Globe 14 (Dec. 10, 1844) (remarks of Rep. Hale).

⁸ *See id.* (remarks of Rep. Hale, suggesting “that provision might be made for such a contingency”); *id.* at 21 (sponsor offering amended bill, providing for contingency, in terms substantially similar to those now in 3 U.S.C. § 2).

⁹ Though I regret to say I suggested earlier, in a CNN chatline conducted before understanding the background of the statute, that such a theory might be valid. <http://www.cnn.com/chat/transcripts/2000/12/7/friedman/>. Live and learn. I am grateful to Prof. Kenneth Katkin, whose email of December 7, 2000 to a discussion list for Constitutional Law professors, on file with the author, set me straight.

¹⁰ The gap cannot be filled by construing the “safe harbor” provision, 3 U.S.C. § 5, to set a time after which § 2 authorizes the Legislature to choose electors; § 5 was not enacted until 42 years after § 2.

electors by claiming authority under § 2 supporters of the losing candidate would be sure to contend that the decision was a usurpation of power, because the winner of the election might have been determined in good order. This is a recipe for chaos.¹¹

The essential point of the 1845 statute was to create a uniform national election day. It would make no sense – either in advancing that goal or in serving democratic theory – to provide that, just because an election contest could not be resolved quickly, the Legislature could nullify the election and select the state’s electors itself.¹² Section 2 should be construed as limited to the contingency that called it forth: If a state selects its electors by popular election, but requires more than a simple plurality for the selection, then there is a chance that the election held on Election Day will produce no winner, and so notwithstanding Congress’ attempt to provide for a uniform election day the state may in that case hold a subsequent proceeding to select its electors.

C. Deadlines

Under Article II of the Constitution, electors throughout the nation must cast their votes on the same day, to be chosen by Congress.¹³ The date prescribed by Congress – perhaps with a touch of whimsy? – is “the first Monday after the second Wednesday in December” after the election,¹⁴ which in 2000 was December 18. Under another statutory provision, 3 U.S.C. § 5, if before election day a state provides a procedure “for its final determination of any controversy or contest” concerning the appointment of electors, and that determination is made at least six days before the time fixed by law for the meeting of the electors, then the determination is conclusive when the electoral votes are counted before Congress.¹⁵ Thus, December 12 was the deadline for

¹¹ Note that Congress rejected an amendment to the Election Day bill that, as one member described it, would have given “concurrent jurisdiction” to the electors of a given state and to the Legislature to fill vacancies among the electors; as that member said, “those two bodies being of different political opinions, the election might be negatived entirely, and no election take place.” 14 Cong. Globe 15 (Dec. 10, 1844).

¹² At the time of the statute, the electors of one state, South Carolina, were still chosen by the state’s Legislature. The sponsor of the bill made it clear that, though the prior practice of the Legislature had been to meet in December, the Legislature would have to be in session to choose electors on the designated day. See 14 Cong. Globe 14 (Dec. 10, 1844) (statement of Rep. Duncan) (“no difficulty could occur in [South Carolina], for its legislature could be convened every fourth year on the day to be fixed by the bill, to discharge the duties therein prescribed.”); see also, e.g., *id.* at 28 (Rep. Campbell of South Carolina).

¹³ “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” U.S. CONST. ART. II, § 1.

¹⁴ 3 U.S.C. § 7.

¹⁵ 3 U.S.C. § 5.

Florida to conclude its contest if it was to take advantage of this “safe harbor.” Finally, 3 U.S.C. § 15, which provides for the counting of the electoral votes by Congress, set January 6, 2001 as the date for the count to commence.¹⁶

So, then: By when did Florida have to decide who – so far as it was concerned – had won the state’s electors?

It is obvious that, so far as federal law is concerned, Florida did not have to make a decision by December 12. By its terms, § 5 gives the state an option: *If* a process prescribed by the state complies with the terms of the statute, one of which is the deadline, then the determination yielded by that process is conclusive in the count of the electoral vote. If the state does not satisfy the statute, it does not forfeit its electoral votes. Rather, that simply means that the determination of the winner of the state’s electors is contestable in Congress. Section 15 provides a rather elaborate procedure, which I shall in Section G, for resolving the contest in that case.

It does appear that the Florida Supreme Court construed Florida law to require adherence to the December 12 deadline, at least in the ordinary instance.¹⁷ And the United States Supreme

¹⁶ 3 U.S.C. § 15. January 6 is the standing date provided by the statute. Occasionally, Congress has passed special statutes selecting another date for a given count, but this time around it stayed with the standing date.

¹⁷ Perhaps the strongest expressions of the Florida court on this matter came in *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1273 (Fla. 2000), on remand from the Supreme Court. There, the court said,

What is a reasonable time required for completion [of a manual recount] will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.

Id. at 1285 n.17. And later in its opinion, the court said:

As always, it is necessary to read all provisions of the elections code in *pari materia*. In this case, that comprehensive reading required that there be time for an elections contest pursuant to section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.

Id. at 1290. The United States Supreme Court did not cite these passages in *Bush v. Gore* – perhaps because this opinion was issued just a day before *Bush*.

Chief Justice Wells of the Florida Supreme Court, dissenting from the court’s order requiring a

Court, making a rather expansive reading of vague language from the Florida court's opinion of November 21,¹⁸ treated the matter as if Florida law were not only clear but absolute on the matter. When the election dispute first reached the Court, the justices had punted the case back to the Florida court, professing uncertainty in *Bush v. Palm Beach County Canvassing Board* ("*Bush I*") as to the basis for the Florida court's opinion.¹⁹ Eight days later, on December 12 in *Bush v. Gore* ("*Bush II*"), having held that the recount as ordered by the Florida court was constitutionally defective, the Court showed no such reticence. The Florida Supreme Court had decided that December 12 was the deadline, that date had come, and so it was impossible to complete a valid recount in a timely manner.²⁰ Game over. The Court did not bother to ask the Florida court to determine whether that court construed Florida law to make qualification for the safe harbor the preeminent goal, so that if the only way to conduct a constitutionally permissible recount required abandonment of that goal the recount could not be held. It is at least plausible that, given the chance, the Florida court would have held that manual recounts, for which the Florida election code provides in extensive detail, took precedence over the safe harbor, which the election code does not even mention.

Judge Posner also finds the Supreme Court's invocation of the December 12 deadline unpersuasive and even distasteful, decrying its "gotcha!" flavor."²¹ But he suggests that December 18 was in fact the deadline for Florida to resolve the dispute over selection of its electors. The *Bush II* dissenters appear to agree, as does Charles Fried²² I do not.

statewide recount, thought it clear that the majority was insisting on December 12 as a deadline. *Gore v. Harris*, 772 So.2d 1243, 1268 (Fla. 2000) (Wells, C.J., dissenting) ("The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.").

¹⁸ The Florida court said that excluding late returns was proper only if including them would "compromise the integrity of the electoral process," which it could do in two ways, one of them "by precluding Florida voters from participating fully in the federal electoral process." The court then cited generally 3 U.S.C. §§ 1-10, without specifying or discussing the "safe harbor" provision. *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220, 1237 (Fla. 2000)

¹⁹ 121 S.Ct. 471, 475 (2000).

²⁰ *Bush v. Gore*, 121 S.Ct. 525, 533 (2000).

²¹ Posner, *supra* note 2, Part II.B ("the remedy decreed by the five-Justice majority has a "gotcha!" flavor, as if the U.S. Supreme Court had outsmarted the Florida supreme court by nailing that court with its perhaps unconsidered suggestion that December 12 was the deadline under Florida law for designation of the state's electors"). Similarly, Dean L. Kinvin Wroth, who wrote on the Electoral Count Act four decades ago, said the day after the election that the Supreme Court majority "played 'gotcha'" with the "safe harbor deadline. William Glaberson, *The 43rd President: The Legal Issues; Concession on 'Deadline' Helped Seal Gore's Defeat*, N.Y. Times, Dec. 14, 2000, p. 1.

²² See 121 S.Ct. at 545 (Souter, J., dissenting); Fried, *supra* note 3.

All electors had to *vote* on December 18, because the Constitution says that the date for electors to vote shall be the same throughout the nation and that is the date that Congress selected. But this does not mean that the electors had to be *certified* by that date as having been elected. Usually, of course, certification occurs well before that date. Indeed, 3 U.S.C. § 6 provides that it “shall be the duty” of the executive of the state “as soon as practicable” after final ascertainment of the results of the election, to send a certificate of ascertainment of the electors chosen to the Archivist of the United States, and that “it shall also thereupon be the duty” of the executive, “on or before the day on which they are required . . . to meet,” to deliver six duplicate originals of that certificate to the electors. The better interpretation, I believe, is that the executive’s duty to deliver certificates to the electors is made subject to the practicability standard; if it is impractical to certify the results beforehand, then the executive is not duty-bound to make the delivery.

In any event, if the executive fails, whether excusably or not, to make timely delivery, that does not mean that the state forfeits its electoral votes. Of course, timely certification makes much easier the job of Congress in counting the electoral vote; if there is a lawful certification and only one slate of electors votes, then usually there is no room for dispute.²³ But two or more slates of electors can vote on the designated day, and it is then the job of Congress to determine which, if any, of the votes shall be counted. Indeed, 3 U.S.C. § 15 explicitly provides for Congress’s consideration of multiple slates, and allows the possibility that Congress will determine itself that a given slate was properly elected, even though that slate was not certified by

²³ 3 U.S.C. § 15 provides that

no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

This statute cannot reasonably be understood to require forfeiture of the state’s electoral votes if the executive was late in delivering a copy of the certificate to the electors, or even if the executive was late in certifying the results. At most, the statute *authorizes* the two Houses to reject votes if the votes were not regularly given by electors whose appointment was legally certified. It seems dubious that a late certification should be grounds for denying a state its votes. As explained below, if two slates of electors vote, and there has been no “safe harbor” determination, there is no doubt that Congress not only may but should count the votes (if regularly given) of a slate that the two Houses agree was the properly elected one, even if that slate has not been certified at all. It would be anomalous if the votes of a slate that was properly elected, but not certified, would count if another slate also voted on the designated day, but not if no other slate voted then. I conclude that if only one slate from a state votes on the designated day, and the votes are regularly given, Congress should decline to count their votes only if the two Houses determine not only that their appointment was not properly certified but also that they were not in fact elected.

the executive of the state – and even though another one was.²⁴

On one occasion in the modern era, in Hawaii in 1960, two competing slates have indeed met and voted on the designated date.²⁵ The state first certified the Republican slate as the winners and reversed itself after both slates voted, and after the completion of a recount ordered by a state court over a protest that the completion would be too late for federal law.²⁶ This case is particularly interesting because the Democratic slate, the one that was accepted, received no certification before it voted.²⁷

²⁴ That statute provides that if there is more than one purported return from a state, and there has been no “safe harbor” determination,

then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

Thus, it is the responsibility of the two Houses to determine which slate was “appointed in accordance with the laws of the State,” and so far as federal law is concerned that determination does not require certification at all. Indeed, if the two Houses agree they can accept one slate even though another slate has been certified by the executive under seal, as prescribed by § 6.

²⁵ The only other occasion since passage of the Electoral Count Act on which two electoral slates submitted returns occurred in Oregon in 1888, the first election after passage of the Act. There was no serious dispute, however. Cong. Rec. 50th Cong., 2d Sess., p. 1860. One slate was certified by the Governor and the other appears to have been a prank or the work of a prank.. Email from Stephen Siegel to discussion list for constitutional law professors, March 23, 2001, in possession of author. Many thanks to Prof. Siegel for providing information on this and other double-return incidents.

Before passage of the 1887 Act, there were double-return incidents in Louisiana, which was in political chaos, in 1872 and in 1876, and in Florida, South Carolina, and Oregon in 1876. In the 1876 Florida case, the Democratic electors received only an irregular certification before they voted and a certification from the new governor afterwards; in the South Carolina case, the Democrats apparently had little claim to victory and met and voted to keep up appearances; PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* 155 (1906).

²⁶ L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 *DICKINSON L. REV.* 321, 341 (1961).

²⁷ In the 1876 Florida case, the Electoral Commission concluded that

it is not competent under the Constitution and the law, as it existed at the date of the passage of [the Act creating the Commission, which charged the Commission with deciding according to then-existing law], to go into evidence *aliunde* the papers opened by the president of the Senate in the

Judge Posner is correct that the case lacks dispositive precedential value. Hawaii's votes did not affect the outcome of the national election. The President of the Senate, Richard Nixon, was the losing Republican candidate for President, doing his best to operate in gracious mode.²⁸ So that the count would not be delayed, and "without the intent of establishing a precedent," he suggested without objection that Congress accept the electors certified after the fact by the Governor "as the lawful electors from the State of Hawaii."²⁹

Despite Nixon's obvious purpose simply to dispose of the matter quickly, the incident has considerable value for present purposes. Note that Nixon spoke of "the" lawful electors. There does not seem to have been any doubt that Hawaii had valid electoral votes despite the fact that two slates voted on that date. In an analysis written shortly after the event, L. Kinvin Wroth, now Dean of the University of Vermont Law School, said that if Hawaii's votes had been outcome-determinative, "Republican objections to the decree as binding would have been sound, whatever

presence of the two houses to prove that other persons than those regularly certified to by the governor of the state of Florida, in and according to the determination and declaration of their appointment by the board of state canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day, are inadmissible for any such purpose.

ELECTORAL COUNT OF 1877. PROCEEDINGS OF THE ELECTORAL COMMISSION AND OF THE TWO HOUSES OF CONGRESS IN JOINT MEETING RELATIVE TO THE COUNT OF ELECTORAL VOTES CAST DECEMBER 6, 1876, FOR THE PRESIDENTIAL TERM COMMENCING MARCH 4, 1877 (1877), at 196, available at <http://moa.umdl.umich.edu/cgi/sgml/moa-idx?notisid=ABF0865>.

The Commission's vague reference to the Constitution has little weight; nothing in the Constitution addresses how the identity of the electors shall be ascertained, apart from the provision that they shall be appointed in the manner determined by the Legislature. And, as indicated above, the statutory framework has changed; 3 U.S.C. § 15 clearly provides in some settings for Congress to make its own determination of which slate was elected.

Furthermore, in the Oregon case, the Commission did go behind the certificate of the Governor, though it did not have to canvass returns. The Republicans won the contest for the state's three electoral votes, but one of the candidates for elector was ineligible because he was a postmaster. The Governor, a Democrat, took the position that the votes cast for that elector were void, and he certified as the winning elector the fourth vote-getter, a Democrat. The Republican electors took the view that their colleague had been validly elected but was ineligible to serve, and so they filled the vacancy themselves and refused to cooperate with the Democratic elector, who appointed substitutes of his own. HAWORTH, *supra* note 25, at 157-67, 250-61; PROCEEDINGS, *supra*, at 640-41.

²⁸ Note his farewell remarks to Congress, after the completion of the count, lacking any suggestion that this was the Members' last chance to kick him around. 107 Cong. Rec. 291 (Jan. 6, 1961).

²⁹ 107 Cong. Rec. 290 (Jan. 6, 1961).

their fate in a Democratic Congress."³⁰ Wroth does not suggest that, if Hawaii's votes had mattered, accepting the Democratic slate would have been an improper outcome, notwithstanding the fact that the slate was certified after it voted. He only contends, and properly, that in that setting the Governor's certification of that slate should not have been accepted as binding: Competing slates of electors had voted, and the state had made no "safe harbor" determination, so it would be up to Congress to determine which slate of electors was the valid one. The Governor's certification would certainly play a role in that determination, but it would not be binding on Congress.

I posed the question by when Florida had to decide who – so far as it was concerned – had won the state's electors. The real answer is that, though it would simplify matters if Florida decided early, the state wasn't absolutely compelled to decide at all. If the election contest was finally resolved by December 12 in satisfaction of the "safe harbor" provision of 3 U.S.C. § 5, then that resolution would be binding on Congress. If – as ultimately happened – there was no such final resolution of the contest³¹ but the executive lawfully certified a slate, that slate voted as prescribed by law, and it was the only one to send a return of its vote to Washington, then, too there would be nothing for Congress to decide. But if there was no resolution of the contest satisfying the safe harbor and two or more slates voted on December 18, then it would be for Congress, in the vote count beginning on January 6, to decide, in accordance with the procedure set out in 3 U.S.C. § 15, which slate was properly elected. Congress would not be bound by any decision made by state officials. The two Houses could assess the validity of recounts recently completed or still in progress, and perhaps if they wanted to do so – not that it would necessarily be a good idea – they could even supervise their own recount.

C. The Fourteenth Amendment

One of the most notable aspects of Judge Posner's article is his disdain for the principal ground on which the United States Supreme Court held the manual recounts in Florida unconstitutional; another leading conservative jurist, Robert Bork, agrees.³² The critical issue in

³⁰ Wroth, *supra* note 26, at 342.

³¹ In *Bush II*, issued on the evening of December 12, the Court reversed the judgment of the Florida Supreme Court and remanded the case "for further proceedings not inconsistent with this opinion." 121 S.Ct. at 533. The Florida Supreme Court ordered dismissal of the case on December 14 and issued an explanatory opinion on December 22. *Gore v. Harris*, 772 So.2d 524 (Fla. 2000). Thus, the case was not finally disposed of on December 12. And, though as a political matter, the decision of that date was the coup de grace for Vice President Gore, it did not resolve all legal issues. It would have been possible for Gore to argue on remand that the United States Supreme Court had misunderstood Florida law and the Florida Supreme Court's statements about that law, and that in fact that law allowed a recount to extend beyond December 12 if that was the only constitutional way to conduct one.

³² See Bork, *supra* note 3 ("[T]hese and similar disparities have always existed within states under our semi-chaotic election processes. By raising that to the level of a constitutional violation, the

counting the Florida votes was that many punch-card ballots did not have holes punched through cleanly enough to be recorded by the counting machines as casting a vote for President, but nevertheless had enough of a punch that arguably they provided an indication of the voter's intent. The Florida Supreme Court held that these "undervotes" should be recounted manually, a vote to be counted if there was a clear indication of the intent of the voter. But application of this standard differed from one canvasser to another, and even from one time to another, and the Florida Supreme Court did not elaborate on when the "intent of the voter" should be deemed established with sufficient clarity to treat a ballot as validly cast. Primarily for this reason, the United States Supreme Court held that the recounts as ordered by the Florida court violated the Fourteenth Amendment's guarantee of equal protection of the law.³³ According to the majority, this general

court federalized state election laws. The opportunities for uncertainty, litigation, and delay in close elections seem endless, which is probably why federal courts have never entered this particular briar patch before. Once the Equal Protection Clause is unleashed, it will apply to every federal, state, and local election in the country."). Charles Fried speaks more favorably about the Equal Protection holding, but nevertheless concludes that "the three concurring Justices, whose views Professor Dworkin does not discuss, were on sounder ground than the seven who found an equal protection violation." Fried, *supra* note 3.

³³ There were other grounds as well, but I believe they were less substantial.

First, in selected counties all the ballots were recounted but the recount ordered throughout the rest of the state by the Florida Supreme Court would cover only the undervote. 121 S.Ct. at 531. One concern is that different counties had different categories of votes recounted, but this appears to be insubstantial. Whether a manual recount is held at all in a given county depends in part on whether a candidate requests one, and neither candidate ever challenged the system allowing recounts in some counties but not in others. Another concern appears to be that certain categories of ballots were counted in a given county but not others. Thus, there may have been some voters whose ballots were improperly counted because they punched two holes but the machine only read one, and those ballots would not be recounted. *Id.* Well, perhaps, but there could not have been very many of these ballots, and to discover them would require reviewing every punch-card ballot in the state; neither candidate was complaining about these, and neither was asking for a full recount. The Florida Supreme Court should have been entitled to restrict the recount to categories of ballots that appeared most likely to present problems. A similar response applies to the fact that the recount ordered by the Florida court would not address the "overvote" – cases in which the ballots had been deemed to indicate votes for two Presidential candidates and so were treated as not casting a valid vote for any candidate. *Id.* The overvote problem is not symmetrical with the under vote problem, which appeared to be the principal problem and was the one pressed by the Democrats. It is far more likely that a voter will (a) make a marking sufficient to yield a clear indication, on manual inspection, of intent to cast a vote but insufficient to be read by the machine, than that the voter will (b) cast a valid vote by punching out one hole but make a marking that would be read by the machine as a second hole, therefore invalidating the vote, but on manual inspection would not affect the clear inference of intent to cast a single vote. (Ironically, as Judge Posner points out, Posner, *supra* note 2, at n.15, some overvotes may have turned the election for Vice President Gore, if he had complained about the overvote. It appears that a significant number of votes were invalidated because they had a hole punched and a write-in indication – even though the hole was punched for the Democratic ticket and the name written in was Gore's.)

Second, the Court interpreted the Florida decision as allowing a partial recount of a county to be

test was constitutionally inadequate given “the absence of specific standards to ensure its equal application.”³⁴ Judge Posner’s assessment of this holding, which he says he does “not find . . . compelling,” is worth quoting at some length, notwithstanding his own aversion to long block quotations:³⁵

The conduct of elections has been confided to local government – to counties and indeed, to a considerable extent, to precincts. Different counties in the same state often use different equipment, methods, ballots, and instructions, generating different sources and rate of error; and ballots are often counted differently in different precincts, and, perhaps more important, . . . differently when they are counted at the county level rather than at the precinct level. Such differences had not previously been thought to deny equal protection of the laws and if they are now to do so this portends an ambitious program of federal judicial intervention in the electoral process, a program the Supreme Court seems, given the haste with which it acted, to have undertaken without much forethought about the program’s scope and administrability. The last thing we need is more election litigation.³⁶

This response, I believe, is right on the mark.

In addition, Judge Posner gives reason to doubt the standing of any person to complain about disparate standards, a matter with which the Court seems to have been very unconcerned.³⁷

included in the total if time to conduct the recount ended before the count could be complete. 121 S.Ct. at 531-32. The Court’s interpretation of the Florida decision is far from an inevitable one. But in any event, this was clearly a premature concern. There was no way of knowing when the Supreme Court made its decision whether the Florida court would in fact be confronted with a partial recount of a county when the recount had to be halted.

Finally, the Court expressed concern about the procedures under which the recounts would be held – the ad hoc nature of the counting teams, some of whom “had no previous training in handling and interpreting ballots,” and the inability of observers to object. *Id.* at 532. The Court did not explain why these concerns would amount to a constitutional violation, nor did it suggest constitutional standards of procedure (Prescribed training? Required ability to object?). Certainly the Florida procedure was rough-and-ready, but if a recount was proper those procedures would not make the recount contemplated by the Florida Supreme Court worse than none at all.

³⁴ 121 S.Ct. at 530.

³⁵ See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423 (1995) (“go easy on quotations, especially long block quotations”).

³⁶ Posner, *supra* note 2, Part II.B.

³⁷ The Court did not pause to ask whether any petitioner was a voter whose ballot was not counted but would have been counted under more generous standards applied in another county. Pamela Karlan has argued that there were no plaintiffs who both had standing and would have their claims remedied by the

“If my dimple was not counted in the original election and yours was,” he asks, “what exactly is my complaint?” Neither ballot, in his view, should have been counted, and absent invidious discrimination (which was not shown) the counting of one ballot and not the other does not give the disfavored voter ground for complaint.³⁸ I am not as sure as he is that such a ballot should not have been counted,³⁹ but clearly three members of the majority thought it should not be, because that proposition is one of the foundations of their concurrence based on Article II of the Constitution.⁴⁰

Judge Posner has more sympathy for an argument under the Due Process Clause; though not focusing much on that Clause, the *Bush II* majority relied on it as well as on the Equal Protection Clause, though the *per curiam* opinion of the majority did not articulate the holding very well. According to Judge Posner, the Florida Supreme Court’s refusal to adopt a specific standard for the recount, while accepting recounts from Broward and Palm Beach Counties that were based on methodologies inconsistent with each other, “can fairly be described as irrational, even perhaps as the near equivalent of ballot-box stuffing.” But even here Judge Posner is hesitant, for “the creation of a federal duty to use uniform *precise* criteria in a recount” “would not be an inconsequential doctrinal step.”⁴¹

I find the variation in standards allowed by the Florida Supreme Court more tolerable than does Judge Posner, and *a fortiori* more than does the *Bush II* majority. Greater tolerance of variation should have been enough to reject both the Equal Protection and the Due Process arguments. Many standards that the law uses every day – “beyond a reasonable doubt,” for example, and just about any test invoking a reasonable person – are subject to wide variation in application, and yet the law is satisfied to apply such standards without further definition.

The *Bush II* majority recognized this point; indeed, it said, “The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement.”⁴² But this case, in the Court’s view, was different. The search for intent was limited to the evidence on the face of the

shut-down ordered by the Supreme Court. [forthcoming article]

³⁸ *Id.* He also asks, “Or if I was a good boy and punched my chad clean through, and you only dimpled your chad, what is my complaint if your dimple is counted as a vote . . . ?” *Id.*

³⁹ *See infra* Section F.

⁴⁰ 121 S.Ct. at 537 (Rehnquist, C.J., concurring).

⁴¹ Posner, *supra* note 2, Part II.B.

⁴² 121 S.Ct. at 530.

ballot, and so could be “confined by specific rules designed to ensure uniform treatment.”⁴³ In other words, the problem was not so much that the intent standard was excessively vague as measured against some absolute measure of precision. Rather, the problem was that the standard was more subject to variation than it needed to be; Florida had forsaken an opportunity for precision.

Certainly uniform rules *could* be developed, but they would not necessarily be very good rules for determining a voter’s intent. Even on the face of a single ballot, there is an infinite range, across several dimensions, of evidence bearing on the intent of the voter. How much of the chad is left attached, and where, and if it is attached how deeply indented is it? What patterns of punches and indentations are there elsewhere on the ballot? What markings, if any, are there? Any simple rule by definition will exclude relevant information from the inquiry, and so inevitably lead to inaccurate determinations. Any complex rule will inevitably lead to variations in application, even if one entity makes all the decisions; ask anybody who has to perform a recurring task of any complexity, such as calling balls and strikes throughout a baseball game,⁴⁴ or grading a set of law school essay exams, or trying to replicate a pasta sauce. The variations are inevitably greater if decisions are made separately by numerous decision-makers.

All of which is not to say that trying to come up with more specific rules would have been imprudent. Perhaps it would have been a good idea. But the Florida statute, as understood by the Florida court, articulated only a general standard, and that was a constitutionally valid choice. It was a similarly valid, though clearly debatable, choice by the Florida Supreme Court not to embellish on the standard that it perceived in the statute, leaving the determination of how the standard would apply in individual cases to the persons charged with making those applications.

The Court’s emphasis on the unused opportunity for precision helps explain one of the most curious aspects of the opinion. Clearly, the Court recognized one vulnerability of a holding based on lack of uniformity in standards for determining the validity of a vote. Differences between one county and another in determining what constituted a sufficient indication of the intent of the voter paled in comparison to the differences among counties in voting systems. Indeed, optical scanning systems appeared to be so much better than punch-cards at ensuring that intended votes were recorded, at least when the ballots were scanned at the precinct, immediately after being completed, that the manual recount of punch-card undervotes may be regarded as an attempt to minimize this disparity. But the Court could not demand true uniformity in election mechanisms across a state; that would not only be a judicial project of almost unimaginable scope, but it would render invalid the vote in many states. The question, it said,

⁴³ *Id.*

⁴⁴ See Tom Zeller, *The Strike Zone’s Connected to the . . .*, N.Y. TIMES Apr. 1, 2001, § 4, p. 3 (describing major league baseball’s attempts to discourage umpires from the “fashion” of “employing multiple strike zones of varying 37 dimensions throughout the course of nine innings”).

is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court *with the power to assure uniformity* has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.⁴⁵

In other words, the Florida court could have done better to assure uniformity, given that it alone, or the trial court under its supervision, rather than multiple decision-makers was in control of the statewide recount, and so it should be held accountable for not doing better. The reasoning has a Procrustean feel to it, as if it were drawn just to satisfy this case – an inference strengthened by the Court’s emphasis that its “consideration [was] limited to the present circumstances.”⁴⁶ Only “in the special instance of a statewide recount under the authority of a single judicial officer” did the Court’s demand for uniformity apply.⁴⁷ If, as had occurred during the initial protest phase, several counties held recounts under different supervisory officials and applied different standards, that would apparently not be a problem. For that matter, it appears that if state law authorized the Secretary of State to require a statewide recount, and she allowed her delegees to apply the intent standard in a differential manner, that would not be a problem, because she is not “a judicial officer.” But these distinctions seem to make little sense. The legislature, in establishing statewide rules, can delegate broad authority to local officials to refine, on a case-by-case basis, a broad statutory standard, and nothing in the *Bush II* opinion suggests that it cannot. Why, then, does the Fourteenth Amendment prevent a court with statewide supervisory power from doing the same thing, leaving it to local officials to implement a legislatively-prescribed standard on a case-by-case basis? And, looked at from the other side: If the judicial refusal to articulate a more precise standard was unconstitutional because a single decision-maker supervising the process could articulate such a standard, why is the legislative tolerance of vastly different voting systems acceptable, given that the Legislature could if it wished mandate a uniform system statewide?

In short, though variations from county to county, or from ballot to ballot, as to what constituted a vote were unfortunate, and though perhaps the Florida Supreme Court should have acted more aggressively to limit them, they are to some extent inevitable and in any event should not be held unconstitutional. Perhaps *Bush II* will distort decision-making in the lower federal courts.⁴⁸ But I think it unlikely that the United States Supreme Court will ever use the case – really use it, not just include it in a string cite – to strike down another application of state election law as insufficiently uniform. The majority’s Fourteenth Amendment rationale was a disposable

⁴⁵ *Id.* at 532 (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ This is Judge Bork’s prediction. Bork, *supra* note 3.

tool crafted for use on one occasion.⁴⁹

And yet, ironically, the tool did not even do the job for which it was made. The *Bush II* majority's Fourteenth Amendment holding has one other notable defect, emphasized by Judge Posner. If the recounts ordered by the Florida Supreme Court failed to satisfy the Fourteenth Amendment, the remedy one would ordinarily expect would be a remand to give that court an opportunity to order constitutionally satisfactory recounts. But instead the Court shut the recounts down. As I have already indicated, and as Judge Posner agrees, the stated reason for this remedy, that satisfactory recounts could not be completed in compliance with the "safe harbor" provision of 3 U.S.C. § 5, is not persuasive; the Florida court should have been given the opportunity to determine whether later recounts should be held given that the Supreme Court decision made this the only way to hold a recount. Judge Posner suggests that the shut-down may still have been justified by the Fourteenth Amendment holding because it would not have been possible to complete a recount complying with the Supreme Court's standards, and judicial review of it, by December 18, the date on which the electors voted. Even if that factual premise is true – and I believe it is somewhat speculative – the Supreme Court certainly did not justify its decision on this basis. And in any event, as I have already shown in Section C, it was not in fact necessary that the proceedings be concluded by December 18. In sum, bridging the gap between a holding that the recounts ordered by the Florida court were defective and a decision effectively barring further recounts required something close to pure judicial fiat.

Could there have been a better way?

E. Article II: The Structure of the Argument

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, while helping to form a majority in support of the Fourteenth Amendment holding, would have barred the recounts on a different ground as well. In their view, the decision of the Florida Supreme Court requiring the recounts "impermissibly distorted" Florida's election laws "beyond what a fair reading required," and thus violated Article II of the Constitution, which provides that each state shall appoint electors "in such manner as the Legislature thereof may direct."⁵⁰ Judge Posner finds this ground of decision more attractive than the Fourteenth Amendment holding, as does Judge Bork.⁵¹

⁴⁹ So I've come up with an other metaphor, which I think fits the case somewhat better than the two that are sufficiently inevitable to have to quote, but sufficiently cliched to put in a footnote. *Lambert v. California*, 355 U.S. 225, 232, (1957) (Frankfurter, J., dissenting) (expressing confidence "that the present decision will turn out to be an isolated deviation from the strong current of precedents – a derelict on the waters of the law"); *Smith v. Allwright*, 321 U.S. 649, 668 (1944) (Roberts, J., dissenting) (contending that the majority's decision, by overruling a recent case, tends to bring decisions of the Court "into the same class as a restricted railroad ticket, good for this day and train only").

⁵⁰ 121 S.Ct. at 535 (Rehnquist, C.J., concurring).

⁵¹ Bork, *supra* note 3.

Without confronting the question whether he actually believes the Article II argument was correct as a matter of law, Judge Posner believes it is sufficiently plausible to support what he regards as the Court's act of judicial statesmanship in ending the contest.

Before approaching the merits, it is apparent that an Article II holding would have two significant advantages over the Fourteenth Amendment holding. First, as Judge Posner points out, if Article II precludes a construction of state law authorizing manual recounts in the circumstances of the case, then the appropriate remedy is to bar the recount. There would be no reason to give the Florida Supreme Court an opportunity to conduct a permissible recount – for no recount would be permissible. Thus, the remedy that the United States Supreme Court actually adopted, shutting down the recount, would link up with the substantive basis of the decision, which it did not do with the Fourteenth Amendment holding.

Second, if an Article II holding was a misconstruction of law, it would at least be a narrowly focused one. If the Fourteenth Amendment holding were taken seriously, it would distort the law of the Fourteenth Amendment so far as it governs elections, and even more generally; thus, I have predicted that it will probably be ignored. By contrast, an Article II holding may never become relevant again, and if it does it would be in the context in which it arose, election of the President.

But is there merit to an argument that Article II precluded the recount? In this section, I examine the structure of such an argument. I conclude that Article II does impose constraints on how a state may select the manner in which it appoints its electors and even the manner in which it determines which electors have been appointed. In *Bush I*, the first case before the Supreme Court, the Court suggested that the state constitution cannot limit legislative choice on these matters. That is true to some extent, I acknowledge, but it has no real bearing on this case. In his concurrence in *Bush II*, the Chief Justice drew a sharp distinction between judicial and legislative action. That, too, is significant in some settings, but I contend that this distinction as such is not significant here. It does correlate, however, with the one factor that I do believe is significant here, and which is also apparent in the Chief Justice's concurrence – whether the state action in question can plausibly be considered consistent with pre-existing law.

In Section F, I contend that, under this standard, the recount ordered by the Florida Supreme Court should have been upheld. And in Section G, I contend that in any event the United States Supreme Court should not have reached the merits, instead leaving the matter to be decided by the political process prescribed by the Constitution and by federal statute.

1. Legislature versus State Constitution

Article II prescribes that each state shall choose its electors in such manner as the legislature shall direct. “Not as the *state* shall direct,” as Judge Posner points out, “but as the

state legislature shall direct.”⁵² In *McPherson v. Blacker*, the Supreme Court declared that Article II “leaves it to the legislature exclusively to define the method” of appointment.⁵³ The Court characterized the power as “plenary”⁵⁴ and quoted approvingly a Senate report stating, “This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States.”⁵⁵

In *Bush I*, the United States Supreme Court unanimously expressed concern on this score. The case addressed the Florida Supreme Court’s interpretation of Florida law to allow county canvassing boards a greater time to file their returns than the Secretary of State had permitted. The justices remanded the case on the purported ground that they were “unclear 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.”⁵⁶

On the other hand, dissenting in *Bush II*, Justice Stevens said that Article II “does not create state legislatures out of whole cloth, but rather takes them as they come – as creatures born of, and constrained by, their state constitutions.”⁵⁷ And he was able to point to a well-founded distinction in the way the Court has treated the Constitution’s mentions of state legislatures. Where the legislature is acting in a law-making capacity, it is subject to the usual constraints imposed by the state constitution on its making of law. Thus, the legislature’s power under Article I § 4 to prescribe the “time, place, and manner” of elections for Congress does not relieve it of the usual obligation of presenting its prescriptions to the governor for signature or veto⁵⁸ or of a state’s provision that acts of the legislature be subject to review by referendum.⁵⁹ By contrast, when the legislature is asked to make a “binary decision,”⁶⁰ as when it is asked to “act as

⁵² Posner, *supra* note 2, at Part II.A.

⁵³ 146 U.S. 1, 26 (1892).

⁵⁴ *Id.* at 25, 35.

⁵⁵ *Id.* at 34-35, quoting S. Rep. No. 395, 43d Cong., 1st Sess. (1874).

⁵⁶ 121 S.Ct. 471, 475 (2000). See also *id.* at 474 (quoting *McPherson*, 146 U.S. at 25, that the language of Art. II “operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power”).

⁵⁷ 121 S.Ct. at 539.

⁵⁸ *Smiley v. Holm*, 285 U.S. 385 (1932).

⁵⁹ *Ohio ex rel. Davis v. Hildebrandt*, 241 U. S. 565 (1916).

⁶⁰ *Bush v. Gore*, 121 S. Ct. at 539 n.1 (2000) (Stevens, J., dissenting).

a ratifying body” in considering constitutional amendments under Article V,⁶¹ such constraints do not apply.⁶² And it seems quite clear, as Justice Stevens contended, that in determining the manner in which electors are to be appointed under Article II, the legislature is acting in a law-making capacity akin to that under Article I § 4.⁶³

Can the lines of cases on which Justice Stevens relies be reconciled with the principle asserted by *McPherson* and endorsed by *Bush I*? I believe that they can be. At least as a first cut, that the distinction between substance and procedure – however creaky it may be in other contexts – serves well here, substance referring in this context to the manner of selection prescribed by the legislature and procedure to the process by which the legislature makes the prescription. In fact, this distinction has guided state court decisions governing both Article I §4 and Article I : The state constitution may make the legislative determination of the manner in which electors are appointed subject to the ordinary procedures for the enactment of legislation, but it may not restrict the manner of appointment that the legislature selects.⁶⁴ If it makes changes to the state’s election laws, such as in the definition of the class of eligible voters, applicable to elections generally, those changes will presumptively be applicable to Presidential elections, but that is only as a default matter, the legislature being free to prescribe a different rule for selection of electors.⁶⁵

Thus, for example, the state constitution may make presentation to the governor for

⁶¹ *Smiley*, 285 U.S. at 365.

⁶² *Hawke v. Smith*, 253 U.S. 221 (1920) (holding that state referendum requirement does not apply to ratification under Art. V). At least one legislative decision under the original Constitution – the election of Senators – could not be considered either law-making or binary; *Smiley* spoke of the legislature as “an electoral body” in performing this function. 285 U.S. at 365.

⁶³ *Bush v. Gore*, 121 S. Ct. at 539 n.1 (2000) (Stevens, J., dissenting). See James C. Kirby Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 503 (1962).

⁶⁴ See Kirby, *supra* note 64, at 503-04 (drawing a distinction “between *how* and *what* and showing that case law adheres to it).

⁶⁵ Note the following language from the Senate report quoted by *McPherson*:

Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

This passage acknowledges that a state constitution might make substantive provisions – such as determining the qualifications of voters – that presumptively would apply in Presidential elections. But if as this passage indicates such provisions are to be treated only as default rules, subject to defeasance for Presidential elections by ordinary legislation, then they do not operate as constraints on the legislature.

signature or veto a prerequisite for the legislation determining the manner in which electors shall be appointed; in that respect, as Justice Stevens says, Article II takes the legislature as it comes, created by and operating under the procedures established by the state constitution. Those procedures may include participation by the governor and even, at least arguably, by the people in a referendum. Article II does not, however, designate the state as a monolith to determine the manner of appointment. It designates the legislature. And the legislature, however broadly conceived it may be for these purposes, is an entity or group of entities capable of making law – in contrast to the state constitution, which is a body of law. Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for Presidential electors, the legislative choice should prevail.⁶⁶

However this general issue should eventually be resolved, however, it has little or nothing to do with decisions affecting the 2000 Presidential election. The Florida Supreme Court did not interpret the election code to be in conflict with the state constitution and then hold that the latter invalidated the former. In *Gore v. Harris*,⁶⁷ the December 8 decision that was reviewed by *Bush II* – the decision that really mattered, in which it ordered the statewide recount – the Florida court, taking the hint from *Bush I*, avoided reliance on constitutional sources altogether. Even in *Palm Beach Canvassing Board v. Harris*,⁶⁸ the November 21 decision reviewed by *Bush I*, in which it extended the deadline for counties to file their returns, that court did not perceive such a conflict. Rather, it interpreted the code in light of general principles found in the state constitution and elsewhere. It made perfect sense to do this. This is especially so given that, in the respects here relevant, the election code did not differentiate between Presidential and other elections. One would expect the code to be drafted, or in any event to be subject to being construed, in accordance with the state constitution. To hold that the legislation accords with the constitution is not to hold that the constitution constrained legislative choice. Thus, it could not have been particularly surprising when, asked on remand to explain the basis for its decision, the

⁶⁶ Referendums pose an interesting problem. Suppose the legislature passed a statute allowing felons to vote and the people then rejected the statute in a referendum. Presumably *Ohio ex rel. Davis v. Hildebrandt*, 241 U. S. 565 (1916), which upheld the validity of a referendum in the context of Article I § 4, would extend to this situation as well. The referendum could be considered part of the legislative process in the manner of a veto. But now suppose the referendum operated against an old statute, or on a blank slate – that is, state law previously said nothing about felons being ineligible to vote. Then it is harder to consider the referendum part of the process by which the legislature makes law; rather, it seems the referendum is a *different* law-making process, and its participants, the people of the state, are a law-maker different from the legislature. Arguably, though, even in this situation, Article II's reference of the legislature should include the referendum. The referendum is part of the ordinary, or at least generally authorized, law-making process, and perhaps it is that process rather than the particular body to which Article II refers.

⁶⁷ 772 So.2d 1243 (Fla. 2000).

⁶⁸ 772 So.2d 1220 (Fla. 2000).

court was able to reach the same result without relying on constitutional sources.⁶⁹

2. *Legislature versus Judiciary*

Chief Justice Rehnquist's concurrence in *Bush II* made much of the distinction between courts and the legislature,⁷⁰ as does Judge Posner.⁷¹ Once again, I believe Article II does draw such a distinction, but it is less important than might appear at first, in part because it correlates to a considerable extent with the distinction, between before-the-fact and after-the-fact law-making, that is more consistently important and that is more relevant to *Bush II*.

At least at the extreme, Article II must limit the role of state courts in a way that it does not limit the role of state legislatures. Suppose that some time before Election Day, the legislature determined that the election as planned would be unfair and that the situation could not be remedied in time, that it enacted a statute providing that it should select the electors itself, in the old-fashioned way, and that on Election Day it did just that. Presumably this would be permissible; at least nothing in Article II precludes the legislature from doing so.⁷² But now suppose instead that the state supreme court held that the election as planned would be unfair, that state common law or constitutional law empowered the court to fashion an appropriate remedy, and that the appropriate remedy was that the court itself should choose the electors on Election Day. Even assuming the court has the power to enjoin the conduct of the election as planned – a plausible hypothesis, at least if that conduct would violate the federal Constitution – it seems inadmissible to hold that Article II authorizes the court to select its own method of appointing the electors. The Constitution explicitly gave the power to determine the manner in which electors are chosen to the organ of government most subject to popular control. We cannot assume that mention of the legislature was haphazard, so that another part of state government can exercise the function.

On the other hand, courts obviously have a role in applying the law governing the selection of electors, because the legislature – including that of Florida – typically gives the courts

⁶⁹ 772 So.2d 1273 (Fla. 2000).

⁷⁰ See 121 S.Ct. at 535 (“This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.”).

⁷¹ See Posner, *supra* note 2, Part II.C (“[T]he ‘Manner directed’ clause of Article II can be used to curb such abuses by limiting the making of the rules for the appointment of the state’s Presidential electors to the organ of government that operates prospectively, which is the legislature. Courts operate retrospectively.”).

⁷² See *McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892) (emphasizing that the legislature may resume the selection of electors at any time, and noting that the selection of electors by the Colorado legislature in the 1876 election was unchallenged, despite the heated controversy surrounding that election).

such a role.⁷³ Indeed, the “safe harbor” provision, 3 U.S.C. § 5, explicitly recognizes that a state may select a judicial tribunal as the ultimate decision-maker within the state in resolving a contest concerning the selection of electors, and if that decision is timely the statute makes its determination binding upon Congress. It would be not only impractical but a substantial intrusion on state authority if every decision of the state supreme court concerning state election law in a Presidential election were subject to *de novo* federal review. Clearly, as the Chief Justice acknowledged, the interpretations of the state supreme court are entitled to substantial deference.

Moreover, just as presentment to the executive is part of the law-making machinery of each state, interpretation by the judiciary may be considered to be as well. Suppose that on its face a provision of the state’s election code, applicable to elections in general, appeared clearly not to make the fact that an election was close sufficient grounds for ordering a manual recount – but that there was well-settled judicial precedent, developed over many years in cases involving non-Presidential elections, allowing recounts for that reason. Then under any realistic understanding of what the law was as of the time of Election Day, it allowed such recounts. In a close contest for Presidential electors, then, adherence to the law would seem to allow the recounts; Article II should not be deemed to require the state courts, or the United States Supreme Court, to disregard the established interpretation and rely only on the statutory text as if the intervening history had not occurred.

Now compare a hypothetical involving alteration of the law not before the election by the judiciary but after the election by the legislature. Suppose the election code and judicial interpretations of it were very clear that closeness of an election was not a sufficient ground to order a manual recount – and that shortly after a very close election the legislature changed the law to provide that manual recounts should be held whenever the election satisfied prescribed standards of closeness. Such an intervention, albeit legislative, is an attempt to alter the results of the procedure for selecting electors as established by the legislature before Election Day, and it should be constitutionally precluded.⁷⁴

Indeed, it appears – uncomfortable as it may have made counsel for Vice President Gore to assert it before the Supreme Court⁷⁵ – that after the election the courts have *more* legitimate room than does the legislature to refine the standards for determining whom the state selected as its electors on Election Day. The legislature can only make new law; it has no role in interpreting statutes already on the books. The judiciary, by contrast, is charged with interpreting and applying pre-existing statutes. Sometimes, we know, the judiciary must confront a situation in

⁷³ See Fla. Stat. § 102.168 (judicial proceeding to contest election).

⁷⁴ See *infra* Section E.3.

⁷⁵ See Bork, *supra* note 3 (“Counsel for Gore was put in the untenable position at oral argument of contending that the Florida court could make post-election changes in the law that the legislature could not.”).

which, perhaps because the law did not anticipate it, it is not clear what the governing principle of law is. And yet the judges must decide, and they should try to articulate reasons supporting their decision. For this reason, if for no other, judges must sometimes establish principles that were not clearly understood beforehand as stating the law. The performance of that role is legitimate, if for no other reason than that it is inevitable.

In short, I am suggesting that the relative standing under Article of judicial and legislative decision-making that bears on the selection of the electors depends to a significant extent on timing. Before the election, judicial decision-making is less likely to be valid, because the legislature is the organ of state government designated by Article II to select the means by which electors are appointed. After the election, judicial decision-making is if anything more likely to be valid. At that point, the problem is likely not to be determining the basic means of selection but rather refining and applying the previously articulated principles for determining which electors were in fact the victors on Election Day. Thus, the concern with after-the-fact law-making takes pre-eminence. That, then, is the concern that is most relevant to the dispute in the 2000 election dispute, which arose once the polls were closed.

3. *Ex Ante versus Ex Post*

The Florida decision reviewed in *Bush v. Gore* was issued after Election Day. *Ex post*, or after-the-fact, decision-making raises Article II concerns that *ex ante*, or before-the-fact, decision-making does not. If the decision is so significant that it could be deemed a change in the manner in which the state selects its electors, so that the state should be deemed not to have chosen its electors before the time of the decision, then the decision could violate the prescription of Article II that Congress may choose a date, as it has done, on which all states should choose electors.

More basically, a concern arises even if the decision is deemed only to affect the manner in which the state *determines* what choice it made on Election Day. Fundamental fairness precludes the state from making outcome-decisive changes in the rules for determining the winner of an election contest after the contest itself has been held. Such a principle has been found in the Due Process Clause of the Fourteenth Amendment.⁷⁶ But Article II, addressing the selection of electors, is a more focused forum for it, and that is the forum in which it has been discussed in the context of the 200 election.⁷⁷ Article II clearly implies that the Legislature must “direct” the manner of appointment of electors before the state appoints the electors. A corollary is that if, under the rules for determining the outcome as they stood on Election Day, one candidate’s slate

⁷⁶ *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995).

⁷⁷ I do not believe it much matters whether the issue is posed in terms of Due Process or Article II or both – except that the federal interest may be more apparent in the Article II context (this is the President being elected, not a sheriff) and the concern might appear more readily justiciable to the extent it is phrased in terms of Due Process. I suggest below, however, that even for the justiciability purpose the characterization should not matter. *See infra* note 126.

of electors should be declared the winners, the rules should not be changed during the determination process in such a way that leads to declaration of another slate as the winners. This principle seems to underlie the requirement of 3 U.S.C. § 5 that, for a state's contest-resolution process to qualify for safe-harbor status, it must be established before Election Day.

I have already suggested a hypothetical that highlights the importance of this principle. Suppose that as of Election Day that state law was very clear that a manual recount could not be held simply because an election was close. Article II should prohibit the state from changing the law after a Presidential election to provide that manual recounts could indeed be held in that election merely because the election was very close – and this prohibition should apply whether the change in law is effected by the legislature or by the courts.

The problem, of course, is that the law is not always so clear with respect to issues that arise in the counting of votes, and those issues must be resolved one way or another. Suppose that state law said nothing about manual recounts one way or the other, and simply prescribed that all contests over the results of elections would be resolved by the judiciary. Then Article II should not inhibit the state courts from deciding one way or the other as to whether the recounts should be held.

Or suppose that there were decisions by the lower courts, or a pattern of administrative practice, limiting the circumstances in which manual recounts should be held, but the state supreme court had never ruled on the matter. Article II probably should not be construed to prevent the state supreme court from resolving the issue for the first time in the context of a contest over Presidential electors, and doing it contrary to the prior sources of law. A supreme court is in place to be the ultimate expositor of the jurisdiction's law. It should not be bound by the decisions of inferior tribunals (though perhaps it owes them enough attention to determine whether they carry persuasive value) or precluded from resolving an issue for the first time in a contest in which that issue might matter more than ever before.

Finally, suppose that, in the eyes of a federal decision-maker attempting to enforce Article II,⁷⁸ prior sources of law that *should* constrain the state supreme court – legislation and the court's own decisions – tend to point in a given direction but do so with some ambiguity. Here again Article II should probably not be read to compel the state supreme court's choice. Legal doctrine, we all know, is often open-textured and debatable. Article II should not become a tool to federalize state law concerning disputes in determining the results of the state's election for Presidential electors by depriving state courts of the usual leeway to decide difficult cases.

Thus, while Article II should be understood to pose some restraints on the results that a state court can reach in resolving such disputes, the restraints must not be tight. Unless the principles applied by the court amount to a clearly unfair and implausible construction of state law

⁷⁸ I am eliding here the question whether that decision-maker should be in Congress or on the Supreme Court.

as the law stood on Election Day, there should not be an Article II problem.

Interestingly, this standard is not far from the one prescribed by the Chief Justice in his concurrence; he asked whether “the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.”⁷⁹ That opinion reflected a concern with the respective roles of the judiciary and the legislature as well as with after-the-fact decision-making.⁸⁰ I have argued in this section that the former concern as such should not have been a significant factor in *Bush v. Gore*. But I have also argued that the latter one is a legitimate one to raise under Article II when a state court resolves a dispute over the results of a Presidential election. In Section F, I turn to the question of whether the concern was serious enough in the Florida case to warrant federal intervention. And Section G addresses the question of whether the Court should have determined the merits of the Article II issue.

F. The Florida Supreme Court’s Decisions Under the Article II Lens

Florida election law provides for two basic post-election procedures by which a candidate may challenge the results of an election. First is an administrative procedure called a protest, in which a candidate may challenge a county canvassing board’s initial count of the votes. When a preliminary recount of selected precincts “indicates an error in the vote tabulation which could affect the outcome of the election,” the board may conduct a manual recount of all ballots in the county.⁸¹ At least ordinarily, the protest is supposed to be resolved, and the votes certified by the board, within seven days of the election.⁸² Second is a contest, which begins only after a winner is certified. The contest is a judicial procedure in which a candidate can establish his right to an office on any of several grounds, among which is “receipt of a number of illegal votes or rejection

⁷⁹ 121 S.Ct. at 535.

⁸⁰ *See id.* at 535 (“In order to determine whether a state court has infringed upon the legislature’s authority, we necessarily must examine the law of the State as it existed prior to the action of the court.”).

Part of the Chief Justice’s professed concern with the need to protect legislative prerogative was based on the perception that the legislature had sought the safe harbor offered by 3 U.S.C. § 5, which as noted above requires that the state’s final resolution of a contest concerning the selection of its electors be made in accordance with previously established procedures. *See id.* at 534 (“If we are to respect the legislature’s Article II powers . . . we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the ‘safe harbor’ provided by § 5.”). This is ironic. Nothing on the face of the Florida election code refers to § 5; it only references by the Florida Supreme Court that suggest as a matter of state law that the legislation should be understood to seek protection of the safe harbor – whether in all circumstances is another question. *See supra* note xx and accompanying text. In any event, the state’s desire to qualify for the safe harbor is a matter of state law; it should not add anything to an argument for federal intervention under Article II.

⁸¹ Fla. Stat. § 102.166.

⁸² Fla. Stat. §§ 102.111, 102.112.

of a number of legal votes sufficient to change or place in doubt the result of the election.”⁸³ The court has broad power “to provide any relief appropriate under such circumstances.”

Secretary of State Katherine Harris refused to extend the seven-day deadline for certification by the county boards to give the boards additional time to conduct manual recounts,⁸⁴ and she indicated that voter error, including failure to punch a punch-card ballot properly, did not justify holding a manual recount.⁸⁵ Nevertheless, on November 21, the state supreme court ordered her to accept returns through November 26, thus allowing more time for manual recounts in counties where Vice President Gore had requested them.⁸⁶ And on December 8 it ordered judicially-supervised hand recounts throughout the state of the "undervote," ballots that contained no marking registered by the counting machines in the vote for President.⁸⁷ The first decision was reviewed and vacated in *Bush I*, and the second was reversed in *Bush II*.

In the Chief Justice’s view, the Florida Supreme Court committed four basic and inter-related errors that together condemn its decisions under Article II: (1) Manual recounts were not justified by the statute, because there was not an error in the vote tabulation or a failure to count legal votes; difficulties with attached chads on punch-card ballots were attributable to voter error. (2) The extension of the time for certification disregarded the governing statute. (3) The decision in the contest made the initial certification meaningless. (4) The recounts jeopardized the state’s ability to take advantage of the safe harbor offered by 3 U.S.C. § 5. Judge Posner agrees with each of these objections except perhaps the last. With respect to each but the last, the alleged errors is arguably compounded by the failure of the state supreme court to defer to the discretion of other officials – the Secretary of State, the canvassing boards, and the trial court. I will address each of these objections in turn.

1. The Standard for Valid Votes and for Recounts

A key premise of the Article II analysis both of the Chief Justice and of Judge Posner is the proposition that a punch-card ballot without a hole for a single Presidential candidate punched cleanly through, knocking the chad off, does not properly cast a vote for President.⁸⁸ Judge

⁸³ Fla. Stat. § 102.168(3)(c).

⁸⁴ DE 00-10 (Nov. 13, 2000); letter of Nov. 15, 2000, to Hon. Charles Burton, available at <http://news.findlaw.com/cnn/docs/election2000/uscbushpbccbjal129.pdf>.

⁸⁵ DE 00-13.

⁸⁶ *Palm Beach Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000).

⁸⁷ *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000).

⁸⁸ Posner, *supra* note 2, Part I.A (error in tabulation occurs when "the ballot contains a cleanly, completely punched-through vote for Gore and for no other Presidential candidate, yet the counting

Posner contends that voters were instructed to punch the chad cleanly through and check the back of the card to ensure that no chad was still attached; a voter who failed to do so, therefore, failed to comply with instructions.⁸⁹

From this premise, the Chief Justice and Judge Posner draw the conclusion that hand recounts should not have been held. As I have just indicated, the Florida statute governing the protest phase provides for hand recounts only if there is "an error in the vote tabulation which could affect the outcome of the election;"⁹⁰ though the language is less clear than it might be, it would appear that such an error is the counting of illegal votes or the failure to count legal votes. This is indeed the standard explicitly adopted by the contest statute, which authorizes relief for "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election."⁹¹ But failure to make a clean hole, in the Rehnquist-Posner view, is an error by the voter; a ballot made in violation of instructions and lacking a clean hole is in their view not a legal vote and failure to count it is not an error in the vote tabulation.⁹² A corollary is that the Florida Supreme Court erred in its protest-phase decision of November 21,⁹³ when it required an extension of the time for county canvassing boards to conduct hand recounts,⁹⁴ and in its contest-phase decision of December 8,⁹⁵ when it ordered judicially-

machine somehow failed to record it as a vote for Gore").

⁸⁹ *Id.* ("In the counties that used punchcard machines, not only was the voter instructed to punch a clean hole through the ballot (no dimples); he was also told to turn the ballot over after removing it from the voting machine and to make sure there were no bits of paper stuck to it, that is, no dangling chads.").

⁹⁰ Fla. Stat. § 102.166(5).

⁹¹ Fla. Stat. § 102.168(3)(c).

⁹² 121 S.Ct. at 537 ("[T]he [Florida] court's interpretation of 'legal vote,' and hence its decision to order a contest-period recount, plainly depart from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots."); Posner, *supra* note 2, at Parts I.B, II.A ("There were few if any errors in the machine tabulation of the Florida Presidential votes, at least after the machine recount. . . . The many dimpled and dangling chads were the result of voters' either failing to follow the instructions or, if the voting machine itself was defective, failing to seek the assistance of one of the precinct election workers. Under the Florida election statute, only errors in the tabulation of the vote warrant the canvassing board's ordering a hand recount of the county's votes. . . . Distinguishing between errors in voting and in tabulation is important because the voter is complicit in the former error whereas the latter error is invisible to the voter. If the punchcard machine doesn't work and as a result the voter does not emerge with a fully punched-through ballot, he should know, if he's read the directions, that he has a spoiled ballot and he should request a fresh ballot and a properly operating voting machine.").

⁹³ Palm Beach Canvassing Board v. Harris, 772 So.2d 1220 (Fla. 2000).

⁹⁴ Posner, *supra* note 2, at Part II.A ("If voter error, not being an error in tabulation, is not a valid ground for recounting rejected (or all) ballots, there was no possible justification for extending the statutory

supervised hand recounts throughout the state of the "undervote," ballots that contained no marking registered by the counting machines as a vote for President.⁹⁶

There is some appeal to the clean-hole standard, which puts responsibility on the voter to get it right. But I do not believe it is the standard provided by Florida law for what constitutes a legal vote.

At the outset, it is important to note that the clean-hole instruction was not given in every punch-card county. Chief Justice Rehnquist's concurring opinion in *Bush* made it sound as if this was a statewide instruction,⁹⁷ but that was misleading. His source, Judge Tjoflat's opinion in the United States Court of Appeals for the Eleventh Circuit dissenting from denial of preliminary relief, made clear that the instructions later quoted by the Chief Justice were given only in Palm Beach County; the Broward County instructions, also quoted by Judge Tjoflat, said nothing about knocking the chad off or checking the back of the card.⁹⁸ Some of the counties using the Votomatic machines had instructions similar to those used in Palm Beach,⁹⁹ but others had

deadline for the submission of a county's votes in order to permit an effort to recover votes from ballots rejected because of voter error. The only reason the county canvassing boards needed extra time was to complete the laborious hand recounts that are necessary to ascertain the clear indication of the voter in a ballot the voter spoiled.").

⁹⁵ *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000).

⁹⁶ Posner, *supra* note 2, at Part II.A (saying that the decision of December 8 was "a surprise," in part "because it had become clear at the trial that hand recounts of spoiled ballots are largely standardless and probably inherently subjective").

⁹⁷ 121 S.Ct. at 537 (Rehnquist, C.J., concurring).

⁹⁸ *See Touchston v. McDermott*, 234 F.3d 133, 1141 n.19 (Tjoflat, J., dissenting):

Instructions to voters in Palm Beach County, a county that uses punch card technology, read: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." The instructions in Broward County, also a punch card county, read: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice."

The instructions given on the website of the Broward County Supervisor of Elections, <http://www.browardsoe.org/voting/votoinst.htm>, now tell voters to knock the chads off the ballot. But the instructions on the website as it stood on Election Day did not say this, and neither did the instruction card given to voters in the polling place. Copy of instruction card in possession of the author.

⁹⁹ These included Collier, Hillsborough, Miami-Dade, Osceola, Pasco, Pinellas, and Sarasota Counties. Copies of instruction cards in possession of the author.

instructions similar to those in Broward, without any mention of the need to clean chads off.¹⁰⁰ The clean-hole standard, therefore, cannot be a statewide standard for determination of what constitutes a legal vote.

Perhaps one could attempt to resuscitate the Rehnquist-Posner view by stating that a valid vote is one cast in accordance with instructions given to the voter. It would be rather ironical for the Chief Justice to adopt this standard, because it would plainly require county-to-county variation in determination of what constitutes a valid vote. Beyond that, it would be overly restrictive and impossible to enforce if taken seriously. Officials could not, and should not, invalidate the ballot of a Palm Beach voter for failing to check the back of the card for dangling chads, or the ballot of a Broward voter who pushed her stylus through the card at an angle rather than straight down.¹⁰¹ The fact is that many votes are counted without dispute even though the voter fails to comply with the instruction to punch a hole cleanly through; indeed, state law, in mandating a machine recount in close elections, anticipates that a second machine run of the ballots will count ballots that were missed on the first run because of attached chads. If these votes were not valid, then it would be “an error in the vote tabulation” to count them.¹⁰² One consequence would be that the canvassers would have to have a hand recount if for no other reason than to pick out and discard all ballots with attached chads – a silly result given that the machine had counted them and all or virtually all of them clearly reflected the voter’s intent.

Certainly nothing in the Election Code suggests that the instructions given to voters in a particular county provide the standard for what constitutes a legal vote in that county,¹⁰³ and so for what constitutes an error in the vote tabulation. Those instructions, established pursuant to legal authority but not by law, should be regarded merely as what they are on their face – as instructions, telling the voter what to do to minimize difficulty and the chance of error in counting the vote. For the true standard under Florida law of a legal vote we must search not the Palm Beach County instructions but the Election Code itself.

¹⁰⁰ These included Duval, Lee, and Marion Counties. Copies of instruction cards and materials in possession of the author.

¹⁰¹ See note 98 *supra*.

¹⁰² An alternative would be to say that if the voter fails to knock the chads off then whichever result the machine yields – counting the vote or not – should not be considered an error in tabulation. “Does the machine count it?” would be a plausible standard of law as to what is deemed a valid vote, though it is different from the instruction-based standard used by Judge Posner. It is clearly not the instruction created by Florida law, however, and it would seem most unattractive to hold that, though the law contains a standard of validity incorporating considerations other than the machine response, whether the machine happens to read the ballot or not is controlling in determining whether the vote shall actually count.

¹⁰³ If punch-card ballots are to be used, a useful rule of law might be: A vote is valid if the machine counts it, and not if it doesn’t (assuming the machine is not broken). But that standard was not the one created by Florida law.

The Florida Supreme Court construed the statute reasonably by deriving from it the standard of whether there is “a clear indication of the intent of the voter.” True, the statute is less transparent than one might wish in this respect, but this standard does emerge with sufficient clarity. The statute states the standard explicitly in providing how “damaged or defective” ballots should be counted;¹⁰⁴ though this provision at least arguably does not apply to a ballot merely because the ballot bears an attached chad rather than a clean hole,¹⁰⁵ it is at least suggestive of an underlying concept of validity. The statute also makes the intent of the voter determinative (without saying explicitly how clearly the intent must be indicated) in providing how a manual recount should be conducted, once the decision to conduct it has been made.¹⁰⁶ This provision sets a bottom-line standard for what constitutes a vote. It makes little sense to provide that the intent standard applies in conducting a hand recount but some other standard as to what constitutes a vote applies in determining whether the machines have erred in tabulating the vote.

In other words, the "error in the vote tabulation" standard should be applied by looking ahead to the intent standard. At least this is a plausible, not an outlandish reading of the statute – and it is in accord with prior Florida practice, for in prior years the county canvassing boards had conducted hand recounts that counted some ballots with attached chads.

But does adoption of this standard override the legitimate discretion of the Secretary of State? During the protest phase, the Secretary issued a series of opinions taking the position that an “error in the vote tabulation” means “a counting error in which the vote tabulation system fails to count . . . properly punched punch-card ballots,” and that “[v]oter error” does not qualify, so that failure of the machines to count ballots of voters who had “fail[ed] to properly follow voting procedures” would not justify a manual recount.¹⁰⁷ These opinions did not attempt to determine precise rules as to what constituted a “properly punched punch-card ballot,” but they did look to the voter instructions for the determination of what constitutes a valid vote.

The Chief Justice said that the Florida Supreme Court “must defer to the Secretary’s interpretations.”¹⁰⁸ By contrast, that court said that the state’s courts “will not defer to an agency’s opinion that is contrary to state law.”¹⁰⁹ The truth is murkier and more complicated than

¹⁰⁴ Fla. Stat. § 101.5614(5) (“No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”).

¹⁰⁵ See *Gore v. Harris*, 772 So.2d 143, 1266 (Fla. 2000) (Wells, C.J., dissenting).

¹⁰⁶ Fl. St. 102.166(7)(b) (“If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.”).

¹⁰⁷ DE 00-11, DE 00-12, DE 00-13 (Nov. 13, 2000).

¹⁰⁸ 121 S.Ct. at 537.

¹⁰⁹ *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So.2d 1220, 1228 (Fla. 2000).

either of these statements suggest and seems to lie somewhere between them; the issue of how much deference the judiciary owes to administrative interpretations of law is as elusive in Florida law as it is in federal law. The opinion cited by the Chief Justice said that

although not binding judicial precedent, advisory opinions of affected agency heads are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency of government. . . . [T]he judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law.¹¹⁰

And one of the cases cited by the Florida Supreme Court repeated the principle from prior cases that the interpretation of a statute by the administrative entity charged with enforcing the statute “is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute.”¹¹¹

The Florida Supreme Court over-reached when it said that the Secretary’s interpretation of the “error in the vote tabulation” standard “contravenes the plain meaning” of the statute;¹¹² the statute does not *have* a plain meaning. But Florida administrative law was not so crisp that it demanded adherence to the Secretary’s interpretations on this score – and *a fortiori*, failure to adhere to those interpretations – which themselves were made after the election, and squarely in accordance with the Secretary’s partisan interests – did not constitute a violation of the federal constitutional principle against post-election law-making. Determination of where the standards for validity of a vote were to be found, in the varying instructions given to voters or in the statute itself, may have appeared to be so basic an issue of law, and one on which administrative expertise had so little bearing, that the court felt it owed the Secretary little deference in principle. Further, the consequences of her interpretation, which would make even the clearly indicated intent of some voters ineffective, despite the obvious legislative concern for determining that intent, may well have appeared intolerable to the court, clearly not within the contemplation of the statute. And the situation may have appeared even worse if the court realized that if manual recounts were not held some of those voters whose votes would not be tallied, despite the clear indication of their intent on the ballot, had acted in accordance with the instructions given them.

In view of the closeness of the Florida count, it was plausible that a sufficient number of votes to turn the election had been validly cast, under the standard that should have governed, but

¹¹⁰ Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840, 844-45 (Fla. 1993).

¹¹¹ Donato v. American Tel. & Tel. Co., 767 So.2d 1146, 1153 (Fla. 2000). *See also* Nikolits v. Nicosia, 682 So.2d 663, 666 (Fla. Ct. Apps., 4th Dist. 1996) (deference unnecessary where administrative interpretation is “clearly erroneous”).

¹¹² Palm Beach Cty. Canvassing Bd. v. Harris, 772 So.2d 1220, 1228 (Fla. 2000).

not counted by the machines. That is a possibility that could not be lightly ignored. Neither Florida administrative law nor the federal Constitution required the Florida Supreme Court to conclude that deference to the Secretary of State precluded it from taking remedial action to ensure that those votes would be counted.

2. *Extension of the Initial Deadline*

The Florida statute is remarkably clumsy in one respect. One section says that if a county canvassing board fails to make its returns within the seven-day deadline that county “shall be ignored” by the Elections Canvassing Commission in determining the results of the election.¹¹³ The immediately succeeding section provides that such results “may be ignored.”¹¹⁴ Secretary Harris initially took the view that these statutes gave her no discretion to accept late returns; the permissive language, she said, only referred to “unforeseen circumstances” such as a natural disaster that might make compliance impossible.¹¹⁵ The next day, a lower court told her that she had discretion to accept late-filed supplemental or corrective returns and could not reject them without taking account of all facts and circumstances that might affect that discretion.¹¹⁶ The day after that the Secretary issued a new set of guidelines as to when the seven-day deadline might be waived. This one was more refined than the prior one – but it did not allow for recounts attributable to “voter error.”¹¹⁷ The lower court accepted this statement as an adequate exercise of discretion; the state supreme court did not.

At the very least, the statute on its face gave the Secretary discretion to reject late returns. Judge Posner is correct that the state supreme court decision gave her decision no deference,¹¹⁸ as is perhaps most clearly indicated by the fact that the court effectively took over her job by laying out its own schedule for certification. Its decision is therefore open to criticism. But the defects of that decision do not amount to an Article II problem.

Bear in mind that the Secretary’s refusal to accept late recounts was based at least in part on the premise that the recounts were attempts to cover for “voter error.” That conclusion, as I have shown above, depended on a perception of law – one with which the state supreme court

¹¹³ Fla. Stat. § 102.111(1).

¹¹⁴ Fla. Stat. § 102.112(1).

¹¹⁵ DE 00-10 (Nov. 13, 2000).

¹¹⁶ *McDermott v. Harris*, No. 00-2700 (Leon Cty., Fla. Nov. 14, 2000).

¹¹⁷ Letter of Nov. 15, 2000, to Hon. Charles Burton, available at <http://news.findlaw.com/cnn/docs/election2000/uscbushpbccbjal129.pdf>.

¹¹⁸ Posner, *supra* note 2, Part II.A (“Her decision not to delay the certification of the winner of the Presidential election deserved considerable deference; it received none.”).

disagreed. The court could have written a plausible enough opinion saying that the Secretary had committed legal error in her perception of what a valid vote is; that therefore her statement of the factors bearing on whether to accept late returns did not bear accurately on the case; that given the closeness of the election, the importance of conducting manual returns to correct machine failure to count valid votes, and the difficulty of conducting those returns, adherence to the seven-day deadline would be an abuse of discretion; and that she now had to exercise her discretion, properly guided, to determine what new deadline to set. Likely the court was in no mood to act with such moderation because of time pressure and because of the appearance of partisanship that Secretary Harris had given. But such an opinion would have made the court look less over-reaching than it did and yet allowed the boards to finish their counts.

In any event, though, the court's November 21 decision to extend the boards' deadline during had little impact on its December 8 decision to order a statewide recount, and it is the later decision that made the difference, because it ordered the statewide recount, and that was reviewed in *Bush II*. Judge Posner argues that the earlier decision was important, because it allowed Broward County to complete its recount, thus giving Gore a net gain of 393 votes, and "[t]he difference might have proved decisive in the recount that the Florida supreme court ordered on December 8 had that recount gone through to completion."¹¹⁹ The argument is self-evidently dependent on contingencies that never occurred – the court-ordered recount never was completed, and there is no way of knowing whether the 393 votes would have been decisive. Furthermore, in light of the view that the Florida Supreme Court took of its power to order a statewide recount as part of the contest, earlier completion of the Broward recount was not a precondition for ultimately including a manual recount of that county's undervote in the statewide tally. And ironically, in that light, extension of the deadline turned out to be a Pyrrhic victory for Gore; by extending the deadline for initial certification, the state supreme court shortened the period for the contest, which if allowed to proceed to completion might have given Gore victory. In the end, it was not Bush who was hurt by the extension.

3. *Rendering the Earlier Stage Meaningless*

Both the Chief Justice and Judge Posner contend that the state supreme court's order of a statewide recount of the undervote during the contest phase renders the earlier certification meaningless.¹²⁰ As Judge Posner puts the point, the state supreme court, reversing the trial court, "ruled in effect that any doubts that might warrant a canvassing board in conducting a recount at the protest stage *compelled* the court at the contest stage to order (in fact to conduct itself or under its supervision) a hand recount." Having set up its own schedule of deadlines for the county canvassing boards to complete their counts, the state supreme court now required a much later recount to be conducted with the trial court, though lacking staff and experience, as the "primary vote tabulator." "This," says Judge Posner, "is all upside down."

¹¹⁹ Posner, *supra* note 2, Part II.A.

¹²⁰ 121 S.Ct. at 537; Posner, *supra* note 2, Part II.A.

There is considerable force to the argument. As a matter of sound administrative procedure, one might expect the judicial role in the contest phase to be limited to ensuring that the canvassing boards and other election officials had not acted beyond the range of their discretion during the earlier phases of the count.

But the matter is not so simple. The protest operates county by county; only at the contest phase is a governmental entity able to view the situation statewide and order a statewide remedy. The contest statute also gives the court extremely broad remedial authority, in contrast to the rather confined authority of the county canvassing boards. Though the contest is an adversarial proceeding, the court is not restrained by the parties' requests for relief. Hence, the state supreme court ordered a statewide recount, a remedy that would have been essentially impossible beforehand, notwithstanding the fact that Gore had not requested it. Furthermore, all that is necessary to warrant relief in the contest phase is that "a number of legal votes sufficient to change or place in doubt the result of the election" have been rejected; if more than that is required to qualify as "an error in the vote tabulation" and so justify a manual recount in the protest phase, such additional requirements do not apply during the contest.

The state supreme court's decision of December 8 did not pose a substantial danger that a candidate, knowing that he has a chance of getting relief in the contest, would essentially ignore the protest phase. Even if the protest reflected nothing more than the first of two bites at the apple, a candidate would not likely forsake that first bite. But even under the December 8 decision the protest does have greater significance. Unless the results as shown by the certification are very close, the courts will not likely grant relief in the contest. And if the county boards have already completed a manual recount, then the December 8 decision shows that the courts are likely to accept the results of that recount.

The matter was not clear-cut. But the statewide election was extraordinarily close, and the Florida Supreme Court was operating under the reasonable premise that a punch-card ballot can be legal notwithstanding an attached chad if it bears a clear indication of the intent of the voter. The court was therefore not out of bounds in reading the contest statute as requiring not merely a review of the conduct of the county canvassing boards to determine whether they had abused their discretion but a statewide remedy to determine whether uncounted but legal ballots would alter the result of the election. Article II of the federal Constitution did not invalidate that reading.

4. Return to the Safe Harbor

The Chief Justice argued that the recount ordered by the Florida Supreme Court on December 8 "significantly departed from the statutory framework in place on November 7" because it could not be completed by December 12; thus, the recount could not be reconciled with the "legislative wish" – language of the *per curiam* decision in *Bush I*, not of any source of

Florida law – to take advantage of the safe harbor offered by 3 U.S.C. § 5.¹²¹

But possible loss of the safe harbor does not create a serious Article II issue. This is hardly a situation in which the state supreme court, acting after November 7, overrode prior legislation clearly adopting the December 12 deadline. On the contrary, as I have already indicated in Part C, the supposed legislative wish is not expressed in the Florida Election Code, and it was in fact read into the Code after November 7 by the Florida Supreme Court itself.

Moreover, that court never indicated an intention to carry matters past December 12. If the recount ordered on December 8 failed to satisfy the Fourteenth Amendment but a recount under other standards would be satisfactory, the Florida court should have had an opportunity to determine the impact of the December 12 deadline – but a decision that in these circumstances that deadline must yield could hardly be deemed a nullification of previously established law. If (contrary to the holding of *Bush II*) the recount as ordered on December 8 was constitutionally satisfactory and the difficulty lay only in the looming self-imposed deadline, then the most obvious culprit was not the state supreme court but the United States Supreme Court, which halted the recount on December 9 and therefore precluded any chance of completing the count by December 12.

4. Summary

I do not mean to argue that the decision of the Florida Supreme Court to order a statewide recount was clearly correct as a matter of Florida law; it was not. The argument that the court should have deferred to the Secretary of State's determination that incompletely punched ballots were not legal votes is plausible, and people of good faith can find it persuasive. But to constitute a violation of Article II it is not enough that the decision be wrong, or even obviously wrong and wrong-headed. It is a sad phenomenon that all the time we confront judicial decisions that meet those descriptions. Such is the law, such is life. For a post-election judicial decision to constitute a violation of Article II, it must be a substantial and clearly unjustifiable alteration of law that was established before Election Day. The decision of the Florida Supreme Court does not come close to meeting that description.

G. How the Matter Should Have Been Decided

I have discussed the merits of the Article II argument. But I believe the Court never should have reached them. It never should have taken the case; instead, it should have left the matter to the political process prescribed by the Twelfth Amendment and by federal statute.¹²²

¹²¹ 121 S.Ct. at 538-39.

¹²² Testifying before a House subcommittee, Justice Thomas later said, ““If there was a way, and I speak only for myself, to have avoided getting involved in that difficult decision . . . I would have done

Given that it did take the case, the Court should have held the Article II issue non-justiciable, a matter committed to Congress in the process of counting the electoral vote pursuant to the Twelfth Amendment. And even if it did reach the merits of the Article II issue, the availability of the political process should have informed its decision, counseling it that relatively light scrutiny was appropriate because Congressional review was available.

1. Justiciability

An argument of non-justiciability must confront *McPherson v. Blacker*.¹²³ There, the Court rejected a challenge under Article II to Michigan's old system of electing electors by districts, and as a prelude to doing so it held that the matter was justiciable, not a political question. The Court spoke in very broad terms, saying that "the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained."¹²⁴ But the situation in *McPherson* was altogether different from that confronting the Court in *Bush II*.

In *McPherson*, the challenge concerned the state's basic system for selecting electors and reached the Court before the election. Thus, in contrast to the 2000 case, the Court did not thrust itself into a contest concerning an election already held. To some extent, then, the Court was able to operate behind a veil of ignorance, deciding in the abstract what an acceptable system of selection was rather than arbitrating the standards for determining who actually won an election. This was a more seemly judicial function, one less likely to seem like an intrusion into politics.

More significantly, the timing factor affects the need for judicial intervention. Suppose Michigan's system for selecting electors violated Article II. It would be a democratic disaster if the state held its election under that system and then Congress, in counting the electoral votes, determined that the state had not made a valid selection of electors and therefore its votes could not be counted. But before the election there would be no practical way of ensuring a Congressional decision, and even if Congress made such a decision it would have dubious force. A decision by the Supreme Court was the only feasible method of reviewing Michigan's system

it." WASHINGTON POST, March 30, 2001, at A13. Actually, there was quite an easy way for the Court to have "avoided getting involved" – by not treating Gov. Bush's emergency application for a stay as a petition for *certiorari* and granting it. See *Bush v. Gore*, 121 S.Ct. 525, 542 (Souter, J., dissenting) ("The Court should not have reviewed either [*Bush I*] or this case . . ."), 550 (Breyer, J., dissenting) ("The Court was wrong to take this case.").

¹²³ 146 U.S. 1 (1892).

¹²⁴ *Id.* at 23.

for compliance with Article II.¹²⁵

Now compare the situation in Florida in 2000. The election had already been held in accordance with the statutory plan established by the Legislature. The only dispute was over the results of that election. No judicial intervention was necessary to ensure that a federal authority would have the opportunity to determine the federal issues related to that dispute. Whether Florida definitively resolved the dispute or not, and whether its attempts at resolution were constrained by the Supreme Court or not, all purported certificates reciting its electoral votes would be transmitted pursuant to the Twelfth Amendment to Washington, D.C., directed to the President of the Senate. That Amendment further directs:

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.

Note that the Amendment – which in this respect is substantially identical to the original Article II – does *not* say that the certificates shall be directed to the Chief Justice of the United States, and that the Chief Justice shall open them in the presence of the Supreme Court and they shall then be counted. The constitutional decision to repose the responsibility for counting the vote within the national legislature rather than with the judiciary was not adventitious. It seems plain that this is “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” supporting the conclusion that the matter was a non-justiciable political question.¹²⁶

Certainly Congress has always understood that the sole responsibility for determining the electoral vote is lodged within it. The crisis of 1876-77 was attributable in large part to the fact that the Twelfth Amendment is ambiguous about exactly where the power to count the vote for the Presidency is lodged – in the President of the Senate, in the two Houses acting concurrently,

¹²⁵ The Secretary of State in *McPherson* argued that the matter was not justiciable in part because any decision of the Supreme Court was subject to political review, ultimately in Congress. *Id.* The Court did not respond squarely to this argument. It is true that theoretically Congress might have disagreed with the Court’s decision holding the system for selection of electors valid, and at least arguably Congress would not be bound by that decision. But if the Court held the system invalid and enjoined it, then no electors would be chosen under that system and there would be nothing for Congress to review. In other words, though the Court’s decision could not altogether eliminate the possibility that the state would elect a slate of electors that Congress would later determine to be invalid, it could at least narrow that possibility, and do so in a way not subject to Congressional review.

¹²⁶ *Baker v. Carr*, 369 U.S. 186, 215 (1962). Thus, I do not believe the justiciability issue is much affected whether the substantive argument is phrased in terms of Due Process or Article II. In either case, the objection is post-election law-making, and in either case its resolution is committed – in the context of a Presidential election – to Congress. But even assuming the Due Process claim was justiciable, the prudential reasons counseling against Supreme Court intervention apply as fully to it as to the Article II claim.

in the two Houses acting as one body, or in the House of Representatives alone. But there does not seem to have been any serious thought that the power rested outside Congress, or that the Supreme Court should decide the various disputes over the credentials of state electors.¹²⁷ As the House committee reporting the bill that eventually became the Electoral Count Act of 1887 said,

The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes. . . . The power to determine rests with the two Houses, and there is no other constitutional tribunal.¹²⁸

By 2000, though, the Supreme Court seems to have concluded that only it could save the nation from chaos, and Judge Posner agrees.¹²⁹ Both the constitutional commitment to Congress and the statutory mechanism created by the 1887 Act remain in place – but the Court had too little faith in them to allow them to work.

2. *The Statutory Framework*

Congress passed the Electoral Count Act to try to ensure that it could resolve future crises in a more orderly way. It is instructive to examine how the Act operates in general and would have operated in this Presidential election had the Supreme Court not shut the process down; thus we may find the path cut off by the Supreme Court. The wording and structure of the statute are muddy, but its basic operation is clear enough.

Most often, the statute operates under one basic rule: If there is just one return from a state, its electors have been lawfully certified, and the votes were “regularly given” by the

¹²⁷ Five members of the Court did sit on the Electoral Commission that helped to solve the crisis by rendering presumptive decisions in the cases of challenged electors. But that Commission was a creation of Congress, the other ten of its members were members of Congress, it only acted on matters referred to it under the terms of the statute, and the two Houses of Congress reserved the power, acting concurrently, to overrule the Commission’s decisions.

¹²⁸ H. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President), *quoted in* Bush v. Gore, 121 S.Ct. 525, 555 (2000) (Breyer, J., dissenting).

¹²⁹ He asks,

[W]hat exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis? We might call this the reverse political-questions doctrine. Political considerations in a broad, nonpartisan sense will sometimes counsel the Court to abstain, but sometimes to intervene.

Posner, *supra* note 2, Part II.D.

electors, then those votes may not be rejected; the two Houses may, however, reject votes, even if those votes are the only ones from the state, if the Houses agree that the votes were not regularly given by electors whose votes have been lawfully certified.¹³⁰

If there are multiple returns, a more complicated set of rules comes into play. First, the “safe harbor” provision of 3 U.S.C. § 5 may apply: If the state has provided, by laws enacted prior to election Day, “for its final determination of any controversy or contest concerning the appointment of . . . electors . . . , by judicial or other methods or procedures,” and that determination is made at least six days prior to the date prescribed for the electors to meet, then that determination “shall be conclusive . . . in the counting of the electoral votes.”

The statute further provides for the contingency in which “there shall arise the question which of two or more . . . authorities . . . is the lawful tribunal” of the state designated by § 5. In that case if the two Houses, voting separately, concurrently decide that the validity of one slate “is supported by the decision of such State so authorized by its law,” then the votes of that slate shall be counted.¹³¹

But if there has not been a § 5 determination – and presumably if competing tribunals claimed to have made a § 5 determination but the Houses did not agree on one – then the votes shall be counted of a slate that the two Houses agree “were cast by lawful electors appointed in accordance with the laws of the State”; provided, however, that even though the Houses agree that the slate was lawfully appointed, they might agree that their votes were not lawfully given, in which case the votes should not be counted.¹³²

Finally, if the two Houses fail to agree as to which slate was lawfully appointed, then the default rule is that “the votes of the electors whose appointment shall have been certified by the executive of the State, under the Seal thereof, shall be counted.”¹³³

This complex procedure may seem to invite endless wrangling; that prospect is a concern raised by Judge Posner.¹³⁴ But in fact the statute provides tight time limits designed to ensure that the count will be brought to a prompt conclusion.¹³⁵

¹³⁰ 3 U.S.C. § 15.

¹³¹ 3 U.S.C. § 15.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Posner, *supra* note 2, at n.73 and accompanying text (suggesting that a battle in Congress might have resulted in Strom Thurmond or Lawrence Summers acting as President).

¹³⁵ 3 U.S.C. §§ 17, 18.

Now let us see how this process might have worked in the 2000 election. I will run through it under two alternative counterfactual assumptions.

3. If There Had Been a § 5 Determination

First, suppose that the Court decided not to review the Florida Supreme Court's decision of December 8, and that the statewide recounts, and the contest proceeding of which they were a part, were concluded by December 12. Then, pursuant to 3 U.S.C. § 5, the determination made by the Florida court at the conclusion of that proceeding should have been conclusive in the count of the electoral vote.

If the court had determined that Bush was the winner, presumably there would have been no problem – he would have received Florida's electoral votes, and the Presidency, without further dispute. But how much more satisfying an outcome that would have been – the recount ordered by the state supreme court completed without federal interference and the election awarded to the winner of that count – than the one we have.

If the court had determined that Gore was the winner, however, that likely would not have been the end of the story. If the Legislature had gotten into the act by designating its own slate, that should not have had any impact; as I have shown in Section B, the Legislature had no post-election authority to designate a slate. Presumably, though, the Governor, Jeb Bush, the Republican candidate's brother, would not have altered certification of the Republican slate even if the state supreme court ordered him to do so; in a functional family, spending a few weeks in jail is probably a reasonable price to pay to give your brother a good chance for the Presidency. That court would not have had to play a game of chicken, however. It could have reached its final determination and, relying on § 5, sent certification of that determination to Washington. Thus, two competing returns would be opened in Congress, one of a slate certified by the Governor and the other supported by what purported to be a § 5 determination.

Now, Republicans in Congress may have resisted the conclusion that the final judgment of the state supreme court was a determination satisfying § 5. Recall that as of January 6, 2001, while the Democrats had the narrowest of edges in the Senate – with the President of the Senate, Al Gore himself, in position to break a 50-50 tie – the Republicans had a slightly larger edge in the House. House Republicans would have had the incentive to deny § 5 treatment to the determination by the state supreme court, because eventually that would have meant that the default rule, counting the slate certified under seal by the Governor, would apply. Republicans may thus have contended, for reasons addressed in Section F, that the court's decision did not accord with pre-existing law. And, for reasons similar to those I have presented in Section F, such a contention would not have been sound on the merits. Apart from that, however, Congress should not have reached the merits of that contention, or if it did it should have considered them with a thumb heavily on the side of the scale favoring legitimacy of the state supreme court's decision.

To see this, it is helpful to understand the basic nature of § 5. This provision is not addressed in general to a state’s post-election counting procedure. Rather, it is addressed to the state’s procedure for its “final determination of any controversy or contest concerning the appointment of” the state’s electors. Failure to appreciate that distorted much of the discussion during the election affair, including the opinion of the United States Supreme Court in *Bush I*. The statute presupposes a “controversy or contest” and tells the state that if it provides a method for “final determination” of that dispute, and that determination is made at least six days before the electors vote, then the determination will be conclusive in Congress’s counting of the electoral vote. The county-by-county administrative protests pursuant to § 102.166 of the Election Code that were on review in *Bush I* cannot be that “final determination”; indeed, at that point, no “contest or controversy” had ripened concerning appointment of the state’s electors, because no statewide authority had certified a winner. There is no doubt that the “final determination” of the “contest or controversy” is not made under Florida law by an administrative protest. Rather, it is made by the judicial procedure established by § 102.168, which is even explicitly termed a “contest,” which begins only after an administrative certification is made, and which is the state’s last word on who won the election.¹³⁶

The idea behind § 5, then, is that *if* there arises a “contest or controversy” that may result in multiple slates of electors voting, but the state makes a timely “final determination” of it in accordance with a previously established procedure, the state will then be treated as a black box; even if multiple slates do vote, Congress will not look behind that determination but will accept its results. Given this, it does not make sense for Congress to be persnickety about whether the precise procedure used by the tribunal or the substantive result that it reaches is in accordance with state law. Note that § 15 provides an explicit procedure for Congress to determine “which of two or more . . . authorities . . . is the lawful tribunal” for purposes of § 5. But it does not provide an explicit procedure for Congress to determine that the procedures followed by what is concededly the “lawful tribunal” – the state supreme court in this case – or the result reached by it do not square with state law. As did the Electoral Commission in 1877, Congress no doubt realized that it is an unfortunate result if Congress itself has to resolve questions of state law in determining the electoral vote. “Pick your final decision-maker,” Congress effectively told the states in the 1887 Act, “and if it comes up with a timely decision we will not look behind its determination.” Not a mere black box can the state become, but one with a very hard casing.

Thus, for example, Congress should not decide that the state contest-resolution procedure does not qualify under § 5 because the court previously shortened the time for it by extending the earlier administrative phase of the dispute. This does not necessarily mean that, if the designated tribunal were to effectively select electors itself without regard to the procedure established by the

¹³⁶ Nevertheless, in *Bush I*, the Supreme Court strongly suggested that “a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.” 121 S.Ct. at 474. But § 5 does not call into question “any construction of the Election Code.” It only applies to the proceeding established for final resolution of a contest, and that proceeding was not on review in *Bush I*.

legislature before the election, Congress would be powerless to do anything about it. At some point, Congress might conclude that the tribunal had acted in so lawless a way that the result it produced should be considered not a determination of the contest but rather a coup. But plainly this conclusion would be warranted only in extreme cases – and nothing the Florida Supreme Court did after the 2000 election, or was likely to do if the recounts continued, would be so extreme.

This seems an appropriate structure for decision, for as I have indicated in Section E in discussing the structure of an Article II claim, only in extreme cases should the decision of the state tribunal pose a constitutional problem. Perhaps, though, the statute should be construed not to give Congress the power to break into the black box at all and reject a decision made by the designated tribunal. That is not particularly troublesome as a constitutional matter. Ultimately, if civil order is to be maintained, there must be some entity whose determination of the results of a state's election is conclusive, and we must hope that that entity will perform its duty and not exercise its power lawlessly. State judges are bound to follow the Constitution.¹³⁷ The determination of the results of a state's election depends principally, if not exclusively, on determinations of state law. It makes perfect sense for Congress, in exercising its power of counting the electoral vote, to devolve the authority to resolve a contest in a given state upon the tribunal designated by that state.

Whether such arguments would have carried the day in Congress it is hard to say. But they would have had legal force, and that would have created political force. Perhaps in the end, notwithstanding the results of the recount and its certification by the state supreme court, House Republicans would have denied § 5 treatment to that certification. Gov. Bush would still have been elected President, and the result would still have appeared to many, as it did in the actual event, to be a usurpation of power. But at least it would have been an exercise of power taken in the face of rather than precluding the recount, and it would have been effected by members of the government acting without any pretense that they were not politicians.

4. Recounts Without a § 5 Determination

Now suppose that the recount had been completed, but not in time for a resolution under § 5. This might have occurred if the Supreme Court had never stopped the recount, either because it declined to take *Bush II* on review or because it never issued a stay, but the state failed to meet the December 12 deadline. Or, bringing the case closer to the actual events, it could have occurred if the Court remanded the case to the state supreme court and allowed the recount to continue under standards that the Court deemed constitutionally appropriate.

Once again, if Bush had won the recount under judicial supervision, that presumably would have been the end of the matter. And once again, that would have been a satisfying result. Democrats could not complain about judicial usurpation if the recount they had sought showed

¹³⁷ U.S. CONST. Art. VI.

their ticket to be a loser.

Again, the more interesting and complex case is the one in which Gore wins the recount. Again, I assume that in this case there would have been competing certificates presented to Congress, one for Republican electors under seal by the Governor, and another for Democratic electors from the state supreme court, in addition perhaps to an illegitimate certificate from the Legislature. But now by hypothesis the judicial certificate would not satisfy the safe harbor of § 5, and Congress would have no legal compulsion to accept it. Now the Republicans would have a clear advantage, for if the two Houses did not agree that one slate was the legitimate one, the default provision would apply in favor of the slate certified by the Governor.

But the result would not have been open and shut. Suppose the recount was widely perceived to be fair, and that it revealed a fairly substantial margin in favor of the Democratic ticket – say a few thousand votes rather than dozens or hundreds. Then, especially in light of the fact that the Democrats won the popular vote nationwide, there might have been substantial pressure on some Republican members of the House, particularly those from marginal districts, to accept the results of the recount. It would only have taken a small handful of cross-over votes to elect the Gore-Lieberman ticket. Perhaps even those few votes would not have been forthcoming. Whichever way the proceedings in Congress turned out, however, our President and Vice President would have been elected as they always have been – by open politics.

CONCLUSION

It was five weeks after Election Day when the Supreme Court brought the dispute to a close. Had the political process prescribed by the Constitution and by federal law been allowed to run its course, the dispute might (depending on the result of the recount) have gone on another three and a half weeks, perhaps a little more. The transition period, after the clear emergence of a winner, might have been reduced to two weeks, perhaps even less. That surely would have been a cost of continuing with the process. But it would not have compared to the cost to democracy that we actually incurred, in which our highest court, at some presumed loss to its own credibility, halted the prescribed process for determining the electoral votes and effectively declared the contest over.

Perhaps such a cost would be worthwhile if it were truly necessary to maintain order and unity. But there is no warrant for concluding that chaos was threatened if the matter had remained in doubt for a few more weeks. The Constitution and federal statute provide a political process for counting the electoral vote, because the selection of the President and the Vice President is a quintessentially political function. Had the process continued, it would have been highly contentious and partisan, and even bitter, but it would not have led to bloodshed or secession or even a delay in inauguration. The culmination of that process occurs in Congress, the national legislature. Each state is given an opportunity to resolve its own disputes, and the state may choose, as Florida has done, to make its supreme court the ultimate tribunal for that resolution. But the United States Supreme Court has at most a peripheral role in the process, and

not one explicitly provided by Article II, the Twelfth Amendment, or by statute. If a state genuinely discriminates against some of its voters, the Court's intervention might be warranted. But the Court must be extremely careful lest it usurp the functions of the voters, of the states, and of the Congress.

In this case, the Court's intervention was unjustified. We should recognize that manual recounts under subjective standards are troubling, even state law calls for them. And it is easy enough to see how an observer, particularly one hoping for a Republican victory, would conclude that the state supreme court over-reached its authority and gave insufficient deference to the Secretary of State. But that court was the designated tribunal for providing the state's resolution of the contest over its electoral votes, and even assuming that the Supreme Court had any power of review at all over the state court's determinations that power should be reserved for egregious cases. That description does not come close to fitting the state court's attempt to count the number of voters whose ballots bore a clear indication of their intent but were not counted by machine.

And so I continue to believe that the decision in *Bush v. Gore* was a terrible mistake, an unsupportable intrusion into our democracy. Confronted with the contrary conclusion of observers like Judge Posner, I am compelled to conclude that, strongly held as one's views on this case may be, it is possible for others, approaching the matter from a different perspective, to reach a decision that may appear wrong-headed and unsupportable, but to do so in good faith. Thus, all one can do is acknowledge the authority of those in a position to decide the matter definitively and live with the result. But I cannot forget that this is precisely the attitude that the Supreme Court should have taken in this case. And so I still find it hard to make a full peace with *Bush v. Gore*.