

REANALYZING *BUSH V. GORE*: DEMOCRATIC ACCOUNTABILITY AND JUDICIAL OVERREACHING

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INTRODUCTION

This Article addresses two central criticisms of the United States Supreme Court's treatment of the issues raised by the disputed Florida election and ultimately resolved in *Bush v. Gore*:¹ that the Court violated principles of democratic process and dramatically overstepped the boundaries of judicial review. As will become apparent, the Article gives only modest attention to the text of the many opinions by the Florida and United States Supreme Courts in the *Bush v. Gore* drama. It will be an interesting question in the years ahead whether the formal legal grounds set forth as the basis of the United States Supreme Court's per curiam decision or of any of the concurrences or dissents will survive as plausible foundations for election jurisprudence. This Article ignores that question and, instead, attempts to analyze the Court's various judgments during the period of the dispute in a broader sense. Just as the purely legal grounds of the United States Supreme Court's opinions in cases such as *Dred Scott*² or *Brown v. Board of Education*³ are

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1. 531 U.S. 98 (2000). The United States Supreme Court issued three rulings in the Florida election dispute: (1) *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), issued on December 4, vacating the Florida Supreme Court's opinion in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla. 2000), overruling judgments of the Florida Secretary of State; (2) *Bush v. Gore*, 531 U.S. 1046 (2000) (*Bush v. Gore I*), issued on December 9, staying the statewide recount ordered by the Florida Supreme Court; and (3) *Bush v. Gore*, 531 U.S. 98 (2000) (*Bush v. Gore II*), issued December 12, permanently halting the recount and effectively awarding the election to Governor Bush. Because the criticisms of the United States Supreme Court that I address in Part I are directed at the Court's various rulings generally, I will refer to "*Bush v. Gore*" without distinguishing among the Court's rulings. The three rulings of the United States Supreme Court as well as those of the Florida Supreme Court are discussed in more detail in Part II.

2. 60 U.S. (19 How.) 393 (1856).

of less interest than the substantive judgments made by the Court in its institutional role under the Constitution, so I believe the purely legal grounds of *Bush v. Gore* deserve less attention now.

The most serious criticisms of the way that the United States Supreme Court resolved the Florida election are not that the majority opinion contains logical failures or ignores conflicting precedent, however accurate such complaints might be. The most serious criticisms are that the United States Supreme Court fundamentally breached its Constitutional role by disregarding basic principles of the process of democratic accountability and by committing what some commentators, including my colleague Bruce Ackerman, have called “a Constitutional coup.”⁴ This Article addresses those criticisms. Part I considers the claim that the United States Supreme Court, by overruling decisions of the Florida Supreme Court, abused the political process and removed all possibility of accountability to the citizenry. Part II examines the events in the Florida election drama in more depth to analyze whether the United States Supreme Court’s various rulings improperly usurped power allocated by the Constitution to the citizenry.

I. *BUSH V. GORE* AS A FAILURE OF PROCESS

This Part addresses the criticism by Michael C. Dorf and Samuel Issacharoff in their interesting Article in this issue of the Law Review, arguing that the United States Supreme Court’s resolution of the Florida election was inconsistent with the political process theory to which the Court has been committed since *United States v. Carolene Products*.⁵ At heart, their criticism is that, by resolving the disputed election through its own rulings, rather than by allowing the Florida Supreme Court’s rulings continuing the vote counting to stand, the United States Supreme Court extinguished the possibility that the Florida citizenry could hold any officer responsible for the manner of dealing with the disputed election. As we shall see, it is my view that the issue of accountability to the elector-

3. 347 U.S. 483 (1954).

4. Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. BOOKS, Feb. 8, 2001, at 3.

5. 304 U.S. 144 (1938). Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001).

ate is much more complicated than Professors Dorf and Issacharoff have described and that the criticism of the United States Supreme Court on democratic process grounds requires revision.

Professors Dorf and Issacharoff ascribe the political process theory to the United States Supreme Court's decision in *United States v. Carolene Products*. As is well-known, in *Carolene Products*' footnote four, the Court defined three categories of legislation to which there should be no presumption of constitutionality and, thus, no (or less) deference by the judiciary to the decision of the legislature. The second of these categories is "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."⁶

The political process theory derives from this idea. At heart, it reflects a concern about the accountability of political decisions and a commitment to ultimate political control by the citizenry. The basic point of the process theory is that judicial deference to democratic judgments of a legislature or of other political actors may be suspended where those judgments are in some way insulated from subsequent political accountability to the citizenry. In this view, judicial review and subsequent accountability to the citizenry are substitute means of controlling legislative action. In a democracy, political accountability to the citizenry is superior as a democratic check than subsequent review by the courts. In contrast, where there is some reason to believe that there are limitations on the ability of the citizenry to hold political actors accountable, judicial review becomes more crucial.

As Professors Dorf and Issacharoff explain, a prototypical example of the political process problem is the historical legislative districting plans—which, for example, allocated a larger number of representatives to rural farm than to urban areas within a state—that were subjected to judicial review by the Supreme Court in *Baker v. Carr*⁷ and *Reynolds v. Sims*.⁸ The districting plans were largely invulnerable to political change because the plans themselves diluted the political strength of those citizens who might otherwise vote to amend them to shift

6. *Carolene Prods.*, 304 U.S. at 152 n.4.

7. 369 U.S. 186 (1962).

8. 377 U.S. 533 (1964).

the distribution of representation. Because of this insulation from democratic accountability, there were weaker grounds for a court to defer to the judgment of the state legislature which would otherwise have been thought to be the more democratic institution. Though the political process theory seemed novel and pathbreaking at the time,⁹ there is a venerable tradition to a concern of this nature over political accountability. In *McCulloch v. Maryland*, Chief Justice Marshall defended the supremacy of federal to state regulation of the Second National Bank on the grounds that the citizens of the broader United States had no political voice with respect to legislation enacted in Maryland.¹⁰

Note that the Court's phraseology in *Carolene Products*, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," does not fully express the idea. Legislation which restricts political processes is one example of a constraint on subsequent political accountability. But the basic proposition of the process theory is broader and would extend to any political actor and any political decision, beyond simply restrictive legislation. According to the theory, where there are impediments to the subsequent accountability of responsible political actors, there should be no presumption either of the constitutional validity of legislation or of the legal appropriateness of the political judgment.

Professors Dorf and Issacharoff criticize the United States Supreme Court's decision in *Bush v. Gore* on political process grounds. According to Professors Dorf and Issacharoff, the United States Supreme Court defined the issues so that it would determine whether Bush or Gore would be President. Because the members of the Supreme Court are totally independent and, thus, beyond realistic democratic political accountability, the citizenry possesses no means to tangibly express its political judgment of the Supreme Court's decision. Like historical apportionment prior to *Reynolds v. Sims*,¹¹ the decision can neither be overturned nor politically punished.¹²

9. Indeed, Professors Dorf and Issacharoff explain the many years it required for the theory to be worked out. Dorf & Issacharoff, *supra* note 5.

10. 17 U.S. (4 Wheat.) 316, 330 (1819).

11. 377 U.S. 533 (1964).

12. In this respect, the decision appears similar to the pardons issued by President Clinton in the last hours of his final term of office. It would be consis-

Professors Dorf and Issacharoff's answer to this problem is criticism by the academy. Although the Supreme Court cannot be affected politically, it can be criticized—if not condemned (as it has been)—by the legal academy. My colleague Bruce Ackerman, not satisfied with mere condemnation, has gone further and recommended that the “punishment” consist of a refusal by the Senate to confirm any of President Bush's appointments to the Supreme Court, effectively reducing the membership of the Court if a currently sitting justice were to retire.¹³

Neither the academy's condemnation of the Supreme Court nor the Senate's reduction of the size of the Supreme Court through a refusal to confirm subsequent appointments, however, directly accords to the political process theory. There is no doubt that there is some level of “punishment” reflected in condemnation by the academy or by the Senate's refusal to confirm successor appointments. But the point of the political process theory is democratic accountability to the citizenry, not criticism or punishment in the abstract. To take an example from Professors Dorf and Issacharoff, the billboards raised in the South after *Brown* urging the impeachment of Earl Warren were surely criticism, perhaps punishment, but they could not be regarded as a triumph of political process.¹⁴ To the contrary, the point of the political process theory is to make certain that important political decisions and the political actors who make those decisions remain accountable in some way to the citizenry. Criticism by the academy or the Senate's refusal to confirm Supreme Court appointments does not in any serious way serve to make the Supreme Court politically accountable to the citizenry.

Academic criticism of the Supreme Court may damage egos, but the most probable response of the Court is simply to ignore the law reviews. Similarly, refusing to confirm President Bush's appointments to the Court may punish him politi-

tent with the political process theory to constrain a President to issuing pardons only in periods in which the President retains some subsequent political agenda through which he or she could be held accountable. See George L. Priest & Minor Myers III, *The Deeper Scandal Of The Clinton Pardons*, CHRISTIAN SCI. MONITOR, Feb. 26, 2001, at 9.

13. Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48.

14. Dorf and Issacharoff accept this point, see *supra* note 5, at 936, though their remedy of condemnation by the academy differs little.

cally, but he was not directly responsible for the Supreme Court's decision, and there remain other means of holding him politically accountable as President. Does refusing to confirm successor appointments punish those Justices who remain on the Court? Not very effectively; it may only serve to justify the Court's decisions to reduce its caseload.

The stronger argument is that the refusal to confirm appointments by President Bush will punish those Justices hoping to retire and be succeeded by persons with similar views.¹⁵ Some commentators have implied that this concern over succession motivated some of the five-person majority agreeing to the per curiam opinion.¹⁶ This remains an unsupported charge.¹⁷ It may well be true that a Justice considering retirement will calculate how the timing of the decision will affect subsequent Court membership. This consideration is probably more important on a Court—like the present Supreme Court—which has rendered so many decisions by a five-to-four vote.¹⁸ But there are serious limitations to the accusation. First, it is very difficult to predict the future decisionmaking of any Supreme Court appointee, as the unexpected attitudes of Justices Blackmun, Stevens, and Souter, among other recent appointees demonstrate. Moreover, even members of the current Court seem bound over some range by *stare decisis*;¹⁹ the threat to any Justice's prior jurisprudence is surely attenuated.

More importantly, however, this means of "punishing" retiring Justices has no clear relation to political accountability to the electorate. Again, the basic concept of the process theory is to allow the electorate to determine who is to be held politically accountable. Refusing to confirm President Bush's nominees puts political power in the hands of the electorate only in

15. Ackerman, *supra* note 13.

16. *Id.*

17. My colleague, Jack Balkin, who has forcefully argued this point, quotes an ambiguous remark by Justice O'Connor concerning the probable victor in Florida and a statement of her husband indicating that he thinks that she wants to retire, slim evidence for a claim of "coup." Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1440 n.98 (2001).

18. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2000).

19. See *Jones v. United States*, 529 U.S. 848 (2000) (opinion by Justice Ginsburg, who dissented in *Lopez v. United States*, 514 U.S. 549 (1995)) and *United States v. Morrison*, 529 U.S. 598 (2000) (holding that criminalization of arson of private residence was beyond the scope of Congress's Commerce powers).

the next election, in 2004, at which time it is not at all evident that resentment over the United States Supreme Court's handling of the 2000 Florida election will constitute a determinative issue in the campaign.

As a consequence, I believe that the Dorf and Issacharoff criticism of the United States Supreme Court in the *Bush v. Gore* drama on political process grounds fails. Neither criticism by the academy nor the refusal to confirm successor Justices constitutes accountability to the electorate. Moreover, as the remainder of this Part explains, it is substantially more difficult than Professors Dorf and Issacharoff allow to determine which actors in the *Bush v. Gore* drama most seriously interfered with the ability of the Florida electorate to hold political actors accountable for the outcome.

What exactly was the source of the harm to the political process and to democratic accountability from the various events of the disputed Florida election? What was the role of the United States Supreme Court in contributing to whatever democratic harm occurred? As we shall see, most of the criticism of the United States Supreme Court's role in the Florida election—including the criticism of Professors Dorf and Issacharoff—derives from examining the Court's actions as if the United States Supreme Court were the only political institution involved in the dispute. In contrast, when the actions of the United States Supreme Court are considered in light of the preceding actions of the Florida Supreme Court, to which the United States Supreme Court was necessarily responding, the criticisms must be substantially amended.

Toward this end, it is helpful to briefly review the events of the dispute. Florida election law, though not entirely without flaws, established a straightforward mechanism for evaluating disputed elections. According to Florida law, following an election, each county canvassing board²⁰ had seven days to report its election results to the Florida Secretary of State.²¹ Within that seven-day period, any candidate could “protest” the outcome in any county. Upon a “protest,” a sample was taken of the ballots in that county, and if the sample revealed evidence

20. A canvassing board is a committee appointed internally within each county to administer the election.

21. The procedures established by Florida election law are described in much greater detail in the next Part. The detail is unnecessary here for evaluating the Dorf and Issacharoff political process criticism.

of an "error in the vote tabulation" of sufficient significance to affect the outcome, a manual recount of all ballots within that county would be ordered. According to Florida law, if the manual recount were not or could not be completed within the seven-day period, the Secretary of State had discretion to ignore the recount—even if it had been partially completed—and certify the original vote. These features of the Florida election law are uncontroversial. What actually happened?

Following the November 7 election in which the original tally showed Governor Bush to be the winner, Vice President Gore filed a "protest" of the vote in three Florida counties. Samples of the ballots in those counties were taken and manual recounts were ordered. None of the manual recounts, however, could be completed within the seven-day statutory period. At the end of the seven-day period, on November 14, the Secretary of State, invoking the discretion afforded her by the statute, certified the original tally in favor of Governor Bush. The grounds that she gave for her decision to certify the original tally, instead of waiting for a completion of the manual recounts, might be questioned, but were surely plausible. She explained that, among other grounds, unless there were reasons for delayed reporting beyond the control of the county canvassing board—in effect, *force majeure* circumstances (hurricanes, floods, fires, etc.)—the seven-day recount period provided for in the statute should be binding. Again, this is a plausible exercise of discretion.²² According to the Secretary of State's discretionary application of the statute, certification should normally occur immediately after the seven-day period has run; certification can be delayed if events occur that are clearly beyond the control of the county canvassing board that impaired completion of any recount. Absent such concerns, the original tally should be certified. Of course, given the electoral results in the rest of the Nation, the effect of her certification of the original tally in favor of Governor Bush was to ensure Governor Bush's nationwide victory.

The next event in the dispute, however, was more dramatic. Suit was filed by the Palm Beach Canvassing Board

22. As explained in more detail in the next Part, Ms. Harris relied upon an internal Division memorandum interpreting the provisions of the statute. Her formulation of the grounds for delayed reporting was substantially broader than the Division staff had determined. For a more detailed discussion of these events, unnecessary for discussion here, see *infra* text accompanying note 39.

(essentially represented by Gore attorneys) challenging the various rulings of the Secretary of State. On November 21, the Florida Supreme Court upheld the challenge and entered an order in essence reversing Ms. Harris's decisions.²³ The Florida Supreme Court extended the November 14 deadline for completing the manual recounts to November 26. It also overruled the Elections Division by interpreting the grounds for ordering a manual recount—"error in vote tabulation"—to incorporate error by a voter in indicating his or her preference. Finally, the Florida Supreme Court stripped the Secretary of State of her discretion with respect to vote certification by ordering her to accept the results of the then-partial recounts, criticizing her "hyper-technical reliance upon statutory provisions."²⁴ The Florida Supreme Court supported this ruling by invoking broad principles of the Florida Constitution.

Although the subsequent details are not crucial for the discussion here,²⁵ *Bush v. Gore* represents a decision by the United States Supreme Court that, in effect, overturned these actions by the Florida Supreme Court. The question I wish to address is how should we evaluate these various decisions given the concerns of the political process theory? Professors Dorf and Issacharoff, among others, criticize the decision of the United States Supreme Court in *Bush v. Gore* as inconsistent with the political process theory. Can the criticism be fully defended?

To answer this question, I wish to move the analysis one level back. Let us first ask, is there a justification in the political process theory for the decision of the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris* to take the administration of the disputed election out of the hands of the Florida Secretary of State and to attempt to define the recount mechanism itself?

I think not. Indeed, I believe that the exact criticisms that Professors Dorf and Issacharoff have directed to the United States Supreme Court in *Bush v. Gore* are equally applicable to

23. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000).

24. *Id.* at 1227.

25. For a detailed discussion of the events between the Florida Supreme Court's decision in *Palm Beach County Canvassing Board v. Harris* and the United State Supreme Court's decisions in *Bush v. Gore I & II*, see *infra* text accompanying note 45.

the decisions of the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*.

The Florida Secretary of State is an elected official. Indeed, she is the officer elected as the State's chief supervisor of elections. The Florida election law, appropriately enacted, afforded her discretion to certify or not to certify the original tally following the seven-day reporting/protest period. She exercised that discretion on defensible grounds.

According to the political process theory, a court should decline to defer to the judgments of elected officials only where there appears some impediment to the exercise of subsequent political accountability. Is there some impediment here? Not in the slightest. As an elected official, the Secretary of State can be held subsequently accountable by the citizenry; she, or someone from her party, has to run for the office in the next election.²⁶ Similarly, and more generally, if the citizenry is unhappy with the procedures prescribed by the Florida election law, each Florida legislator can be held politically accountable in the next election and the election law amended or overturned. There is no evident source that might impair subsequent political accountability.

As a consequence, the exact criticisms directed by Professors Dorf and Issacharoff (and others) against the United States Supreme Court could and should be directed against the decisions of the Florida Supreme Court. There are no grounds under the political process theory for the Florida Supreme Court to suspend its normal deference to legitimate decisions of elected officials even if the Florida Court disagrees with them.²⁷

26. It might be argued following the discussion of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 330 (1819), that there is a political accountability problem in that the outcome of the Florida election determined the winner for the Nation, not just Florida, and that none of the non-Florida national electorate possessed a means of holding Florida officials, such as Ms. Harris, accountable. This is a mistaken analogy. The electoral outcome in Florida can only be determined by Florida citizens, not by citizens of other states. It was an artifact of timing and the closeness of both the national and Florida elections that Florida became the determinative battleground. This timing artifact cannot give citizens of other states any right to a voice in the outcome of the Florida election.

27. Justices on the Florida Supreme Court are subject to retention in a democratic election though this fact does not make them democratically accountable in exactly the sense of the political process theory. As Professors Dorf and Issacharoff insist, it is inconsistent with conceptions of an independent judiciary to presume that judges are or should be politically accountable for individual decisions in the manner of legislators or other political officials. Dorf & Issacharoff, *supra* note 5. Thus, that some Justices of the Florida Supreme Court may later

There, of course, is one principal difference between the respective positions of the Florida and United States Supreme Courts. The Florida Supreme Court's opinions remain subject to Constitutional review by the United States Supreme Court. But if we view the Florida Supreme Court's decision to wrest control of the election process from the Secretary of State as, in some sense, anti-democratic and, thus, inconsistent with the political process theory, how should we evaluate the decision of the United States Supreme Court to overrule the Florida Court's decisions?

The United States Supreme Court's decision in *Bush v. Gore*, in essence, restored the democratic accountability central to the political process theory by reinstating the discretionary decision of the Secretary of State. Admittedly, the United States Supreme Court did not justify its decision in these terms and, surely, the Court can be faulted for an inexpressive and not fully worked out opinion, however drafted under conditions resembling emergency. But the criticisms of Professors Dorf and Issacharoff are not simply that the Court's opinion is weak or inconsistent or, even, shallow. Instead, they claim that the Court's decision violated the standards of political process by arrogating to themselves—not to democratically elected officials—decisionmaking power over the election. This criticism, I believe, is wrong.

As will be explained in more detail in the next Part, the set of events leading up to *Bush v. Gore* can best be understood as a battle between two courts over the mechanisms of control of the election process in Florida. The Florida Supreme Court—to my mind, in a manner totally contrary to the political process theory—claimed through its decisions that it, not the elected Secretary of State, should make the determinative political judgment as to how the Florida election process was to be managed. Although the Florida Supreme Court claimed to find a basis in the Florida Constitution for this ruling, it is very difficult to assert that the Secretary of State's exercise of discretion was lawless or otherwise constitutionally suspect.

The United States Supreme Court overruled the Florida Supreme Court's various decisions toward this end. In doing so, however, the United States Supreme Court made definitive

stand for reelection—or may not—does not provide political accountability to the citizenry in the democratic sense.

the earlier decisions of the elected Secretary of State. Thus, substantively, the decisions of the United States Supreme Court—not of the Florida Supreme Court—are most consistent with the political process theory. In *Bush v. Gore*, the United States Supreme Court reinstated control over the Florida election process to the democratically elected official politically accountable for those decisions, control that had been wrested from that official by the Florida Supreme Court. As a consequence, the United States Supreme Court in *Bush v. Gore* restored to the citizens of Florida the power to hold politically accountable the official responsible for determining how the election was to proceed. By restoring the discretion that the Florida election statute gives to the democratically elected and democratically accountable Secretary of State, the United States Supreme Court achieved an ultimate result in the case much closer to the ambitions of democracy and the political process theory than otherwise would have occurred.

II. JUDICIAL OVERREACHING: *BUSH V. GORE* AS A CONSTITUTIONAL COUP

Far more damning than the criticism that the United States Supreme Court acted in ways inconsistent with political process norms is the accusation that the Court engineered the stealing of the election in favor of Governor Bush more directly: that the Court's decisions that, in essence, guaranteed Governor Bush's Florida victory, constituted a Constitutional "coup." Perhaps the most prominent (more accurately, notorious) statement to this effect is the public protest of "673 Law Professors" who proclaim,

[W]e all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were acting as political proponents for candidate Bush, not as judges.

It is Not the Job of a Federal Court to Stop Votes From Being Counted.

By stopping the recount in the middle, the five justices acted to suppress the facts Suppressing the facts to

make the Bush government seem more legitimate is the job of propagandists, not judges.

By taking power from the voters, the Supreme Court has tarnished its own legitimacy . . . [W]e protest.²⁸

Although the statement is not specific, the claim seems to be that two decisions of the Court—on December 9 (*Bush v. Gore I*), to stay the continuing recount that the Florida Supreme Court had ordered the previous day; and on December 12 (*Bush v. Gore II*), to terminate it—were both illegitimate and constituted a seizure of power in which the Court substituted its preference for the election of Governor Bush in place of the choice of Florida voters. This point is reinforced by the use of the terms “taking power” or “coup.”²⁹ Such terms imply that, in its various decisions, the United States Supreme Court asserted its authority illegally in wresting decision making power from those actors who possessed legally legitimate authority for determining the outcome of the election. To make the point, the 673 Law Professors contrast the decisions of the United States Supreme Court to the purported choices of Florida’s voters. No one doubts that Florida’s voters possess the rightful authority to determine the winner of the Florida election. And if the only actors in the drama were the United States Supreme Court and Florida’s voters, the claim of “coup” might possess some plausibility. Once again, however, the claim ignores the role of other institutional actors in the Florida election, in particular, the Florida Secretary of State and the Florida Supreme Court.

In order to appropriately evaluate the nature of the alleged “coup” by the United States Supreme Court, it is necessary to examine the underlying decisions of the Florida Supreme Court, which the United States Supreme Court overturned. It is also necessary to examine, in turn, the actions of Katherine Harris, the Florida Secretary of State, which the Florida Supreme Court overturned. One can accuse the United States Supreme Court of a Constitutional coup only if one can defend

28. 554 *Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7, available at 673 *Law Professors Say*, <http://www.the-rule-of-law.com/statement.html>.

29. It is my colleague, Bruce Ackerman, not quite the 673 Professors, who claim the Court executed a “coup.”

without reservation the legitimacy of the decisions of the Florida Supreme Court overruling the Secretary of State.

Toward this end, it is helpful to briefly review the sequence of the background events leading to the respective decisions of the Florida and United States Supreme Courts:³⁰

1) The election was held on Tuesday, November 7, 2000.

2) The next day, Wednesday, November 8, the Florida Division of Elections reported that Governor Bush had prevailed over Vice President Gore by 1,784 votes. According to Florida statute, given that small margin, an automatic machine recount was conducted³¹ reaffirming Governor Bush's victory, but by a smaller margin.

3) The following day, November 9, the Florida Democratic Executive Committee requested manual recounts in Broward, Palm Beach, and Volusia Counties. The statute vests discretion in each county canvassing board as to whether to conduct a manual recount. If a board chooses to proceed, the statute provides that it first conduct a sample recount to determine whether there is evidence of "error in the vote tabulation, which could affect the outcome of the election."³² If it finds such evidence, the statute provides that the board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.³³

Procedures (a) and (b), above, obviously relate to errors caused by machine or software failures. There was no complaint that the voting machines did not operate as they were designed.³⁴ That left procedure (c), the manual recount. Pursuant to the statute, the canvassing boards of these counties conducted a

30. This history is related by the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220, 1225-27 (Fla. 2000).

31. FLA. STAT. § 102.121(4) (2000).

32. FLA. STAT. § 102.166(5) (2000).

33. FLA. STAT. § 102.166(5)(a)-(c) (2000).

34. There were, of course, serious complaints that the machines were ill-designed to deal with (1) under-votes (where the machine read no vote for, say, a Presidential candidate but had recorded votes for lesser officials; the complaint here was that the machine was insufficiently sensitive to a voter's failed effort to completely perforate the ballot); and (2) over-votes (where the machine had read the ballot as voting for more than one candidate for President but some more careful interpretation was possible).

sample manual recount and concluded that there was a sufficient increase in votes for Vice President Gore to justify a full manual recount. At the same time, there was some uncertainty as to what the term "error in the vote tabulation" meant. The Chair of the Palm Beach Canvassing Board requested an opinion from the Director of the Elections Division as to how the statutory term was to be defined.

4) The Florida election statute also provides that each county board must certify returns no later than seven days after the election,³⁵ in this case, November 14. Fearing that a comprehensive manual recount could not be completed by that date, the Chair of the Palm Beach County Board requested a separate advisory opinion from the Elections Division as to what the consequences were if the manual recount in Palm Beach extended past the November 14 deadline. The Florida statute itself does not explicitly provide for exceptions to the deadline. It states, however, in section 102.112, that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department."³⁶

5) The Elections Division responded to these various requests for interpretive opinions on Monday, November 13. First, in answer to the Palm Beach request as to the meaning of "error in the vote tabulation," the Division reported that the term meant machine or software tabulation error only.³⁷ On

35. Upon penalty to members of the canvassing board. FLA. STAT. § 102.111(1) (2000).

36. FLA. STAT. § 102.112 (2000). Note that the preceding section 102.111 states inconsistently, "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified." (emphasis added). In its November 21 opinion in *Palm Beach County Canvassing Board v. Harris*, the Florida Supreme Court made much of the inconsistency between the term "may be ignored" in section 102.112 and "shall be ignored" in section 102.111, emphasizing the incoherence of the statute as a grounds justifying the Court's intervention. 772 So. 2d at 1233-34. The Court's discussion seems disingenuous since the term "may be ignored" of section 102.112 surely trumps the "shall be ignored" of section 102.111. The Court's labored discussion of this easily-resolved inconsistency appears (to this reader) as a pretext to justify the Court's broad reinterpretation of the statute.

37. According to the Division, "[a]n 'error in the vote tabulation' means a counting error in which the vote tabulation system fails to count properly marked marksense or punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four pre-

this point, the Elections Division separately responded to a similar inquiry from the Chair of the Florida Republican Party, expressly rejecting the proposition that a failure of a voter in marking or punching the ballot qualified: "The inability of a voting systems [sic] to read an improperly marked marksense or improperly punched punchcard ballot is not a [sic] 'error in the vote tabulation' and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102.155(5)(a) through (c)."³⁸

Second, with respect to the question as to whether there could be an exception to the November 14 deadline if the manual recount could not be completed, the Elections Division reported that the only grounds for exception were unforeseen circumstances like a natural disaster that made compliance with the deadline impossible.

[I]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at the time may be certified by the department. This section contemplates unforeseen circumstances not specifically contemplated by the legislature. Such unforeseen circumstances might include a natural disaster such [sic] Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections in that the law provides for automatic recounts, protests, and man-

cincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes." DE 00-13, Manual Recount Procedures and Partial Certification of County Returns, Nov. 13, 2000, L. Clayton Roberts, Director, Division of Elections, *available at* http://election.dos.state.fl.us/opinions/de2000/de00_13.html.

38. DE 00-11, Definitions of Errors in Vote Tabulation, Nov. 13, 2000, L. Clayton Roberts, Director, Division of Elections, *available at* http://election.dos.state.fl.us/opinions/de2000/de00_11.html. A similar Advisory Opinion was issued in response to a request by the Chair of the Broward County Supervisor of Elections: "Voter error in not an 'error in the vote tabulation.'" DE 00-12, Manual Recount Procedures, Nov. 13, 2000, L. Clayton Roberts, Director, Division of Elections, *available at* http://election.dos.state.fl.us/opinions/de2000/de00_12.html.

ual recounts. It also plainly states when this process must end.³⁹

6) Later that day, Monday, November 13, Katherine Harris, the Florida Secretary of State (a Republican and co-chair of the Florida Bush campaign), issued a statement indicating that, on the basis of the Division's Advisory Opinion and upon the authority of section 102.112,⁴⁰ she would ignore all returns received after 5:00 P.M. on November 14.

7) Following Ms. Harris's statement, the Volusia County Canvassing Board joined by the Palm Beach Board and Vice President Gore sought declaratory and injunctive relief before a Leon County Court, asking the Court to declare that the county canvassing boards were not bound by the November 14 deadline and barring the Secretary of State from ignoring subsequently submitted election returns.

8) The next day (the date of the statutory deadline), November 14, the Leon County Court ruled that the November 14 deadline was mandatory, but that Volusia County could subsequently submit amended returns, and that the Secretary of State was afforded discretion under section 102.112⁴¹ as to whether to accept or ignore any amended returns. By the 5:00 P.M. deadline, all counties had submitted returns.

9) On the day following the deadline, November 15, the Secretary of State sent a letter to the various county election supervisors requesting them to submit to her any grounds that they thought might justify a subsequent amendment of the vote counts that had been certified by the November 14 deadline. In her letter to the county boards, she set forth three criteria that she concluded, pursuant to her discretion, would justify post-deadline amendment: proof of fraud; substantial non-compliance with election procedures; or the intervention of acts of God or other circumstances beyond the control of the canvassing board that prevented reporting by the deadline.⁴² Her letter provided supporting legal authority for each of these criteria. Her letter went substantially beyond the single grounds

39. DE 00-10, Deadline for Certification on County Results, Nov. 13, 2000, L. Clayton Roberts, Director, Division of Elections, available at http://election.dos.state.fl.us/opinions/de2000/de00_10.html.

40. FLA. STAT. § 102.112 (2000).

41. *Id.*

42. The text of the Harris November 15 letter appears in *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220, 1226-27 n.5 (Fla. 2000).

for exception—unforeseen circumstances such as a natural disaster—given in the Election Division’s November 13 Advisory Opinion DE 00-10. Natural disaster was one ground of exception, according to Ms. Harris, but she presented two additional grounds.

10) Four counties submitted statements in response to the Harris letter. The same day, November 15, the Secretary of State announced that none of the reasons given by the counties in these statements qualified for exception according to the criteria announced in her letter and that, therefore, she would not accept amended returns. She indicated that the vote totals certified in compliance with the November 14 statutory deadline would stand, to be adjusted only by the results from overseas absentee ballots which, by stipulation with federal authorities, could be counted if received by November 17.⁴³

11) Finally, on November 16, the Florida Democratic Committee along with the Vice President sought an order compelling the Secretary of State to accept amended returns. Pursuant to Florida procedure, the trial court certified the issues in the underlying litigation to the Florida Supreme Court and enjoined the Secretary of State from certifying the results of the Florida election until the appeal was decided.

The certified case was resolved by the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*, issued on November 21.⁴⁴ The Court began its analysis by stating that the most important principle for determining how the election recounts should proceed was vindicating “the will of the people.”⁴⁵ In the Court’s words, “the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.”⁴⁶ Later in the opinion, invoking a provision of the Florida Constitution that states

43. The State of Florida had entered an agreement after a federal suit that it would accept absentee ballots from overseas voters if received no later than ten days after the election. The Florida Supreme Court also made much of the three-day difference and of the unwillingness of the Secretary of State to accept amendments following the seven-day deadline provided in the statute notwithstanding the ten-day deadline established by the federal settlement. The Elections Division, however, had adamantly advised of the strictness of the November 14 deadline. DE 00-10, *supra* note 39 (“It [the statute] also plainly states when this process must end.”). The State’s settlement of the federal suit, of course, could not effect a general amendment of the election statute.

44. 772 So. 2d 1220 (Fla. 2000).

45. *Id.* at 1227.

46. *Id.* This quotation appears in a Section entitled “Guiding Principles.”

that “all political power is inherent in the people,”⁴⁷ the Court added that “technical statutory requirements must not be exalted over the substance of this right.”⁴⁸

Applying these principles, the Florida Supreme Court ruled that

1) The Department of Elections’ Advisory Opinion DE 00-13 defining “error in vote tabulation” to exclude voter error in punching the ballot was wrong as a matter of law. County boards possessed the authority to manually review wrongly punched ballots to determine “the will of the voter”,⁴⁹

2) The criteria announced by the Secretary of State for the exercise of her statutory discretion to accept amended returns were improper. The Court ordered the Secretary to accept amended returns unless “their inclusion [would] compromise the integrity of the electoral process”,⁵⁰

3) The county canvassing boards could continue manual recounts regardless of the November 14 deadline and, indeed, could have until November 26, to submit amended returns.⁵¹

Following this ruling, the manual recount resumed. Various disputes arose within individual counties as to what the standard should be for determining “the will of the voter,” especially with respect to under-vote ballots—ballots which the machines read as having no vote for President, but which indicated votes for other positions (the single chad or dimpled chad issue). As the new November 26 deadline approached, the canvassing board in Miami-Dade County concluded that it could not complete the recount even within the extended period, and halted recounting with approximately 9,000 under-votes not reviewed. On November 26, the various counties amended their certified returns. The new totals showed Governor Bush again the victor, but now by only 537 votes.⁵²

The drama, however, was not over. The Florida election statute allows a candidate to “contest” the certified total to determine whether the Canvassing Commission⁵³ has included in

47. *Id.* at 1236 (citing FLA. CONST. art. I, § 1).

48. *Id.* at 1236–37.

49. *Id.* at 1227.

50. *Id.* at 1239.

51. *See id.* at 1240.

52. *See Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

53. The Florida Canvassing Commission is a three-person committee charged to report the final certified totals. Its members are the Governor, the Secretary of State, and the head of the Department of Elections. Because the

the certified total any number of "illegal votes" or has failed to include "a number of legal votes sufficient to change or place in doubt the result of the election."⁵⁴ On November 27, Vice President Gore filed a complaint in Leon County contesting Governor Bush's 537 vote margin. The Leon County Court held an evidentiary hearing on December 2 and 3, and entered an oral order denying Gore relief on December 4.⁵⁵

As these events occurred, the Florida Supreme Court's November 21 decision in *Palm Beach County Canvassing Board v. Harris* was appealed to the United States Supreme Court. The United States Supreme Court issued its ruling on the appeal on the same day that the Leon County Court denied Vice President Gore's contest, December 4. In *Bush v. Palm Beach Canvassing Board*,⁵⁶ the United States Supreme vacated the Florida Supreme Court's opinion, and remanded the case to the Florida Court for further consideration. Presumably, from concerns about comity, respect for the state court, or sensitivity to the state supreme court authority, the United States Supreme Court indicated only that it had concluded "that there is considerable uncertainty as to the precise grounds for the [underlying] decision."⁵⁷ At the same time, however, the Court listed several substantive issues that it believed that the Florida Supreme Court had not adequately considered: (1) the United States Constitution Article II delegation to the Florida Legislature of the right to direct how electors are chosen; (2) the safe harbor provisions of 3 U.S.C. § 5; or (3) what constitutional or statutory grounds there were for the Florida Court's extension of the "7-day deadline . . . by 12 days."⁵⁸

The Florida Supreme Court chose to hear the appeal of the Leon County Court's denial of the Gore contest of the vote total certified on November 26, prior to readdressing the case remanded by the United States Supreme Court.⁵⁹ The Florida

Florida Governor was the brother of the Republican Presidential candidate, he recused himself and was replaced by the Florida Secretary of Agriculture. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1230 n.17 (Fla. 2000). The Secretary of State, Katherine Harris, spoke for the Commission.

54. FLA. STAT. § 102.168(3)(c) (2001).

55. See *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

56. No. 00-836, slip op. (U.S. Dec. 4, 2000).

57. *Id.* at 6 (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940)).

58. *Id.* at 4-7.

59. Hearing the Leon County Court appeal first allowed the Florida Supreme Court to order the resumption of the recounting of the Miami-Dade returns

Supreme Court ruled on the Gore contest on December 8, in *Gore v. Harris*,⁶⁰ largely, though not entirely, overruling the Leon County Court. First, the Florida Supreme Court overruled the County Court's rejection of 215 Gore votes from Palm Beach County and of 168 Gore votes from Miami-Dade County, but affirmed the addition of fifty-one Bush votes from Nassau County.⁶¹ Through these rulings, Governor Bush's November 26 margin of 537 votes was reduced to a margin of 205. More importantly, however, because it kept the election undetermined, the Florida Supreme Court ordered the trial court to itself examine the 9,000 votes from Miami-Dade County which the Miami-Dade election officials had declined to count because of the impending November 26 deadline.⁶² At the same time, the Florida Supreme Court ordered a statewide recount of all under-votes, not just the 9,000 from Miami-Dade County.⁶³

While the Florida Supreme Court's opinion in *Palm Beach County Canvassing Board v. Harris* had been unanimous, *Gore v. Harris* was a four-to-three decision. Chief Justice Wells issued an extraordinary dissent that is worth reviewing because, in my view, it was likely to have been highly influential with the majority of the United States Supreme Court in its ultimate decision in *Bush v. Gore II*. Though Chief Justice Wells stated that he did "not question the good faith or honorable intentions of my colleagues in the majority," he also concluded that:

[T]o return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and

and the extension of recounting to the entire state. As a matter of judicial economy, it surely would have seemed more prudent to address first the questions raised by the United States Supreme Court, another ground for suspicion of the Florida Supreme Court's motives.

60. 772 So. 2d 1243 (Fla. 2000).

61. *Id.* at 1248.

62. *Id.* at 1262.

63. *Id.* The Court also affirmed the rejection of 3300 Palm Beach votes alleged to favor Gore, but which the Palm Beach County Canvassing Board had refused to certify. *Id.* at 1248.

objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates.

Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.⁶⁴

Chief Justice Wells was particularly concerned about the ruling ordering a new statewide manual recount of under-votes:

I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide recount. To the contrary, I find the majority's decision in that regard quite extraordinary.⁶⁵

The Chief Justice repeatedly insisted that the Florida Court had not set forth any standards or procedures for recounting the under-votes:

[S]ection 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.⁶⁶

[T]he majority returns this case to the circuit court for a recount with no standards. . . . It only stands to reason that

64. *Id.* at 1263 (Wells, C.J., dissenting).

65. *Id.* at 1265.

66. *Id.* at 1267.

many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.⁶⁷

Chief Justice Wells also expressed serious concerns that the Florida Supreme Court's interpretation of the election statute violated Article II's delegation of authority to determine the manner of choosing electors to the Legislature and about the implications of the continuing recount with respect to Florida's qualification for the 3 U.S.C. § 5 safe harbor.⁶⁸

Gore v. Harris was decided by the Florida Supreme Court on December 8, and immediately appealed to the United States Supreme Court. What the United States Supreme Court did after December 8, has led to the charges of "taking power" and "coup." First, on December 9, the day after the Florida Supreme Court ordered the additional Miami-Dade and statewide recount of under-votes, the United States Supreme Court stayed that order.⁶⁹ Again, the recounting stopped. On December 11, the Florida Supreme Court released its revised opinion in *Palm Beach County Canvassing Board v. Harris*,⁷⁰ the case remanded by the United States Supreme Court, affirming each of its earlier conclusions, but removing its expansive discussion of the Florida Constitution. Finally, the United States Supreme Court released *Bush v. Gore II* on December 12, reversing the Florida Supreme Court's order of the additional recount of under-votes and determining that no time remained for principled recounting, effectively awarding the election to Governor Bush.⁷¹

Given this sequence of events, how should we characterize the United States Supreme Court's actions? Do they reflect, as

67. *Id.* at 1269.

68. *Id.* at 1268-69.

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

70. 772 So. 2d 1273 (Fla. 2000). Chief Justice Wells dissented on the ground that the decision should wait until review of *Bush v. Gore II* by the United States Supreme Court. *Id.* at 1292.

71. *Bush v. Gore*, No. 00-949, slip op. (U.S. Dec. 12, 2000).

charged, naked partisanship, a “taking” of power, a “Constitutional coup”?

Charges of that nature seem strained. In retrospect, there were strong reasons to suspect that a majority of the Florida Supreme Court (each of whose members were Democrats) were, themselves, pressing Florida law to keep open the possibility that some manner of further recounting would generate enough new “votes” to secure the election for Vice President Gore.

The Florida Supreme Court had been, to put the point mildly, aggressive in its interpretation of the Florida election statute. First and most importantly, in *Palm Beach Canvassing Board v. Harris*, it had overruled, not the Secretary of State’s, but the Division of Elections’ various Advisory Opinions limiting the interpretation of the term “error in the vote tabulation” to machine error, not voter error. This decision was crucial to the entire drama because it transformed the recount from a machine reading which could be completed immediately (and which, presumably, could not be easily manipulated, but which would guarantee victory for Governor Bush) into a county-by-county subjective determination of voter intent with an uncertain outcome. In addition, in the same opinion, the Florida Supreme Court overruled the discretion that the statute afforded to the Secretary of State with respect to amended returns, and unilaterally extended the statutory deadline by twelve days. In its next opinion, *Gore v. Harris*, the Court added a net 332 Gore votes, ordered the Leon County Court to count the 9,000 Miami-Dade votes that the Miami-Dade Canvassing Board had declined to count, and out-of-the-air ordered a statewide recount of under-votes.

Some have defended these various rulings of the Florida Supreme Court as efforts to rein in the partisanship of the Republican Secretary of State, Katherine Harris.⁷² Harris was in an unfortunate position as a Republican and, especially, having served as co-chair (with the Presidential candidate’s brother, the Florida Governor) of the Florida Bush campaign. It surely would have been wiser for her to recuse herself from any decisionmaking with respect to the election, though she, in turn, may have felt it necessary to stay in control in order to rein in what she might have seen as the partisan decisions of the De-

72. See Ackerman, *supra* note 4.

mocratic canvassing boards in Palm Beach, Broward, and Volusia Counties.

Moreover, she was not the author of the Advisory Opinions that the Florida Supreme Court overruled. The civil service Division staff—not Ms. Harris—had generated the various Advisory Opinions defining the term “error in the vote tabulation,” interpreting the deadline, and determining the criteria for the acceptance of amended county returns.⁷³ The Florida Supreme Court insinuated partisan impropriety in Ms. Harris’s announcement on November 13, the day before the deadline, that she would refuse to accept returns or amendments submitted after the deadline.⁷⁴ Perhaps her announcement was totally partisan. But it is not inappropriate for a public officer to announce in advance the manner in which she expects to exercise her discretion, especially where the individual county canvassing boards may have been exerting great effort in conducting manual recounts that could not be completed by the November 14 deadline. Moreover, the position she announced only mirrored the determination by the Department of Elections in Advisory Opinion 00-13 which had been published earlier that day. And the final criteria that she applied (following the order of the Leon County Court) were substantially more expansive than the single natural disaster exception interpreted by the Elections Division staff.

The claim of “Constitutional coup” has been buttressed by the assertion that the grounds upon which the United States Supreme Court overruled the Florida Supreme Court were a pretext. In *Bush v. Gore II*, the United States Supreme Court reversed the order mandating a statewide recount invoking Article II of the Constitution, the Equal Protection Clause, and the ambition of the Florida Legislature to comply with the safe harbor provisions of 3 U.S.C. § 5. These grounds seem hardly pretextual. The Article II ground is serious because there were good reasons to believe that the Florida Supreme Court was interpreting the election statute enacted by the Florida Legislature in totally unknown and unexpected ways. The Florida Court began its opinion in *Palm Beach Canvassing Board v.*

73. Although each of these Advisory Opinions is signed by L. Clayton Roberts, the Director of the Division of Elections, each indicates that the text of the opinion was prepared by Kristi Reid Bronson, Assistant General Counsel.

74. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1226, 1238 (Fla. 2000).

Harris with the extraordinary statement, “the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.”⁷⁵ Similarly, at a later point in the opinion, the Court stated, “[t]echnical statutory requirements must not be exalted over the substance of this right” (guaranteeing political power to “the people”).⁷⁶ It is not implausible to interpret these statements as indicating that the Florida Supreme Court was ready to enforce its definition of “the will of the people” without regard to the statutory election rules enacted by the Florida Legislature, in violation of the Article II delegation of authority to determine the method of choosing Presidential elections: “in such a manner as the Legislature [of each state] shall direct.”⁷⁷

The United States Supreme Court has been particularly excoriated for its December 9 ruling in *Bush v. Gore I* staying the continuation of the Miami-Dade and statewide recounts.⁷⁸ The claim here is that it represents bad faith for the United States Supreme Court to conclude on December 12, in *Bush v. Gore II* that there is insufficient time for a further recount when the Court itself had halted recounting three days earlier in *Bush v. Gore I*.

The December 9 ruling by the United States Supreme Court was without opinion. Justice Scalia issued a concurring opinion which, given the emergency nature of the proceeding, was probably unwise.⁷⁹ In his concurrence, he presented two reasons justifying the stay. The first was that the counting of votes of questionable legality threatened irreparable harm to Governor Bush “by casting a cloud upon what he claims to be the legitimacy of his election.”⁸⁰ This is the statement condemned in the protest of the 673 Law Professors,⁸¹ and it is difficult to defend. Where time is of the essence, as it obviously was with respect to a recount, even if the later totals were subsequently ruled unavailable because of the statutory deadline, continuing to count could not cause harm in any serious way.

75. *Id.* at 1227.

76. *Id.* at 1236–37.

77. U.S. CONST. art. II, § 1, cl. 2.

78. See 554 *Law Professors Say*, *supra* note 28.

79. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000). Justice Scalia defended the concurrence as a necessary response to Justice Stevens’ dissent, joined by Justices Souter, Ginsburg, and Breyer, which challenged the showing of irreparable harm.

80. *Id.*

81. See 554 *Law Professors Say*, *supra* note 28.

The second reason given by Justice Scalia, however, is more telling and, in fact, illustrates a problem with the recount procedure that was more serious than Justice Scalia may have recognized. Justice Scalia indicated that another issue in the case was the varying county standards for determining the will of the voter from examining under-votes—the dimpled chad, hanging chad, equal protection issue. Justice Scalia concluded that “permitting the count to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate.”⁸² This is an important point. I have substantial experience with empirical studies in many different contexts.⁸³ It has been my experience (and I would expect, the experience of every other empirical worker) that any empirical counting conducted prior to determining the final standard for the count must usually be abandoned and the counting begun again from the start once the appropriate standard is determined. This means that, even if the Florida Supreme Court were later to announce a standard for determining “the will of the voter” in the context of a punchcard under-vote, each canvassing board would have to begin the recount again once the standard were announced.⁸⁴ As a consequence, no time was lost by virtue of the United States Supreme Court’s December 9 stay. That the counting process itself led to degradation of the ballots only reinforces the conclusion.⁸⁵

Finally, the strongest grounds refuting the claim that the United States Supreme Court stole the election for Governor Bush or engaged in a Constitutional coup is that its December

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

83. See e.g., George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297 (1981); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1 (1984); George L. Priest, *Measuring Legal Change*, 3 *J.L. ECON. & ORG.* 193 (1988).

84. The counting issue might have been different if each canvassing board had recorded upon its review of each ballot what the chad condition of the ballot was. Then, once a standard were announced, the appropriate total could be reconstructed. Without this procedure, however, recounting would have to begin anew after announcement of the standard. No county board, of course, was counting the ballots in such a manner.

85. The stronger and more plausible defense of the December 9 stay is that a majority of the Court recognized the persuasiveness of Justice Wells’ dissent, though they suspended final judgment until briefing and argument.

12 opinion in *Bush v. Gore II* so closely tracks the dissent of Chief Justice Wells (a Democrat) in *Gore v. Harris*. Every proposition upon which the majority of the United States Supreme Court defended halting the recount appears first in Chief Justice Wells' dissenting opinion. Chief Justice Wells states that there is no legal basis for the Florida Supreme Court to order the statewide recount of under-votes.⁸⁶ Chief Justice Wells raises the Article II⁸⁷ and equal protection claims.⁸⁸ Many have criticized the United States Supreme Court for emphasizing the 3 U.S.C. § 5 safe harbor provision, arguing that the Court should have remanded the case to the Florida courts to allow them—or the Florida Legislature—to determine how important to them the federal safe harbor provisions were. But Chief Judge Wells in his dissent emphasizes those provisions, and argues that they provide strong reasons to halt the recounting immediately.⁸⁹ Finally, it is Chief Justice Wells who first raises the issue of Constitutional crisis and who, in his dissent, warns his colleagues that crisis is upon them unless they stop the recounting, necessarily leaving Governor Bush the victor.⁹⁰

As a consequence, the strongest defense to the claim that the five-person, conservative, Republican majority of the United States Supreme Court acted as partisans, seized power, or executed a Constitutional coup is that the Chief Justice of the Florida Supreme Court, a Democrat, seems to be the architect of the coup. There is not an argument in favor of cutting off the Florida recount in the United States Supreme Court's opinion in *Bush v. Gore II* that was not presaged by Chief Justice Wells' dissent in *Gore v. Harris*.⁹¹ This is a very peculiar form of political coup.

86. *Gore v. Harris*, 772 So. 2d at 1263, 1265.

87. *Id.* at 1268.

88. *Id.* at 1269.

89. *Id.* at 1268–69.

90. *Id.* at 1263.

91. Chief Justice Wells' views on these issues were again signaled in the Court's treatment of the remand of *Bush v. Gore II* from the United States Supreme Court. The United States Supreme Court remanded the case on December 12, as is typical, "for further proceedings not inconsistent with this opinion." 531 U.S. 98, 111 (2000). On December 22, 2000, the Florida Supreme Court issued a *per curiam* opinion which stated, self-servingly, that its December 8 decision in *Gore v. Harris* (the case overruled in *Bush v. Gore II*) had established a clear standard for the recount—whether there was a "clear indication of the intent of the voter"—that was the equivalent of the standard established by the Florida

CONCLUSION

It is common—perhaps traditional—in United States Supreme Court scholarship to focus solely on the texts of Supreme Court opinions, ignoring the opinions and judgments of those lower federal and state courts who face the same issues at earlier points. This practice or tradition surely derives from the conclusion that, after the United States Supreme Court speaks, all that has gone before is irrelevant.

In all great political dramas, however, there are many actors. Often, it is difficult to understand the actions of one without understanding the actions of the others with whom the one—here, the United States Supreme Court—must interact. Though one might criticize the United States Supreme Court for the results in the *Bush v. Gore* drama, in my view the principal criticism is that it has not, to date, fully explained all that it was taking into account in its decisions. It is abundantly clear, however, that the United States Supreme Court's opinion in *Bush v. Gore II* cannot be understood fully without examining the role of the Florida Supreme Court and, surely, cannot be understood without appreciating the influence of Chief Justice Wells' dissent in *Gore v. Harris*.

Legislature. The opinion mentioned that the United States Supreme Court had ruled that there was not sufficient time to define a more precise standard for ballot review, and then commented:

upon reflection, we concluded that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature. *Gore v. Harris*, 772 So. 2d 524, 526 (Fla. 2000). Pointedly, Chief Justice Wells separately concurred "only in the result," implicitly criticizing the majority's hypocritical and self-serving explanation of its decisions. *Id.* at 527.

