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BUSH V. GORE: REPLY TO FRIEDMAN

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The litigation that followed the election deadlock in Florida last year and that culminated in the Supreme Court's decision in *Bush v. Gore*¹ has triggered an avalanche of scholarly commentary, almost all highly critical of the decision. Professor Friedman's article² is one of the most scholarly and temperate of the articles that I have read which criticize the decision.

I appreciate the force of his criticisms of my book,³ which defends the decision, though not the reasoning by which the majority of the Court reached it. I will respond to these criticisms in this brief comment, following essentially the order of discussion in his article. The comment is not self-contained but presupposes familiarity both with my book and with Friedman's article.

I want at the outset to dispel any impression which my comment may create that I consider my position on the merits of *Bush v. Gore* "right" and Professor Friedman's "wrong." Such terms are inapplicable to the most difficult constitutional cases, of which *Bush v. Gore* (I think Friedman agrees) is one. I go no further than to claim that the decision (not, to repeat, the majority opinion) was reasonable. I also agree with much of Friedman's analysis, but will not discuss the areas of agreement.

Friedman puts a great deal of weight on an interpretation of section 2 of the Electoral Count Act⁴ as barring the appointment by the state legislature of a slate of presidential electors merely because the election is deadlocked. This is important because the worst-case scenario that I sketch in my book and that provides the basis for my belief that the Supreme Court's decision terminating the deadlock was pragmatically justified pivots on the likelihood that the Florida Legislature would have appointed a Bush slate had the Florida Supreme Court declared Gore the winner of the Florida popular vote. Section 2 provides that if the popular election (or whatever other mode the state's election law may specify for the appointment of the state's presidential electors) "fail[s] to make a choice" of electors on election day (November 7 in 2000), the state legislature may select them.⁵

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1. 531 U.S. 98 (2000).

2. Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811 (2001).

3. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (Dennis J. Hutchinson et al. eds., 2001).

4. 3 U.S.C. § 2 (1994).

5. *Id.*

Friedman is right to point out that uncertainty about what choice was made is consistent with having made a choice. But what if December 18 (in 2000, the day on which the Electoral College was to vote—and note that the Constitution requires that all the electoral votes be cast on the same day⁶) had rolled around and the winner of the popular election had not yet been determined? That was a likely eventuality given the time required to conduct a statewide recount and to submit the results to judicial review. Would that eventuality, had it materialized, not have been a failure to choose the state's electors, since it would mean⁷ that Florida would not be represented in the Electoral College? And, if so, wasn't the state legislature entitled to appoint, at least tentatively, a slate of electors against the contingency that on December 18 the deadlock would still be unresolved? I consider this an appropriate interpretation of section 2. Is it the "right" interpretation? Who knows? But it is sufficiently plausible to have set the stage for a face-off in Congress on January 6 (the date of the counting of the electoral votes) on whether the slate appointed by the legislature or the slate certified by the state's supreme court was the legitimate one. And then the worst-case scenario would unfold as I described it in my book.

Friedman argues that there is no absolute requirement that a state's electoral votes, to be counted, must be certified by December 18.⁸ So the fact that that day arrived with no resolution of the electoral deadlock by the Florida Supreme Court need not have excluded Florida from participating in the selection of the President by the Electoral College. But I am not sure what follows from this suggestion. One possibility would be that, on December 18, Florida would vote the Bush slate on the ground that pending completion of the recount he was the presumptive winner of the popular election. But suppose that between December 18 and January 6, Gore had been declared the winner of the Florida popular election. Would Florida then recast its electoral votes? But the Constitution requires that all electoral votes be cast the same day. A voter who fails to vote on election day is not allowed to vote later. To skirt this problem, Florida might ask each slate of electors to vote on December 18, leaving to Congress the decision which votes to count. But this of course assumes that the deadlock must be resolved by Congress, and that is precisely the worst-case scenario that I sketch in my book.

So far I have been considering whether *Bush v. Gore* really did head off a fight in Congress to determine the next President. Now let me turn to the question whether, as a matter of doctrine rather than

6. U.S. CONST. art. II, § 1, cl. 4.

7. Subject to a qualification discussed shortly.

8. Friedman, *supra* note 2, at 819-21.

consequences, the Florida Supreme Court violated the "manner directed" clause of Article II. (I agree that it did not violate the equal protection clause.) I accept Friedman's test: "[u]nless the principles applied by the court amount to a clearly implausible construction of state law as the law stood on Election Day, there should not be an Article II problem."⁹

Friedman attributes to me the view that "a punch-card ballot without a hole for a single presidential candidate punched cleanly through, knocking the chad off, does not properly cast a vote for President."¹⁰ He bases this attribution on a statement in the statistical chapter of my book (chapter 2); it was not intended as a statement of law, and indeed all I said there was that this interpretation made the best fit with the ordinary meaning of "error in the vote tabulation," the relevant statutory phrase.¹¹ My position was and is that because this is a permissible interpretation, one that does no violence to the statute, common sense, or precedent,¹² its adoption by the state's division of elections should, under Florida law, have been conclusive on the courts. The state's election statute expressly delegates responsibility for interpretation of the statute to the state election officials; and when an agency given such a responsibility exercises it reasonably, then under normal principles of administrative law obtaining in Florida as elsewhere that is the end of the judicial inquiry.¹³ I thus have no quarrel with Friedman's statement that under Florida law "[i]f a statute leaves room for a range of reasonable constructions, then the courts should ordinarily defer to a choice within that range made by the administrative entity charged with implementing the statute."¹⁴

Deference to administrative judgment is particularly indicated where a sensible decision depends on considerations that are likely to be known better by the administrative officials and staff than by judges and (what is not quite the same thing) that are difficult to weigh and compare by the methods of litigation.¹⁵ Both conditions were met here. The question how much time and effort to invest in trying to recover votes from voter-spoiled ballots, in the context of looming deadlines for the selection of the state's Electoral College

9. Friedman, *supra* note 2, at 841. I don't see, however, how this squares with his later statement that "to constitute a violation of Article II it is not enough that the state supreme court's decision be wrong, or even obviously wrong and wrongheaded." *Id.* at 857 (emphasis added).

10. *Id.* at 843.

11. FLA. STAT. § 102.166(5) (2000), amended by 2001 Fla. Laws ch. 40, § 42, at 151-52.

12. The last point is the most debatable, and is discussed below.

13. See POSNER, *supra* note 3, at 100.

14. Friedman, *supra* note 2, at 851.

15. This too Friedman acknowledges as a principle of Florida law. *Id.* at 851 nn.157-

winner, is not a question that judges have a comparative advantage in answering. It depends on subquestions such as how trustworthy the methods for inspecting spoiled ballots for ascertainable voter choice are, how trustworthy the local election boards that will conduct the inspection are, how long a hand recount will take, how likely the recount will be to change the outcome of the election, and the significance to be attached to the clarity and completeness of instructions that the voter was given by the local election boards (that is, how culpable in the spoilage of the ballot the voter should be thought). The ascertainment and weighing up of these factors require a managerial-style judgment in a field (election administration) which most judges have only fleeting, episodic contact with and no real expertise in, rather than the resolution of the kind of clean-cut issue of statutory interpretation or application with which judges are comfortable.

Moreover, although the interpretation adopted by the state election officials was not compelled by the language of the statute (interpretations rarely are), it was more consistent with that language than the interpretation adopted by the Florida Supreme Court in its November 21 decision, which required that all spoiled ballots (or at least all undervoted ballots) be counted if the voter's intent could be ascertained. Remember that the operative statutory language was "error in the vote tabulation"¹⁶; without that, there is no legal basis for a full hand recount in the protest phase of an election dispute. Tabulation means counting, and the counting is done by machines, and if the machines are properly programmed, maintained, and operated, and fail to record a vote only because the ballot was not marked properly by the voter, it is hard to see the failure to record as a *tabulating* error. Professor Friedman's argument that the real statutory standard is "clear indication of the intent of the voter,"¹⁷ because that is the standard applicable to damaged or defective ballots, is strained. There is a clear distinction between a damaged or defective ballot on the one hand and a ballot that the voter has spoiled: namely that the voter is not complicit in the first type of screw-up. State election officials should be entitled to confine the intent standard to the subset of screw-ups in which the voter is least at fault. That is precisely the kind of practical, splitting-the-difference resolution that, in the absence of a clear statutory directive, is best left to the judgment of the administering agency.

Now if Friedman is correct that, despite all I have said, the Florida Supreme Court had prior to the 2000 election carved out a special

16. See *supra* note 11 and accompanying text.

17. Friedman, *supra* note 2, at 847 (citing *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000)).

exception from the normal principles of administrative law for election disputes, that special exception would constitute a valid judicial gloss on the state election statute. And he is right that there are cases which indicate that spoiled ballots should be counted as votes if the voter's intent is discernible. But he is putting a lot of weight on dicta. All but two of the cases are ones in which the court was refusing to set aside the result of an election.¹⁸ They are realistically viewed as based not on a careful analysis of the statute but on a natural reluctance to upset the results of an election, establishing a presumption that if applied to the 2000 election deadlock they would have required deferring to the position taken by the state election officials, who sought to ratify the popular vote. The other two cases date from 1917 and 1929, respectively. In the earlier case the refusal to count certain ballots was deemed unlawful because the ballots did not violate any mandatory provision of the election code,¹⁹ and in the later case an election was set aside *because* the ballots had been improperly completed by the voter.²⁰

I thus emphatically disagree with Professor Friedman's contention that the officials' "interpretation was clearly wrong or at least unreasonable, and beyond the bounds within which deference was required."²¹ I also disagree that the Florida Supreme "court's November 21 decision to extend the [canvassing] boards' deadline had little impact on its December 8 decision to order a statewide recount."²² What was critical about the November 21 decision was not the extension but the ruling, carried through to the December 8 decision, that spoiled ballots must be counted if the voter's intent is discernible. Had it not been for that ruling, there would have been no basis for ordering a statewide recount, since it was only the large number of spoiled ballots that cast doubt on whether Bush had really won the popular election.

Professor Friedman expresses doubt as to whether the election deadlock was even justiciable in the U.S. Supreme Court, given that the Constitution commits the counting of the electoral votes to Congress without setting forth any standard for how disputes over the

18. See POSNER, *supra* note 3, at 107 n.29 (the *Boardman* and *Carpenter* cases cited by Friedman, *supra* note 2, at 848 n.146, plus several other cases not cited by him).

19. *Darby v. State ex rel. McCollough*, 75 So. 411, 412 (Fla. 1917) (per curiam). Not all the instructions given voters are intended to state legal requirements. See POSNER, *supra* note 3, at 107 n.29. In *Darby*, a bond referendum case, two voters had marked their "X" to the right of the proposition to be voted on rather than the left, as the instructions required. *Darby*, 75 So. at 412. The votes were counted by hand—this was before machine counting—and there was no rational basis for the rejection of the two ballots in question. The idea that a decision like *Darby* (setting its antiquity to one side) would require state election officials to permit the counting of dimpled chads as votes is fanciful.

20. *Florida ex rel. Nuccio v. Williams*, 120 So. 310, 315 (Fla. 1929) (en banc).

21. Friedman, *supra* note 2, at 852.

22. *Id.* at 854.

validity of electoral votes cast on Electoral College election day are to be resolved. I agree that a dispute over electoral votes presents a "political question" that the Court should refuse to answer.²³ But rather than showing that the Court should not have agreed to review the Florida Supreme Court's decisions in the litigation over the deadlocked Florida election, this point demonstrates the opposite. Once the dispute landed in Congress on January 6, it would be too late for judicial intervention to resolve the dispute; that is one of the things that makes the worst-case scenario plausible. But before the dispute landed in Congress, when the issue was not how Congress would resolve a dispute over electors but the consistency of the Florida court's decisions with the U.S. Constitution, there was no "textually demonstrable constitutional commitment of the issue to a coordinate political department."²⁴ Nowhere does the Constitution suggest that Congress shall resolve disputes over the application of Article II or any other provision of the Constitution to the selection of a state's presidential electors, a process that takes place before the electoral votes are counted. Congress is not "clearly the forum that the Constitution chose to resolve these disputes."²⁵

Professor Friedman devotes a fair bit of space to discussing the likely resolution of the deadlock had a Gore slate been approved by the Florida Supreme Court by December 12. I believe there is no reasonable possibility that the statewide recount ordered by that court on December 8 could have been completed in four days with full exhaustion of judicial remedies. And so the dispute would have been tossed into the lap of Congress after all—there to be resolved, in Friedman's words, by "open politics."²⁶ The intended force of "open" is unclear. Does it mean naked? Raw? Patently partisan? Or perhaps democratic? Experience with past presidential elections not resolved in the orthodox manner, namely 1800 (Jefferson over Burr), 1824 (John Quincy Adams over Jackson), and 1876 (Hayes over Tilden) suggests that when the President is selected in an unorthodox way (by the House of Representatives, in the first two examples, and by an ad hoc commission appointed by Congress, in the third), he comes into office trailing poison. (The Hamilton-Burr duel may have been a consequence of the 1800 election foul-up, as Hamilton vigorously supported Jefferson, his traditional foe, against Burr.²⁷)

23. POSNER, *supra* note 3, at 184-85.

24. Baker v. Carr, 369 U.S. 186, 215 (1962) (quoted in Friedman, *supra* note 2, at 859).

25. *Contra* Friedman, *supra* note 2, at 868 ("Congress is clearly the forum that the Constitution chose to resolve these disputes.").

26. *Id.* at 867.

27. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 40-43 (2000).

And finally, I do not think that the Supreme Court's intervention, ham-handed though it unquestionably was (for which Gore is to blame for not having accepted the result of the popular election in Florida), imposed a significant "cost to democracy."²⁸ It did damage the prestige (or, if one prefers, the "credibility") of the Supreme Court, but as the Court is not a democratic institution, but a republican check on democratic ardor and abuse, I do not see such damage as a setback for democracy. I don't see what other democratic cost was incurred, unless one doubts, as I do not, that the outcome of the popular election was an unbreakable statistical tie. The recount ordered by the Florida Supreme Court, if carried through to the end, might have changed the result of the election; it would not have revealed the "true" winner.²⁹ And, on the other side, on the benefit side of the Court's intervention, the "order and unity" side that Friedman mentions briefly, I disagree that dumping the deadlock into Congress would not have led to "even a delay in inauguration."³⁰ If Congress did not resolve the deadlock within two weeks, that is, by January 20, an Acting President would have been appointed—but not, I take it, inaugurated.

28. Friedman, *supra* note 2, at 868.

29. POSNER, *supra* note 3, at 88-90.

30. Friedman, *supra* note 2, at 868.

