1-1-2002

Article II and the Florida Election Case: A Public Choice Perspective

Michael L. Wells
University of Georgia School of Law, mwells@uga.edu

Jeffry M. Netter
University of Georgia Terry College of Business

ARTICLE II AND THE FLORIDA ELECTION CASE: A PUBLIC CHOICE PERSPECTIVE

MICHAEL L. WELLS*
JEFFRY M. NETTER**

> [T]he very principle of constitutional government requires it to be assumed, that political power will be abused to promote the particular purposes of the holder; not because it is always so, but because such is the natural tendency of things, to guard against which is the special use of free institutions.
>
> John Stuart Mill[1]

This Article puts aside the equal protection rationale on which the majority relied in *Bush v. Gore*.[2] We share Richard Epstein's view that "[a]ny equal protection challenge to the Florida recount procedure quickly runs into insurmountable difficulties."[3] In our view there is a more compelling argument to support the ruling. It begins with Chief Justice Rehnquist's concurring opinion, which focused on Article II, Section 1, Clause 2, of the United States Constitution.[4] Clause 2 provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct" electors for President and Vice President.[5] The critical issue in *Bush* was whether the Supreme Court of Florida's interpretations of the Florida election statutes violated this provision, not whether it violated the Equal Protection Clause.

Rushed for time, none of the Justices addressed this novel constitutional issue in a systematic way.[6] Though the concurring and dissenting opinions in *Bush* disagree sharply on the merits of the underlying case, they appear to share a common premise as to how Article II ought to be interpreted. Both agree that Article II assigns

---

* University of Georgia School of Law.
** University of Georgia, Terry College of Business.

1. 19 JOHN STUART MILL, *Considerations on Representative Government*, *in* COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON POLITICS AND SOCIETY 505 (J.M. Robson ed., 1977).

2. 531 U.S. 98, 110 (2000) (per curiam).

3. Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 614 (2001); *see also* Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001) (asserting that the "embarrassingly weak" equal protection holding "had no basis in precedent or in history").

4. *Bush*, 531 U.S. at 111-15 (Rehnquist, C.J., concurring).

5. U.S. CONST. art. II, § 1, cl. 2.

6. Our analysis concentrates on the reasoning of the various opinions, and does not attempt to explain why the Justices may have written their opinions the way they did.

the task of making presidential election rules to the legislature and forbids state courts from taking that power for themselves.[7]

While we begin with the Chief Justice's emphasis on Article II, we do not endorse his "state separation of powers" reasoning. In Part I we argue that it is a mistake to treat Article II as a device for protecting state legislatures from state courts. The problem with this interpretation of Article II is that state legislatures have ample means to protect themselves without the assistance of the federal courts. Part II makes the case for an alternative, novel reading of Article II, one that is not developed in the opinion of any of the Justices nor in the scholarly commentary that has appeared in the wake of the decision. In this alternative view, Article II serves as a guarantee that election rules are put in place *before* the election, so as to minimize the problem of self-dealing by partisan officials (whatever posts they hold) who know how their rulings will affect the outcome. Part III applies this principle to the Florida election case and defends the United States Supreme Court's ruling.

I. SEPARATION OF POWERS IN THE STATE GOVERNMENT

When the Chief Justice quoted the language of Article II, he italicized "Legislature" and maintained that the impact of the Article II language is to require heightened deference on the part of judges to the state legislature.[8] This means that the task for the Court in reviewing an Article II case is "to determine whether a state court has infringed upon the legislature's authority,"[9] and whether "significant departure from the legislative scheme . . . presents a federal constitutional question."[10] In other words, Article II is aimed at maintaining the separation of powers within the state government. Beginning from this premise, the concurrence went on to find that the Florida court had gone too far.[11]

Like the concurrence, each of the four dissenters began from the same premise—that the Court's task was to decide whether the Su-

---

7. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). The dissenting opinions acknowledge that state legislatures have the authority under Article II to appoint electors, but do not agree that the election dispute was an appropriate matter in which to intervene. *See id.* at 123-24 (Stevens, J., dissenting); *id.* at 130-33 (Souter, J., dissenting); *id.* at 141-42 (Ginsburg, J., dissenting); *id.* at 148 (Breyer, J., dissenting).

8. *Id.* at 112-15 (Rehnquist, C.J., concurring).

9. *Id.* at 114.

10. *Id.* at 113.

11. *Id.* at 115.

preme Court of Florida exceeded its authority.[12] In his dissent, Justice Breyer, joined by Justices Stevens and Ginsburg, denied that "Article II grants unlimited power to the legislature . . . to select the manner of appointing electors."[13] But he seemed to accept the Chief Justice's standard of impermissible distortion as the standard by which the Florida court should be judged, for he devoted much of his opinion to demonstrating that no such impermissible distortion took place.[14] Justice Stevens, joined by Justices Ginsburg and Breyer, declared that the Florida court's "decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole."[15] Justice Souter, joined by the three other dissenters, framed the issue as "whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests,"[16] and found that "[n]one of the state court's interpretations is unreasonable to the point of displacing the legislative enactment . . . ."[17] Justice Ginsburg likewise found "no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office,' and no cause to upset their reasoned interpretation of Florida law."[18]

Suppose, for the time being, that these seven Justices are right to view Article II as a "state separation of powers" provision, aimed at protecting the state legislature from its courts. In that event, the dissenters seem to have the better argument. Chief Justice Rehnquist seems to have thought that he would make a convincing case for judicial usurpation simply by showing that the Florida court aggressively interpreted the provisions of Florida election contest law to bring about a regime that bore little resemblance to the plain meaning of the statutory text.[19] As a description of what the Florida court did, his charge has merit, for the Florida court broadly interpreted the statutory term "legal vote," expanded the grounds for contesting an election, and entered an ambitious remedial order.[20]

---

12. Each dissenting opinion addressed the issue of whether the Florida state court's interpretation of a state statute governing election laws violated the provisions of Article II. *See id.* at 123-24 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 135-36 (Ginsburg, J., dissenting); *id.* at 147 (Breyer, J., dissenting).

13. *Id.* at 148 (Breyer, J., dissenting).

14. *Id.* at 149-52.

15. *Id.* at 128 (Stevens, J., dissenting).

16. *Id.* at 130 (Souter, J., dissenting).

17. *Id.* at 131.

18. *Id.* at 136 (Ginsburg, J., dissenting) (internal citation omitted).

19. *Id.* at 112-15 (Rehnquist, C.J., concurring).

20. *Id.* at 116-22.

Chief Justice Rehnquist's contention is not that judges are *generally* forbidden to look beyond the plain meaning of statutes when interpreting them. In our legal system, judicial activism in the interpretation of statutes is hardly atypical.[21] His position is that this case is different from other instances of statutory interpretation because here the issue is judicial construction of legislation relating to presidential electors, and Article II authorizes the legislature to make these decisions.[22] The problem with this argument is that Chief Justice Rehnquist does not identify a reason why Article II makes such a difference. The reason cannot be merely that Article II specifies that the state legislatures are to make laws on presidential elections. Constitutional grants of power to legislatures do not ordinarily give rise to special constitutional rules of statutory interpretation. Thus, Article I authorizes Congress to do various things, such as regulate commerce,[23] set up a system of lower federal courts,[24] and protect intellectual property.[25] Yet no one supposes that special rules of statutory interpretation apply to such cases, such that courts are obliged to defer to the plain meaning of the text or to obey some other constraint. Indeed, a prominent theme in the Supreme Court's cases over the past few years is a rather searching review of Congress's exercise of the power granted to it in Section 5 of the Fourteenth Amendment to enforce the provisions of that amendment "by appropriate legislation."[26]

The point here is not that judicial activism poses no threat to the separation of powers. In the course of interpreting statutes judges

---

21. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 5 (1994) ("[S]tatutory interpretation is dynamic. The interpretation of a statutory provision by an interpreter is not necessarily the one which the original legislature would have endorsed . . . ."); Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES 407, 456 (D. Neil MacCormick & Robert S. Summers eds., 1991) (explaining that the realist nature of the American legal culture has an impact on the way judges interpret statutes).

22. *Bush*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring).

23. U.S. CONST. art. I, § 8, cl. 3.

24. *Id.* cl. 9.

25. *Id.* cl. 8.

26. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001) (stating that "Congress's § 5 authority is appropriately exercised only in response to state transgressions"); United States v. Morrison, 529 U.S. 598, 626-27 (2000) (holding that 42 U.S.C. § 13981, which provided civil remedies for victims of gender-motivated violence, was not a valid extension of Congress's Section 5 power); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that although the Age Discrimination in Employment Act of 1967 clearly stated Congress's intent to abrogate states' Eleventh Amendment immunity, that abrogation exceeded Congress's authority under Section 5); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646-48 (1999) (finding the Patent Remedy Act invalid under Section 5).

may well intrude on the legislature's prerogatives. Yet a solution is close at hand and does not require federal judicial meddling in the business of state governments. In our legal system, the main tool for seeing that courts do not exceed their authority is the power of the legislature to override nonconstitutional court rulings by enacting new legislation.[27] This use of statutes to curb judges is a "self-help" remedy that requires no intervention by the Supreme Court. Its availability is a powerful argument against Supreme Court oversight of the methods by which judges interpret statutes. Besides the plenary power of the legislature to override judicial interpretation of statutes, another "self-help" remedy may be available. Because of the peculiarities of presidential election law, it may well be that the Florida legislature could have nullified the decision of the Florida court by sending its own set of electors to Washington. In that event, the ultimate decision as to whether to accept a set of electors would have been up to Congress. If the only value at stake were state separation of powers, the availability of such a remedy may suffice.[28]

II. ARTICLE II AND THE LAW OF DEMOCRACY

Bush can best be defended if there is a good reason for reading Article II to impose a special constitutional constraint on a state court's methods of statutory interpretation in presidential election cases. In this part we propose a stronger case for special deference than the one set forth in the plurality opinion. It is based on the theory of "public choice," which brings economic principles to bear on issues of constitutional design.

A. Economic Analysis of Constitutions

A constitution sets up a framework of rules within which the ordinary business of government takes place.[29] Economists have analyzed

---

27. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence or procedure that are not required by the Constitution.").

28. Thus, Justice Breyer thought it best to leave the matter up to Congress. *See* Bush v. Gore, 531 U.S. 98, 152-55 (2000) (Breyer, J., dissenting) (explaining that because there is federal law that authorizes Congress to resolve election disputes, there is no need for the Court to be involved); *see also* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 655 (2001) (arguing that there is "greater legitimacy to judicial intervention in the political process for countermajoritarian purposes than when the Court seeks to invoke the role of protector of majority preferences").

29. Professors Issacharoff, Karlan, and Pildes describe the Constitution as an instrument that "establish[es] relatively stable and non-negotiable precommitments that enable generally accepted structures of political competition to emerge and endure." SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS

the role of constitutional rules under two rubrics—constitutional economics and game theory. Constitutional economics is defined as "the application of the methods and analytic techniques of modern economics to the study of the basic rules under which social orders may operate."[30] In other words, constitutional economists study why rules are put into place and the effects of different rules on the society at large.[31]

The analysis of the rules is derived from the maximizing of behaviors of *individuals*, which then have collective effects. Society and societal rules are treated as the result of interactions among rational individuals.[32] Thus, constitutional economics rejects the proposition that groups of individuals act as a collective unit seeking the common good. This differs from some other theories of how government may work, such as the "civic republican" notion that there is a distinctively public good that exists separate from the interests of individuals.[33]

Alternatively, game theory analyzes strategic behavior undertaken by people in a "game" and studies the behavior of individuals who are maximizing something in their interaction with others.[34] A game is nothing more than a situation where people interact with each other.[35] Economists use game theory to study constitutional rules because rules are frequently set up as a way to influence the "strategic" behavior of individuals who pursue their self-interest in situations where property rights are not well-defined.[36] A prominent example of

---

17 (1998). Richard Posner likewise recognizes the instrumental function of the Constitution in "set[ting] forth the fundamental powers, duties, and structure of the government." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 675 (5th ed. 1998).

30. Geoffrey Brennan & Alan Hamlin, *Constitutional Economics*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 401, 401 (Peter Newman ed., 1998). An alternative definition of constitutional economic analysis is that it attempts to "explain the working properties of alternative sets of legal-institutional-constitutional rules that constrain the choices and activities of economic and political agents, the rules that define the framework within which the ordinary choices of economic and political agents are made." James M. Buchanan, *Constitutional Economics*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 585 (John Eatwell et al. eds., 1987).

31. *See* Brennan & Hamlin, *supra* note 30, at 401 (defining "constitutional economics" as "the analysis of any stable pattern of rules . . . which structure and influence social interaction").

32. *Id.* at 402.

33. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 20 (1993) (explaining that the American Framers "modernized the classical republican belief in civic virtue," and that virtue was a "commitment to the general good rather than to self-interest").

34. *See* POSNER, *supra* note 29, at 23 (defining game theory as "the theory of *rational* strategic behavior").

35. *See id.* at 21 (defining "game" as a "strategic situation").

36. A fundamental element of game theory is that the rules of a game have a major impact on the outcome of the game. In terms of constitutional economics, constitutional

such a situation is the competition among self-interested individuals to capture resources held by government.

A basic question both literatures have examined is why and how people constrain their behavior.[37] Put another way, why do self-interested individuals voluntarily agree to restrict the actions they can take in the future? In the area of constitutional economics, the related inquiry is why there are rules and why the rules are set up as they are. In game theory, the same questions are why and how do individuals credibly commit to taking an action. The general answer is that individuals can potentially improve their own prospects by acquiescing to limits on their future actions in return for similar constraints on the behavior of others. This acceptance of constraints can prevent people from taking actions that harm others and can have positive effects such as encouraging cooperation.[38] The simplest example is an ordinary contract. By agreeing to do certain things, the two parties to a contract constrain their future action for the sake of attaining some benefit that is worth more to them than the loss of freedom they have accepted.

A well-known example from game theory, The Prisoners' Dilemma, illustrates how individuals can make themselves better off by agreeing to rules that constrain their behavior.[39] Consider the following matrix facing two prisoners *A* and *B*. *A* and *B* are kept separate by the police who tell *A* and *B* they must either confess or not confess.[40] While both parties would be better off if neither confessed and each received a one-year sentence, they will probably both confess. This is because if one does not confess and the other does, the party who does not confess will receive a twenty-year sentence.

---

rules impact how participants behave and the outcome of their behavior. Brennan & Hamlin, *supra* note 30, at 404.

37. James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 2-3 (1990). Standard economic analysis studies the choices made by individuals who are subject to constraints imposed exogenously, such as purchasing decisions subject to an income constraint. *Id.* Constitutional economics, in contrast, studies the choice among constraints. *Id.* at 3.

38. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES 14 (1985).

39. *See id.* at 3-5 (discussing and analyzing the "classic" prisoners' dilemma).

40. *See generally* Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 496-500 (1992) (explaining the prisoners' dilemma game). This matrix, set up by the police, is an example of a "game," in that it involves strategic interaction among players—*A* and *B*. Presumably the payoffs in the matrix are, to some extent, a function of the strength of the evidence the police have that *A* and *B* committed a crime, as well as established penalties for a crime. Note, however, that the rules of the game have a very big impact on the outcome of the game. These rules include the payoff structure, how informed *A* and *B* are about the payoffs and their rival's actions, whether *A* and *B* can communicate, whether this game will be replayed (can they bargain with the police), and so on.

A confesses, *B* confesses. *A* receives three-year sentence. *B* receives three-year sentence.	*A* confesses, *B* does not confess. *A* receives two-year sentence, *B* receives twenty-year sentence.
A does not confess, *B* confesses. *A* receives twenty-year sentence, *B* receives two-year sentence.	*A* does not confess, *B* does not confess. Each get one-year sentence.

By confessing, the greatest penalty each person can receive is three years. However, if before the game had started, *A* and *B* had set up some binding way of constraining themselves to never confess, they would get to the preferred outcome of no confession. Suppose, for example, they had hired an enforcer who would kill either of them who confessed. If this was a believable and credible commitment, the likelihood of confession would decrease.

Alternatively, suppose *A* and *B* lived in a jurisdiction with a constitution. If the constitution contained a provision that any one who confessed to a crime would have to forfeit his or her property, it is less likely *A* and *B* would have confessed. For the constitution to have this effect it would have to be enforceable, known to the participants, and not changeable by the authorities. *A* and *B* would have been better off with this constraint on their ability to confess.

The point of this illustration is simply to show that rules which constrain individual's choices can also benefit those individuals. We are concerned here with part of the set of rules that comprise the United States Constitution. The Constitution establishes the "fundamental powers, duties, and structure of the government."[41] These rules serve as a kind of long-term contract among the people and between the people and the government,[42] just as the pact to maintain silence is a kind of long-term contract between *A* and *B* in our illustration.

B. Constitutions and Elections

Taking this contractual model of the constitution as the starting point for analysis, the next inquiry is to determine what ought to be governed by constitutional rules. For the narrow purposes of this Article, it is not necessary to offer a comprehensive answer to this question. Our focus instead is on the role of constitutional rules in

41. POSNER, *supra* note 29, at 675. Posner also notes that the United States Constitution requires a supermajority to change. *Id.* Thus, the Constitution in general is less sensitive to interest group pressure, especially short-run oriented pressure, than ordinary legislation. The rules in the Constitution are likely to be more efficiency oriented than those in ordinary legislation. *See id.*

42. *See id.* at 676.

constraining the actions of state officials in connection with presidential elections.[43]

Under the contractual model we have sketched in section A, election law is a matter of constitutional concern. In order to see why, we must distinguish it from the bulk of matters on which legislatures pass laws, which we call "ordinary legislation." Ordinary legislation is the means by which people with conflicting interests battle over who pays for government and who benefits from it.[44] People have conflicting interests, and the government's choices will reflect the preferences of the winners of elections.[45] It is a fact of life that the losers of an election often pay for the spoils that go to the winners. Elected officials can be expected to vote their interests, which will often mean the interests of the fraction of the population who elected them and upon whom they depend for support in the future.[46] "Ordinary legislation" is the vehicle for this distribution of substantive burdens and benefits.

Elections determine who will make decisions about the content of ordinary legislation. Election law is the "law of democracy";[47] in contrast to ordinary legislation, it addresses the more fundamental question of how the lawmakers *themselves* will be chosen. Election law is a matter of constitutional dimension because a basic feature of the social contract is that the losers of an election must accept the choices made by the winners. But this obligation is not absolute, for it depends on the fairness of the process. An appropriate test of fairness is to imagine we are behind a veil of ignorance, unaware of how our particular interests would be affected by our choice of a process. The critical issue is whether reasonable people would agree to a given pro-

---

43. For a more comprehensive view of the economic role of constitutions, see BRENNAN & BUCHANAN, *supra* note 38, at 2; Brennan & Hamlin, *supra* note 30, at 402; Buchanan, *supra* note 30, at 585; POSNER, *supra* note 29, at 675-84.

44. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986) ("According to the so-called interest group or economic theory of legislation, market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups.").

45. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980) (asserting that in a representative democracy, value determinations are made by elected officials).

46. Note there is no perfect voting scheme. All outcomes of elections are to some extent a function of the rules followed in the election. Game theory economists, led by the Nobel Prize winning work of Kenneth Arrow, have proved mathematically that no voting scheme can ever perfectly aggregate the preferences of individuals into a singular "will" of the people. AVINASH DIXIT & BARRY NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 259 (1991).

47. The phrase is borrowed from the title of the leading casebook in the area, ISSACHAROFF ET AL., *supra* note 29.

cess under these conditions.[48] The common sense rationale for this view of election law is that no one would willingly submit to live in a regime that permits others to govern him without the *constitutional* assurance that the process will give his own interests as much respect as those of people with whom he may compete for resources.

The democratic legitimacy of the outcomes of the political process depends on the fairness of the process itself. As John Hart Ely stated, "[m]alfunction occurs when the *process* is undeserving of trust."[49] Recognizing this, the Supreme Court has declared that constitutional rules are required in order to assure that elections are fair.[50] If election law were left entirely to legislation, the dominant political forces would often take steps to ensure their continued domination.[51] A well-known example of this anti-competitive behavior was the persistence of malapportioned legislatures—where rural voters control far more seats than their numbers should warrant[52]—in the years before the Supreme Court instituted the regime of "one man one vote" in *Reynolds v. Sims*.[53]

For these reasons, election law is a prime example of the type of rules that deserve constitutional status. Election law should be structured to minimize opportunities for one interest group to profit at the expense of others.[54] Before *Bush*, most judicial and scholarly treatments of election law focused on "institutional arrangements," such as

---

48. *See* JOHN RAWLS, POLITICAL LIBERALISM 134-37 (1993) (stating that citizens' political power is proper when exercised in accordance with a constitution that free and equal citizens may reasonably be expected to endorse).

49. ELY, *supra* note 45, at 103.

50. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."). *See generally* ISSACHAROFF ET AL., *supra* note 29, at 1 ("At the heart of a democratic political order lies a process of collective decision-making that must operate through pre-existing laws, rules, and institutions.").

51. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646-47 (1998) (describing the tendency of political parties to make election law that ensures their continuing dominance).

52. *See* Baker v. Carr, 369 U.S. 186 (1962); *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 757-58 (1991) (citing *Baker* as a case where legislators "had proven fiercely resistant to reapportioning themselves out of a job").

53. 377 U.S. at 568.

54. It is desirable to minimize political conflict about an election not just because that conflict can lead to the inefficient redistribution of power to powerful interest groups, but also because such conflict is a waste of resources. One problem with conflicts over resources controlled by government is that potential winners expend resources in an attempt to influence government. In the 2000 election, a plausible case could be made that the hours billed by lawyers in fighting the election contest were a deadweight loss to society.

who was entitled to vote and for what office, rather than "on the nuts-and-bolts of casting votes and having them counted."[55] But the constitutional value of ensuring the fairness of elections has as much force in the latter context as in the former, for in a close election the winner may depend as much on the "nuts-and-bolts" of the electoral process as on who was allowed to vote in the first place.

Any post-election dispute will be a partisan battle, where one side will be unhappy with the outcome. Yet one can distinguish between the rules by which such battles will be fought and the conduct of the struggle, just as one can distinguish between the rules of a game and the play of the game. Here the focus is on the rules of the electoral contest. Under our contractual premise, the standard of fairness that election rules must meet is that reasonable people generally agree to them, even though they differ among themselves on the desired outcome.[56] Our argument is that fairness to all sides in electoral contests demands that battles of this kind take place under a legal regime that does not systematically favor one side or the other. In what follows, we argue that the Florida court may have violated this fairness norm, which we will call the "rules-of-the-game" norm. In any event, an argument starting from this premise is a strong ground from which to challenge the Florida court's holding.[57]

One may object to this account of fairness on the ground that general agreement on matters of public policy is an impossible standard. But at the appropriate level of generality (i.e., the level of constitutional rules) it should indeed be possible to achieve broad

---

55. SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD, at ii (rev. ed. 2001).

56. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 79 (1962) ("The requirement that, at the ultimate constitutional stage, general agreement among all individuals must be obtained precludes the adoption of special constitutional provisions or rules designed to benefit identifiable individuals . . . ."); RAWLS, *supra* note 48, at 133-44 (developing the idea of the overlapping consensus and suggesting that social unity can result from the overlap of reasonable doctrines).

57. The requirement of evenhanded electoral rules, of course, is not the *only* aspect of fairness that may be relevant to a post-election dispute. Sometimes the losers will have an argument based on detrimental reliance on their pre-election understanding of the rules regarding voting. *See* Roe v. Alabama, 43 F.3d 574, 581 (11th Cir. 1995) (explaining that a post-election departure from prior rules "would have the effect of disenfranchising those who would have voted but for the inconvenience [of the prior rule]"); Griffin v. Burns, 570 F.2d 1065, 1078-79 (1st Cir. 1978) (using a detrimental reliance rationale to overturn a Rhode Island Supreme Court decision that excluded certain ballots from an election). *See generally* ISSACHAROFF ET AL., *supra* note 55, at 15-18 (discussing the possibility that detrimental reliance which leads to non-voting establishes a constitutional violation). But the value of evenhanded rules is a separate and independent aspect of fairness. In principle, one could succeed on a "rules-of-the-game" claim without showing any detrimental reliance.

consensus on constitutional arrangements. In a seminal work on public-choice economics, James Buchanan and Gordon Tullock distinguish the constitution, which sets up "general rules for collective choice," from "the later choices to be made *within* the confines of certain agreed-on rules."[58] Though people may disagree in the course of making constitutional rules, participants acting in good faith should ultimately be able to reach consensus:

> This discussion should not be unlike that of the possible participants in a game when they discuss the appropriate rules under which the game shall be played. Since no player can anticipate which specific rules might benefit him during a particular play of the game, he can, along with all the other players, attempt to devise a set of rules that will constitute the most interesting game for the average or representative player. It is to the self-interest of each player to do this. Hence, the discussion can proceed without the intense conflicts of interest that are expected to arise in the later playing of the game itself.[59]

The point of the analogy to a game, of course, is not that politics should be an "interesting game," like soccer or baseball. It is that we have a strong incentive to assent to constitutional arrangements that enable everyone to pursue their goals through ordinary politics, including electoral politics, rather than spending resources through post-election attempts to change the voting results.

While this argument applies to all elections, presidential elections especially call for a federal constitutional rules-of-the-game guarantee because the interests of the nation as a whole are at stake. Article II, Section 1, Clause 2, is the appropriate vehicle for applying the rules-of-the-game norm, though the lack of precedent in the area obliges the Court to write on a virtually clean slate. Admittedly, the argument for a federal constitutional requirement of evenhanded rules-of-the-game in dealing with election contests is not based directly on the text of Article II or the debates at the Constitutional Convention. Though elections are central to democratic self-government, "there is paradoxically little that the [Constitution's] text or its history offers in the way of directly relevant guidance."[60] Courts must "construct a conception

---

58. BUCHANAN & TULLOCK, *supra* note 56, at 77.

59. *Id.* at 79-80; *see also* POSNER, *supra* note 29, at 675 (making a related argument, and suggesting the more fundamental the rule, the more difficult it should be to change).

60. ISSACHAROFF ET AL., *supra* note 29, at 17. For a discussion of the reasons the Constitution offers little guidance on elections, which relate mainly to the fact that the original Constitution "reflects the premodern world of democratic practice and the long-since re-

of democracy with less textual and historical foundation than in some other areas of constitutional law."[61] No doubt the Court was right to ignore the absence of a textual and historical foundation for its doctrine when it took on the problem of reapportionment.[62] By the same token, courts should not be deterred from making constitutional rules for the adjudication of election contests.[63] For that matter, a realistic appraisal of the Court's practice is that constitutional interpretation nearly always—and not merely in election law—takes account of values that cannot be traced to the text or to the intent of the Framers.[64]

III. THE FLORIDA ELECTION CONTEST AND THE "RULES-OF-THE-GAME"

Now consider the application of the rules-of-the-game norm to the problem of election contests. The relevant issue is *when* rules for contests ought to be made. Evenhanded rules-of-the-game can only be maintained by seeing to it that no one changes the rules in the middle of the game, at a time when they know how any changes will affect the outcome. Most election law concerns who is entitled to vote for what, and that determination is necessarily made before the election takes place.[65] But the rules governing an election contest are different. Because the contest takes place after the election, it is possible to make rules for contests either before or after the election in question, and the time of that rulemaking is a critical issue.

---

jected assumptions of that world on which the Constitution rests," see *id.* at 18. These assumptions include, notably, an "aristocratic conception of democracy." *Id.* at 19.

61. *Id.* at 21.

62. ELY, *supra* note 45, at 119.

63. In one respect, the barriers to making constitutional law under Article II are weaker than those the Court faced in the reapportionment cases, where a long-standing Supreme Court doctrine held that legislative apportionment was a political question on which courts should not rule. Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion). The Court (somewhat implausibly) distinguished *Colegrove* when it ruled, in *Baker v. Carr*, that legislative apportionment could be challenged on equal protection grounds. 369 U.S. 186, 237 (1962); *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 284-85 (4th ed. 1996) (discussing the grounds on which the *Baker* Court distinguished *Colegrove*). There is no corresponding precedent that would forbid the Court from interpreting Article II as it sees fit.

64. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204, 1209 (1987).

65. Pre-election issues dominate the major casebook in the field. *See generally* ISSACHAROFF ET AL., *supra* note 29; *see also* ISSACHAROFF ET AL., *supra* note 55, at ii ("[M]ost of the scholarship and federal case law involving the political process prior to the 2000 election focused more on institutional arrangements than on the nuts-and-bolts of casting votes and having them counted.").

A. The Timing Problem

In a world free of political considerations, the timing of lawmaking for election contests may seem unimportant. The legislators or judges in charge of making law will focus only on the relevant legal materials, and these will be the same, whether lawmaking occurs before or after the election. But in the real political world, which is after all the one that matters, timing makes a big difference. Before the election, lawmakers are behind a partial veil of ignorance. In some cases, they surely understand how a particular contest rule could favor one side more than another. But it may be impossible for them to know much about the impact of most of the contest rules they are charged with making. Even more important, they will not have information as to the importance to the outcome of choosing one rule over another. It is one thing to know that allowing contests in a given set of circumstances will favor one side or the other. It is another to know just how crucial a given rule may be.

After the election, much more information on such matters is available, for votes have been counted and exit polls have been taken. Everyone knows just where to look for more votes for one side or the other. (That they may be mistaken is not a sufficient answer to this point, so long as they are probably right.) One can expect that, other things being equal, the real world consequences of the choice will weigh more heavily on a decision-maker who knows that his ruling will make a significant difference in who is elected President. Samuel Issacharoff, Pamela Karlan, and Richard Pildes, in their book on the Florida election, point out that the situation changes after the election:

> As the events in Florida showed, once the votes are cast, every potential procedural and substantive decision becomes outcome determinative. There are ample reasons to believe that every claim put forward and every decision made will be the product of an attentive eye to the bottom-line result—or at least will be publicly perceived as such.[66]

Notice, too, that the problem of partisan bias is not limited to legislators or executive officials: "[J]ust as the partisan effects of all potential courses of action are known to partisan political officials, so too are they known to judges who must adjudicate electoral challenges."[67] We do not mean to suggest that a judicial forum should be

66. ISSACHAROFF ET AL., *supra* note 55, at iii.

67. *Id.*

unavailable;[68] however, the need to prevent anyone from changing the rules in the middle of the game also extends to judges.

The Florida court's ruling in *Bush* demonstrated a failure to observe the evenhanded rules-of-the-game norm.[69] That norm is better served if contest law is made before rather than after the election takes place in order to avert the danger that too much post-election knowledge will produce partisan bias. In addition, the norm requires that the law be applied without regard to context, rather than applied on a case-by-case basis by judges or others who exercise discretion.[70] As a result, the rules-of-the-game norm demonstrates that Article II imposes on state courts an obligation to give considerable weight to the rules embodied in statutory texts and prior cases.[71] The rules-of-the-game norm should be a constitutional constraint on the methods judges use to interpret election statutes, just as the *Erie* doctrine is a constitutional constraint on the methods federal courts use when confronted with common-law issues.[72] Both the rules-of-the-game norm and the *Erie* doctrine oblige a court to favor a restrictive view of its

---

68. To the contrary, Professors Issacharoff, Karlan, and Pildes rightly insist that "the failure to provide for a judicial forum threatens to undermine the legitimacy of the political process itself." *Id.*

69. *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (explaining that the Florida court's ordered recount necessitated adopting state election rules after the election).

70. Professor Issacharoff makes this argument as an interpretation of 3 U.S.C. § 5 rather than a constitutional principle. *See* Issacharoff, *supra* note 28, at 646 ("It is entirely fair to read 3 U.S.C. § 5 as codifying an important principle of electoral democracy requiring the rules of engagement to be explicated ex ante and to be fairly immutable under the strain of electoral conflict."). Yet he claims, "[t]here are two key drawbacks to the altered procedures standard for constitutional review." *Id.* One drawback is that the per curiam opinion "abandoned this path" in favor of the equal protection theory. *Id.* The other problem is that "federal constitutional review of changed state election procedures would . . . require that every local and state election procedure be subject to federal judicial scrutiny," and this "would run counter to long-standing abstention doctrines." *Id.* at 647.

Neither of these objections is fatal to our thesis. The majority's decision to opt for equal protection in no way undermines the validity of the rules-of-the-game approach. The second objection is based on speculation on Issacharoff's part about events that have not yet occurred. Nobody knows how many cases of this kind would arise. We suspect that in practice the number would be small, if only because litigation would be worthwhile only in the small percentage of elections in which the margin is razor-thin.

71. For a general description of how rules can and do constrain decision-making, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 112-34 (1991).

72. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that courts must apply state law in all cases except those governed by federal congressional acts or the United States Constitution); *see also* FALLON ET AL., *supra* note 63, at 693-95 (discussing ways of ascertaining state law).

discretion and to give more weight than it otherwise may prefer to the existing positive law.[73]

Our argument depends on the premise that judges are as prone to partisan bias as other officials.[74] In *Bush*, Justice Stevens complained that the challenge to the Florida court rested on "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."[75] We agree with this assessment, and differ with him only on what should be done about it. While Justice Stevens would have us disregard the specter of partisan bias, we think realism obliges one to explicitly acknowledge that judges may put partisan considerations ahead of neutral decision-making. We further assert that a case like *Bush*, involving a presidential election, presents an ever greater danger that courts will apply legal principles in a partisan way.[76] However, judges' good faith, or their general "impartiality and capacity,"[77] need not be called into question if we set the rules up ahead of time. In so doing, we do not have to depend on judges and other officials to shut their eyes to the impact of their decisions. This is especially important in presidential elections because the judicial ruling not only decides the issue at hand, but also determines the person who will have authority to make rules on a wide range of important national issues and

---

73. In his dissent, Justice Stevens seems to assert that *because* the Florida court is the ultimate arbiter of what Florida law is, "its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted." *Bush*, 531 U.S. at 128 n.6 (Stevens, J., dissenting). The answer to this assertion is that Article II places a constitutional constraint on the power of the Florida court to construe state law as it sees fit. Instead, the state court's interpretive methodology must give considerable weight to the text (or the lack of it) and to relevant precedents. In other words, it must adopt a comparatively "formalist" approach to the interpretation of election statutes when applying them to elections that have already taken place. This includes, but is not limited to, a focus on the plain meaning of the statute. *See* Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Alienikoff and Shaw*, 45 VAND. L. REV. 715, 719 (1992) (arguing that "there is no inconsistency in locating the level of formality somewhere above (or behind) plain meaning, but still below that of the best all-things-considered judgment by the interpreter of what should happen in the case at hand"). Thus, relevant precedents can also be considered.

74. *See* MICHAEL ABRAMOWICZ & MAXWELL L. STEARNS, BEYOND COUNTING VOTES: THE POLITICAL ECONOMY OF *Bush v. Gore* 17-18 (Law and Economics Research Paper Series, Paper No. 01-09, 2001).

75. *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

76. Judges are likely to be as politically attuned as legislators, for most of them have attained their posts by some involvement with politics over the course of their careers. *See* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 481 (1998) (asserting that presidents make federal judicial appointments based upon shared constitutional or political views).

77. *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

who may even have an impact on the future career prospects of the judges themselves.[78]

B. The Rules-of-the-Game and the Standard of Review

When we set aside "separation of powers" and focus instead on the rules-of-the-game norm, the Supreme Court of Florida's ruling proves more difficult to defend. The availability of legislative intervention, which answers separation of powers concerns,[79] is irrelevant to the rules-of-the-game challenge to the Florida court. The legislature cannot be trusted to vindicate this constitutional value any more than it can be trusted to defend free speech or equal protection or any other constitutional value apart from its own prerogatives.[80] Therefore, the rules-of-the-game norm should be vindicated regardless of which other government institutions have a role in choosing the president because the fairness of the vote-counting process is essential to the legitimacy of the outcome of the election.

---

78. A critic may claim that this "self-dealing" argument actually subverts our thesis in that it applies as much to the Justices of the United States Supreme Court as it does to the judges of the Supreme Court of Florida. *Cf.* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (arguing that the Justices of the Supreme Court are necessarily partisan due to the current selection process). Our answer to this objection is that the authority to finally decide federal constitutional issues must be placed somewhere because "an important . . . function of law is its ability to settle authoritatively what is to be done." Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997). In our system, the final judicial authority rests with the United States Supreme Court. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that the federal courts are the ultimate arbiters of the Constitution); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"). If the Court fails to meet its responsibilities, a variety of remedies may be available, including new appointments, constitutional amendments, and perhaps restrictions on the Court's jurisdiction. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 135-37 (14th ed. 2001) (describing President Franklin Roosevelt's Court-packing plan); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1062-63 (2001) (explaining that the Eleventh Amendment "overrode" *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in order to restore the principal of state sovereign immunity); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 523-31 (1983) (discussing whether *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), held that Congress has complete discretion in exempting certain types of cases from the Supreme Court's appellate jurisdiction). However, none of these remedies will likely undo the adverse short term consequences of a given ruling. Note that the same problem arises no matter what institution of government is given the final say over this or any other issue.

79. *See supra* text accompanying notes 27-28.

80. *See* THE FEDERALIST No. 48 (James Madison) (describing the problem of legislative tyranny).

What is more, the test for determining whether the Florida court went too far is not whether that court used traditional methods of interpretation, or whether it acted like a court, or whether its interpretations were reasonable. These criteria, advanced in the *Bush* dissents,[81] are plausible means of discerning whether a court has transgressed on the legislature's authority. Under them, it may be hard to find a constitutional flaw in the Florida court's work.

The rules-of-the-game norm requires us to query, however, whether the Florida court's rulings brought about a major change in the rules as they existed before the election.[82] Justice Stevens opined that a judicial interpretation of a statute does not make law, but simply describes the law as it has always been.[83] Whether or not this is so as a matter of legal theory is, of course, a much debated issue.[84] From the perspective of the rules-of-the-game norm, that theoretical dispute is beside the point. The resolution of the Article II issue depends on a realistic assessment of how much the Supreme Court of Florida altered the preexisting contest arrangements, not whether one can show that the whole body of legal materials bearing on the matter can plausibly be read as the Florida court read them.

Chief Justice Rehnquist did not explain his "significant departure" test as a rules-of-the-game standard.[85] Nonetheless, the "significant departure" test is an appropriate way of evaluating the lower court's decision. Chief Justice Rehnquist's concurrence was right to insist that in this case "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[86] Unlike Chief Justice Rehnquist, however, we do not rely on

---

81. *See Bush*, 531 U.S. at 130 (Souter, J., dissenting) (discussing whether the decision by the Florida Supreme Court usurped the duties of the Florida legislature).

82. *See infra* Part III.C.

83. *Bush*, 531 U.S. at 127-28 (Stevens, J., dissenting).

84. A contemporary variation on this theme is the Hart-Dworkin debate. H.L.A. Hart argued that law is "open textured." He meant that law is a body of rules, that there are issues left open by application of the rules in force at any given time, and that judges, in deciding both statutory and common law issues, fill the gaps with law of their own making. *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961). Ronald Dworkin objected to this account, maintaining that the legal material furnishes a "right answer" to nearly every issue that comes before a court. RONALD DWORKIN, LAW'S EMPIRE, at viii-ix (1986). For an application of this theory of adjudication to problems of statutory interpretation, see *id.* at 313-54.

85. *See Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring) (stating that Article II, Section 1, Clause 2 gives state legislatures exclusive authority to decide how to appoint presidential electors, and that a "significant departure" from the legislature's plan presents a federal constitutional question).

86. *Id.*

the naked fact that the Florida law is embodied in a statute.[87] Judicial interpretations of the statute, so long as they were made *before* the election are also relevant to the inquiry. Even prior administrative rulings, pursuant to statutory authority, carry some weight in determining the pre-existing law.[88]

In this case, the statute was enacted in 1999 and there were no rulings by the Florida court interpreting it prior to *Bush*.[89] Yet there were earlier rulings of the Florida court on the issue of what counts as a legal vote, and there was some evidence of the way administrators understood the election contest law.[90] The question of whether, in view of all the Florida materials bearing on the issue, the Florida court applied or broke with pre-existing law is taken up in the next section.

C. *Did the Florida Court "Significantly Depart" from Pre-Existing Law?*

Much of Chief Justice Rehnquist's reasoning is consistent with the rules-of-the-game account of Article II. In fact, the rules-of-the-game norm is a better foundation for his argument than are separation of powers principles. No matter how activist the Florida decision may have been, nothing in it seems to raise serious questions about the separation of powers within the Florida government, for the Florida legislature retains power to nullify the Supreme Court of Florida's doctrine.[91] But the force of the concurrence's argument is stronger if Article II's goal is to maintain an evenhanded rules-of-the-game method for choosing a president. From a rules-of-the-game perspective, the focus of attention is on whether the Florida Supreme Court adhered to the law as it stood before the election, not on separation of powers. In that event, a successful demonstration that the Florida court's ruling was a significant departure from the pre-election law would make a compelling case for striking it down.

The ultimate question that needs to be addressed, then, is how the rules-of-the-game principle applies to *Bush v. Gore*: did the Florida court change the pre-existing law enough to violate the Article II requirement of evenhanded rules-of-the-game? Plausible arguments

87. *See id.* at 116-17 (discussing the Florida legislature's statutory scheme).

88. *See infra* Part III.C.3.

89. FLA. STAT. ANN. § 102.168 (West Supp. 2002) (amended 2002).

90. *See infra* Part III.C.3.

91. By contrast, in its initial ruling on the election, the Florida court seemed to rest its decision on the Florida constitution when it held that the Florida Secretary of State did not have discretion to reject amended vote tallies subsequent to manual recounts. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1239-40 (Fla. 2000), *rev'd*, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000). The legislature could not so easily overturn a ruling that rests on state constitutional grounds.

can be made on both sides of this issue. However, we feel that the concurrence arrived at the right result, albeit by following the misguided separation of powers path.[92] The argument we offer is not so devastating that any reasonable critic would be compelled to endorse it. Few legal arguments on novel issues can meet that standard. Yet it seems to us strong enough to save the Supreme Court from the charge that it acted "without the slightest legal basis,"[93] or that it compromised "the Nation's confidence in the judge as an impartial guardian of the rule of law,"[94] or that the ruling "ma[kes] it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor."[95]

The Supreme Court of Florida's "significant departure" from preexisting law occurred when it ruled that, under the Florida statute on election contests, grounds existed for a contest of the presidential election.[96] Vice President Gore relied solely on a provision of Florida's election law that authorizes an election contest based on the "[r]eceipt 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."[97] He argued that enough "legal votes" had not been counted to "place in doubt the result of the election."[98] There was evidence to show that they had not been counted because the punch card ballots used in certain areas did not register votes for president when run through the tallying machines.[99] The main reason the machines did not count these votes was that some voters did not effectively punch a hole in the ballot; rather, those voters left the bit of paper that should have been punched out (the "chad") either partially attached ("hanging") or merely indented ("dimpled").[100] Endorsing this thesis, the Florida court decided that "a legal vote is one in which there is a 'clear indication of the intent of the voter'"; thus,

---

92. *Bush*, 531 U.S. at 112-15 (Rehnquist, C.J., concurring).

93. Bruce Ackerman, *Anatomie Du Coup d'Etat Constitutionnel Americain*, LE MONDE, Feb. 27, 2001, at 18. Professor Ackerman's article is in French. The quotation in the text is our translation of his complaint that the Court acted as it did "sans la moindre base juridique pour ce faire." *Id.*

94. *Bush*, 531 U.S. at 129 (Stevens, J., dissenting).

95. Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18, 18.

96. *Bush*, 531 U.S. at 118-19 (Rehnquist, C.J., concurring).

97. FLA. STAT. ANN. § 102.168(3)(c) (West Supp. 2002) (amended 2002).

98. *Bush*, 531 U.S. at 101-02 (per curiam).

99. *Id.* at 105.

100. *See id.*; Dennis Cauchon, *Bush's Fight May Have Been Unneeded: Miami Talley Fails to Push Gore Over Top*, USA TODAY, Feb. 26, 2001, at 3A.

the statute authorized a contest of this election.[101] Moreover, in order to resolve the contest, the Florida court directed the circuit court to enter orders necessary to begin a hand recount of disputed ballots in Miami-Dade County, and to add to the tally ballots already recounted by hand pursuant to earlier judicial and administrative rulings in both Miami-Dade and Palm Beach counties.[102]

As authority for its interpretation of "legal vote," the Florida court cited subsection 101.5614(5) of Florida's election law.[103] This subsection describes the procedures to be followed with regard to each of several types of defective ballot cards.[104] It also states that "[n]o 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] The court also cited three Florida cases and three cases from other jurisdictions—Massachusetts, South Dakota, and Illinois—to support its interpretation of "legal vote."[106]

---

101. Gore v. Harris, 772 So. 2d 1243, 1257 (Fla. 2000), *rev'd*, Bush v. Gore, 531 U.S. 98 (2000) (quoting FLA. STAT. ANN. § 101.5614(5) (West Supp. 2002) (amended 2002)).

102. *Id.* at 1262.

103. *Id.* at 1256.

104. *Id.* at 1256-57. The subsection reads, in its entirety:

> If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot card shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballot cards shall be clearly labeled "duplicate," bear a serial number which shall be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot. If any ballot card of the type for which offices and measures are printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy may be made of the damaged ballot card in the presence of witnesses and in the manner set forth above, or the valid votes on the damaged ballot card may be manually counted at the counting center by the canvassing board, whichever procedure is best suited to the system used. If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board. The totals for all such ballots or ballot cards counted manually shall be added to the totals for the several precincts or election districts. *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.* After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for the precinct.

FLA. STAT. ANN. § 101.5614(5) (West Supp. 2002) (amended 2002) (emphasis added).

105. FLA. STAT. ANN. § 101.5614(5).

106. *Gore*, 772 So. 2d at 1256-57. As persuasive support for its interpretation of legal vote, the Florida court cited *Pullen v. Mulligan*, 561 N.E.2d 585, 609-11 (Ill. 1990) (allowing a manual recount of punctured, hanging, and dimpled chads when the voter's intent may be discerned with reasonable certainty); *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass.

Our concern is whether the Supreme Court of Florida acted properly in applying the reasoning from these authorities to its conclusion as to what counts as a "legal vote in Florida." The answer to this inquiry depends on the standard by which the reasoning is evaluated, and the choice of a standard depends on why one asks the question in the first place. The Florida court's use of Florida statutes as well as Florida, Massachusetts, South Dakota, and Illinois case law would be acceptable if the issue was whether the court had acted "within the bounds of reasonable interpretation,"[107] as Justice Souter proposed.[108] But the analysis in section B suggests that Chief Justice Rehnquist's "significant departure" test is better suited to achieving the rules-of-the-game goal of Article II. The Florida court's reasoning is far too flimsy to meet that test.

1. The Statutory Argument.—First, a fair reading of the statute invoked by the Florida court is that the statute is aimed at the different and narrower issue of how election officials should handle defective ballot cards.[109] The "intent of the voter" language in that section appears after a list of directives as to how different types of defective ballots are to be treated.[110] Beginning from the premise that the con-

---

1996) (holding that punctured chads establish voter intent with "reasonable certainty"); *Duffy v. Mortenson*, 497 N.W.2d 437, 439-40 (S.D. 1993) (finding that a vote must be counted unless it was impossible to determine the intent of the voter, and that a hanging chad should constitute a vote). As direct support from Florida caselaw, the Court cited *Boardman v. Esteva*, 323 So. 2d 259, 267 (Fla. 1975) (finding that voters should not be disenfranchised if they substantially comply with absentee voter laws); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420, 421 (Fla. 1944) (holding that only ballots marked with an "X" may be counted); and *State ex rel. Peacock v. Latham*, 169 So. 597, 597-98 (Fla. 1936) (acknowledging that Florida law allows circuit courts to discern the legality of votes).

107. Bush v. Gore, 531 U.S. 98, 131 (2000) (Souter, J., dissenting). Thus, we have no quarrel with the defense of the Florida Supreme Court set forth by Professor Tribe. Laurence H. Tribe, *eroG .v hsuB and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170, 201-11 (2001). Our thesis, one not addressed by Professor Tribe, is that Article II imposes special constraints on the interpretation of election statutes.

108. American courts often engage in a freewheeling style of statutory interpretation, in which they take into account not only the text and background of the statute, but a wide range of social and ethical considerations as well. *See generally* ESKRIDGE, *supra* note 21.

If one begins from the premise that the only correct way to interpret an election statute is to pay close attention to realizing the intent of its drafters, then a strong argument can be made that the Florida court's "interpretation does not fall within the boundaries of acceptable interpretation." Epstein, *supra* note 3, at 619; *see also* Richard A. Posner, Bush v. Gore: *Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719, 728-34 (2001) (criticizing the Florida court's interpretation of Florida election law). By contrast, our argument does not depend on judgments about the propriety of any particular approach to statutory interpretation.

109. *See* FLA. STAT. ANN. § 101.5614(5).

110. *Id.*

text in which words are used is a guide to their significance, this reference to "the intent of the voter" can hardly be considered a general principle for determining what qualifies as a vote without similar indications elsewhere in the statute or in the case law. The Florida court provides no such references. On the contrary, the statute seems to contemplate that properly informed voters should produce ballots that the machines can read. Florida election law directs officials to provide voters with instructions on how to properly cast a vote, a working model of the voting machine they will use, and a sample ballot.[111] In addition, voters in precincts using punch-card ballots "are instructed to punch out the ballot cleanly."[112]

Viewed in this context, the statute bears an attenuated relationship to the issue of what constitutes a "legal vote." A creative court, having concluded that it is unjust to reject ballots just because the machines cannot read them, could certainly use this language to bolster its reasoning that a policy exists favoring the intent of the voter. But the Article II issue is whether the Florida court's reading is a "significant departure" from pre-existing Florida law. The statute itself provides scant support for the "significant departure" query. While one may fairly infer a policy favoring the voter's intent from the statutory language upon which the Florida court relies, that language does not purport to set down a general rule to that effect. Indeed, the policy is evidently a fairly weak one as far as the statute as a whole is concerned, for it does not appear to be explicitly affirmed in any other part of the election statute.

2. The Case Law.—The relevant Florida case law is, in fact, at odds with the Supreme Court of Florida's ruling.[113] None of the Florida cases lend much support to the court's "intent of the voter" test for what counts as a "legal vote." One such case, *Boardman v. Esteva*,[114] ruled that "substantial compliance with the absentee voting laws is all that is required to give legality to the ballot."[115] This ruling shows that Florida election law can be flexible, but it does not speak to the question of whether the test for "legal vote" is "intent of the voter" or

111. *See Bush*, 531 U.S. at 119 (Rehnquist, C.J., concurring) (citing FLA. STAT. ANN. §§ 101.46, .5611 (West 1992 & Supp. 2001)).

112. *Id.*

113. In contrast, the cases from Massachusetts, South Dakota, and Illinois strongly support the Florida court's interpretation of "legal vote." Each of these cases bolster the Florida court's contention that improperly dislodged chads provide sufficient indicia of the voter's intent and that those ballots should be counted. *See supra* note 106.

114. 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976).

115. *Id.* at 264.

something more demanding. The Florida court did not claim otherwise.[116]

Another of the cited Florida cases, *State ex rel. Peacock v. Latham*,[117] addressed procedural issues that arise when two courts have jurisdiction over parts of the same election litigation.[118] The Florida court's parenthetical offered to support the "intent of the voter" test does not, in fact, support use of that test.[119]

The only case the Florida court cited as direct authority for its ruling was *McAlpin v. State ex rel. Avriett*.[120] Citing *McAlpin*, the Florida court declared that "[t]his Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a 'legal vote' that should be counted."[121] But the actual holding of *McAlpin* flatly contradicts that proposition. *McAlpin* concerned the counting of paper ballots in a close election.[122] The statute under consideration in *McAlpin* directed that the ballots be marked with a cross ("X"), but some voters marked their ballots with a check ("V") or with other marks.[123] The *McAlpin* court stated:

> In the case at bar, we are confronted with a series of irregularly marked ballots some with check (V) marks and others with at least three other different characters. We hold . . . that the use of the cross (X) . . . is mandatory and that all ballots marked with other characters should not be counted.[124]

This Florida case is squarely at odds with the cases the Florida court cited from Massachusetts, South Dakota, and Illinois.[125] The only reasonable reading of *McAlpin* is that "voter intent" is *not* the test

---

116. *See* Gore v. Harris, 772 So. 2d 1243, 1256 (Fla. 2000), *rev'd*, Bush v. Gore, 531 U.S. 98 (2000) (citing *Boardman* for the proposition that "where voters do all that statutes require them to do, they should not be disenfranchised solely because of failure of election officials to follow directory statutes").

117. 169 So. 597 (Fla. 1936).

118. *Id.* at 598.

119. *See Gore*, 772 So. 2d at 1256 (citing *State ex rel. Peacock* for the proposition that the election contest statute can be used not only to investigate the legality of the votes cast but also to "correct any inaccuracies in the count of the ballots").

120. 19 So. 2d 420 (Fla. 1944).

121. *Gore*, 772 So. 2d at 1256.

122. *McAlpin*, 19 So. 2d at 420.

123. *Id.*

124. *Id.* at 421.

125. *See supra* note 106 (discussing the non-Florida cases relied upon by the Florida court).

of whether a voter has cast a "legal vote";[126] rather, substantial compliance with the instructions for marking ballots is required to cast a "legal vote."[127]

There is nothing in the Florida election statutes that addresses the continuing validity of *McAlpin*. If the only issue were one of state law, we doubt that *McAlpin* would (or should) be read as a bar to further evolution of the definition of "legal vote," foreclosing the Supreme Court of Florida from moving to the view taken in Massachusetts, South Dakota, and Illinois. But Article II is a constitutional constraint on the Florida court's power to construe its statute as it sees fit with regard to an election that has already been held. Under the rules-of-the-game norm, the application of Florida election law to a prior election is not merely one of state law.[128] Because of the systemic interest in depriving decision-makers of broad discretion after the election, Article II's rules-of-the-game norm obliges courts to abide by the rules in effect at the time of the election. Insofar as case law informs the construction of the election statutes, *McAlpin* governs this case and favors Bush, not Gore.

3. Prior Administrative Practice.—The Florida court's construction of "legal vote" rejected contrary judgments by Florida's Secretary of State and the Miami-Dade County canvassing board. Before the contest proceeding that was at issue in *Bush v. Gore*, Gore had "protested" the election.[129] In response to the protest, the Miami-Dade canvassing

---

126. For a contrary view, see Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1418-19 (2001).

127. In his dissent, Justice Breyer cited *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917), as "roughly analogous judicial precedent" for an "intent of the voter" test. Bush v. Gore, 531 U.S. 98, 151 (2000) (Breyer, J., dissenting). *Darby* holds that marking an "X" after a ballot proposition, rather than before, as instructed, does not invalidate the ballot. *Darby*, 75 So. at 412. This case may be viewed as endorsing "substantial compliance." In any event, given the later authority of *McAlpin*, it is an exceedingly dubious foundation for a defense of the Florida court's construction of the statute; in fact, the Florida court in its December 8 ruling did not rely on it. *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940), also adopts an "intent of the voter" test. *Id.* at 50-51. Four years later, however, *McAlpin* expressly limited the holding of *Carpenter*. *McAlpin*, 19 So. 2d at 421.

128. A corollary of this reasoning is that the Florida court could have avoided Article II problems by making its ruling prospective only, and not applying it to the 2000 presidential election.

129. *Bush*, 531 U.S. at 101 (per curiam). Using the election protest provisions of the Florida election law, FLA. STAT. ANN. § 102.166 (West Supp. 2002) (amended 2002), Gore sought hand recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties. *Bush*, 531 U.S. at 101. Candidates file election *protests* "with the County Canvassing Board [to address] the validity of the vote returns." Gore v. Harris, 772 So. 2d 1243, 1252 (Fla. 2000), *rev'd*, Bush v. Gore, 531 U.S. 98 (2000). However, election *contests* are filed in Florida circuit court and "address[ ] the validity of the election itself." *Id.*

board decided, after much equivocation, not to conduct a hand recount.[130] Florida's Division of Electors, a part of Florida's Department of State, rejected Gore's argument that a manual recount should be conducted.[131] The Division ruled that grounds for such a recount do not include situations in which "a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched."[132]

The Supreme Court of Florida rejected these judgments because the Division ignored the plain meaning of section 102.166(5) of Florida's election laws.[133] If the issue was merely whether the court acted in a judicial rather than legislative capacity or acted reasonably, one would be hard pressed to find fault with its decision. After all, the court has the final say in interpreting Florida law, not administrative and executive officials.[134] Viewed from the perspective of Article II, however, the Florida court's action is more vulnerable to criticism. The Florida election officials violated no plain statutory text, nor any ruling by the Florida court. The election protest statute stated that "[t]he county canvassing board may authorize a manual recount"[135] and thus appeared to give the canvassing board discretion as to whether to hold a recount. The Supreme Court of Florida, in a 1993 election case, reaffirmed the principle 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."[136] Whatever the merit of the Florida court's construction of "legal vote" as a rule for

130. *Gore*, 772 So. 2d at 1258.

131. Each of the four Florida counties in which Gore sought a recount conducted hand recounts of at least 1% of the votes cast. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1279 (Fla. 2000). After doing so, Palm Beach County sought an advisory opinion from Florida's Division of Elections to determine whether a discrepancy between the original ballot count and the sample manual recount authorized a manual recount for all Palm Beach County ballots. Manual Recount Procedures and Partial Certification of County Returns, DE 00-12 (Nov. 13, 2000), *available at* http://election.dos.state.fl.us/opinions/de2000/de00_13.html. The Division ruled that Florida law did not authorize a county-wide recount. *Id.*

132. *Harris*, 772 So. 2d at 1282. Specifically, the Florida court disagreed with the Division's interpretation that "error in the vote tabulation" means only a tabulation error arising "from incorrect election parameters" or voting software error. *Id.* at 1283. The Florida court stated that "error in vote tabulation" also encompassed "failure of the voting machinery to read a ballot." *Id.*

133. *Id.* at 1283.

134. *See Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

135. FLA. STAT. ANN. § 102.166(4)(c) (West Supp. 2002) (amended 2002).

136. Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844 (Fla. 1993).

future cases, it does represent a departure from administrative interpretation of Florida election law.

Taken together, (a) *McAlpin*, (b) the absence of clearly relevant statutory text favoring the Florida court's position, and (c) prior administrative practice furnish persuasive reasons to deny that the Florida court's reading of "legal vote" had strong support in preexisting Florida law. Thus, the Supreme Court did not act irresponsibly when it characterized the Florida court's decision as a "significant departure" from pre-existing law, in violation of Article II.

CONCLUSION

Henry Hart once criticized the Supreme Court for taking too many cases, thereby depriving itself of the time needed to achieve "the maturing of collective thought."[137] It would be unjust to level that charge against the opinions in *Bush*. The case raised a novel constitutional issue under Article II, which arose in a politically charged context. Through no fault of its own, the Court had little time in which to decide the dispute. It is no wonder the opinions are less than adequate to the challenge the case presented. Yet the underlying point of Hart's criticism is relevant to *Bush*. He could have been speaking of this case when he asserted that "[i]deas which will stand the test of time as instruments for the solution of hard problems do not come even to the most gifted of lawyers in twenty-four hours."[138]

Our aim has been to argue that the result in *Bush* may be more defensible than the reasoning in the majority and concurring opinions. Not only does the Article II rules-of-the-game theory of the case offer a more persuasive rationale than the per curiam equal protection rationale or the concurrence's separation of powers argument, it also provides a more defensible basis than does the per curiam opinion's reasoning for the Court's refusal to send the case back for further proceedings. Under the equal protection reasoning, it is hard to answer Justice Breyer's argument that the Florida court should have been allowed to try to craft a vote-counting mechanism that would satisfy the Supreme Court's concerns.[139] The rules-of-the-game rationale repudiates the whole notion of recounts to determine the intent of the voter. Accordingly, there are no grounds for such a remand.

---

137. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

138. *Id.*

139. *See Bush*, 531 U.S. at 146 (Breyer, J., dissenting).

Before (or at least in addition to) excoriating the Court for its failures of craft, critics ought to consider whether this is one of the many decisions for which it is necessary to distinguish between the Court's reasoning and its result. Scholars have found much to criticize in the reasoning of *Brown v. Board of Education*[140] and *Roe v. Wade*,[141] two decisions that most of the Court's liberal critics ardently defend, even as they acknowledge faults in the reasoning.[142] And the comparison is hardly fair to *Bush* in any event, for the troublesome aspects of those opinions cannot be attributed to a lack of time for reflection. When the passions excited by the election have cooled, and scholars disappointed by the Republican victory have regained their detachment, they may come to see *Bush* as a landmark case in the law of democracy.

140. 347 U.S. 483 (1954).

141. 410 U.S. 113 (1973).

142. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (defending *Brown* on grounds not advanced in the Court's opinion); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-34 (1959) (same); Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (questioning the *Roe* Court's reasoning, but defending *Roe*'s result under a role allocation theory of due process); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 296-98 (1975) (acknowledging that *Roe* has been criticized as an exercise of "judicial preference," but theorizing that societal interests rather than the Court's mandate are responsible for *Roe*'s outcome).