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I. INTRODUCTION

In November and December 2000, a series of governmental officials and governmental bodies made decisions that may have determined the outcome of a presidential election. Many of those individual decisions—whether exercised by Florida county canvassing boards, the Florida Secretary of State, the Florida Attorney General, the Florida Circuit Courts, the Florida Supreme Court, the lower federal courts, or the United States Supreme Court—corresponded with the political affiliation of the decision-maker.[1] During five weeks of multi-pronged litigation, the processes of law never seemed more up for grabs. Had the post-election contest continued, it may ultimately have been resolved by avowedly political branches of government, the Florida Legislature and the United States Congress.[2] All these events raise a profound question: Can it still be said, as Chief

1. *E.g.*, Monica Davey, *Court Blocks Certification of Votes: Hero or Hack, Harris on the Hot Seat*, CHI. TRIB., Nov. 18, 2000, at 1N ("GOP faithful wear freshly printed T-shirts emblazoned with Harris' name. Her Tallahassee office is brimming with 60 bouquets sent by people such as John McMillan, a forestry executive who praised Harris for her decision this week to refuse to certify manual recounts from three Florida counties, a ruling that could decide the presidential election. A Republican who served as co-chairwoman for Bush's Florida campaign, Harris has been blistered by Democrats who allege she made her decision based on partisan alliances, not the law."); Mireya Navarro, *Counting the Vote: The Attorney General*, N.Y. TIMES, Nov. 16, 2000, at A27 ("Indeed, it is his [state Attorney General Robert A. Butterworth's] party loyalty in the midst of the partisan rancor over ballot-counting in the state that has made the Bush campaign openly critical of Mr. Butterworth's efforts to interpret election law. On Tuesday, in a legal opinion, he said that counties had the right to hold a manual recount of all ballots if they found evidence of errors in initial counts that could affect the outcome of the election."); Sue Anne Pressley, *Outspoken Democrat Pressed Drive for a Manual Recount*, WASH. POST, Nov. 14, 2000, at A23 ("Carol Roberts, a Democrat serving as one of three members of the Palm Beach County canvassing board, isn't shy about making her political views known. . . . Roberts, a raspy-voiced Palm Beach County Commissioner, led the way in insisting on a full manual recount off [sic] all votes cast for president in the county, and said she has received death threats since her motion carried 2-1 in the early morning hours Sunday.").

2. Federal law provides for congressional objections to slates of electors unless they are chosen at least six days prior to the time fixed for the meeting of electors according to laws enacted prior to the day fixed for the appointment of electors. 3 U.S.C. §§ 5, 15 (1994). The Constitution places the authority for choosing electors with the state legislatures, which may lead a state legislature to choose its own slate. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."). *But see* Bruce Ackerman, *As Florida Goes . . .*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that the Florida Legislature should not be able to name a slate in this election controversy since it would be choosing to do so after the election).

Justice Marshall did in *Marbury v. Madison*, that we are "a government of laws, and not of men"?[3]

That question has been voiced loudly, especially as it relates to the ultimate decision. Immediately after the United States Supreme Court decided *Bush v. Gore*,[4] the editors of *The New Republic* pronounced: "Are the justices, then, hypocrites? Alas, they are not. They are—*sub silentio*, as they might say—Republicans. This ruling was designed to bring about a political outcome, and it is an insult to the intelligence of the American people to suggest otherwise."[5] In the same magazine, Legal Affairs Editor Jeffrey Rosen wrote that the Supreme Court had "made 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."[6]

These fulminations cannot be dismissed as the overblown rhetoric of aggrieved political propagandists. No less an authority figure than Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg and Stephen Breyer, wrote in dissent that "the identity of the loser [in the presidential election] is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[7]

As of Spring 2001, that charge has gone unanswered. Rosen observed in *The New York Times Magazine* that "few conservative commentators even attempted to defend the legal reasoning of the decision; instead, they focused on what they considered the rough justice of the outcome."[8] *The Washington Post* reported on February 21, 2001 that a forthcoming law review article by Appellate Judge Richard Posner was the first intellectual defense of the outcome in *Bush v. Gore*, but even Posner's article reportedly derides the Court's per curiam majority opinion and its reliance on the Equal Protection Clause and argues that the desire to head off a major crisis justified the concurring Justices'

3. 5 U.S. (1 Cranch) 137, 163 (1803).

4. 121 S. Ct. 525 (2000).

5. *Unsafe Harbor*, NEW REPUBLIC, Dec. 25, 2000, at 9, 9.

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

7. Bush v. Gore, 121 S. Ct. at 542 (Stevens, J., dissenting).

8. Jeffrey Rosen, *In Lieu of Manners*, N.Y. TIMES MAG., Feb. 4, 2001, at 46, 50.

interpretation of the Constitution[9]—even if that interpretation was not itself "conclusive."[10]

Notwithstanding the dicta, protests, and punditry, the rule of law was vindicated in *Bush v. Gore*. In this article, I defend the proposition that the Florida Supreme Court's order that ballots be hand-counted statewide offended the rule of law, justifying reversal by the United States Supreme Court based on the Equal Protection Clause and the Due Process Clause. I also argue that the Court's majority opinion is consistent with conservative jurisprudence, properly understood, and that the intellectual debate over the Court's decision reflects a wider *Kulturkampf* in contemporary legal thought that extends to the meaning and desirability of living under the rule of law.[11]

Ironically enough, intimations of the correctness of *Bush v. Gore* can be read in unheralded opinions subsequently issued by the Florida Supreme Court. On December 14, 2000, after Vice President Gore had conceded the election, all seven Florida justices concurred in a two-page order dismissing the case because "[o]n the date of the subject election, the Florida Election Code did not provide the elements necessary for a resolution of the disputed issues, based on the constitutional parameters expressed by the United States Supreme Court."[12] On December 22, 2000, longer opinions followed. Five of the Florida justices, including all four that had previously ordered the hand recount, concurred in a joint opinion that elaborated, "[U]pon reflection, we conclude 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."[13]

9. Bush v. Gore, 121 S. Ct. at 533-39 (Rehnquist, C.J., concurring) (opining that the Florida Supreme Court impermissibly distorted the Florida Election Code, in violation of the U.S. Constitution art. II, sec. 1, cl. 2).

10. Benjamin Wittes, *Maybe the Court Got It Right: A Judge's Defense of the Florida Election Decision*, WASH. POST, Feb. 21, 2001, at A23.

11. On the *Kulturkampf* in law, see generally Philip Rieff, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions*, 3 YALE J.L. & HUMAN. 315 (1991). For discussions of the effect of the *Kulturkampf* upon legal doctrine, see Joel E. Friedlander, *Constitution and* Kulturkampf*: A Reading of the Shadow Theology of Justice Brennan*, 140 U. PA. L. REV. 1049 (1992) and Joel Edan Friedlander, *Corporation and* Kulturkampf*: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31 (1996).

12. Gore v. Harris, No. SC00-2431, slip op. at 2 (Fla. Dec. 14, 2000) (per curiam).

13. Gore v. Harris (Gore II), 773 So. 2d 524, 526 (Fla. 2000) (per curiam).

One of those four justices wrote a separate opinion in which he discussed several flaws in Florida's Election Code and voting systems and recommended new legislation.[14] The fifth justice, who had dissented from the decision to order a hand recount,[15] wrote a separate opinion stating that "[a]lthough the pursuit of the truth and the preservation of the right to vote are worthy goals, they cannot be achieved in a manner that contravenes [legal] principles."[16] He concluded: "Our nation has been through an ordeal, but we have learned from the experience."[17]

Precisely what lessons were learned by the justices of the Florida Supreme Court, and what lessons we can glean from their newfound modesty about the judicial function, require a more detailed explication. But first it is important to review the legal issues before the United States Supreme Court, the antinomian theory implicit in the central attack leveled against the majority decision in *Bush v. Gore*, and the academic debate over the possibility and desirability of living under the rule of law.

II. THE DEMISE OF THE JURISPRUDENCE OF RADICAL SELF-RESTRAINT

Jeffrey Rosen properly observed in his initial post-mortem that "faith in law as something more than politics has had powerful opponents throughout the twentieth century. For everyone from legal realists and critical race theorists to contemporary pragmatists, it has long been fashionable to insist that the reasons judges give are mere fig leaves for their ideological commitments."[18] In its almost century-long history, Rosen continued, *The New Republic* has "resisted this cynical claim. From Learned Hand and Felix Frankfurter to Alexander Bickel, the editors of this magazine have insisted that, precisely because legal arguments are so malleable, judges must exercise radical self-restraint."[19] Rosen summarized the tradition to which he claims adherence as follows: "Our views about judicial

14. *Id.* at 530 (Pariente, J., concurring).

15. Gore v. Harris (Gore I), 772 So. 2d 1243, 1270-73 (Fla. 2000) (Harding, J., dissenting), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

16. *Gore II*, 773 So. 2d at 527 (Shaw, J., concurring).

17. *Id.* at 530.

18. Rosen, *supra* note 6, at 18.

19. *Id.*

abstinence have been those of Oliver Wendell Holmes: 'If my fellow citizens want to go to hell, I will help them,' he said. 'It's my job.'"[20]

That Holmesian standard is the one Rosen applied to the United States Supreme Court majority. Their flaw, he wrote, is that "[t]hey foolishly tried to save the country from what they perceived to be a crisis of legitimacy."[21] The fact that the five conservative Justices cited no judicial precedent directly bearing on the facts before them is presented as proof of their apostasy.[22]

Curiously, Rosen did not evaluate the legal act precipitating the Court's review.[23] When Holmes wrote in private correspondence that it was his job to help his fellow citizens go to hell if they chose, he was referring to his determination to faithfully interpret the Sherman Antitrust Act, even though he thought it was a foolish statute.[24] Yet, the *Bush v. Gore* Court was not interpreting ordinary congressional legislation. The Justices were confronted with a state court order that threw out certified election results[25] and ordered a hasty manual count of tens of thousands of ballots in each of Florida's counties.[26] Each county's counters were to be guided by no standard other than that a vote is "legal" if there is a "clear indication of the intent of the voter."[27] Florida's Supreme Court also ordered that ballots previously hand recounted in three counties be made part of the final total[28] even though each county used different standards for evaluating ballots.[29] None of the Justices on either side could

20. *Id.* (citation omitted in original).

21. *Id.*

22. *Id.*

23. *See id.*

24. Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS 248-49 (Mark DeWolfe Howe ed., 1953).

25. Gore v. Harris (Gore I), 772 So. 2d 1243, 1261 (Fla. 2000) (per curiam), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

26. *Gore I*, 772 So. 2d at 1262; Bush v. Gore, 121 S. Ct. at 544 n.1 (Souter, J., dissenting) (estimating the total number of undervotes at 60,000 based upon testimony at oral argument).

27. *Id.*

28. *Id.*; *see also* Bush v. Gore, 121 S. Ct. at 531 ("[The Florida Supreme Court] mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore.").

29. Bush v. Gore, 121 S. Ct. at 531; Clay Lambert, *Supreme Court Rules: End Counts by Sunday with No Standard, S. Florida Questions: Which Votes Count?*, PALM BEACH POST, Nov. 22, 2000, at 1A ("[T]he standard for what counts as a vote has varied not only among the three counties doing recounts, but has also changed within Palm Beach and Broward counties during their recounts.").

locate direct precedent for evaluating such an order.[30] Two of the dissenters agreed with the five Justice majority that the Florida Supreme Court's failure to establish uniform standards for the evaluation of several different types of ballots presented "a meritorious argument for relief."[31] As Justice Souter wrote: "I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights."[32]

Put differently, the *Bush v. Gore* Court was itself reviewing the legality of a decision by a state court that saw itself as trying "to save the country from what they perceived to be a crisis of legitimacy." What made the Court's task all the more atypical was that the Florida Supreme Court's orders were necessarily subject not only to the general principles embedded in the Equal Protection Clause and the Due Process Clause but also to a federal statute and a federal constitutional provision that imposed time deadlines and required adherence to the pertinent state election statutes as they existed on election day.[33] The *Bush v. Gore* Court was thus in the unusual posture of policing a state court to determine whether the state court had exceeded its authority by deviating from any of numerous pre-existing legislative rules, while also policing the state court order and the state legislation itself for conformity with the Equal Protection Clause and the Due Process Clause. If the statewide hand recount ordered by the Florida Supreme Court failed on any of those grounds, it was unlawful. Only if the Florida Supreme Court acted in conformity with all the applicable rules could it be said that the United States Supreme Court had an obligation to affirm their order that ballots be recounted by hand in the search for voter intent.

State legislation and federal legislation each imposed significant roadblocks on the path chosen by the Florida

30. *See* Bush v. Gore, 121 S. Ct. 525.

31. *Id.* at 545 (Souter, J., dissenting).

32. *Id.*

33. Federal law provides for congressional objections to slates of electors unless they are chosen at least six days prior to the time fixed for the meeting of electors according to laws enacted prior to the day fixed for the appointment of electors. 3 U.S.C. §§ 5, 15 (1994). The Constitution places the authority for choosing electors with the state legislatures. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

Supreme Court. The problem with the Florida Election Code was a dearth of statutory language supporting a judicially imposed hand recount of undamaged ballots that did not register as votes when processed by properly functioning tabulation machines. In his subsequent call for legislative reform, one of the Florida justices observed, "[T]he Florida Election Code did not provide for an automatic procedure to allow for the option of one candidate to request a statewide manual recount according to uniform, 'objective' standards."[34] Moreover, the Florida Election Code was subject to the interpretation (proffered by the Secretary of State and endorsed by then-Governor Bush) "that the manual recount statute does not provide for the counting of undervotes" and that neither does the post-certification contest provision.[35] Additionally, the Florida Election Code did not set forth any specific standard for evaluating ballots if manually recounted at the county level upon a candidate's protest prior to certification.[36] Florida's Chief Justice had earlier written in dissent but without contradiction that "the local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance."[37]

Article II, Section 1 of the United States Constitution vests state legislatures with the power to decide how that state's presidential electors are to be selected.[38] Federal legislation mandates that Congress count the votes of electors chosen within a tight time limit pursuant to a pre-existing state legislative scheme.[39] If the electors were determined pursuant to pre-existing state law by December 12, 2000 (six days before the time fixed for the meeting of each state's electors), then that determination would be conclusive upon Congress when they tabulated the results of the Electoral College.[40] If the electors

34. Gore v. Harris (Gore II), 773 So. 2d 524, 532 (Fla. 2000) (Pariente, J., concurring).

35. *Id.* at 535.

36. *Id.* at 534.

37. Gore v. Harris (Gore I), 772 So. 2d 1243, 1269-70 (Fla. 2000) (Wells, C.J., dissenting), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525.

38. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

39. 3 U.S.C. §§ 5, 15 (1994).

40. *Id.* § 5 ("If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State . . . and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive . . . .").

were judicially determined after December 12, 2000 and another state body (such as the Florida Legislature) disputed the regularity by which that determination was made and appointed a competing slate of electors, then Congress, upon meeting on January 6, 2001, would have the discretion to determine which slate of electors had been appointed in accordance with Florida law.[41] One question before the courts was whether the Florida Election Code contemplated that any post-election litigation must conclude before December 12, 2000 so that Congress would have no choice but to accept the electors so appointed.

The significance of the deadlines divided the *Bush v. Gore* Court. Only a week earlier the United States Supreme Court had unanimously vacated a Florida Supreme Court ruling that extended the process for certifying the election results, due to the Florida Supreme Court's failure to clarify whether that court had considered the import of the federal legislation and its December 12 "safe harbor."[42] In its December 8 opinion ordering the statewide hand recounts, the Florida Supreme Court acknowledged that the "outside deadline [was] established by federal law,"[43] that "time [was] of the essence,"[44] that public servants throughout Florida would need "to work over this weekend" to hand count the ballots,[45] and that "practical difficulties may well end up controlling the outcome of the election."[46] In a separate December 11, 2000 opinion reinstating its previously vacated decision, the Florida Supreme Court interpreted the Florida Election Code as authorizing the Secretary of State to reject late, amended returns only if those

41. *Id.* § 15 ("[I]n case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law . . . .").

42. Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471, 474-75 (2000) (per curiam).

43. Gore v. Harris (Gore I), 772 So. 2d 1243, 1261 (Fla. 2000) (per curiam), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

44. *Id.* at 1262.

45. *Id.* at 1262 n.22.

46. *Id.* at 1261 n.21.

late returns did not allow time for a post-election contest or did not "accommodate the outside deadline set forth in *3 U.S.C. § 5* of December 12, 2000."[47]

The *Bush v. Gore* majority interpreted the December 11 opinion as requiring a post-election contest to be completed by December 12.[48] The *Bush v. Gore* majority also interpreted the December 8 opinion as authorizing the appointment of electors based on the tabulation of all hand-counted ballots by December 12, even if the hand recounts were not complete.[49] These rulings combined to magnify the due process and equal protection deficiencies for the hand recount. As the *Bush v. Gore* majority summarized the problems:

> [W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.[50]

The hastily written majority opinion[51] did not provide any citation for that sentence.[52] The proposition is soundly based, however, in the centuries-old equitable principle "Equality is Equity." As explained in the leading treatise at the turn of the last century, the principle is founded on the "notion of equality or impartiality" inherited by English equity courts from the Roman doctrine of *æquitas*, and it "furnishes a practical rule for the guidance of equity courts in their administration of reliefs, whenever they obtain jurisdiction over a great variety of cases, unless some compulsory dogma of the law stands in the way."[53]

47. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1289-90, 1290 n.22 (Fla. 2000).

48. 121 S. Ct. at 533 ("The Supreme Court of Florida has said that the legislature intended the State's electors to 'participate fully in the federal electoral process,' as provided in *3 U.S.C. § 5*. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12.") (citation omitted).

49. *Id.* at 531-32 ("The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete.").

50. *Id.*

51. *See* Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A (discussing the events and pressures leading up to issuance of the majority opinion written primarily by Justice Kennedy).

52. *Id.*

53. 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 405 (3rd ed. 1905).

The Florida Supreme Court had not attempted to order equitable relief that was consistent with principles of equal treatment and impartiality. The post-certification contest was invoked pursuant to a statute that authorized the filing of a complaint and the granting of judicial relief based upon the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."[54] Yet the court conferred upon the counters the discretion to choose what type of mark or puncture for a given candidate would constitute a "legal vote." The only interpretive guidance the Florida Supreme Court could locate was from a separate statutory provision that allowed the counting of damaged ballots from which the "clear indication of the intent of the voter as determined by the canvassing board" could be inferred.[55] As a practical matter, given the few days between when the Florida Supreme Court heard Vice President Gore's appeal and the court's December 12 deadline for concluding the contest, there was no time for an appellate court to authoritatively decide, according to a uniform standard, after opportunity for objections and arguments, which ballots did or did not constitute legal votes. Rather than dismiss the contest proceeding on the ground that there was no statutory basis or time for impartial adjudication of ballot disputes by a court, the Florida Supreme Court entered an order that allowed the decisions of the counters to determine the outcome of the contest.

All four dissenting Justices preferred not to hear the *Bush v. Gore* appeal and not to stop the hand recount.[56] Once the appeal was heard, the two dissenters who saw merit in the equal protection claim would have allowed the hand counting of ballots to extend beyond December 12, 2000 to December 18 (the date set for the meeting of electors) and would have allowed the Florida Supreme Court to establish uniform statewide procedures to govern the hand recount.[57]

54. FLA. STAT. ANN. § 102.168(3)(c) (West Supp. 2000).

55. *See* Gore v. Harris (Gore I), 772 So. 2d 1243, 1256-57 (2000) (per curiam) ("[W]e conclude that a legal vote is one in which there is a 'clear indication of the intent of the voter.'" (quoting FLA. STAT. ANN. § 101.5614(5) (West Supp. 2000))), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525.

56. Bush v. Gore, 121 S. Ct. 512 (2000) (granting application for stay and granting petition for writ of certiorari by five to four vote).

57. Bush v. Gore, 121 S. Ct. 525, 545 (Souter, J., dissenting) ("Petitioners have raised an equal protection claim (or, alternatively, a due process claim), in the charge that

Any of those options would necessarily have opened the door to the argument that the Florida Supreme Court was impermissibly rewriting the Florida Election Code after the election, thereby tempting Congress to reject the electors and/or tempting the Florida Legislature to appoint its own slate of electors with Congress deciding which slate had been validly appointed under Florida law.[58] The dissenters forthrightly recognized that possibility. Justice Souter wrote that if the Court abstained from ruling the "political tension could have worked itself out in the Congress."[59] Justice Breyer counseled that "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about."[60]

Here we see the jurisprudence of "radical self-restraint" favored by Rosen. Quoting favorably from *The Least Dangerous Branch* by Professor Alexander Bickel, Justice Breyer wrote that the Court should abstain from adjudicating a political dispute that is marked by "the 'strangeness of the issue,' its 'intractability to principled resolution,' its 'sheer momentousness, . . . which tends to unbalance judicial judgment,' and 'the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.'"[61] This is a telling passage for Justice Breyer to rely upon, given that he had already concluded that the Florida Supreme Court's

unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. . . . In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order. Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18.") (citation omitted).

58. *See supra* note 2 and accompanying text. Federal law requires Congress to accept electors appointed according to state election laws in place on the day of the election. These state election laws must provide for the selection of electors at least six days before the meeting of electors. *See* 3 U.S.C. §§ 5, 15 (1994). Federal law also provides for congressional resolution of disputes resulting from two sets of electors being appointed. *Id.* § 15.

59. Bush v. Gore, 121 S. Ct. at 542 (Souter, J., dissenting).

60. *Id.* at 556 (Breyer, J., dissenting).

61. *Id.* at 557 (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962)).

standardless hand recount order violated "basic principles of fairness."[62]

Of the factors identified by Bickel, Justice Breyer seems most concerned with institutional self-doubt. Justice Breyer writes that

> above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. . . . [Public] confidence is a public treasure. . . . It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.[63]

The fear of frustrating the "people's will" and undermining "public confidence" are of paramount concern. Favorable public opinion is seen as a precondition to the Court's ability to lay down a rule of law, rather than a consequence of an institution's reputation for the principled application of law to fact.

Given that seven Justices thought the state court order violated the Constitution, a refusal by the Court to rule on the merits of the case would have been a political choice with political consequences. It would have meant throwing Florida's electors into the political maw,[64] despite the Florida Supreme Court's own ruling on December 11 that "the Legislature would not wish to [risk] Florida's vote [not] being counted in a presidential election."[65] The ultimate result could then become a function of the alignment of political forces in the Florida Legislature and the United States Congress, as influenced by public opinion at that time and perhaps whatever bargains individual legislators might think it prudent to strike. Public opinion would itself be influenced by the results of the hand recount, especially since the public would not know that a majority of the Court's Justices thought that the hand-counting procedures were constitutionally defective.

Doing the politically prudent thing cannot be equated with fidelity to the rule of law. It is not lawless to reach the merits of a case. It was in 1962 that Bickel published *The Least Dangerous*

62. *Id.* at 551.

63. *Id.* at 557.

64. *See* 3 U.S.C. §§ 5, 15 (1994) (allowing electors to be challenged in Congress if not selected more than six days prior to the meeting of the electoral college and according to a legislative scheme in place on election day).

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

Branch[66] and Justice Felix Frankfurter dissented in *Baker v. Carr*—the landmark case that first held malapportionment of legislative districts to be justiciable under the Equal Protection Clause.[67] Over the next thirty-eight years a mass of equal protection and due process of law doctrine was judicially created by the United States Supreme Court.[68] Only the most radical self-restraint could prevent the Court in December 2000 from deciding the constitutionality of a judicially-imposed hand recount scheme that endorsed disparate treatment of identical ballots when the alternative is a constitutionally-tainted, ultimately unreviewable legislative struggle for the presidency.

The eclipsed jurisprudence of radical self-restraint is not synonymous with the rule of law. Indeed, that jurisprudence was the harbinger of a continuing, wide-ranging intellectual attack on the very idea of the rule of law. As explained below, the reversed decision of the Florida Supreme Court, the dissenting opinions in the United State Supreme Court, and many of the extra-judicial attacks on the *Bush v. Gore* majority represent variants of contemporary intellectual attacks on the classical understanding of the rule of law. Each form of attack denies the existence of ascertainable legal rules and equitable principles that bind legal actors.

III. THE CONTESTED JURISPRUDENCE OF THE RULE OF LAW

A. *Modern and Postmodern Conceptions*

In 1995, law professor Gary Minda published *Postmodern Legal Movements: Law and Jurisprudence at Century's End*,[69] a book which sought to synthesize the origins, evolution, and significance of five contemporary legal movements—law and economics, critical legal studies, feminist legal theory, critical race theory, and the

66. BICKEL, *supra* note 61.

67. 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

68. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW chs. 3-5 (1990) (lamenting the explosion of judicial activism in the late twentieth century); Stanley H. Friedelbaum, *Justice Brennan and the Burger Court: Policy-Making in the Judicial Thicket*, 19 SETON HALL L. REV. 188 (1989) (discussing Justice Brennan's judicial philosophy and activism). For a recent example of an equal protection decision involving a nationally divisive issue—homosexual rights—authored by Justice Kennedy and joined by the *Bush v. Gore* dissenters, see *Romer v. Evans*, 517 U.S. 620 (1996).

69. GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

law and literature movement. These movements first asserted themselves in the 1970s and 1980s, became firmly entrenched in American law schools by the early 1990s, and fostered the emergence of a "new postmodern jurisprudential perspective."[70] By 1990, Minda writes, "There was a loss of belief in a secular and autonomous jurisprudence as the 'Rule of Law' for all rules."[71] The new postmodern jurisprudence, according to Minda, "is not a theory of law, but a kind of *antitheory*—an antitheory that strives, however problematically, to resist the adjudicatory impulse, the regulatory obsession of modern legal thought."[72]

Minda divides the history of American legal thought into two periods. From 1871 to 1980, "modern jurisprudence" developed, reigned and then declined.[73] The legal scholars in this period strove to "explain, justify, and defend the idea of legal decision making according to the ideal of an autonomous Rule of Law."[74] This was a secular, rationalist project. According to Minda, it began in 1871 with the publication of the first modern law school casebook, by the dean of Harvard University Law School, Christopher Columbus Langdell, who wrote in its preface:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.[75]

A decade later, Oliver Wendell Holmes published *The Common Law*, in which he used his encyclopedic knowledge of legal history to show that law develops in response to, among other factors, the "felt necessities" of the time.[76] Following in the footsteps of Langdell and Holmes, modern legal scholars

70. *Id.* at 9.

71. *Id.* at 232.

72. *Id.* at 234.

73. In the first through fourth chapters, Minda traces the history of modern jurisprudence from its origin in 1871 through its reign and decline. *Id.* at 13-80.

74. *Id.* at 60.

75. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (photo. reprint 1983) (1871).

76. MINDA, *supra* note 69, at 17 (quoting O.W. HOLMES, JR., THE COMMON LAW 5 (1881)).

developed models of what the correct legal rule should be.[77] Some emphasized the methods of legal reasoning and the legal process.[78] Others looked outside the structure of legal rules to sociological studies or to contemporary political theory and moral theory.[79]

Minda characterizes Bickel as representing both the height and the ultimate failure of the legal process branch of modern jurisprudence.[80] The legal process scholars of the 1950s and early 1960s were greatly concerned with their inability to justify the Supreme Court's decision in *Brown v. Board of Education*[81] in terms of legal reasoning divorced from politics or morality.[82] In *The Least Dangerous Branch*, Bickel proposed that the Court use the "passive virtues" (such as the political question doctrine endorsed in dissent by Justice Frankfurter in *Baker v. Carr*[83] and by Justice Breyer in *Bush v. Gore*[84]) to limit judicial review only to those cases in which the Court could rely on an accepted neutral principle of law.[85] By 1970, Bickel had become sufficiently skeptical about the judicial enterprise that he argued it was impossible for the Supreme Court to elaborate neutral principles that would justify judicial supremacy in cases involving controversial issues of social policy.[86]

The postmodern legal movements described by Minda represent an extreme form of Bickel's disenchantment with the ability of judges to elaborate principled legal rules. Law and economics scholars argued in the 1970s that judges would be better off substituting economic theory for legal analysis.[87] At the same time, critical legal studies scholars argued that "law is politics" and that legal categories and legal rules were hopelessly indeterminate.[88] In the mid-1980s, feminist and race-conscious movements grew out of the critical legal studies movement.[89]

77. *Id.* at 20-21.
78. *Id.* at 20.
79. *Id.*
80. *See id.* at 44-45.
81. 347 U.S. 483 (1954).
82. MINDA, *supra* note 69, at 47.
83. 369 U.S. 186 (1962) (Frankfurter, J., dissenting).
84. 121 S. Ct. 525, 557 (2000) (Breyer, J., dissenting).
85. MINDA, *supra* note 69, at 38-39.
86. *Id.* at 44-45.
87. *Id.* at 83.
88. *See id.* at 107-08.
89. *Id.* at 125.

Minda describes gay and lesbian, Native American, Asian American, and black feminist critiques of the idea that legal reasoning can be the basis for establishing an autonomous, universal system of legal rights.[90] Relying on contemporary social and literary theory, postmodern legal scholars argue that objectivity and truth are culturally contingent and that "all canons of law are man-made and thus always subject to reinterpretation."[91] While suggesting the possibility of discovering "new canons of interpretation" and developing "a new constructive jurisprudence" that responds "to the different perspectives and interests of multicultural communities," Minda warns that postmoderns may hasten the death of more than the modernist approach to law and adjudication: "At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself."[92]

B. *Postmodern Strains in the* Bush v. Gore *Litigation*

Three different strands of postmodern jurisprudence can be discerned in the tangled litigation that became *Bush v. Gore*. One of those strands, identified above, is the "radical self-restraint" of Justices Breyer and Souter, who each avoided invalidating a recount order that they believed to be unconstitutional,[93] and, in the case of Justice Breyer, did so because he was concerned that the United States Supreme Court lacked the institutional authority to issue an order that would prompt the disappointed half of the country's voters to question whether there was a difference between law and politics.[94] There can be no better example of Minda's definition of postmodern jurisprudence—an "antitheory that strives, however problematically, to resist the adjudicatory impulse."

A separate strand of postmodern jurisprudence was woven through the reversed decision of the Florida Supreme Court.

90. *See id.* at 195-98.
91. *Id.* at 256.
92. *Id.* at 256-57.
93. Bush v. Gore, 121 S. Ct. 525, 545 (2000) (Souter, J., dissenting) (noting that the equal protection claim presents "a meritorious argument for relief"); *id.* at 551 (Breyer, J., dissenting) (stating that the recount order "implicate[d] principles of fundamental fairness").
94. *See id.* at 557 ("And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure.").

The Florida Supreme Court majority maintained that its obligation was to "do no more" and "do no less" than pursue what it perceived to be the "clear message from . . . legislative policy . . . that every citizen's vote be counted whenever possible."[95] The majority saw no impediment in the fact that no statute or caselaw specified how undamaged, untabulated ballots should be interpreted, or the fact that different counters had interpreted similarly marked ballots in different ways. According to the majority, the Florida Supreme Court's "responsibility to resolve this election dispute under the rule of law" required only that the justices do "the best we can" and "remain confident that [the counters] will also do the best they can to fulfill their duties as they see them," even though "practical difficulties may well end up controlling the outcome of the election."[96] In other words, there would be no "rule of law" applied to the differing interpretations of the ballots by the various counters.

A third strand of postmodern jurisprudence is seen in the racialist critique of Florida election law, which was largely repressed in the litigation itself, even as it was voiced loudly by non-lawyers outside the courtrooms.[97] Perhaps recognizing the impossibility of casting the apparent racial dimension of Florida's uncounted undervotes in terms of "new canons of interpretation" or a "new constructive jurisprudence" that would be judicially acceptable and politically useful, Gore's litigators, and the Florida Supreme Court, employed rhetoric of arid formalism to justify the exercise of judicial discretion.[98]

Only one judicial opinion, that of Judge Carnes of the Eleventh Circuit Court of Appeals, took note of a racialist critique advanced by Gore's supporters. In opining that the selective hand counts requested by the Florida Democratic Party pursuant to Florida law violated the Equal Protection Clause, Judge Carnes discussed an affidavit submitted by the Florida

95. Gore v. Harris (Gore I), 772 So. 2d 1243, 1254 & n.12 (Fla. 2000) (per curiam), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

96. *Id.* at 1261 n.21.

97. *See, e.g.*, Michael Crowley, *Race Not Run*, NEW REPUBLIC, Dec. 18, 2000, at 17 (discussing the heavy criticism of Al Gore among black leaders for not bringing up the racial dimension of the vote-counting dispute).

98. When reinstating its vacated decision extending the time for county canvassing boards to submit amended returns for certification, the Florida Supreme Court claimed to perceive "a clear legislative policy" based on its use of various canons of construction to resolve an ambiguity created by conflicting statutory provisions. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1291 (Fla. 2000).

Democratic Party stating that "'two groups of citizens, the elderly and minorities, are more prone to have problems [with punch-card voting] than the rest of the population.'"[99] Using demographic and voting data, Judge Carnes explained how the Florida Democratic Party had chosen counties for hand recounts based on partisan self-interest, not based on which punch card counties had the highest proportion of elderly or minority voters.[100]

Subsequently, the Florida Supreme Court ordered an unprecedented statewide hand recount in the search for voter intent unrecorded by vote tabulation machines.[101] When ordering that relief, the Florida Supreme Court was presumably aware of the argument that the tallies from punch-card tabulation machines disenfranchised minority voters. The court suggested in a footnote that "the demonstrated margins of error may be so great to suggest that it is necessary to reevaluate utilization of the [punch-card] mechanisms employed as a viable system."[102] The unsought and unprecedented relief ordered by the Florida Supreme Court had the effect of remedying the perceived defects with punch-card voting, even though no constitutional claim had been asserted that the use of punch cards in various counties impermissibly disenfranchised any group or was otherwise unconstitutional. The postmodern racialist perspective serves as a critique of existing law that invites modernist judges and regulators to fashion new legal rules.

C. *The Classical Understanding of the Rule of Law*

The jurisprudence that presents the true antithesis to the postmodern perspective described by Minda is not the "modern legal thought" characterized by the rationalistic search for the ideal legal rule. While the contemporary debate in American law reviews may be between and among moderns and postmoderns, what unites both camps is their unspoken common opposition to the classical understanding of the rule of law, which arose out of a culture that believed in the obligation of imperfect human

99. Siegel v. LePore, 234 F.3d 1163, 1203 (11th Cir. 2000) (Carnes, J., dissenting) (citation omitted).

100. *Id.* at 1202-03.

101. *Gore I*, 772 So. 2d at 1261.

102. *Id.* at 1261 n.20.

agents to apply eternal and accessible principles of justice. For that classical understanding, which is consistent with the approach taken by the *Bush v. Gore* majority, one cannot look to Minda's book, which implicitly assumes, as do the contemporary scholars it discusses, that the jurisprudence prior to Langdell and Holmes may safely be ignored.

The British scholar A.V. Dicey brought the phrase "rule of law" into common currency in his book *Introduction to the Study of the Law of the Constitution*,[103] first published in 1885.[104] Dicey, following de Tocqueville, identified the rule of law as a distinctive characteristic of Great Britain and the United States that was unknown to continental Europe.[105] Dicey discussed three aspects of the rule of law. First, it means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."[106] Second, it means "the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts."[107] Third, it means that the general principles of the constitution are the "result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."[108]

In identifying the rule of law with the vindication of rights through adjudication, Dicey was following in the footsteps of Sir William Blackstone, the original holder of his chair as Vinerian Professor of English Law at Oxford.[109] In his *Commentaries on the Laws of England*, the first systematic effort to explain the principles of the common law to students, Blackstone celebrated how the common law and the English constitution secured the absolute natural rights of individuals. Blackstone wrote that human law is founded upon and cannot contradict the "law of nature and the law of revelation," and that no restriction of

103. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (photo. reprint 1982) (8th ed., 1915).

104. Roger Michener, *Foreword* to DICEY, *supra* note 103, at xi.

105. DICEY, *supra* note 103, at 110 ("Yet, even if we confine our observation to the existing condition of Europe, we shall soon be convinced that the 'rule of law' even in this narrow sense is peculiar to England, or to those countries which, like the United States of America, have inherited English traditions.").

106. *Id.* at 120.

107. *Id.*

108. *Id.* at 115.

109. *See* Michener, *supra* note 104, at xvi.

liberty is justified unless it contributes to the public good.[110] Blackstone's *Commentaries* took deepest root in the United States, where they became the basis for legal education and the scholarly work most cited by American judges,[111] long after Blackstone's influence in England waned in a tide of Benthamite reform and collectivist legislation.[112] Blackstone's theories found their American expression in the judicial enforcement of constitutional limits, until Holmesian skepticism fostered greater solicitude for governmental action.

In the common law tradition explicated by Dicey and Blackstone, the rule of law is not a romantic or rationalistic quest for ideal legal rules. It is the institutionalized artifact of a culture that holds that human action must be judged according to pre-existing rules, which are themselves judged according to superordinating principles of justice. Perhaps the earliest predecessor of Dicey and Blackstone is Christopher Saint Germain, whose *Doctor and Student, or Dialogues Between a Doctor of Divinity and a Student in the Laws of England*, published in 1518, discussed how the judge's responsibility is to follow an inherited rule of law, unless the rule is contrary to the law of God or to the law of reason, or conscience and equity dictate that an exception be made from the general rule.[113] From such natural law premises, equitable doctrines developed, such as those informed by the principle "Equality is Equity."[114]

At the close of the twentieth century, what were once jurisprudential premises have become the implicit focus of intellectual attack. The modernist and postmodernist attacks on the rule of law lie in their self-conscious effort to create new rules and new legal regimes, while questioning the legitimacy of a judge who claims to follow pre-existing statutory or decisional

110. SIR WILLIAM BLACKSTONE, THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 30-31 (Gareth Jones ed., 1973).

111. Gareth Jones, *Introduction* to BLACKSTONE, *supra* note 110, at lii.

112. *See generally* A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 62-302 (2d ed. 1914) (discussing the periods of Benthamism and collectivism in English history and their impact upon law and public opinion in England).

113. CHRISTOPHER SAINT GERMAIN, DOCTOR AND STUDENT; OR, DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND 37-51, 144-47 (photo. reprint 1988) (1518).

114. POMEROY, *supra* note 53, § 8 (explaining how equity jurisprudence formed out of natural law premises).

rules unless they contradict a pre-existing principle of reason, equity or constitutional law.

D. Bush v. Gore: *The Vindication of the Rule of Law*

In the litigation that became *Bush v. Gore*, we see the effect of a century of rethinking the premises of law. By the time Dicey published the eighth edition of his treatise in 1915, he wrote that "the ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline."[115] Evidence of that decline included recent legislation giving "judicial or quasi-judicial authority to officials who stand more or less in connection with, and therefore may be influenced by, the government of the day, and hence have in some cases excluded, and in others indirectly diminished, the authority of the law Courts."[116] In Florida, much attention focused on government officials who had been legislatively granted seemingly unbounded discretion—the members of the county canvassing boards and the Secretary of State.[117] Individual canvassing boards decided whether to conduct hand recounts and what would count as a voted ballot;[118] the Secretary of State decided whether to certify late-counted returns.[119]

When the actions of the county canvassing boards and the Secretary of State were subjected to judicial scrutiny, the lower

115. DICEY, *supra* note 103, at xxxviii.

116. *Id.*

117. *See, e.g.*, David G. Savage & Henry Weinstein, *Case Before Florida Justices May Turn on a Legal Phrase*, L.A. TIMES, Nov. 19, 2000, at A22 ("The secretary of state also argues that she has broad discretion to decide such issues and that a state court is obliged to defer to her opinion."); *State Justices Must Act in Interest of the Voters*, PALM BEACH POST, Dec. 5, 2000, at 20A ("In another example of the contradictions this controversy has produced, Judge Sauls justified his decision by saying that state laws give individual canvassing boards 'broad discretion' in setting standards for hand counts.").

118. *Guide to the Election Controversy in the Sunshine State*, WASH. POST, Nov. 26, 2000, at A8 ("Florida law allows a candidate to request a manual recount of ballots. The three-member election canvassing board in each county has the power to decide whether to do the recount."); *see also* Jean Heller, *Palm Beach Recount Waits on High Court*, ST. PETERSBURG TIMES, Nov. 16, 2000, at 9A ("If a hand recount does get under way today, a local judge has cleared the way for elections officials to qualify some votes previously disqualified. Circuit Judge Jorge Labarga ruled Wednesday that elections officials could count 'dimpled' or 'pregnant' chads as valid votes if they were convinced it was the intent of the voter to punch all the way through. . . . However, Labarga did not order that these votes be counted. Rather, he left it to the canvassing board's discretion.").

119. *See Guide to the Election Controversy in the Sunshine State*, *supra* note 118, at A8 ("At first, Florida Secretary of State Katherine Harris said she would not accept the results of such recounts and told the counties to submit their final tallies a week after the election. But the state Supreme Court ruled that the recounts were allowed and required Harris to accept any results submitted by 5 p.m. Sunday.").

courts deferred to their apparent broad discretion.[120] The Florida Supreme Court saw its role differently. It read a moral and political imperative into the shadows and ambiguities of the legislative scheme: To the extent possible, intended votes were to be discovered and counted.[121] Judicial recognition of that imperative was then translated by the Florida Supreme Court into orders that granted broad discretion to persons who would be charged with the responsibility to inspect the ballots and determine whether they constituted "legal votes."[122]

The appeal of the latter order presented the United States Supreme Court with a question particularly suited for the close of a century that has witnessed a massive proliferation of rulings, regulations, and governmental bodies: Can a court vest government officials with unbounded and unreviewable power? In finding that the standardless discretion granted to the ballot inspectors was unconstitutional,[123] the five conservative Justices in the *Bush v. Gore* majority upheld the centuries-old but now-embattled idea of the rule of law.

IV. CONCLUSION

The Florida Supreme Court was likely unaware of the perils of judicial improvisation when it unanimously proclaimed on November 21, 2000 that the Secretary of State could not exercise her statutory discretion "to summarily disenfranchise innocent electors in an effort to punish dilatory Board members."[124] In granting selected counties five additional days to manually recount all ballots and submit amended returns to the Secretary of State, the court offered the blithe explanation that it was "invok[ing] the equitable powers of this Court to fashion a

120. *See, e.g.*, Gore v. Harris (Gore I), 772 So. 2d 1243, 1252 (Fla. 2000) (per curiam) ("In the present case, the trial court erroneously applied an appellate abuse of discretion standard to the Boards' decisions."), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

121. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1291 (Fla. 2000) ("We have construed the provisions providing for a timetable as directory in light of what we perceive to be a clear legislative policy of the importance of an elector's right to vote and of having each vote counted.").

122. *See id.* at 1262 ("In tabulating the ballots and in making a determination of what is a 'legal' vote, the standards to be employed is [sic] that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'").

123. Bush v. Gore, 121 S. Ct. 525.

124. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d at 1240.

remedy that will allow a fair and expeditious resolution of the questions presented here."[125]

The Florida Supreme Court soon learned that practical realities and layers of legal doctrine posed significant barriers to the court's effort to reorder the post-election process. As of the November 26 deadline, neither Palm Beach County nor Miami-Dade County had submitted complete amended returns of hand-counted ballots.[126] On December 4, 2000, a unanimous United States Supreme Court vacated the Florida Supreme Court's ruling on the basis that it was unclear whether the Florida Supreme Court appreciated the importance of not construing the Florida Election Code in a manner "that Congress might deem to be a change in the law."[127] On December 6, 2000, the Eleventh Circuit Court of Appeals issued a pair of rulings allowing the hand recounts to be included in the certified tallies without reaching the merits of the constitutional claims.[128] Only one judge out of twelve stated that the constitutional challenges lacked merit.[129] Four dissenting judges issued separate, lengthy opinions.[130] One dissenter discussed the constitutional problems with a process that allowed ballots in only selected, populous counties to be recounted by hand.[131] A second dissenter wrote that the Florida Supreme Court had impermissibly changed the post-election rules for counting votes and certifying vote totals by allowing hand recounts to discern voter intent.[132] A third dissenter wrote separately that the Florida Legislature had "abdicated its responsibility to prescribe meaningful guidelines for ensuring

125. *Id.*

126. Palm Beach County submitted amended but incomplete recounts. *Counting the Vote: Tracking Bush's Lead*, N.Y. TIMES, Nov. 27, 2000, at A16. Miami-Dade County did not finish its original hand recount. *Timeline of Events*, INDIANAPOLIS STAR, Nov. 27, 2000, at A9.

127. Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471, 474 (2000) (per curiam).

128. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000); Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000).

129. *Siegel*, 234 F.3d at 1181-90 (Anderson, J., concurring).

130. *See id.* at 1194-1213 (Carnes, J., dissenting); *id.* at 1193-94 (Dubina, J., dissenting); *id.* at 1190-93 (Birch, J., dissenting); *Touchston*, 234 F.3d at 1134-57 (Tjoflat, J., dissenting).

131. *Siegel*, 234 F.3d at 1200-13 (Carnes, J., dissenting).

132. *Touchston*, 234 F.3d at 1139-49 (Tjoflat, J., dissenting).

that any such manual recount would be conducted fairly, accurately, and uniformly."[133]

The Florida Supreme Court must have been aware of these opinions when it handed down its decision on December 8, 2000 ordering the statewide hand recount.[134] Yet the majority avoided engaging the due process and equal protection objections to its ordering a hand recount that would end in four days, would be administered by unidentified teams of counters, according to unidentified procedures, without any judicial instruction as to what puncturing or marking on a ballot would constitute a legal vote, and would not provide for judicial or appellate review of the counters' decisions.

Rather than wrestle with the federal constitutional issues and equitable principles raised by imposing injunctive relief, the Florida Supreme Court majority wrote that it had to "do no more" and "do no less" than pursue what it perceived to be the "clear message from . . . legislative policy . . . that every citizen's vote be counted whenever possible."[135] According to a footnote in the majority opinion, the "rule of law" requires nothing more or less than that the justices do "the best we can, and remain confident that [the counters] will also do the best they can to fulfill their duties as they see them."[136] No citation was offered for that proposition. None can be found.

The *Bush v. Gore* majority did not accept the constitutionality of construing an election code as licensing government officials to do the best they can in recounting votes.[137] Nor did they accept the dissenters' urgings to leave well enough alone and allow the politicians to sort it out.[138] For the *Bush v. Gore* majority, the rule of law limits the discretionary powers of governmental

133. *Siegel*, 234 F.3d at 1191 (Birch, J., dissenting); *Touchston*, 234 F.3d at 1158 (Birch, J., dissenting).

134. Gore v. Harris (Gore I), 772 So. 2d 1243 (Fla. 2000) (per curiam), *rev'd per curiam, sub nom.* Bush v. Gore, 121 S. Ct. 525 (2000).

135. *Id.* at 1254 & n.12.

136. *Id.* at 1261 n.21.

137. *See* 121 S. Ct. at 530 ("The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.").

138. *See id.* at 556 (Breyer, J., dissenting) ("The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.").

actors, including the power of a court to tolerate an order that violates the principles of equal protection and due process of law.

The *Bush v. Gore* majority was excoriated for so ruling, but not by the Florida Supreme Court. "[U]pon reflection," the Florida Supreme Court later concluded, "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."[139]

That final "reflection" is an act of recognition. The rule of law requires that a judicial decision rest not on obeisance to the "people's will," not on a sense of political prudence or "radical self-restraint," not on the effort to discern and impose an unarticulated legislative policy, and not on the "perspectives and interests of multicultural communities"; rather, it rests on a judicial commitment to interpret and apply what law and equity, in all their fullness and complexity, require. After a century of jurisprudence and five weeks of litigation, the alternatives are not pleasant to ponder.

139. Gore v. Harris (Gore II), 773 So. 2d 524, 526 (Fla. 2000) (per curiam).