VOTER'S INTENT AND ITS DISCONTENTS

UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY. By Abner Greene.[1] 2001. Pp. 202. $19.95

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It seems like everyone has written a book about the 2000 presidential election. I will content myself with reviewing one of them. The choice is easy. Abner Greene's *Understanding the 2000 Election: A Guide to the Legal Battles That Decided the Presidency* presents the definitive description of the legal battles that followed the closing of the polls on Tuesday, November 7.[3] Those battles culminated in the Supreme Court's ruling in *Bush v. Gore*,[4] a decision that has already become one of the most vilified in American history. Greene is much more careful and measured than most commentators in his account of the Court's actions and all of the events that occurred in the five weeks after the election, and that is one of the great appeals of his book. There are two more reasons why it was the obvious election book for me to read. The first reason heeds the intuition of many schoolchildren as memorialized by C.S. Lewis: the shortest book is the best one to review.[5] Second, Abner Greene is a very good friend of mine. He voted for Gore, I voted for Bush, but

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3. Abner Greene, *Understanding the 2000 Election: A Guide to the Legal Battles That Decided the Presidency* (New York U. Press, 2001).

4. 531 U.S. 98 (2000).

5. See C.S. Lewis, *The Screwtape Letters* vi (Macmillan, 1962). Greene's book is 202 pages, compared to, e.g., the 275 pages of Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford U. Press, 2001), and the 266 pages of Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton U. Press, 2001).

our friendship transcends such differences. The special virtue of our friendship in this circumstance is that it dissipates whatever temptation there could be toward the invective that has characterized so much of the debate about *Bush v. Gore* and the other issues surrounding the election.

Much has been written about the election in books, law reviews, popular journals, internet sites, and countless other forums—with much more commentary to come. It is not my intent to survey all of that literature here. Greene provides a comprehensive account of the legal battles attending the 2000 presidential election, and I will review that account here in Part I while leaving the rest of the story to others. My contribution to the debate concerning the election is to examine what should count as a "vote." Greene considers that question throughout his book, so I will build upon his discussion first to articulate a normative standard for counting votes, and second to identify alternative explanations for the Court's decision in *Bush v. Gore* besides partisan politics.

Five months before election day, in the course of resolving a mundane labor law dispute, the Seventh Circuit remarked, "If in November a person fails to pull the lever for Al Gore or George W. Bush or any of the other presidential candidates, but instead scrawls an oblique message on the ballot, no vote will be counted."[6] The court spoke too soon. The meaning of the oblique message conveyed by indented, hanging, and other lingering chads proved to be critical in the legal battles over the election. In Part II, I argue that the determination of what constitutes a "vote" is fraught with difficulty, especially when it turns on inferences from ambiguous evidence that are drawn after an election takes place. That question, in other words, mirrors the recent debates about statutory interpretation that dispute the significance of evidence of legislative intent beyond that contained in the statutory text itself. Greene describes the arguments for accepting a generalized inquiry into a voter's intent as the decisive standard, but he neglects many of the concerns that such reliance raises. The alternative approach to reading

6. *Nat'l Labor Relations Bd. v. Americold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000). The case involved an election to determine whether employees of a refrigerated warehouse wanted to be represented by the Teamsters, with the union supporters prevailing by two votes once the court held that a ballot marked "neither nor" counted for neither side. Judge Evans began the court's opinion by observing that "[m]arking an X in either the 'yes' or 'no' box of a ballot might not seem like a particularly demanding task." Id. at 936.

ballots—the approach that corresponds to a textualist theory of statutory interpretation—emerges from a less familiar, and quite different, state supreme court case deciding another election dispute in December 2000.[7] The approach to interpreting ballots suggested by that case and from the analogy to statutory interpretation emphasizes the dual need to avoid speculating about voter's intent and "to insure a standard of objectivity in our election process."[8]

Discontent with the Florida Supreme Court's approach to effectuating the intent of the voters resulted in *Bush v. Gore*. But the widespread dissatisfaction with the reasoning contained in the United States Supreme Court's *per curiam* opinion has been accompanied by a quick assumption that partisan bias is the only possible explanation for the Court's decision. In Part III, I describe how Greene first concludes that the rationale of the *per curiam* opinion is plausible, and then proceeds to offer his own compelling First Amendment theory to justify the result in *Bush v. Gore*. I continue by offering three of my own possible explanations for why the Court did what it did, any of which suggests that it is improper to assume that the Court acted for partisan reasons. Finally, in Part IV, I conclude by wholeheartedly commending Greene's concluding chapter on how the rule of law triumphed in the election.

I. GREENE'S ACCOUNT OF THE 2000 PRESIDENTIAL ELECTION

Greene is well qualified to write about the legal issues raised by the 2000 presidential election. His prior work has explored numerous constitutional and statutory questions that bear upon the kinds of institutional and interpretive issues raised by the election.[9] His specific expertise on the election was recognized by many national media sources that relied upon his insights as the events were unfolding.[10]

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7. See *Paulsen v. Huestis*, 13 P.3d 931 (Mont. 2000), discussed infra at text accompanying notes 36-41.

8. Id. at 934 (quoting *Spaeth v. Kendall*, 801 P.2d 591, 593 (Mont. 1990)).

9. See, e.g., Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1 (2000); Abner S. Greene, *The Work of Knowledge*, 72 Notre Dame L. Rev. 1479 (1997); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994); Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 S. Ct. Rev. 261.

10. See Greene, *Understanding the 2000 Election* at 202 (cited in note 3) (noting that Greene "made more than eighty appearances in a wide array of television, radio, and newspaper venues [during the resolution of the 2000 election]. He became the ABC

The book that Greene wrote is wonderfully clear and dispassionate. He succeeds completely in his effort to explain all of the legal issues surrounding the election, not just the Court's decision in *Bush v. Gore*. He begins by describing the role of the electoral college in selecting the President. He then reviews the many aspects of the manual recounts of the punch card ballots that featured in the decisions of the numerous courts—including the Florida Supreme Court and the United States Supreme Court—that considered the meaning of a legal vote, the Florida statutory schemes for protesting and contesting the election, the federal statutory scheme for selecting presidential electors, and the federal Constitution's guarantee of equal protection under the law. He analyzes the disputes surrounding the butterfly ballot employed in Palm Beach County and the absentee ballots in Seminole and Martin Counties. And Greene sketches the laws governing the role that the Florida legislature and the United States Congress could have played in deciding the election. Throughout, Greene proceeds with fairness to the arguments of each party, avoiding the hyperbolic accusations that characterized much of the public debate at the time and much of the academic response to its conclusion. This dispassionate approach is one of the book's signal virtues.

The legal battles themselves were anything but dispassionate. Much of the passion generated by the election can be explained by its stakes. Bush supporters and Gore supporters truly believed that the good of the nation depended on their chosen candidate becoming President. But there is another explanation for the passion displayed in those legal battles. Both candidates believed that they had *really* won the election. The primary reason for Gore's belief was the thousands of voters who were apparently confused by the "butterfly ballot" employed in Palm Springs County. As Greene explains, "[t]he claim of the dismayed Democratic voters—that thousands of them went to the polling place [in Palm Beach County] to vote for Gore, but those votes were never registered—was always at the emotional core of Gore's argument that he had really won Florida." (p. 137) Gore's belief that he had won the election also stemmed from his more than 500,000 vote victory in the nationwide popular vote and from allegations of misconduct that prevented voters—especially African-American voters—from reaching the polls in

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News Radio regular legal analyst, appeared on *ABC World News Tonight*, CNN, NPR *Talk of the Nation*, and C-SPAN and was quoted on several occasions in the *New York Times*.").

Florida. Bush, by contrast, emphasized that the one objective means of counting the votes in Florida indicated that he won more votes than Gore, and that any subsequent manual counting was subject to purposeful or unintentional manipulation by the people charged with doing the counting. Conversely, each candidate viewed his opponent as trying to steal the election from him. Gore saw Bush as seeking to avoid the counting of the votes that would prove that Gore was the rightful winner of the election. Bush saw Gore as manipulating the recount procedure to manufacture enough "votes" to overcome the lead that Bush had gained through the one objective counting of the ballots. Whatever the merits of their respective positions, each candidate and his supporters were convinced that he had won Florida (and thus the election) and that his opponent was scheming to deprive him of that victory. The legal battles that followed evidenced those passionate beliefs.

Greene reviews those battles in the book's five parts: (1) the nature of manual recounts, both generally and specifically in Florida; (2) the Bush objections to the decisions of the Florida Supreme Court that directed such recounts; (3) the United States Supreme Court's decision in *Bush v. Gore* stopping the recounts ordered by the Florida Supreme Court; (4) the "wild-card lawsuits" involving Palm Beach County's butterfly ballot and the mismanaged absentee ballot applications in Seminole and Martin Counties; and (5) the possible legislative responses by the Florida legislature to name its own slate of electors and by the United States Congress to decide who should serve as President. That organization nicely captures the building drama concerning the manual counting of ballots before turning to the other legal issues that could have determined the election. I will take a different approach here, though, which moves through the details of how we choose the President.

The Constitution directs the electoral college to select the President. Greene explains the compromises that led the Framers to seize upon that method for choosing the nation's chief executive, and he relates Alexander Hamilton's subsequent "smashing piece of political rhetoric" that offered a principled defense of that compromise. (p. 20) Greene also describes the many criticisms that have confronted that system over the years, especially in the four elections (including the 2000 election) where the winner of the popular vote failed to win in the electoral college. Greene allows that the electoral college "does seem mighty strange," (p. 18) and he offers some modest pro-

posals for changing that system even if the electoral college is retained.[11]

As an aside, Greene's description of the ways of choosing the President overlooks another option with which he is familiar. In the 1960's, Milton Bradley produced "Landslide," a board game simulating the election of the President that I have played with Greene many times.[12] The game is pretty faithful to the constitutional structure, though it does take certain artistic liberties. The players—like the real candidates—compete for the electoral votes of each of the fifty states. Reapportionment has not caught up with my copy of the game, so the electoral votes contributed by each state are frozen in the 1970's. That gives Florida 17 votes instead of the 25 votes that it has had since 1990 or the 27 votes it now receives thanks to the results of the 2000 census.[13] To win the game, a player must obtain more electoral votes than any other player. This is a bit different than the winner described in the Constitution who must obtain a majority of all of the electoral votes lest he or she become subject to the whims of the House of Representatives. "Auctions" for each state are won by the candidate who expends "vote" cards that are eerily similar to money, thus prefiguring the contemporary debates over campaign finance reform. The game also contains a few nifty features that are unfortunately absent from the actual election process. A player landing on the "Secret Ballot" space triggers an "auction" for four states at once that can yield as many as 131 electoral votes but as few as twelve. The most valuable "Politics" card allows a player to simply take a state of up to twenty electoral votes from any opponent. Imagine Vice President Gore saying, "Governor Bush, I will take North Carolina (with its thirteen electoral votes) from you, thank you very much." My favorite Politics card is aptly named "Gamble," for it enables a player to pit one of his or her states against any state of an equal or lesser value held by an opposing player, with the high roll of the dice winning both states. Alas, a similar card is not available to candidates during the real election.

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11. His two suggestions are to have each state split its electors in accordance with each candidate's popular vote (as is done to some extent in Maine and Nebraska) and to require each elector to vote for the candidate to which he or she is pledged. (pp. 25-26)

12. The game is now out of print, but it can be purchased on E-Bay for about $15.

13. As an aside to this aside, note that Bush would have collected an additional seven electoral votes if the results of the 2000 census had been in place for the 2000 election. Cf. William Schneider, *Population Shifts Favor GOP*, Nat'l J. 1134 (Apr. 14, 2001) (reporting that the states carried by Bush will gain eleven electoral votes while losing four, and the states carried by Gore will gain one electoral vote while losing eight).

Greene gives you the impression that replacing the electoral college is no more likely than determining the presidency by playing Landslide. As he notes, there is little chance that the smaller states will surrender the exaggerated importance that they enjoy in the electoral college. (p. 25) Perhaps more surprisingly, the 2000 election failed to generate much effort to discard the electoral college. Yet, as Greene reminds, the electoral college will not always choose the President. If no candidate receives the votes of a majority of the electors, then a few other scenarios could come into play. Greene observes that "[t]he framers of the Constitution envisioned an active role for Congress in choosing a president." (p. 168) He concludes that Bush would have prevailed under any of the scenarios involving congressional action once Florida failed to submit its electors by the safe-harbor date established by 3 U.S.C. § 5. (pp. 169-76) As Greene admits, that assertion assumes that each member of Congress would have voted for his or her party's candidate, (p. 174) an assumption that is questionable given the contrary statement made by Maryland Republican Representative Connie Morella even before the presumably enormous pressure would have been brought to bear on Senators and Representatives who often stray from their party's line or who represent jurisdictions dominated by the opposing party.[14] But even if Bush was bound to win once the election reached Congress, Dick Cheney was not as certain to become Vice President. Greene describes how the Twelfth Amendment could have enabled Gore to cast the tie-breaking vote in the Senate for Joseph Lieberman, thereby producing a "President Bush, Vice President Lieberman" result that Greene suggests "would have been the fairest outcome." (p. 176)

The primacy of the electoral college in choosing the President demonstrates the importance of deciding how to choose the electors. Twentieth century voters learned to simply assume that electors are selected by popular vote. Greene reminds us that the mode of selecting electors still lies within the discretion of the state legislature.[15] (pp. 163-64) A few state legislatures

14. See Karen Hosler, *Republican Morella Plans to Back Gore if Forced to Pick Next President; Crossover Would Decide Vote Representing Md.*, Baltimore Sun 17A (Nov. 15, 2000).

15. Greene also writes that "[n]o one disputes that the Florida legislature could, by law applicable to future elections, alter the state's 'manner' of selecting electors." (pp. 163-64) For an argument that comes close to creating such a dispute, see Harold Meyerson, *W. Stands for Wrongful*, LA Weekly 20 (Dec. 8, 2000), reprinted in E.J. Dionne, Jr. and William Kristol, eds., Bush v. Gore: *The Court Cases and the Commentary* 242-45

chose electors themselves as late as the second half of the nineteenth century,[16] but none have done it since then. Greene suggests that a state legislature could act unilaterally if it had the "guts" to do so, (p. 164) but bravery seems an unlikely quality to explain how that could occur. A different motivation—the fear that the state's courts were stealing the election for Gore—animated the Florida legislature's move to select its own slate of electors. But the legislature's actions were greatly complicated by the facts that Florida law had authorized a popular election for the selection of electors and that such an election had been held on November 7. Even so, 3 U.S.C. § 2 allows a state legislature to appoint presidential electors "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law." Greene correctly concludes that the Florida legislature improperly read the "day prescribed by law" as the safe harbor date, when that phrase actually refers to election day. (p. 165) He allows, though, that at some point the Florida legislature might have been empowered to act to appoint electors, though he does not resolve when that point would be. (pp. 166-67)

Such hypotheticals should not obscure the unanimity with which state legislatures today rely upon a popular election to determine presidential electors. The reason why Florida experienced such difficulty in selecting its electors was not because of a rarified debate about constitutional theory, but because of much more mundane disagreements about the counting of the popular vote. Florida's vote counting problem centered on three types of ballots: (1) ballots that were clearly marked, but that were allegedly improperly obtained by the voter; (2) ballots that were clearly marked, but that the voter mistakenly marked for the wrong candidate; and (3) ballots that were not clearly marked by the voter. Again, Greene plainly describes each controversy.

The first group of troublesome ballots arose in Seminole and Martin Counties, where some voters submitted applications for absentee ballots that failed to include the voter's registration number as required by Florida statute. This omission was remedied by Republican Party workers whom the county election officials allowed to fill in the missing numbers, which in turn led

(Brookings Institution Press, 2001) (sharply criticizing the contention that there is no popular right to vote for the President).

16. See Lucius Wilmerding, Jr., *The Electoral College* 64 (1958) (explaining that between 1836 and the 1860, "the choice of Electors was by general ticket in every state except South Carolina, where it was by the legislature").

local Democrats to challenge the resulting ballots. The legal question thus was not what the voter intended to do, but whether he or she was entitled to cast a vote in the first place. Greene takes these cases seriously, even suggesting that the dispute "nearly cost George W. Bush the election." (p. 151) As he explains, though, "the violations turned out to be more like a technical error than fraud," and thus the Florida courts refused to invalidate the ballots cast by the voters despite the way in which they obtained the ballots.[17] (p. 159)

The second vote counting question in Florida involved ballots in which the actions of the voter were clear, but arguably unintended. Such was the case in Palm Beach County, where thousands of voters complained that they misread the famous butterfly ballot and mistakenly voted for Patrick Buchanan instead of Al Gore. Here Greene is not as thorough as he is in the rest of the book. He does not mention the common use of similar ballots throughout the nation,[18] the strong showing that Buchanan had made in the county in previous elections,[19] or the consistent case law from other jurisdictions holding that post-election objections to the format of a ballot cannot invalidate an election.[20] Greene recognizes the enormous remedial problems associated with any attempt to respond to the concerns of confused voters, but his "strong argument that the butterfly ballot violated Florida law" in the first instance is not especially persuasive. (p. 144) Greene's compelling account of the emotional distress that the ballot caused many unsuspecting Palm Beach County voters (pp. 140-41) should not color what was actually an easy case as a matter of well-settled election law.

The third vote counting problem concerned the ballots that failed to clearly indicate whom (if anyone) the voter selected.

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17. See generally *Adkins v. Huckabay*, 755 So.2d 206, 216 (La. 2000) (reviewing decisions and concluding that "[t]he majority of states . . . have concluded that the absentee voting laws should be liberally construed in aid of the right to vote").

18. See, e.g., Douglas Holt and Evan Osnos, *Chicago No Stranger to Florida Ballot Woes*, Chi. Trib. 1, 17 (Nov. 10, 2000) (picturing the butterfly ballot used for the November 2000 Cook County judicial election).

19. See John J. Miller, *"The Campaign Continues": Gore in Florida, Step by Awful Step*, Nat'l Rev. (Dec. 18, 2000) (noting that "Buchanan won only eight-tenth of 1 percent of the Palm Beach total, which was comparable to his rate of support in other counties; and he had received more than twice as many votes in Palm Beach during the 1996 presidential primary, even though he never campaigned there"); Donna Ladd, *Buchanan Country*, Village Voice 29 (Nov. 28, 2000) (describing Buchanan's support in Palm Beach County).

20. See generally 26 Am. Jur. 2d Elections § 316 (1996) (describing the consequences of the use of improper ballots).

These were the various punch card ballots that Gore wanted to manually recount. This saga dominated the legal battles that culminated in *Bush v. Gore*, and it dominates Greene's book as well. The underlying problem, of course, was ascertaining the meaning of punch card ballots on which no "chad" had been punched out for any presidential candidate, and especially those ballots on which the chad was partially dislodged or indented. The legal dispute concerning those ballots raised novel questions about Florida's statutory scheme for counting and recounting votes, contesting and protesting election results, and identifying when those actions should be taken and by whom. The legal dispute spilled over into the federal courts, where the equal protection clause finally resolved the vote counting in *Bush v. Gore*.

Greene carefully explains each of the legal issues that confronted the counting of votes in Florida. His writing is clear, his analysis thorough, and his portrayal remarkably free from bias. He is willing to say when an argument fails to impress him, as evidenced by his frequent characterization of Bush's argument that the Florida Supreme Court legislated instead of interpreted as "weak." (pp. 89, 94, 127) My few disagreements with his account are sufficiently minor to deserve mention only in a footnote.[21] In the end, Greene concludes that "[r]easons were given that were defensible from statutory text or judicial precedent; opposing views were canvassed and rejected through argument; difficult questions were resolved by reference to principle, rather than politics." (pp. 182-83) Greene presents those reasons, views, and questions so thoroughly that one almost wonders what all the fuss was about.

II. BALLOT INTERPRETATION

The question that pervaded the legal battles in Florida was what counts as a vote. Gore insisted that all votes should count; Bush worried that the manual recount would identify "votes"

21. My leading quibbles are these: (1) Greene casually notes that the Florida Supreme Court enjoined the certification of the election "on its own motion" (p. 49) without indicating how unprecedented it was for a court to take such a dramatic step that was unsought by any party; (2) Greene finds "a deep irony" in both Bush and Gore alternately advocating and opposing literal readings of different parts of Florida election law, (p. 62) but his description of those interpretive arguments fails to support the claim that Bush ever departed from a preference for a literal reading of the relevant statutes; (3) Greene says that the Court is "generally divided between five so-called conservative Justices and four so-called liberal Justices," (p. 103) which exaggerates the many recent instances in which the Court's decisional lineup is unpredictable (see, e.g., Richard Garnett, *Disrobed! Actually, They Think For Themselves*, Wash. Post B2 (July 1, 2001)).

that were imaginary. The general rule, as Greene explains, is that "every vote should be counted, if possible." (p. 31) The "if possible" caveat, of course, begs the question of what would make the counting of a vote impossible. One obstacle is the failure of the voter to abide by the rules governing the election, such as failing to register to vote, showing up at the polling place on the wrong day, or selecting more candidates than he or she is allowed. Another type of obstacle to counting a vote—and the one disputed in Florida—is an inability to determine the meaning of the voter's ballot. The "perfect" ballot has yet to be invented: controversies involving paper ballots, punch card ballots, and optically scanned ballots all feature in the reported cases.[22]

State election law can explain what counts as a vote. Greene cites the example of Texas, where Governor Bush approved a statute providing that punch card ballots yield votes if "at least two corners of the chad are detached," or "light is visible through the hole," or "an indentation on the chad . . . is present and indicates a clearly ascertainable intent of the voter to vote," or "the chad reflects by other means a clearly ascertainable intent of the voter to vote." (p. 36) Another example is offered by Palm Beach County, which once provided that "[a] chad that is fully attached, bearing only an indentation, should not be counted as a vote."[23] Absent such specific provisions, the general rule is that whether or not a ballot contains a "vote" depends upon the intent of the voter. Florida follows this rule. Greene describes the Florida statutory provisions instructing election officials to seek a "clear indication of the intent of the

22. See, e.g., *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (counting punch card ballots with indented chads); *Spaeth v. Kendall*, 801 P.2d 591 (Mont. 1999) (refusing to count improperly marked optically scanned ballots); *Brereton v. Bd. of Canvassers of Warwick*, 177 A. 147 (R.I. 1934) (refusing to count paper ballots on which the voter drew a shoe and an animal's head). See also Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. Chi. L. Rev. 657, 658 n.7 (2001) (noting that "significant numbers of Democratic voters" failed to properly complete an optically scanned ballot because they "both darkened the circle for Gore on the ballot and wrote his name as a write-in"); Ed Bouchette, *Tails of Woe: Steelers Flipped Out Over Bizarre Loss to Lions*, Pittsburgh Post-Gazette, Nov. 27, 1998 (describing how a referee mistakenly believed that a player called "heads" instead of "tails" for a coin toss).

23. Guidelines on Ballots with Chads Not Completely Removed, Adopted by the Nov. 6, 1990 Canvassing Bd., quoted in 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, 618 (2001); see also Samuel Issacharoff, *Political Judgments*, 68 U. Chi. L. Rev. 637, 645 (2001) (observing that the 1990 Palm Beach County rules "were fairly clearly abrogated in the rush to accommodate claims of voter error and defective voting machines in Election 2000"). Indiana has a similar standard. See Ind. Code § 3-12-1-9.5 (providing that indented chads do not count as votes), cited in *Siegel v. LePore*, 234 F.3d 1163, 1191 (11th Cir. 2000) (en banc) (Birch, J., dissenting).

voter" or simply "the voter's intent," noting the potentially important difference between those two standards. (p. 33)[24] As the Florida Supreme Court majority explained in its 4-3 contest phase decision, a "legal" vote exists if a ballot provides "a clear indication of the intent of the voter." (p. 64) Beyond that, the Florida courts "refus[ed] to say anything more about how to ascertain the intent of the voter." (p. 34)

But how to determine such intent? Here the dispute in Florida mirrors recent academic debates about statutory interpretation. In most instances, the text and other evidence of legislative intent point in the same direction, so the choice of interpretive theories does not matter. But the statutory text conflicts with legislative history, the statute's purpose, and other indications of legislative intent in a number of memorable cases.[25] Textualist and intentionalist theories yield different results in any such case where the meaning of the statutory text conflicts with other evidence of legislative intent. Textualism insists that the plain meaning of statutory language must prevail even if there is contrary evidence that the legislature actually intended that statute to mean something else. Intentionalist theories, by contrast, are much more willing to honor a variety of indicia of legislative intent even if that yields a result that conflicts with the apparent command of the statutory language.[26]

Each approach offers its own justifications. For intentionalists, what the legislature meant to accomplish should be decisive when interpreting the statutes that the legislature enacted. Relying upon traditional agency principles, defenders of intentionalism posit that the courts should act as the agent on behalf of the

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24. See Greene, *Understanding the 2000 Election* at 202 (cited in note 3), quoting Fla. Stat. § 102.166(4)(a) (manual recount provision directing officials to determine "the voter's intent"); Fla Stat. § 102.166(4)(c) (directing that "damaged or defective" should be counted "if there is a clear indication of the intent of the voter"). The statute has since been amended. See Fla. Stat. § 102.166(2002).

25. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (reading Title VII to permit voluntary affirmative action programs); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (interpreting the Endangered Species Act to prevent the completion of the Tellico Dam); *Church of the Holy Trinity v. United States* 143 U.S. 457 (1892) (holding that a New York City church could hire an English pastor despite a federal law prohibiting the importation of any alien into the United States under a previous agreement to perform labor in the United States); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.) (holding that statutory language prohibiting certain bankruptcy conversions trumps a precisely contrary statement in the legislative history).

26. For an overview of the theoretical debate concerning statutory interpretation, see generally William N. Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 669-816 (West Group, 3d ed. 2001).

legislature—the principal—whose commands the court seeks to obey. So if the legislature failed to anticipate an exceptional case or used language that is less than clear, then the courts should place the legislature's interests above strict adherence to statutory language.[27] Similarly, the legislature should not be punished by the courts for failing to make its intent clear in the statutory text.

For textualists, adherence to the plain language of the statute is essential. The legislature's intent must be manifested in the text that emerges from the legislative process in order for that intent to be effectuated. In Oliver Wendell Holmes's memorable words, "We do not inquire what the legislature meant; we ask only what the statute means."[28] Textualists also worry about the consequences of seeking legislative intent as an end in itself. Legislative intent is routinely questioned as speculative, with no sure way of knowing what the legislature meant besides the statutory text that survived the considerable constitutional hurdles for the enactment of legislation. And the ambiguity of legislative intent fails to provide a meaningful constraint on those seeking to interpret a statute. As Judge Leventhal once remarked about legislative history, it is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[29]

So too with ballots. Bush's "textualist" approach to reading punch card ballots sought to limit consideration to the hole punched out of the ballot, or at least two of the corners of the chad were displaced. (p. 71) He worried that any inference from indented chads was inevitably speculative, and that an official charged with interpreting the chads could reach whatever conclusion he or she desired. Gore's "intentionalist" approach to reading those ballots encouraged election officials to examine each ballot in an effort to ascertain the intent of the voter. Thus Gore would have allowed a ballot containing even a dimpled chad to count as a vote because that dimple indicated what the voter *intended* to do: punch out the chad. He emphasized that the voter's intent should be the standard in order to properly effectuate the franchise upon which the nation depends, and that

27. See William N. Eskridge, Jr. *Dynamic Statutory Interpretation* 123-25 (Harvard U. Press, 1994) (critically analyzing the agency metaphor for statutory interpretation).

28. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899).

29. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (quoting Judge Leventhal).

the officials reviewing the ballots should act as each voter's agent to achieve that end. (pp. 32-33) The Florida Supreme Court agreed with Gore, extolling the virtues of its inquiry into the intent of each voter.[30]

But voter's intent has never been the ultimate interpretive standard, even in Florida. Consider Palm Beach County: thousands of voters insisted that they intended to vote for Gore, but the marks on their butterfly ballots indicated that they voted for Buchanan. If voter's intent was decisive, then the votes should have been recorded for Gore despite the contrary plain meaning of the ballots. Yet the Florida state courts refused to switch those votes from Buchanan to Gore (or to provide any other remedy), though Greene rightly notes that the courts failed to explain why. (p. 146) And the voter intent problem is not limited to Palm Beach County. Surely there are voters throughout Florida, and throughout the United States, who accidentally punched out the wrong chad—or pulled the wrong lever, or placed an "X" in the wrong place—and thus submitted a ballot that reflected an incorrect reflection of their intent in voting. Going a step further, an aggressive intent standard could even consider the many individuals who "intended" to vote on election day but were prevented from doing so by registration requirements, confusion about the time or place to vote, or the weather.[31]

Ideally, the solution in such cases would be for the voter to explain the mistake once it is discovered, and to have the voter's true intent counted in the vote totals. Voters commonly make such corrections if they recognize the error before they submit

30. See *Gore v. Harris*, 772 So.2d 1243, 1256 (Fla. 2000) (referring to "the long-standing case law and statutory law that the intent of the voter is of paramount concern and should always be given effect *if* the intent can be determined"), rev'd, *Bush v. Gore*, 531 U.S. 98 (2000).

31. Both presidential candidates claim that they lost votes in this way. Compare David Gonzalez, *African-Americans Seek Inquiry Into Florida Vote*, N.Y. Times, Nov. 11, 2000, reprinted in Douglas Brinkley, *36 Days: The Complete Chronicle of the 2000 Presidential Election Crisis* 36-38 (Times Books, 2001) (reporting allegations that some African-Americans in Florida were not allowed to vote because they were not listed as registered voters) with Peter Marks, *ABC Tightens Its Rules on Declaring Winners*, N.Y. Times 34 (Nov. 23, 2000) (noting that television networks projected Gore the winner in Florida before the polls closed in a dozen counties in the state's panhandle within the central time zone, and reporting that "Bush campaign officials argue that the projection depressed their turnout in those counties in the closing minutes, and those votes might have been decisive"); Loie Fecteau, *Snow Favored Gore in New Mexico*, Albuquerque J. B2 (Dec. 17, 2000) (describing how an election day snowstorm prevented voters from reaching the polls in Republican parts of New Mexico, a state Gore won by 366 votes, the closest margin of any state in the country).

their ballot while they are still in the polling place. Once submitted, though, votes cannot be changed. That is the rule in other contexts, too. Legislators are not allowed to correct a mistaken vote for proposed legislation a few days after the bill passed. Nor can judges rescind their votes in a case once the decision is final.

Any effort to divine voter's intent after election day despite such precedent is greatly complicated by the use of secret ballots. If ballots were marked with an identification number, then it would be possible for election officials to compare the marking on the ballot with the claims of the voter who marked the ballot, and then to either assure the voter that the ballot accurately reflected the voter's intent or to change the ballot to do so. Even this system would be problematic, though, for it could facilitate strategic behavior by voters who would have preferred to have voted for a different candidate once the results of the voting are made public. As one court defended the rule against counting the subsequent statement of an individual who was wrongfully prevented from voting on election day:

> [I]t would be an uncertain and dangerous experiment to attempt the task of ascertaining and giving effect to their intentions as ballots actually cast and returned. Uncertain, because it would be simply a matter of speculation; dangerous, because it would give to such electors the power of determining the result of an election in a close contest. All that it would be necessary for them to do, in such a case, to decide the election, would be to declare that they intended to vote for a particular candidate. It would enable them to sell the office to the candidate offering the highest price for it, because they would not be called upon for their declaration until a contest arose, after the actual ballots had been counted, and the precise effect of their statement known. They could swear falsely as to their past intention, without fear of punishment, for how would it be possible to disprove their statements as to their intentions with reference to a supposed act, if perchance they had acted?[32]

More recently, the 97,488 Floridians who voted for Ralph Nader presumably had serious second-thoughts about the wisdom of

32. *Martin v. McGarr*, 117 P. 323, 328 (Okla. 1910). See also *McNally v. Bd. of Canvassers of Wayne County*, 25 N.W.2d 613, 617 (Mich. 1947) (asserting that "[j]udges of election and courts should not be required to spend their time in endeavoring to ascertain what the intention of the elector was in depositing his ballot, except so far as he has expressed that intention in the manner by the methods prescribed by the lawmaking power").

their choice once the importance of the vote totals in Florida became known.

In any event, Florida employs secret ballots. Any voter's subsequent claim of a "mistaken" vote, therefore, cannot be accurately judged. Greene recognizes this problem, albeit in his discussion of butterfly ballots, when he observes that the use of affidavits "raises enormous problems regarding voter memory (can a voter who intended to vote for Gore clearly remember that he or she actually punched for Buchanan?) and voter fraud (false affidavits)." (p. 146) In fact, there are a few old cases from the Pennsylvania courts in which voters were allowed to explain their write-in ballots after an election had occurred,[33] but I have been unable to find any other instances of similar post-election voter explanations of intent being accepted by the courts. As one writer observed, "it is often illegal, if not impossible, to identify a particular voter with a particular ballot."[34]

Thus Greene is wrong to assume that every ballot with the chad punched out presents an "easy" case. (p. 71) If the voter's intent is dispositive, then the voter's explanation that he or she meant to vote for a different candidate should trump the chad missing from the ballot. In statutory interpretation terms, the voting history should prevail against the plain meaning of the ballot itself. But that is not the law in Florida, or anywhere else.

The questionable punch card ballots in Florida did not present such a contrast because the marks on the ballots were unclear and the voters were not available to explain them. This was especially true for the punch card ballots whose presidential chads were indented, hanging, or swinging. Imagine the reasons why the chads on a ballot are marked or partially removed, but still attached to the ballot: (1) the voter meant to vote for the candidate corresponding to the chad, but the voter failed to punch the desired chad out; (2) the voter changed his or her mind at the last minute, an explanation that is particularly plausible for so-called overvotes (i.e., ballots on which the voter selected more than one candidate for an office); (3) the voter hit the chad by mistake, an explanation that brings to mind the voter confusion that abounded in Palm Beach County; or (4) the chad was indented or partially dislodged after the voter submit-

33. See Annotation, *Validity of Write-In Vote Where Candidate's Surname Only is Written in on Ballot*, 86 A.L.R.2d 1025, 1031-32 (1962) (citing three Pennsylvania cases decided between 1881 and 1937 in which the court considered the testimony of intentions of voters).

34. Id. at 1031.

ted the ballot, perhaps by a misfunctioning machine or an election official.[35] The common assumption is that the first explanation—that any mark on the chad of a punch card ballot is explained by a voter's failed attempt to displace the chad corresponding to his or her chosen candidate—is the best. This assumption is embodied in election law cases decided by federal and state courts across the country that permitted the counting of dimpled and hanging chads because of the need to count every vote that a voter intended to cast. Greene cites several such cases, (pp. 37-42) which serve to justify an intentionalist approach to reading ballots. What is missing from Greene's account is an explanation why a textualist approach to reading ballots might make sense instead.

That answer was provided during the five weeks that the legal battle was raging in Florida, but it was offered in Helena, not Tallahassee. On December 1, 2000, the Montana Supreme Court resolved a disputed election that had elicited scant national attention.[36] The case arose in Blaine County, a remote part of north central Montana bordering Saskatchewan whose 6,700 residents are spread across 3,500 square miles. Glenn Huestis served as county sheriff between 1985 and 1991, then Theron Peter Paulsen—better known as Pete Paulsen—took his job. Huestis wanted his old job back, and in the spring of 1998 he defeated Paulsen in the Democratic Party primary. Undeterred, Paulsen mounted a write-in campaign for the general election. The morning after election day found Huestis leading Paulsen 1,216 to 1,213, a lead that grew to nineteen votes following a recount requested by Paulsen.[37]

Paulsen claimed that the election officials had failed to count 37 write-in ballots that had been cast for him. Those ballots were marked "Paulson," "Paulsen," "Pat Paulsen," "Pat Paulson," and "Peter Theron Paulsen." Pete Paulsen insisted that the voters who cast those ballots intended to vote for him,

35. For a less gracious explanation of the potentially related problem of undervotes, see Richard A. Posner, Bush v. Gore: *Prolegomenon to an Assessment*, 68 U. Chi. L. Rev. 719, 722 (2001) (writing that "[b]ecause the undercounted votes were only a small fraction of the total number of votes cast, it would not be surprising if a large fraction of them had been cast by undecided, confused, clumsy, inexperienced, or illiterate voters").

36. *Paulsen v. Huestis*, 13 P.3d 931 (Mont. 2000).

37. See id. at 932-33 for further description of the facts of the case. See also *Court Upholds Sheriff's Victory*, Billings Gazette, Nov. 15, 2000, available at <http://www.billingsgazette.com/archive.php?display=rednews/2000/11/15/build/local/0sheriff.inc>; *Former Blaine County Sheriff Pete Paulsen Has Asked . . .*, Associated Press, Jan. 16, 1999, available at 1999 WL 3109416; *Tuesday's Recount in the Blaine County Sheriff's . . .*, Associated Press, Nov. 11, 1998, available at 1998 WL 7464910.

the only Paulsen who mounted a campaign for sheriff, the only Paulsen who had previously served as sheriff, and one of only nine individuals named "Paulsen" or "Paulson" in the entire county. Montana's election code, however, requires a voter using a write-in ballot to include "the candidate's first and last names" and to use a form of the candidate's name that the candidate had submitted in a declaration of intent to seek election.[38] The 37 contested ballots were not counted because they did not comply with the statutory instructions. So Paulsen challenged the election in court.

The Montana Supreme Court unanimously rejected Paulsen's claim. It explained that it had "consistently ruled that ballots that do not clearly express the intent of the voter will be disallowed."[39] It then provided the reason for such a clear statement rule:

> The paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them. *When such expression cannot be gleaned without speculation, however, the vote is to be voided, to insure a standard of objectivity in our election process.*[40]

The exclusion of the ballots obviously bothered the court, but it suggested that any blame for the result should be shouldered by the legislature or by Paulsen himself.[41]

Paulsen is a harsh case. The People exercise their sovereign powers by voting, the 37 Blaine County residents tried to vote, their intent is pretty certain, and yet their ballots were not counted. It is much easier to determine the intent of the voters who wrote "Paulsen" on the Blaine County sheriff's election ballot than it is to decipher the meaning of an indentation on a

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38. See Mont. Code Ann. §§ 13-15-202(3) (governing write-in ballots) & 13-10-211(1)(a) (describing the requirements for a write-in candidate's declaration of intent); *Paulsen*, 13 P.3d at 934 (reporting that "the 37 rejected ballots . . . did not contain a name consistent with one of the 30 names submitted by Paulsen in his declaration of intent").

39. *Paulsen*, 13 P.3d at 934. The court noted in its description of its conclusion in *Marsh v. Overland*, 905 P.2d 1088 (Mont. 1995), that "both statutory and case law required that ballots be disallowed unless the intent of electors could be established with reasonable certainty from the ballot." Id. at 933.

40. *Paulsen*, 13 P.3d at 934 (quoting *Spaeth v. Kendall*, 801 P.2d 591, 593 (Mont. 1990) (emphasis added)).

41. See id. at 932 (acknowledging that election laws "can result in seemingly harsh consequences, potentially even undermining the will of the majority of voters," but insisting that "[a]mending the election statutes is a task for the legislature"); id. at 935-36 (stressing Paulsen's knowledge of Montana's write-in voting requirements and his failure to advise prospective voters about those rules).

presidential ballot in Florida. But the Montana court was right precisely because the statutory rules governing write-in votes were clear, and the contested ballots did not comply with them. The contrast with the interpretive approach preferred by the Florida Supreme Court is sharp. That court candidly proclaimed that voter's intent prevails even if that intent is not expressed consistent with the predetermined election rules: "By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify" the right to vote.[42] To which Michael McConnell has responded, "That is like saying, of a disputed umpire call in the World Series: 'Athletic superiority, not a hyper-technical reliance upon the rules of baseball, should be our guiding principle.' In our system, the will of the people is manifested through procedures specified in advance."[43] The interpretive framework for ascertaining that will must be expressed in advance as well.

Paulsen is like the statutory interpretation cases in which a statute's plain meaning conflicts with other evidence of legislative intent. Florida chad law, by contrast, does not contain the same kind of clear standard of what counts as a vote that is present in Montana write-in voting law. The Florida Supreme Court's decisions are thus analogous to the statutory interpretation cases in which the statutory language fails to yield a plain meaning. Even textualists will consider other evidence of legislative intent when a statute lacks a plain textual meaning. But a general search for legislative intent still troubles textualists because such intent is speculative and because of the lack of constraints on the interpreter of such intent. Those are the same concerns articulated by the court in *Paulsen*: speculation in reading a ballot must be avoided "to insure a standard of objectivity in our election process."[44] Reasonable guesses about a voter's intent can be wrong. Consider an antebellum Alabama case in which election officials contacted a voter who explained that he did not intend to vote for any candidate for sheriff—even though his ballot contained the word "Pence"—much to the chagrin of

42. *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1228 (Fla. 2000) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)), vacated, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

43. Michael W. McConnell, *Supremely Ill-Judged*, Wall St. J. A16 (Nov. 24, 2000), reprinted in Dionne and Kristol, eds., *Bush v. Gore* at 198 (cited in note 15).

44. *Paulsen*, 13 P.3d at 934 (quoting *Spaeth v. Kendall*, 801 P.2d 591, 593 (Mont. 1990)).

the unsuccessful candidate Spence.[45] Or Bush's argument that "[o]ne detached corner of a chad or the impression of the voting tool on a chad could mean an intent to vote but could just as easily mean the voter changed his mind or could merely be a stray marking on the ballot." (p. 33) Further, as the *Paulsen* court noted, the speculative nature of any effort to divine the intent of a ballot that is not clearly marked raises concerns about the integrity of the process. That concern has animated election law decisions in other states.[46] It also lies at the heart of Greene's alternative justification for *Bush v. Gore*, detailed below, that sees a "need to police the conscious or unconscious bias of government officials" if "a jurisdiction gives to officials relatively unconstrained discretion to determine what counts as a vote."[47] (p. 133)

My analogy between reading ballots and statutory interpretation presumes that ballots are like statutes. They have much in common. At the most general level, both represent attempts at communication: a vote for a candidate, or a law governing future behavior. As such, both ballots and statutes are the product of human actions, and sometimes humans make mistakes. Both the marks on ballots and the language contained in statutes can be vague or ambiguous. But there are several relevant differences between ballots and statutes, too. Some of those differences counsel a greater willingness to seek the intent of a voter than the intent of the legislature. It should be easier to determine voter's intent than legislative intent because a ballot is marked

45. *Spence v. Ninth Judicial Circuit Judge*, 13 Ala. 805 (1848). The court explained that "the managers of the precinct where it was given, on the evening of the day of the election, on counting out the votes, called on the voter to know if he intended by it to vote for Spence. He then stated he did not, that he did not intend to vote for sheriff at all, and therefore had written on his ticket the word Pence. After this declaration, made by the voter, we think the managers properly refused to count this vote."). Id. at 811.

46. See *Curtis v. Bindeman*, 261 A.2d 515, 517 (D.C. 1970) (reading an election statute "with a view to insuring that the results are not fraught with dishonesty or the appearance of unreliability"); *Hathcoat v. Pendleton Election Bd.*, 622 N.E.2d 1352, 1355 (Ind. Ct. App. 1993) (explaining that "[t]he purpose of strict adherence to the general rule [requiring both a mark and name on a write-in ballot], especially within the context of elections, is to ensure the integrity of the process and to give effect to the will of the people"). See also *Roudebush v. Hartke*, 405 U.S. 15, 33 (1972) (Douglas, J., dissenting in part) (observing that "[c]harges or suspicions of inadvertent or intentional alteration, however baseless, will infect the case" once ballots are recounted by election officials).

47. Additionally, as Jonathan Rauch observes, "hand counts under conditions of extreme partisanship and stress almost inevitably raise suspicion. Machines err, and they may well be more error-prone than people. But machines don't carry party membership cards." Jonathan Rauch, *Hands Off: Why Florida Election Law Isn't So Crazy After All*, New Republic 24-26 (Dec. 4, 2000), reprinted in Dionne and Kristol, eds., *Bush v. Gore* at 202 (cited in note 15).

by an individual, which avoids the problems of ascertaining the collective intent of the members of the legislature that enacts a statute. Machine error is far more likely to affect ballots than statutes. Another justification for a textualist approach to statutory interpretation is that the legislature is capable of, and should be held responsible for, correcting its own mistakes. At first glance, this is a grossly insensitive argument to extend to the interpretation of ballots, where many mistakes result from misfunctioning equipment or from voters acting in good faith who nonetheless err. This distinction can be significantly minimized, though, by the kinds of voter instructions that I discuss below. On the other hand, some of the differences between ballots and statutes favor less willingness to consider voter's intent than legislative intent. A ballot should be easier to decipher than statutory language. Both can be unclear, but a punch card ballot with a chad punched out is clearer than even the most lucid words that are contained in a statute, while there are relatively few explanations for an indented chad compared to the multiple explanations for why a majority of the legislature approved a provision in a statute. Repeated handling can compromise the ability to read ballots, but not statutes.[48] And the kind of evidence that could offer an insight into a voter's intent—other indented chads, party-line voting—is much less helpful than the committee reports, congressional debates, and other materials that are employed to discern legislative intent. In short, the differences between ballots and statutes point in opposite directions, and the similarities between ballots and statutes suggest that the same approach to their interpretation makes sense after all.

Back in Florida, the undifferentiated effort to rely on the intent of the voter as the lodestar for judging a ballot ultimately failed. Bush argued that there was no clear standard for determining what counted as a vote, that the most generous rendering of what counted as a vote was improper, and that the Florida Supreme Court failed to honor the statutory discretion that the law gave to those officials counting (and recounting) the ballots. In other words, Bush objected to the process as speculative and lacking objectivity—the very failings that doomed the recount request in *Paulsen*. The speculation occurred because the county boards were left to their own devices in trying to ascertain the intent of a voter whose ballot contained an indented or

48. See *Roudebush v. Hartke*, 405 U.S. 15, 32-33 (1972) (Douglas, J., dissenting in part) (warning that each review of contested ballots will threaten the integrity of the ballots).

hanging chad on a ballot. The missing "standard of objectivity" was evidenced in the Republican criticism of Gore "for seeking manual recounts in heavily Democratic precincts and for selecting heavily Democratic precincts in those counties for the initial manual recount."[49] (p. 45) Objectivity further suffered because voter's intent was determined by "the disparate and unguided subjective opinion of a partisan (two members are elected in partisan voting) canvassing board" once those precincts were chosen.[50] The collective weight of those concerns finally manifested itself in *Bush v. Gore*.

I submit that election law needs a clear standard for reading ballots that is uniformly applied. It is not enough to have the rules established before an election; the rules themselves must be sufficiently clear to minimize any post-election disputes about what counts as a vote. Election statutes should thus adopt a textualist approach to interpreting ballots. Such an approach will provide a bright-line rule governing what counts as a "vote" that avoids the post-election controversies about that question that plagued the presidential election in Florida. The bright line must be accompanied by aggressive voter education programs that teach voters what they must do for their actions to count as a "vote," and by affording voters the opportunity to confirm their actions before their ballots are submitted. Florida illustrates both proposals. Broward County instructed voters to "[p]unch the stylus straight down *through the ballot card* for the candidates or issues of your choice."[51] Palm Beach County added, "[a]fter voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card."[52] Or, to cite a final example, the New Jersey Supreme Court has suggested that "perhaps in recognition that voters might change their minds, the Legislature included the requirement of punching the ballot

49. As Greene notes, Judge Tjoflat complained that the Florida Supreme Court allowed Gore to "cherry-pick" the most favorable venues for him to seek additional "votes" (p. 78, quoting *Touchston v. McDermott*, 234 F.3d 1133, 1143 (11th Cir. 2000) (en banc) (Tjoflat, J., dissenting)). Judge Tjoflat also asserted that "a candidate is more likely to have his request for a manual count granted, and to receive favorable interpretations of voter intent, in counties where the candidate shares a political party affiliation with the majority of the canvassing board." *Touchston*, 234 F.3d at 1144 (Tjoflat, J., dissenting).

50. *Siegel v. LePore*, 234 F.3d 1163, 1191 (11th Cir. 2000) (en banc) (Birch, J., dissenting).

51. *Touchston*, 234 F.3d at 1141 n.19 (Tjoflat, J., dissenting) (emphasis added) (quoting the county instructions).

52. Id.

[in addition to writing in a candidate's name] to identify an act that unambiguously expresses the voters' final choice."[53]

The Montana Supreme Court would endorse this approach to interpreting ballots, but as Greene observes, the Florida Supreme Court and most other state courts have accepted a generalized emphasis upon voter's intent. (pp. 37-42) Since the 2000 presidential election, a more textualist approach to interpreting ballots has gained favor. Florida amended its election laws to require "a clear indication on the ballot that the voter has made a definite choice" in order to count as a vote.[54] The ensuing regulations for each type of voting system must strike a balance that avoids "a catch-all provision that fails to identify specific standards" and a requirement that "the voter must properly mark or designate his or her choice on the ballot."[55] The Florida reform was endorsed by the National Commission on Federal Election Reform, a bipartisan commission headed by former Presidents Gerald Ford and Jimmy Carter. The commission recommended that "[e]ach state should adopt uniform statewide standards for defining what will constitute a vote on each category of voting equipment certified for use in that state."[56] The commission further recommended that "the definition of a vote should be as objective as possible and spelled out in clear language before Election Day."[57] By contrast, the commission warned that "[a]morphous statutory references to the 'intent of the voter' invite still more divinations."[58] Like Florida, though, the commission advised that "some allowance be made for at least some voter errors that nonetheless indicate a clear choice."[59] The commission's recommendations and Florida law thus move toward a textualist approach to interpreting ballots, but they stop short of accepting the ballot's "text" as always dispositive. In this respect, they resemble the textualist theory of statutory interpretation of Justice Scalia, who admits of certain limited instances in which the literal text of a statute may not control.[60]

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53. *In re Municipal Election Held on May 10, 1994, for Three Positions on the Sparta Township Council*, 656 A.2d 5, 8 (N.J. 1995).

54. Florida Election Reform Act, § 42 (adding Fla. Stat. § 102.166).

55. Id.

56. *The National Commission on Federal Election Reform: To Assure Pride and Confidence in the Electoral Process* 61 (Aug. 2001).

57. Id. at 60.

58. Id.

59. Id. at 62.

60. See Eskridge, *Dynamic Statutory Interpretation* at 44-47 (cited in note 27) (criticizing Justice Scalia's acceptance of an absurd results exception to his textualist theory);

Of course, I am not so naive as to imagine that any standard will eliminate all potential questions about the meaning of any particular ballot. My point is simply that an objective standard for what qualifies as a "vote" that is in place before election day is the best way to avoid the kinds of legal battles that raged last fall in Florida. If a voter who is instructed how to vote and reminded to check his or her ballot before submitting it nonetheless produces a confusing ballot, then the dangers of speculation and bias that plague subsequent examination of that ballot justify its exclusion. Any more subjective approach to counting votes is likely to fail. For while the absence of a standard distinguished the indented Florida chads from the rejected write-in ballots cast in *Paulsen*, it doomed the recount effort in *Bush v. Gore*.

III. THE EXPLANATIONS FOR *BUSH V. GORE*

So did the Florida Supreme Court's inability to satisfactorily define what counts as a "vote" justify *Bush v. Gore*? Greene points out that seven members of the Court agreed that there was a violation of the Fourteenth Amendment's Equal Protection Clause. (p. 117) Three members of the Court concluded that the state court's actions also violated 3 U.S.C. § 2. The Court then divided 5-4 in its interpretation of Florida law regarding the consequences of the equal protection violation. As Greene explains, the majority determined that the Florida Supreme Court held that the state intended to reach the safe harbor provided by 3 U.S.C. § 2, and since the Court reached that conclusion two hours before the safe harbor was to close, the Court held that further recounts were precluded. (pp. 120-22) Greene skillfully explains that the majority cited the wrong part of the Florida Supreme Court opinion for that proposition, but he then collects other statements of the state court—statements that were overlooked by the Court's majority—to conclude that "it is reasonable to suggest that the Florida Supreme Court thought that all manual recounts must end no later than December 12."[61] (p. 123) Greene would have favored yet another op-

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John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. Pa. L. Rev. 2209, 2229-30 (1995) (reviewing Eskridge, *Dynamic Statutory Interpretation* (cited in note 27)) (analyzing the absurd results rule). I am increasingly skeptical whether any such exception to a textualist theory of statutory interpretation is necessary or advisable. See John Copeland Nagle, *Textualism's Exceptions*, Issues in Legal Scholarship, Dynamic Statutory Interpretation, Article 15 <http://www.bepress.com/ils/iss3/art15> (2002)

61. In addition to the parts of the Florida Supreme Court opinions cited by Greene,

tion, remanding to the state court for a determination of whether Florida law did in fact seek the safe harbor. (p. 125) But, as Greene emphasizes, the issue posed by that remedial question was one of state law.[62] Never has the United States Supreme Court's interpretation of a question of state law been so controversial.

Even though he would have preferred a remand, Greene concludes that the result in *Bush v. Gore* was plausible. Others have not been so charitable. Alan Dershowitz has written about "the culpability of those justices who hijacked Election 2000 by distorting the law, violating their own expressed principles, and using their robes to bring about a partisan result."[63] Suzanna Sherry has said that *Bush v. Gore* "appears to be a nakedly political decision that arrogates all power to the Supreme Court and attempts to ensure that the five Justices in the majority will be joined by ideologically similar colleagues appointed by a Republican President."[64] Over five hundred law professors signed an advertisement published in the *New York Times* proclaiming that "the five justices were acting as political proponents for candidate Bush, not as judges."[65]

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see William Glaberson, *Boies's Concession on "Deadline" Proved Fatal*, N.Y. Times (Dec. 14, 2000), reprinted in *36 Days* at 334-36 (cited in note 31) (discussing the implications of the concession by Gore's attorney at oral argument in the Florida Supreme Court that the Florida vote count must be completed by December 12).

62. Unless, as Greene explains, "the state court understood the safe-harbor provision as mandatory rather than conditional, and thus that the state lacked the authority to count votes past December 12." (p. 125)

63. Dershowitz, *Supreme Injustice* at 12 (cited in note 5). Dershowitz makes it absolutely clear that he is accusing the majority justices "of partisan favoritism—bias—toward one litigant and against another." Id. at 110.

64. Suzanna Sherry, *The 2000 Presidential Election: What Happens When Law and Politics Collide?*, 31 Vand. Lawyer 20, 22 (2001).

65. 637 Law Professors Say By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law, N.Y. Times A7 (Jan. 13, 2000) (advertisement). For additional charges of partisanship, see, e.g., Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics,* 110 Yale L.J. 1407, 1408 (2001) ("That the conservative Justices acted as they did suggested that their partisanship was so thorough and pervasive that it blinded them to their own biases."); Jeffrey Rosen, *The Supreme Court Commits Suicide*, New Republic 18 (Dec. 25, 2000), reprinted in Dionne and Kristol, eds., *Bush v. Gore* at 312 (cited in note 15) (claiming that the decision "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"); Mary McGrory, *Supreme Travesty of Justice*, Wash. Post A3 (Dec. 14, 2000), reprinted in Dionne and Kristol, eds., *Bush v. Gore* at 295 (cited in note 15) (referring to "Justice Antonin Scalia, who might as well have been wearing a Bush button on his robes"); Linda Greenhouse, *The Court's Credibility at Risk*, N.Y. Times (Dec. 11, 2000), reprinted in *36 Days* at 290 (cited in note 31) (quoting Terrance Sandalow as describing the Court's stay order as "an unmistakably partisan decision

The rhetoric employed in the assaults on *Bush v. Gore* is unusually harsh, but it is not the first case to generate complaints that the Court's written opinion failed to explain the actual basis for a decision. Consider another characterization of an opinion as a "failure" because "it so lacks persuasive methodological power as to raise questions . . . about the Court's candor in identifying the real reasons why five Justices voted as they did." That was Philip Frickey's description of *United Steelworkers of America v. Weber*,[66] in which the Court held that Title VII permitted voluntary affirmative action programs. Frickey proceeded to suggest that the decision could be defended, but by an alternative argument advanced in Justice Wisdom's dissent in the Fifth Circuit.[67]

In that spirit, Greene argues that the result in *Bush v. Gore* would have been better grounded in the First Amendment. As he explains:

> In many freedom-of-speech and freedom-of-the-press cases, the Court has insisted that, when law gives discretion to public officials, that discretion must be bounded by clear, objective criteria. For example, if city law gives a city official power to grant or deny parade permits, or power to grant or deny requests to use loudspeakers at a city hall gathering, that law will be upheld only if it sets forth detailed, neutral, objective standards for granting or denying the requests. Otherwise, if the law says, essentially, "grant or deny as best serves the public interest," then the official has an enormous opportunity, consciously or unconsciously, to help speakers whose views she favors and to harm speakers whose views she disfavors. Although the Court has never applied this line of cases in the voting rights setting, voting rights share with speech and press rights a core political nature—they are all part of our essential citizenship; they are what allow us, rather than officials, to remain in control of government. The concern in Florida that different officials would count votes in different ways based on the vague "voter's intent" standard was a concern with roots in these free-speech and free-press cases.
>
> This understanding would allow the Court's key holding in *Bush v. Gore* to have a powerful but limited scope of application in future cases. . . . If one moves away from the stated

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without any foundation in law").

66. 443 U.S. 193 (1979).

67. The piece, which is excellent, is Philip P. Frickey, *Wisdom on Weber*, 74 Tulane L. Rev. 1169, 1177 (2000).

> equal protection basis for the outcome, and instead adopts the First Amendment analysis offered here, then only a certain type of differentiation among voting and vote-counting methods would have to be invalidated. Courts should step in, under the First Amendment theory, only when a jurisdiction gives to officials relatively unconstrained discretion to determine what counts as a vote. For only in that setting do we need to police the conscious or unconscious bias of government officials. (pp. 132-33)

This is the best theoretical defense of the result in *Bush v. Gore* that I have encountered. It captures the essence of Bush's complaints about the vote counting process in Florida: government officials were allowed to employ a vague standard (actually, vague standards) to judge the meaning of a ballot. Vagueness challenges abound in the law, afflicting such disparate standards as the meaning of air pollution, hostile work environments, unreasonable noises, and obscenity. The Due Process Clause prohibits any legal standard that fails to adequately inform those who are subject to it, but constitutional objections to vague legal standards are likely to succeed only if the First Amendment is implicated.[68] Voting might implicate the First Amendment, for voting possesses many of the same expressive characteristics of the speech protected by the First Amendment.[69] While the nexus between counting votes and the First Amendment cases prohibiting standardless government decisions may be unprecedented, as Greene admits, it is worthy of considerable further attention.

Greene's alternative explanation is attractive, but there is no indication that the Court ever entertained it. The persistence of the charges that the Court acted for purely partisan political motives presumes that such judicial misconduct is the only other way to explain why the Court actually reached the result that it did. Surely, though, there are a range of additional explanations

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68. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."); Daniel A. Farber, *The First Amendment* 51 (Foundation Press, 1998) (explaining that "[t]he vagueness rule is related to the Court's longtime concern over standardless administrative discretion in speech cases").

69. See Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 360 (2d ed. 2001) (asserting that "[t]he idea of locating a right to vote in the First Amendment guarantee of free speech has a distinguished pedigree," citing Alexander Bickel and Alexander Meiklejohn, but admitting that "the Supreme Court seems to have rejected the argument").

besides bias even if one is not convinced by the reasoning contained in the opinion. I would like to sketch three such explanations here.

The first explanation sees *Bush v. Gore* as the consequence of the decision nearly fifty years before to treat claims regarding the structure of elections as justiciable under the Equal Protection Clause. Prior to the 1960's, the Court repeatedly rebuffed efforts to employ the Equal Protection Clause to invalidate the manner in which states chose to structure their electoral processes. The Equal Protection Clause prohibited discrimination based on race or other protected characteristics, but general reapportionment claims were treated as presenting nonjusticiable political questions. That approach disappeared with *Baker v. Carr*,[70] where the Court held that reapportionment claims were justiciable. Tellingly, the critics of *Baker* foreshadowed the complaints about *Bush v. Gore*. Justice Frankfurter worried about the lack of "guidelines for formulating specific, definite, wholly unprecedented remedies" for newly acknowledged equal protection violations.[71] He reminded that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."[72] Likewise, Justice Harlan wrote that "[t]hose observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern."[73] Again, Justice Frankfurter: the doctrines of standing and political questions teach "that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."[74] Justice Frankfurter also warned that "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete

70. 369 U.S. 186 (1962).
71. Id. at 267 (Frankfurter, J., dissenting).
72. Id. at 270 (Frankfurter, J., dissenting).
73. Id. at 339-40 (Harlan, J., dissenting).
74. Id. at 287 (Frankfurter, J., dissenting).

detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[75] *Baker* was, in one commentator's words, "politics in search of law."[76] Yet none of this deterred the majority from concluding that the courts could adjudicate equal protection challenges to the manner in which electoral districts are designed. Indeed, Deputy Attorney General Nicholas deB. Katzenbach defended *Baker* as "a great example of the rule of law in our society" even in the teeth of the complaints that the Court had acted too politically.[77] The reaction to *Baker*'s expansion of equal protection jurisprudence into questions of electoral structure thus elicited the same reaction as *Bush v. Gore*. The decision in *Bush v. Gore* does not follow inevitably from *Baker* and its progeny, but it would have been impossible without them.

A second explanation is that *Bush v. Gore* is *Romer v. Evans*[78] redux. In *Romer*, the Court held 6-3 that a state constitutional amendment adopted by the people of Colorado that prohibited government action to protect gays or lesbians violated the Equal Protection Clause. That result pleased many and infuriated others, which is only the first similarity to *Bush v. Gore*. Three aspects of the equal protection analysis in *Romer* are echoed in *Bush v. Gore*. First, the majority in *Romer* relied upon an intuitive sense of what is unequal. Second, it cited few precedents for its decision, while ignoring or struggling to distinguish those arguably least favorable to it.[79] Third, it emphasized the novelty of the contested law, implying that the unprecedented nature of the challenged action provided cause for suspicion about its constitutionality.[80] There are other parallels as well.

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75. Id. at 267 (Frankfurter, J., dissenting).

76. Phil C. Neal, Baker v. Carr: *Politics in Search of Law*, 1962 S. Ct. Rev. 252. Professor Neal described *Baker* as resulting from "a fragmented Court, an abrupt reversal of position, unexplored and debatable substantive principles, and the contemplation of remedies as novel as they are drastic." Id. at 253.

77. Nicholas deB. Katzenbach, *Some Reflections on* Baker v. Carr, 15 Vand. L. Rev. 829, 836 (1962).

78. 517 U.S. 620 (1996).

79. The majority sought to distinguish *Davis v. Beason*, 133 U.S. 333 (1890) (upholding a state constitutional amendment that denied polygamists the right to vote), but it failed to persuade Justice Scalia. Compare *Romer*, 517 U.S. at 634 (describing reliance upon *Beason* as "misplaced") with id. at 649-51 (Scalia, J., dissenting) (developing the analogy to *Beason*). The majority did not cite *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a due process challenge to the application of a state sodomy law to homosexual activity).

80. See *Romer*, 517 U.S. at 633 (explaining that the "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our

The equal protection reasoning in both cases held a particular appeal to Justice Kennedy.[81] Less impressed, supporters of both decisions scrambled to identify alternative theories for the Court's result.[82] Critics of both decisions charged that the Court had fashioned a rule that would not be applied in future cases.[83] Indeed, since it was decided, *Romer* has not heralded a profound change in equal protection jurisprudence, in the constitutional authority of states to restrict local governments, or even in the constitutional treatment of gays and lesbians. So where *Baker* suggests that *Bush v. Gore* is just the most recent in a line of cases extending judicial control over elections via the Equal Protection Clause, *Romer* suggests that *Bush v. Gore* was a unique response to its unprecedented facts.

A third explanation for *Bush v. Gore* is that the Court was outraged by the actions of the Florida Supreme Court. Or, to put it another way, perhaps the Court acted to prevent the state courts from deciding the election. The premise of this view, of course, is that the Florida Supreme Court acted wrongly in its decisions regarding the meaning of a "vote," the authority of the various state bodies involved in counting the votes, the scope and nature of a recount, and the appropriate remedies for any errors. Greene acknowledges that Bush's narrow understanding of what should have counted as "the rejection of legal votes" was "perhaps even stronger than the reading the state high court ultimately adopted" (p. 127); others have been much more insistent that the Florida court's decisions were unjustifiable. An emphasis upon the perceived outrageousness of the Florida Supreme Court's decisions is featured in the post-election analyses of Judge Posner, James Blumstein, and others.[84] Moreover,

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jurisprudence").

81. Justices Kennedy and O'Connor were the only members of the Court to join in the majority in both *Romer* and *Bush v. Gore*. Justice Kennedy wrote the opinion of the Court in *Romer*, and Greene suggests that the *per curiam* opinion in *Bush v. Gore* "was almost certainly written by either Justice O'Connor, Justice Kennedy, or both, because they are the only Justices who didn't join one of the concurring or dissenting opinions." (pp. 116-17)

82. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996) (arguing that Amendment 2 violated the attainder clause).

83. See *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) (accusing the majority of "inventing a novel and extravagant constitutional doctrine").

84. See Posner, 68 U. of Chi. L. Rev. at 719 (cited in note 35) (observing "that the Florida court was acting arbitrarily was the premise of the equal protection argument that the Supreme Court eventually accepted, and that it was acting in violation of Florida law was the premise of the Article II argument that three Justices found persuasive and that I consider the stronger of the two arguments"); James F. Blumstein, *The 2000 Presidential Presidential Election: What Happens When Law and Politics Collide?*, 31 Vand.

there is evidence that the Court shared these concerns. Greene notes the significance of the Court's December 4 decision to vacate the original Florida Supreme Court decision because of questions about its reasoning, and the concerns about the unresponsiveness of the state court that Justice O'Connor expressed at oral argument in *Bush v. Gore*. (pp. 106-07) On this reading, it was the perception that the Florida Supreme Court was seeking to elect Gore that provoked *Bush v. Gore*, rather than an affirmative desire by the majority to elect Bush.

But even if these criticisms of the Florida Supreme Court are correct, they still do not necessarily justify the U.S. Supreme Court's reversal in *Bush v. Gore*. David Strauss has dismissed such a defense of the Court's decision by noting that "the best that can be said is that the Court trumped the supposed lawlessness of the Florida Supreme Court with lawlessness of its own."[85] More simply, two wrongs do not make a right. The legal embodiment of that aphorism is contained in principles of federal jurisdiction that prevent the federal courts, including the Supreme Court, from engaging in a roving attempt to correct every judicial mistake, even—or perhaps especially—when the election of the President is at stake. It is easy to imagine Justice Scalia writing an opinion acknowledging the travesty of justice worked by the Florida Supreme Court but insisting that the federal courts do not sit to remedy all wrongs. Thus critics object both to the Court's substantive rationale and to its decision to decide the case in the first place. That is the most powerful argument against *Bush v. Gore*, and I am not expert enough in the law of federal courts or equal protection jurisprudence to fairly evaluate it here. Note, though, that this analysis shifts the question to whether the Court was right, which is a much different query than whether the Court was so wrong to justify the accusations of partisan bias that have been leveled against it.

Greene's answer is that the Court acted within the bounds of reason. He sees the Court's termination of the election in *Bush v. Gore* as "the most difficult challenge for the thesis that all the rulings from the 2000 election were based in reason." (p. 182) "Yet," he adds, "even here, the majority opinion has the

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Lawyer 23 (2001) (concluding that "the Florida Supreme Court's . . . work product is the necessary foundation for evaluating the [United States Supreme Court's] role in the 2000 Florida election cases").

85. David A. Strauss, Bush v. Gore: *What Were They Thinking?*, 68 U. Chi. L. Rev. 737, 756 (2001). Accord Dershowitz, *Supreme Injustice* at 8 (cited in note 5); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. Chi. L. Rev. 679, 690-92 (2001).

shape and sound of law.... It amounts to an act of legal interpretation." (p. 182) That interpretation may have been wrong, just like numerous other interpretations, but error does not connote bias. The many explanations for the result in *Bush v. Gore*—the *per curiam* opinion's equal protection argument, the concurrence's Article II argument, Greene's First Amendment argument, the "avoidance of a national crisis" justification,[86] and the three explanations that I have briefly sketched here—all contradict the assumption that politics triumphed over law.

IV. CONCLUSION

The best chapter of Greene's book is the last. In it he trumpets the election as the victory of the rule of law. He emphasizes that the election battles proceeded "in law-like fashion. Reasons were given that were defensible from statutory text or judicial precedent; opposing views were canvassed and rejected through argument; difficult questions were resolved by reference to principle, rather than politics." (pp. 182-82) To be sure, the events were often traumatic, but Greene has an explanation for that, too:

> What happened in Florida was this: Forms of law became exposed to an intense nationwide scrutiny. Anything upon which the entire nation's attention is turned, via the overwhelming resources of the contemporary media, will look scarred, imperfect, unclean. This is so whether the item under the microscope is a politician's sex life, a famous athlete's alleged crime, or the system of electing presidents. The resolution of the 2000 presidential election turned on one state, and the resolution in that one state turned on an enormously complex interaction of politics and law. Of course, the law, under such scrutiny, will look imperfect and hard to distinguish from the politics. But that doesn't mean it is any less principled or that it serves any less as a peacekeeping device. (pp. 180-81)

86. Chief Justice Wells was the first to warn that "there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution," while predicting that "this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress." *Gore v. Harris*, 772 So.2d 1243, 1263, 1267 (Fla. 2000) (Wells, C.J., dissenting), rev'd, *Bush v. Gore*, 531 U.S. 98 (2000). Since then, several commentators have suggested that the Court ruled in *Bush v. Gore* to avoid a constitutional crisis. See Michelman, 68 U. Chi. L. Rev. at 692-93 (cited in note 85); Cass R. Sunstein, *Order Without Law*, 68 U. Chi. L. Rev. 757, 758, 768, 772-73 (2001); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. Chi. L. Rev. 775, 789-91 (2001).

The choice of the President could have been decided by violence, Greene reminds us, but it was decided by law instead.[87] (pp. 180, 183)

Greene's contrast between law and violence as the means of influencing policy within the United States proved to be prophetic. Two hundred seventy-three days after it was decided, *Bush v. Gore* suddenly seemed like a distant memory when 2,801 people were killed in the terrorist attacks on the World Trade Center and the Pentagon. The attacks did not in any sense change the rightness or the wrongness of the Court's decision, and the national response undoubtedly would have been the same if Gore had become President, but the attacks placed the election in an entirely different perspective. They reminded us how unusual it is for a society to accept a controversial transfer of governmental power without even a threat of violence. They made the more apocalyptic language about *Bush v. Gore*—language that Greene skillfully avoided—sound out of place. And the attacks produced a sense of national unity that had not been seen in recent generations. The People answered the questions about the divisions within the United States. This time they did not need the Supreme Court to figure out what they said.

87. Accord Issacharoff, 68 U. Chi. L. Rev. at 637 (cited in note 23) (observing that "there was essentially no social unrest, no crisis of governance, no inability to maintain discipline in foreign affairs, no instability in financial markets, no crisis in consumer markets, no stockpiling of goods, and so forth. Instead, there was a captivating display of high-powered lawyering that seized the national spotlight and resolved what in much of human history would have been an invitation to disorder and despair.").