Introduction

Federalist Society. Richard. And others: ELA, WLSA, CLS, JLA, BALSA, EJF.

Mike’s paper. Thoughtful, balanced. We seem to agree that what the majority published won’t do. Disagree about result. He says it is like Brown v. Board of Education: good result, bad opinion. I say it is like Dred Scott: bad result, bad opinion.

My focus just now is not his paper, but what the Supreme Court did and what it said.

With respect to what it did, I believe that our least democratic institution intruded on our most democratic national exercise in a corrosive act of self aggrandizement at the expense of both the states and Congress, which is to say, at the expense of the people.

With respect to what it said, I believe that it exactly performed what it accused the Florida Supreme Court of doing. Namely, and here I quote from what the majority of five wrote about the State supreme court: The opinion “does not satisfy the minimum requirement for non-arbitrary treatment of voters” because of “the absence of specific standards to ensure its equal application” and is therefore “not well calculated to sustain the confidence that all citizens must have in the outcome of elections.” To put it charitably, and these are my words, it is a shabby piece of work that reflects only too well the Court’s internal disarray.
The Result

One good if unintended consequence. The Wizard of Oz has been revealed for what he is. Dorothy. Fearful, all-knowing, all-powerful wizard turns out to be a little old man who turns cranks and manipulates mirrors. Entirely healthy. Tend generally to commit idolatry in the way think about the Supreme Court and its justices. Tom Grey: high level administrative committee; ordinary men and women. Sometimes get it right. Not in this instance.

The Court should not have heard the first appeal. It should not have issued the stay halting the manual recount, the day before the briefs were due in the second appeal. And it should not have elected George Bush after it read the briefs and heard the arguments.

Even if there had been a crisis not of its own devising -- and there was not such a crisis -- even if there had been it was not for the Court to resolve it.

The Court can appropriately help to create a crisis, as it did in Brown v. Bd. of Education, but only so as to put the issue to the people to resolve as happened there.

In this case, there was a clear, textually demonstrable constitutional commitment of Presidential election details and disputes to the States and to Congress. The Constitutional scheme and the statutes implementing it foresee controversies about the electors and elections, and always, repeatedly, they place responsibility for resolving them in the hands of the people’s elected representatives.
There was no crisis of time. The certification of Presidential electors and their votes can be reported to Congress and, in one instance, were in 1960 reported to Congress as late as January 6, when by statute, Congress is to count them.

If there is a challenge to the legitimacy of the selection of a state’s Presidential electors, the Constitution and the statutes implementing it have a very careful, deliberative procedure to follow, and in that process, it is the Senate and the House that are to make the judgments.

And if the electors and their votes are settled upon but they cannot agree on a President, the election is thrown into the House. And if the House has trouble settling on a President, the Constitution and the statutes are again prepared with an answer for that situation as well.

There is no hurry. The need for speed and finality cannot trump the achievement of accord. If no new President is selected by the time the old one’s term expires on Jan. 20, the Constitution is prepared to wait for as long as need be.

In all of this, in waiting for the achievement of accord, the Constitution and the statutes are very careful to omit the Supreme Court as a player. Certainly Madison made it clear that the S. Ct. should have no say in the election of a President, for exactly the reason that Bush v. Gore illustrates. It is for the people and their elected representatives to decide. Or in Justice Souter’s phraseology, the political tension is to work itself out in the Congress.
Why did the Court rush into the breach it created? There are some very unattractive explanations. The personal connections of Justices Scalia and Thomas. Or the stated desire of at least one Justice to retire, but not to want to do so during a Democratic Administration. The Court brought such allegations upon itself. I will stick with what I said. It was an act of self-aggrandizement arising from the Justices inflated sense of their own importance.

The Court usurped the power of the states as well as the Congress, and therefore also the power of the people. It was a very un-Federalist thing to do and also unrepublican, with a little “r.”

We will never know who received the most votes in Florida. The election was too close to call, and reviewing all the punch card ballots will determine nothing, for each uncertain ballot is open to interpretation, and good lawyers can make arguments for and against the way each is to be counted. Anything can be said and argued about anything. Generally, what counts is power, and the people with the power decide which interpretation, which argument will prevail.

Or do they? Is it, after all, always and only a question of power. That’s something we need to talk about, if not here, today, in this forum, then sometime, somewhere.

For today, think with me about how in law we try to resolve disputes. We can never reconstruct the past. There will always be an argument about who killed President Kennedy. There will always be an argument about what happened at Waco. There will
always be an argument about who committed a given crime. There will always be an argument about who breached a given contract.

And how do we bring finality to those disputes? Most are resolved by one form or another of settlement, an agreement. Those that can't be settled, we take to trial, usually a jury trial, where we ask representatives of the people to hear the competing stories and to resolve the dispute with a judgment that achieves practical justice.

And in the unique circumstance of a presidential election, the Constitution has in place a process that uses both of those methods of resolution, so essential to a democracy: agreement and judgment by representatives of the people.

The people as a whole vote. If the result is too close to call or if there are disputes about electors, the controversy goes to the House of Representative, and no deadline is imposed, so that agreement can be achieved, so that the political tension can be resolved in the people's chamber.

Albert Gore won the popular vote. The Supreme Court is already the most institutionally anti-democratic branch of government. It should never have inserted itself into the process and should certainly not have done so in a way that defeated the will of the majority of the people in a presidential election.

I believe that the Electoral College is a good idea. It is Constitutional. Election of the President by five members of the Supreme Court is a bad idea, and it is flagrantly unconstitutional.
The Opinion

A. Per Curiam

Main business of the "per curiam" opinion was Equal Protection. I have these questions about it:

1. What is the right infringed?

2. How is the Equal Protection Clause violated? The Supreme Court has announced, dispositively, that no violation can been established unless it is proved that there has been intentional discrimination. Where and when was an intent to discriminate ever alleged, to say nothing of proved?

3. Why does the perceived infringement of equal protection not entail calling into question a great deal more than the manual recount of undervotes ordered by the Florida Supreme Court?

4. Why not remand with instructions to establish appropriate guidelines for determining voter intent.

B. Concurring. By C. J. Rehnquist

1. He reads Article II, section 1, par. 2 as a constitutional grant of authority to States and their legislatures. Even if it is and is not rather a recognition of state authority,
the state legislature provided for court review of contests, in contrast to the U.S. Constitution and statutes which exclude a similar role for the U.S. Supreme Court.

2. He wrongly views 3 U.S.C. section 5 as a law binding on states which it is not, and as establishing an unbreachable deadline, which does is not. And he says that this deadline is one the legislature wished to meet, an assertion for which there was no evidence.

3. He sat as a state court interpreting state law, an anti-Federalist act for which he could find precedent in only three cases, none of which supported his doing so in this one.
Art. II: level playing field.

Contest before rather than after. No interpretation. Level playing field: referees.

Const. itself provides for post election controversies and judgments.

So does Fla. stat.


But rules are texts.

Text and no interp. P. 41.

Judicial interp. O.k. ahead of time. 42.

Mistake: grounds for contest: “legal vote” too flimsy 46
XX: Jan. 20th. Cong. Jan. 3. If not by term [not chosen, not qualified], VP elect, or, [if not qualified] succession (Speaker).

XII: Electors meeting. How to. Count: majority of whole number of electors = winner. If not, House picks from top 3. By state: 1 vote each. If not by March 4, Senate choose VP.

Stat.

Sec. 5. Safe Harbor

Sec. 15 Safe but not absolutely immune.

Sec. 7 electors mee: Dec. 18

Sec. 12 Dec. 27 steps if no certificate received.