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Otis King

Jonathan A. Weiss

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Articles

We Are Mad as Hell and We Do Not Intend To Get Over It: Where Were The Troops?

Otis King* and Jonathan A. Weiss**

“Those who cast the votes decide nothing. Those who count the votes decide everything.” Ascribed to Josef Stalin.

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* Otis H. King is former Dean and law professor of the Thurgood Marshall School of Law, Texas Southern University; LL.B., Texas Southern University School of Law; LL.M., Harvard. He is currently co-publisher and associate editor of *University Faculty Voice*.

** Jonathan A. Weiss is a former Visiting Professor at the Texas Southern University School of Law; Yale B.A. 1960; Yale Law School, LL.B. 1963. The authors would like to thank Toby Golick and Lee Albert for raising many strong objections to our position. We have tried to accommodate them the best we could. Hal Edgar also asked pointed questions and raised helpful issues. Finally, we want to thank Paul Weiss for his editorial assistance. Roy Galewski of Pace Law School has been even more than one could expect from a Law Review Editor and we are very grateful for his excellent work on this article.

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I. The Obvious Disgrace

The Supreme Court's aberrational decision of *Bush v. Gore*¹ has been devastatingly criticized.² One legal scholar has argued that the majority Justices "are criminals in every true sense of the word, and . . . belong behind prison bars as much as any American white-collar criminal who ever lived."³ Many of these criticisms are quite extreme and perhaps have less basis in the Constitution, precedent, or statute than those of the au-

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

2. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE* 10 (Oxford Univ. Press 2001).

3. VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE THE PRESIDENT* 49 (Thunder's Mouth/Nation Book 2000); See Michael J. Klarman, *Bush v. Gore Through The Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001), for examples of articles with strong and legitimate criticism. In addition, Volume 29, Issue 2 of the Florida State University Law Review is entirely devoted to the *Bush v. Gore* case. Notable among the articles is James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints In Presidential Elections*, 29 FLA. ST. UNIV. L. REV. 625, 635-37 (2001) (specifically mentioning the relevance of a "Republican Form of Government" and Federalist Number 10). There is also a continuing amassing of evidence of misdeeds. See various articles available at <http://www.Democrats.com>. We realize that a book could be written expanding, substantiating, and integrating this evidence and that we are preaching to the choir assembled by many others who have gone before us. We rely on that evidence, the dialectical openness of the choir, to consider the importance of the constitutional considerations not sufficiently stressed and the racial repercussions which implications are so antithetical to democracy, and the years of civil rights achievements secured at tremendous cost through heroic efforts of many sung and unsung, killed and surviving. Finally, we point out that, as time passes, we expect more revelations of malfeasance to support the analysis of this article. This process seems to have begun, since the Justice Department was in the process of examining and possibly filing lawsuits against Florida counties for violations of the Voting Rights Act as this article went to print. See Steve Bousquet, *Voting Rights Lawsuits Might Only Prolong Furor*, ST. PETERSBURG TIMES, May 25, 2002, at 1B.

thors of this piece. Such extreme positions do not show what should have been done at the propitious time. It has become such a truism that the Court should not have reached out (once by Justice Scalia alone and then by the confused, confusing majority) that some law professors now casually state the "Supreme Court shouldn't have taken the case."⁴ Clear, crucial and long-established constitutional elements demonstrate that an appropriate remedy did exist for the anti-democratic overreaching to steal the election.⁵

We will not burden the reader with theories so common nor documentation so obvious, but will accept the irrefutable fact of a pattern and practice of limiting access to the polls for the minorities and poor,⁶ the use of incomprehensible ballots,⁷ of clear

4. Katherine Rosman, *Smoke-Filled Rooms L'il Liberals*, THE NEW YORKER, July 2, 2001, at 25 (quoting Larry Kramer, NYU Professor and former clerk to Justice William J. Brennan, Jr.). Marx once said that he found Hegel standing on his head and put him on his feet. The Court in *Bush v. Gore* found equal protection on the right footing to protect the right to vote and black's rights in general, and the Court turned it on its head to destroy both. Not only did the Court do that but under a cloud of rhetoric, still continuing in some quarters, quasi-scholarly and elsewhere, about "finality" and conjectures of what might have resulted had the Florida process continued, they intervened in the process rather than assessing its result properly framed in a lawsuit for legal interpretation. Supreme Court Justices rarely discuss their decisions in public. However, in January, when a group of visiting Russian justices asked seven members of the Supreme Court about *Bush v. Gore*, remarkable things were said. Dissenter Steven Breyer said it was "the most outrageous, indefensible thing" the Court had ever done. Dissenter Ruth Bader Ginsburg said, "here we're applying the Equal Protection Clause in a way that would de-legitimize virtually every election in American history." David Kaplan, *National Affairs*, NEWSWEEK, Sept. 17, 2001, at 28.

5. Once again, there has been more than ample documentation that across the State of Florida completely illegal acts took place. See <http://www.Democrats.com> for a continuing compendium of many such acts ongoing as we write (e.g. the military ballots). John Conyers Jr., the ranking Democrat on the House Judiciary Committee recently wrote:

A sad reality is that almost four decades since the passage of the Voting Rights Act, the disenfranchised are overwhelmingly people of color. In Florida in 2000, African-American voters were nearly 10 times as likely as whites to have their ballots discarded. Voters in low-income, high-minority districts were more than three times as likely to have their votes for president discarded as voters in high-income, low-minority districts.

The lesson in Florida was that notwithstanding the great work of many states and localities, one rogue state can disrupt a federal election and disenfranchise thousands.

John Conyers Jr., *Voting Rights in Peril*, N.Y. TIMES, January 30, 2002, at A27.

6. The purpose of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994) is to eliminate this practice; "[T]he proscription of § 2 extends beyond formal barri-

miscounting by biased officials,⁸ and of intimidation practiced against those who were attempting an accurate recount.⁹ Focusing on the most egregious part of this decision - the racism, explicit and implicit - we will refer to some widely accepted and well-proven facts in this connection for the purposes of illustration and clarity. Even if the pattern and practice of discrimination were not enough, the fact that racism was a central device for preventing an accurate vote in Florida will justify our theory beyond doubt.

II. Article I and the Sanctity of the Ballot Box

Article I is the heart of our constitutional guarantee of democracy. The Supreme Court, in interpreting this Article on its way to its decision establishing the principle "one man, one vote," held that the sanctity and integrity of voting procedures were hallowed principles of our democracy.¹⁰ There must be no infringement of unhampered access to the polling place.¹¹ Ballots must be appropriately supplied and used; and they must be counted properly.¹² These decisions were long delayed by the

ers to access . . . [to] all practices which . . . result in the denial of equal access to any phase of the electoral process for minority group members." *Harris v. Siegelman*, 695 F. Supp. 517, 527 (M.D. Ala. 1988); *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) (districting schemes that delete minority voting strength).

7. *See* Rebecca Goldsmith, 'We're Not Fools,' Says Critic of Redesigned Ballot - *The Intention was Innocent - Larger Letters for Aging Eyes - But Gore Fans are Foaming*, STAR-LEDGER, Nov. 10, 2000, at 23. The confusing effect "butterfly ballots" had on the entire country is akin to the situation in *David v. Heckler*, 591 F. Supp. 1033, 1043 (E.D.N.Y. 1984) (holding that notice provided to welfare recipients denied them of Due Process, since the notice provided was incomprehensible to most people who received it, and used confusing "bureaucratic gobbledegook, jargon, double talk . . . and doublespeak").

8. *See* Beth Kassab, *Poll Worker Loses His Job After National Ballot Blunder; The Elections Supervisor Retired Some Longtime Clerks After a Ballot Bag was Overlooked Last Year*, ORLANDO SENTINEL, Oct. 7, 2001, at K1.

9. The authors posit that protestors were used in Dade County, Florida to intimidate those recounting there. *See* Louis Freedberg, *As Congress Reconvenes, GOP Wants to Keep Grip on Power*, S.F. CHRON., Dec. 9, 2000, at A7.

10. *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

11. *See* *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("[T]he right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.").

12. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (The right to vote includes "all action necessary to make a vote effective.").

invocation of the idea of a "political question,"¹³ an apparent bow to the separation of powers upon which our argument is also based.

In a major step towards reaffirming the principle of "one man, one vote" announced in *Baker v. Carr*,¹⁴ Justice Hugo Black argued in *Wesberry v. Sanders*¹⁵ that the value of a vote could be based on unchallenged precedents alone (obviating the need for some of the tortured arguments put forth in the *Bush v. Gore* case).¹⁶ Justice Black implicitly acknowledged the existence of racial overtones in articulating a rule that applies to the circumstances in *Bush v. Gore*: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."¹⁷ Our Constitution leaves no room for the classification of people in a way that unnecessarily abridges this right.¹⁸ All but one of the controlling cases, which we will analyze extensively later, deal with the Thirteenth and Fourteenth Amendments. Justice Black, however, based his conclusion on a reading of Article I, Section 2, which so interpreted by the Supreme Court, is sufficient to discredit *Bush v. Gore* completely.¹⁹ *Wesberry* established that there are constitutional limitations placed upon official action or inaction affecting the weight of votes; one person's effective vote in our democracy

13. The political question doctrine precludes cases, as non-justiciable, where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department . . ." *Baker*, 369 U.S. at 217.

14. *See id.*

15. 376 U.S. 1, 17-18 (1964).

16. This analysis is summarized in Jonathan Weiss, *An Analysis of Wesberry v. Sanders*, 38 S. CAL. L. REV. 67 (1965), which discusses the following cases: *Ex parte Yarborough*, 110 U.S. 651 (1884) (based on protection of voters from intimidation even before the civil rights movement and Voting Act); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (where Justice Holmes stated: "the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box"); and particularly, *United States v. Classic*, 313 U.S. 299 (1941) (in lock-step with the decision in *United States v. Saylor*, 322 U.S. 385 (1944), invalidating dilution of the ballot box, while upholding the conviction of those who falsified election tallies).

17. *Wesberry*, 376 U.S. at 17.

18. *Cf. Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) (stating "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

19. *See Wesberry*, 376 U.S. at 17-18.

shall have equal weight with his neighbors.²⁰ As demonstrated below, impediments, distortions, differentiations having racial impact and thwarting of the recount in the Florida vote, violated this established principle of law, and rendered the decision awarding Bush the election (so he would not have “irreparable damage”) completely inconsistent with *Wesberry* and its progeny.

III. Separation of Powers

Did the Supreme Court have the right to intervene in the election? The doctrine of separation of powers suggests not.²¹ The time may have come to completely re-examine this area with deep historic roots.²² There is a long series of essays on the importance of the separation of powers doctrine that deserve careful consideration concerning *The Federalist Papers*, particularly *Federalist No. 85* and its immediate predecessors and successors.²³ Rather than undertake an extensive analysis of this area, however, we choose to rely upon the Supreme Court’s current view of the separation of powers. The Supreme Court is one of the three separate branches of federal government which, by judicial decision, has reserved to itself the function of interpreting the Constitution, while leaving explicit and implicit powers to the other branches and even to the States.²⁴ The cur-

20. *See id.*

21. Commenting on the inherent difficulty of establishing the lines between the branches of government, Madison writes in *Federalist No. 47*, “that where the whole power of one department is exercised by the same hands which possess the whole of another department, the fundamental principles of a free constitution are subverted.” *THE FEDERALIST NO. 47*, at 140 (James Madison) (Roy P. Fairchild ed., John Hopkins Univ. Press 2d ed. 1981); *see also*, *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995), for an interesting discussion by Justice Scalia on the development of the concept of separation of powers.

22. *See* JONATHAN ELLIOT, *THE DEBATES IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (Burt Franklin 1888) (demonstrating how the separation of powers doctrine formed a basis of argument throughout the drafting of the U.S. Constitution).

23. *See, e.g.*, William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 *GEO. WASH. L. REV.* 1301 (1998); David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. REV.* 539 (2001).

24. *See United States v. Morrison*, 529 U.S. 598 (2000). “No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the Constitutional text.” *Id.* at 617 n.7.

rent Court has adopted an increasingly strict interpretation of the separation doctrine. For example, the Court recently struck down the Violence Against Women Act²⁵ holding that Congress had exceeded its limited separate powers.²⁶ Similarly, in *Legal Services Corp. v. Velasquez*,²⁷ the Court struck down a legislative provision which would have prohibited the advancement of constitutional arguments in welfare disputes reaching the Court, not only on viewpoint restriction but also on the separation of powers.²⁸ In considering the question of executive power, the Supreme Court formulated its *Chevron*²⁹ doctrine, giving considerable deference to legislative and administrative "expertise." Many state courts accept this separation doctrine without hesitation.³⁰

Yet, with no authority, and with a history of restraint in this area, the Supreme Court acted dramatically and in violation of the sanctity of Articles II and III of the Constitution by prematurely, at best, exceeding its traditional power to review the *result* of an election, and by failing to consider whether it violated constitutional principles in overreaching to prevent recounts and investigations.³¹ Article II explicitly states that the conduct of the states' legislature determines the mechanism for selecting presidential electors.³² Depending on the state, of

25. 42 U.S.C. § 13981 (1994).

26. *See Morrison*, 529 U.S. at 610.

27. 531 U.S. 533 (2001).

28. *Id.* at 548-49. We noted earlier the Court's reluctance to address the destruction of the ballot box's integrity as "political" presumably on separation grounds. *See supra*, notes 10-13, and accompanying text.

29. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1986).

30. *See Tennessee Gas Pipeline Co. v. Urbach*, 750 N.E.2d 52, 59 (2001) (where the Court refused to "rewrite the statute" - implying it would not interfere in processes which were the province of another branch).

31. The Court has long emphasized the sanctity of Article III in relation to the separation of powers doctrine. The Court has labeled Article III as "an inseparable element of the constitutional system of checks and balances . . ." *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982). Article III also prevents the encroachment of one branch upon the powers of another. *See Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

32. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. CONST. art. II, § 1, cl. 2.

course, state courts may involve themselves in election decisions only until such a point that their involvement becomes final and clearly unconstitutional in result.³³ Assuming, *arguendo*, that the Supreme Court could constitutionally have any involvement at all, it is nevertheless clearly forbidden to act as it did without first having before it for examination a final state court decision, even in the face of the most blatant or egregious violations³⁴ (e.g., all the electors refusing to vote for an African-American). For a Supreme Court, which has been moving steadily in the direction of "States' Rights,"³⁵ to interfere in a state process involving the appropriate state court, is *a fortiori* absurd on its face.

IV. Interpreting the Relevant Constitution

Another solid theoretical ground exists for rejecting such unwarranted intrusion into state power dating back to the earliest Supreme Court decisions. In *Marbury v. Madison*,³⁶ Justice Marshall established the now enshrined principle that the Supreme Court was the final arbiter of the meaning of the Constitution.³⁷ Probably the easiest and most effective way to view the Constitution is to establish unchanging cognitive concepts that can be applied to resolve disputes arising from constantly changing factual situations. Thus, *Laird v. Tatum*³⁸ treats the Air Force as part of the constitutional term "armies,"³⁹ and *Burstyn v. Wilson*⁴⁰ holds that motion pictures are covered under freedom of the press.⁴¹

33. State involvement may be unconstitutional if it violates Equal Protection, the principle of "one man, one vote," and the Thirteenth, Fourteenth, and Fifteenth Amendments implemented by 28 U.S.C. § 1348 and 18 U.S.C. § 1981, particularly augmented by the Voting Rights Act, 42 U.S.C. § 1973 (1994).

34. See 28 U.S.C. § 1257 (2001); see also *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

35. See Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998).

36. 5 U.S. (1 Cranch) 137 (1803).

37. *Id.* at 177-78.

38. 408 U.S. 1 (1972).

39. *Id.* At 16-17 (Douglas, J., dissenting).

40. 343 U.S. 495 (1952).

41. *Id.* at 502. This approach clearly renders absurd the notion that somehow nine Justices could intuit the "intention" of individuals who were collectively trying to craft a model rather than to express their collective inclinations or wills. If the latter had been the case, Beard's book would be more devastating and the Con-

The rationale of Marshall's argument is that Justices are best equipped to read legal language.⁴² With that conclusion, he arrogated the final interpretation of the Constitution to his Court. The *Marbury* decision does not, of course, either implicitly or explicitly, convey any other powers to the Court.⁴³ Much later, however, in another racially charged case, *Brown v. Board of Education*,⁴⁴ the Court did attempt an equitable remedy imported from some vague doctrine of implied resources and common law.⁴⁵ By ordering all "deliberate speed" in *Brown* however, the Court prompted too much fake deliberation and little if any speed.⁴⁶

There are many ways to interpret the language found in the Constitution. There is the textual analysis with historical underpinnings of the Fourteenth Amendment, as urged in dissent by Justice Hugo Black in *Adamson v. California*.⁴⁷ There is a form of textual analysis that relies on reading the words as forming a philosophical whole with embodiments in the relevant cases.⁴⁸

The prevailing approach, however, is to use the common law method of filling out the content by case discussions and the use of precedents. This approach has had the unfortunate result of importing into the Constitution such alien concepts as "sovereign immunity," "community standards," and "offending basic notions of liberty," all of which the Constitution was constructed to avoid, and thereby watering down the conceptual absolutes that Black so persuasively advocated.⁴⁹ These specifically formulated rights and powers were written against the

stitution, with its many flaws, requiring the subsequent addition of a Bill of Rights and other amendments, would be rendered far less important, coherent, basic, and able to serve as a model for other societies seeking democracy. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1952).

42. See *Marbury*, 5 U.S. (1 Cranch) at 173-75.

43. See *id.*

44. 349 U.S. 294 (1955).

45. *Id.* at 301.

46. See Joseph Goldstein's devastating criticism of this position in JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 57-80 (1992).

47. 332 U.S. 46, 69-123 (1947) (Black, J., dissenting).

48. See, e.g., Jonathan A. Weiss, *Privilege, Posture And Protection "Religion" in the Law*, 73 YALE L.J. 593 (1964); Jonathan A. Weiss, *The Elements of the Law*, 10 T. MARSHALL L. REV. 408 (1985).

49. See *Adamson*, 332 U.S. at 68-123 (Black, J., dissenting).

governing principles of all the common law taught and imbued colleagues (thereby creating fantasies such as “balancing tests” with no guidance as how to implement them - what weight given what against what for what reason?). However the Constitution is read, no precedent exists for moving from “interpreting” as justified by Marshall to subverting its explicit language. Ironically, the Court rejected any “hearing” of the legality of the rather dubiously justified “Vietnam Era” as apparently beyond its scope of interpretative powers under the separation doctrine.⁵⁰

Justice Black’s view of individual rights established by the Constitution has prevailed to some extent. For example, the Court has struck down many state provisions involving various Amendments, including the First Amendment,⁵¹ which explicitly applies to Congress, and for many years was used to invalidate state laws. But it was not until 1965, in the case of *Lamont v. Postmaster General*,⁵² that the Supreme Court applied the First Amendment to another branch of government. Any of these methods of interpretation are superior to a leap of fantasy projecting a collective “intent” upon a collective formulation of conceptual categories - with no basis to support the assertion that their “intent” is superior to that of anyone else. Many constitutional rights are applicable to state activities as Justice Black urged in *Adamson*,⁵³ his view of the Bill of Rights

50. See *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 945 (1967). Ironically, a main thrust of the claim of illegality was the separation of powers between Congress and the President, an area that arguably was one improperly referred to the Supreme Court as lying beyond its usual interpretative powers concerning legal disputes; see also, Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968) (discussing the “proper constitutional allocation between the President and Congress of the power to control the use of force in foreign affairs.”). See generally, 110 CONG. REC. S. 18,443 (Aug. 7, 1964) (statement of Sen. Morse). We are grateful to Gary Stone for this point and these citations.

51. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (holding that a Connecticut statute violated the First and Fourteenth Amendments to the extent it authorized censorship of religion).

52. 381 U.S. 301, 304 (1965) (holding that Postal Service and Federal Employees Salary Act of 1962, requiring detention and delivery upon request of “communist political propaganda,” unconstitutional as violative of the First Amendment.).

53. See *Adamson v. California*, 332 U.S. 46 (1947).

as a set of broad commands has been applied to some of them.⁵⁴ After the Bill of Rights were enacted, the most important Amendments for this case, further justification was provided for rejecting the Supreme Court's *Bush v. Gore* decision beyond its clear violation of constitutional language and precedent as established above.

The explicit underlying purposes of the Thirteenth, Fourteenth and Fifteenth Amendments as well as the associated Civil Rights Acts⁵⁵ were to rectify the barbaric practice of slavery, disenfranchisement, and humiliation.⁵⁶ These purposes have been applied to the states. There was the Voting Rights Act⁵⁷ that was won by so much struggle, blood, sacrifice, and courage.⁵⁸ Yet, all these are cognizable by the Supreme Court in the range of applying interpretation to the results achieved by statutory or patterned or customary action, not to interfere in a state's contemplation and process of voting, particularly under Article II - nor to reach into state courts' deliberations before courts there reach final decisions in order to accept a case by *certiorari*.⁵⁹ Worst of all, the cutting edge of the Florida vio-

54. See Jonathan A. Weiss, Review: *One Man's Stand For Freedom, Mr. Justice Black and the Bill of Rights*, 72 YALE L.J. 1665, 1669 (1963).

55. See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994)); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994)).

56. Jennifer R. Hagan, Symposium, *Statutory Rape Realities: Scholarship and Practice - Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After The Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919 (2001); Eric K. Yamamoto et. al., Symposium, *Civil Rights in the New Decade - Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523 (2001); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks The Thirteenth Amendment*, 44 HOW. L.J. 311 (2001).

57. 42 U.S.C. § 1973 (1965).

58. See Gary Fields & Jennifer Davit, *Lost in a Shuffle: In Selma, a Landmark of Civil Rights, Voting Can Still Be a Struggle*, WALL ST. J., Dec. 18, 2000, at A1.

59. 28 U.S.C. § 1257 (1994) states:

State courts; certiorari (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or author-

lations was the return of racism in order to prevent access (including inexcusable exclusion of and voting access impediments placed in front of blacks), accurate ballots and directions, and proper counts.⁶⁰ This racism violated not only the sanctity of the ballot box but three constitutional amendments⁶¹ as well as legislation with enforcement devices to help eradicate Jim Crow⁶² - particularly in the crucial area of voting rights. This point is partly recognized in the Ginsburg, Souter, Stevens, Breyer dissent.⁶³ These enforcement devices furnish the remedy for use by the executive branch and the President as Commander in Chief.

V. Presidential Duties and Troops

In *History of the American People*,⁶⁴ Woodrow Wilson, like Justice Black,⁶⁵ pointed out that the laws of the new government were to be imperative not advisory.⁶⁶ Article II provided

ity exercised under, the United States. (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. *Id.*

Interference or injunction based on conjecture, let alone on "irreparable damage" for one candidate (even overlooking the facts that votes were still being counted elsewhere and ballots yet to come even in Florida, that there were months before the inauguration, much time before the electors met, and a constitutional provision for governance without an active elected President) when a review, if possible or necessary on the appropriate principles could occur, strains belief that even the Justice believed he was doing anything but getting away with the naked use of power for partisan political purposes.

60. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The State has not shown that its procedures include the necessary safeguards. *Id.* at 109.

61. See U.S. CONST. amends. XIII, XIV & XV.

62. For a historical analysis, see Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW & SOC. INQUIRY 377 (1999).

63. *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting).

64. WOODROW WILSON, HISTORY OF THE AMERICAN PEOPLE 71 (1902).

65. Another way besides conceiving of the Constitution as cognitive commands as did Black, the similarity to Black is that Wilson believed that the Executive had the administrative force as Black and others did in the early Commerce Clause cases.

66. "Its laws were to be, not advisory, but imperative . . . It was provided with the executive the Confederation had lacked: a president in whose authority should be concentrated the whole administrative force of its government." Wilson, *supra* note 64, at 71.

for an Executive, a person “in whose authority should be concentrated the *whole* administrative force of its government.”⁶⁷ Conservative Republican President Dwight Eisenhower (in the era when conservative was not a euphemism for “reactionary”) sent troops to Little Rock, Arkansas.⁶⁸ President Kennedy delivered troops in Mississippi to enforce school desegregation.⁶⁹ Certainly, the sacred nature of the vote required the same action, particularly after the achievements of the enfranchising amendments, Civil Rights Acts, Voting Rights Acts, and implementation of associated powers.⁷⁰ Other remedies were suggested in the dissents by Souter, Stevens, Ginsberg and Breyer.⁷¹

The legislature never had a chance to consider the invalidity of the Florida vote. But the country knew it was invalid. And so did the President. Just as troops were sent for other civil rights violations and to protect those trying to exercise or further their rights, troops should have been deployed to Florida by President Clinton in this instance to protect the integrity

67. *Id.* (emphasis added). As we pointed out earlier, cases based on separation of powers, Article II, or states’ rights should only reach the Supreme Court after a final state court decision. See *supra* note 34 and accompanying text. On the other hand, the President can intervene to protect the democratic process at any time.

68. Troops were sent to assist court-ordered integration of a high school. See George S. Peek, *Recent Legislation: Where Are We Going With Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537, 555 (2001). History and precedent demonstrate the plausibility of our argument. In 1875 President Grant refused to send federal troops to Mississippi to monitor a federal election. See Paul D. Carrington, *Lawyers Amid The Redemption of the South*, 5 ROGER WILLIAMS UNIV. L. REV. 41 (1999). Two years later because of the Hayes-Tilden Compromise of 1876, see Yamamoto, *supra* note 56 and accompanying text, all federal troops were withdrawn from the south (until Little Rock) and Jim Crow was the result. An intelligent historically educated President, such as Bill Clinton, should have known that Grant was wrong and Eisenhower was right. Troops should have been sent to prevent the disruption of any recount by protestors; to monitor a state-wide recount, and to monitor a state-wide revote, if necessary. Further, if there was still a resulting failure to correct the destruction of the real vote, the Florida electoral votes should not have counted.

69. See *id.* President Kennedy requisitioned the Mississippi National Guard to aid desegregation. *Id.*

70. One would think that President Clinton, who suffered one branch of the government acting out of control in “impeachment” proceedings, would have been alert to curbing the abuses of another where it affected the fundamental right of democracy.

71. See *Bush v. Gore*, 531 U.S. 98, 123-58 (2000).

of the election.⁷² Since the racism was so pervasive, so obvious, and such a major reversal of progress, it will be the central premise underlying this article, in conjunction with an Article III analysis in light of the separation of powers doctrine.

Even before the election, the Civil Rights Division of the Clinton Administration should have realized that a disenfranchisement mechanism had been developed and deployed well ahead of the 2000 election. Devices, such as denying votes to those with felony convictions in Southern states,⁷³ and Florida in particular, along with other covert and obvious implements, such as outdated, confusing, and difficult to use voting equipment and ballots, had been, and were being, used as an illegal and unconstitutional method of disenfranchising a disproportionate segment of the black and poor communities.⁷⁴ So-called black leaders and Democratic strategists were sadly remiss in not focusing more aggressively on this conduct; the Clinton administration was blind-sided by the effectiveness of the implementation of the disenfranchising mechanisms.⁷⁵ Of course, the result was the theft of the Florida vote and the naming of George W. Bush as President by a five to four vote of the United States Supreme Court.⁷⁶ It can also be assumed, given that George W. Bush is the beneficiary of this system and given the direction of this and likely future Supreme Courts in the near future, there is little that can be expected to come from

72. This country has urged and implemented military support in other countries with corrupted elections to preserve the right to vote. For example, in 1994, the U.S. invaded Haiti to oust a military dictatorship and restore the nation's democratically elected leader, Jean Bertrand Aristide. Michael Norton, *No Solutions in Haiti: Six Years of Work Does Little Good*, available at <http://abcnews.go.com/sections/world/DailyNews/haiti000318.html> (Mar. 18, 2000). Compare this situation with a detailed analysis of the International Law Principles violated by the actions *in pari delictu* of Florida and the Supreme Court. See Erin Chlopak, *Unequal Protection: Disenfranchisement in the 2000 United States Presidential Election*, 8 HUM. RTS. BRIEF 34, 36 (2001).

73. This is a common form of disenfranchisement, and one to which this article devotes much attention.

74. See John Lantigua, *How the GOP Gamed the System in Florida*, THE NATION, Apr. 30, 2001, at 14.

75. Hiring "corporate" lawyers who litigated it piecemeal instead of "civil rights lawyers" was also an error. So was the concession that there would be no contesting of the "military ballots."

76. See *Bush*, 531 U.S. 98 (2000).

either the present Supreme Court or from the present administration.

The issues must be joined, and very serious debate must be initiated to deal with the full participation in the right of citizenship as has been done in past civil rights struggles. This is war and we must fight it.

VI. Some History

The cornerstone of Jim Crow in the United States has always been, and still is, the denial of the right of blacks to vote.⁷⁷ Simply put, if you can vote, the establishment dare not discriminate against you. We seriously delude ourselves if we believe that old Jim is dead. The last presidential election demonstrated all too well that the institution is alive and kicking. No matter what other hideous forms Jim Crow may have taken, no matter the manner and configuration in which it was manifested, its foundation was rooted solidly in the premise that the black man, under all circumstances, must be prevented from voting effectively. The point is entirely missed if this is not recognized. Just as the matrix of slavery was the maintenance of the ignorance of the black citizen, the linchpin of subjugation, following the destruction of that institution was, and is, the denial of the franchise. The slave had to be prevented from learning how to read at all costs, including severe punishment for anyone who dared teach him,⁷⁸ lest he absorb dangerous ideas about equality and freedom and the ability to communicate them. Thus, it was easily understood after the Civil War by those who would continue slavery's badge and its yoke, once the veil of ignorance, maintained so readily during bondage, could no longer be so easily and totally kept over the eyes of the now freedman, that the most direct route to total control and domination of the former slave was through disenfranchisement.

The Ku Klux Klan and other such organizations knew well that other efforts of subjugation would work, but only piecemeal. Inferior schools, low wages, intimidation, and segregation were all tools effectively used, brick by brick, to build a wall

77. See Mack, *supra* note 62.

78. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 208-11 (1956).

to surround and contain blacks in this country. On the other hand, denial of the right to vote was, and is, the single most forceful way in which to accomplish that end in one fell swoop. If people cannot vote in our society, they are unable to influence other factors which control their lives. Quite simply put, the right to vote gives a people the ability to influence the governmental entities that manage the political subdivisions, be they cities, counties, states, or nations in which they live. This power carries with it a direct ability to affect every facet of one's life. Take away the effective right to vote and the few who control power can maintain that control, without effective challenge. Without a universal franchise, voting is controlled by the wealthy and politically strong and becomes simply the mechanism used to keep the "rich, rich, the powerful, powerful, and the poor, poor."⁷⁹

We have focused this part of our discussion on the history of the disenfranchisement of blacks because they have borne the brunt of the attack, through methods, at first overt, and now less open but still effective. The reach of this process, while still falling heaviest on blacks, has been refined to cover others as well in its insidious web; the better to control the outcome.⁸⁰ The most frightening thing is not that open racist and class disenfranchisement still exist, all the way from the smallest precincts to the highest Court in the land, but that it has been all but ignored. Even the Civil Rights Commission, in its scathing attack on the Florida electoral process,⁸¹ missed a most vital point. It was not so much a tragedy that people were denied the right to vote by being placed improperly on a felony list which was then misused.⁸² The real tragedy was that it was permitted to exist at all. One would think the restoration of civil rights, most particularly the right to vote and the reintegration of ex-

79. See Otis H. King, *The Law Student and his Relation to the Community*, 1 TEX. SOUTH. INTRAMURAL L. REV. 167, 172 (1971).

80. See, e.g., Dominick Berbeo, *Suit Filed Over Redistricting: Civil Rights Groups Say Planned Map Disenfranchises Latino Voters*, L.A. DAILY NEWS, Oct. 2, 2001, at N4.

81. See CIVIL RIGHTS COMMISSION, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

82. See, e.g., Greg Palast, *The Great Florida Ex-Con Game*, HARPERS MAGAZINE, March 1, 2002, available at www.gregpalast.com (containing specific examples of misuse).

felons into the political process, would be sought as a means of establishing a sense of belonging and connectedness to the community. On the other hand, the rigid denial of the franchise continues the sense of difference and alienation. Ah, but there is the rub. That is precisely what is being sought and achieved.

In *Richardson v. Ramirez*,⁸³ the Supreme Court held that a California statute disenfranchising convicted felons even after they had served their sentences was constitutional.⁸⁴ There was a strong dissent by Justices Douglas, Marshall and Brennan based on Section Two of the Fourteenth Amendment.⁸⁵ The case was clearly wrongly decided. Even if the California statute met general due process requirements of the Fourteenth Amendment, its premise surely must fail when the disparate impact of disenfranchisement felt by blacks and the poor is considered.⁸⁶ And, in the case of Florida, it is part of a pattern and practice of disenfranchisement aimed directly at the heart of the young black male population.⁸⁷ Even if the process could still withstand equal protection scrutiny, it is difficult to see how, in a fair and honest court review, it could withstand the force of the Fifteenth Amendment and the Voting Rights Act. It is clear that Florida, through its many procedures, the centerpiece of which is felony disenfranchisement, has engaged in a

83. 418 U.S. 24 (1974).

84. *Id.* at 56.

85. *Id.* at 85-86 (Marshall, J., dissenting) "The disenfranchisement of ex-felons had 'its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.'" *Id.* (quoting *Byers v. Sun Sav. Bank*, 139 P. 948, 949 (1914)). This is an issue which now must be addressed, due to its racial overtones and the potential for abuse created by the current definitions of felonies and the use of misdemeanors to exclude individuals as if they were "felonies." (with a largely racial impact).

86. For example, the disparate impact of disenfranchisement felt by African Americans in Florida. See Conyers, *supra* note 5, at A27.

87. Juan Gonzalez, *Never Again: The Real Election Scandal was the Disenfranchisement of Black Voters*, IN THESE TIMES, Jan. 8, 2001, at 14.

While 540,000 blacks voted in the 1996 presidential election, this year 893,000[0] showed up at the polls, a 65% increase. That number would have been even greater were it not for the hundreds and perhaps thousands of blacks denied the right to vote because . . . they had been mistakenly purged as convicted felons. And of course, it does not include the 400,000 black men who, because of a single felony conviction, are banned for life from voting in the Sunshine State. *Id.*

pattern and practice of impermissible discrimination regarding access to the ballot. In this regard, the Civil Rights Commission made the following recommendation:

- 5.2 The U.S. Department of Justice and the Civil Rights Division in the Office of the Florida Attorney General should initiate the litigation process against state election officials whose actions or failure to act violated relevant federal and/or state laws by permanently disenfranchising voters on the basis of felony conviction. Appropriate enforcement action should be initiated to ensure full compliance with the election laws.⁸⁸

The sacred holy trinity of constitutional amendments for blacks, the Thirteenth, Fourteenth, and Fifteenth Amendments, attempted to insure that all citizens of this country, regardless of their previous condition, would be treated equally,⁸⁹ enjoy the fundamental rights of citizenship and, most important, would possess the right to vote. The Civil Rights Legislation was added to effectuate the intent of these Amendments.⁹⁰ The points of the Thirteenth, Fourteenth, and Fifteenth Amendments and all the Civil Rights Legislation were to eradicate the horrors of past American racism, manifested through slavery.⁹¹ For a brief shining moment, Reconstruction held out the promise of an effective implementation of the Amendments, and the country glimpsed what a fully enfranchised freedman could do when allowed to go to the polls unfettered. Unfortunately, another close national election involving the State of Florida occurred.⁹² As a result of the now infamous Hayes-Tilden Compromise, blacks in the South were cast adrift as the protective umbrella of Reconstruction was removed.⁹³ It did not

88. CIVIL RIGHTS COMMISSION, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

89. See *Ex parte Virginia*, 100 U.S. 339, 344 (1879).

90. See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994)); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994)).

91. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872) (stating that the Thirteenth Amendment was aimed at "negro slavery").

92. See generally ARI HOOGENBOOM, *THE PRESIDENCY OF RUTHERFORD B. HAYES* 25-50 (1988) (discussing the disputed election of 1876).

93. This compromise caused withdrawal of federal troops from the South; thereby it "devastated civil rights for African Americans." Yamamoto, *supra* note 56, at 536.

take Southern white leaders long to re-impose a condition of near servitude upon most free blacks and it was not happenstance that the first right removed was that of the franchise.

Gradually, through much effort and many court battles, and notwithstanding monumental setbacks such as *Plessy v. Ferguson*⁹⁴ and its infamous declaration that separate could be equal, the NAACP and other civil rights organizations, inch by tortuous inch, regained some of the lost ground.⁹⁵ Finally, in 1954, the Supreme Court's decision in *Brown v. Board of Education*⁹⁶ gave hope that it stood as a bastion for the full establishment of the rights announced so grandly in the Constitution with the passage of the three post Civil War Amendments,⁹⁷ but never vigorously or fully implemented in practice save perhaps for a brief period during the height of Reconstruction. The one-man, one-vote pronouncement of *Baker v. Carr*,⁹⁸ prefigured by *Wesley v. Sanders*,⁹⁹ was a culmination, or so it was thought, of the struggle for the franchise and triumphantly memorialized the sacrifices made by those who bled and died in the trenches fighting for a meaningful implementation of the Fifteenth Amendment. Reapportionment, which had previously been the tool of gerrymanderers bent on perpetuating the existing systems of power, was now to be reviewed on the basis of rational legislative intent.¹⁰⁰

Battles for the vote were so fiercely contested because those who would keep the necks of blacks bowed realized that if they were permitted to vote they could no longer be prevented from accessing the bounty of this country. More than any other right, except perhaps that of freedom of speech, the right to vote stands as the cornerstone of our democratic society.¹⁰¹ Thus, to deny improperly that right to a significant segment of the popu-

94. 163 U.S. 537 (1896).

95. See William N. Eskridge, Jr., Symposium, *Movements and Law Reform: Channeling Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

96. 347 U.S. 483 (1954).

97. U.S. CONST. amends. XIII, XIV, XV.

98. 369 U.S. 186 (1961).

99. 376 U.S. 1 (1964).

100. See *Baker v. Carr*, 369 U.S. 186, 258 (Clark, J., concurring).

101. *Wesberry*, 376 U.S. at 18 ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

lation seriously undermines the foundation upon which our republic rests.

While much of the process of disenfranchisement was initially instituted as a means of keeping blacks from voting, it has now been refined and carried to its height in Florida as a method of keeping those persons from the polls who are considered undesirable voters by those in power.¹⁰² In the case of Florida, it is a deliberate design by the Republicans to prevent blacks and others who would most likely vote Democratic from being able to vote at all.¹⁰³ Thus, the grand scheme has been not to outspend, or outcampaign the Democratic opposition in Florida, but to construct a mechanism that effectively diminishes their pool of likely voters. This has been done so assiduously and so insidiously that it has worked with few even knowing it was being done, outside the circle of those who orchestrated it. During the past presidential election, it worked to turn a strong Democratic victory for Al Gore in the State of Florida, and concomitantly the United States, into a Supreme Court mandated Electoral College win for George W. Bush.¹⁰⁴

The issue in Florida therefore transcends the question of who actually won, although it is clear if one considers the will of the voters that Al Gore won an overwhelming victory. The first call by the networks that Gore had carried Florida¹⁰⁵ was correct. The exit interviews reported how people had voted.¹⁰⁶

102. See Gonzalez, *supra* note 87, at 14 (pointing out the difficulties posed by the Florida ballots to under-educated blacks and Hispanics).

103. The authors posit that while the Florida processes for voting and disenfranchisement may appear to be neutral on their face, they have been carefully chosen and deliberately designed to have, in application, a devastatingly disproportionate impact on minorities and others likely to vote democratic.

104. See *Bush v. Gore*, 531 U.S. 98 (2000).

105. Edward Walsh & Howard Kurtz, *Battleground State: Florida; Glitch in Tally Throws Contest Into Turmoil*, WASH. POST, Nov. 8, 2000, at A31.

106. The Jews who voted for Gore, to find these votes were counted for Buchanan, must have felt they were being fed raw pork. The networks got it right, after all, based on the methodology of their surveys, which asked people how they had voted. The idea that people should have figured out how to use the confusing butterfly ballots are akin to the use of literacy tests as a prerequisite to voting. See *Katzenback v. Morgan*, 384 U.S. 641 (1966) (upholding a Congressional prohibition of New York's use of a literacy test because it disenfranchised thousands of Puerto Rican immigrants who had been educated in Spanish). Furthermore, even notices to welfare clients must be made intelligible to those at whom which the message is directed. See *David v. Heckler*, 591 F. Supp. 1033, 1042-44 (E.D.N.Y. 1984).

Quite clearly, a substantial majority thought they had voted for Gore and answered accordingly when interviewed.¹⁰⁷ The issue of who won, however, becomes secondary to the more fundamentally important matters of the planned and executed systematic disenfranchisement of Black and poor voters, Democrats, in that state.¹⁰⁸ Issues surrounding the propriety of and mechanism for a recount, and the Supreme Court's dastardly role in stopping it, pale into insignificance when viewed in light of the much more profound and lasting injury capable of being administered by the mechanisms that were put into place by the State to deny the franchise to blacks and/or the poor, the Democrats. And, those who believe that a state mandated upgrading of voting machines so that "errors" are no greater in poor than rich precincts and the outlawing of the butterfly ballots will come close to undoing that disenfranchisement are sorely mistaken. Even with the improvements that such new machines may bring and even though they will solve some of the problems so glaringly exposed during the presidential election, they will do nothing to return to the rolls those who have already been purged for life, because they were black and poor and likely to vote against the rising tide of Republican candidates in that State. They will do nothing to prevent other blacks and poor people, for the same reasons, from being removed from the voting rolls, now and in the future in Florida and other states.

It is quite a shock to look at the most fundamental tenet of an ideal democracy, the right to vote, and realize that the United States Constitution does not specifically guarantee it.¹⁰⁹ Nowhere in that noble and magnificent document is there a guaranteed right to vote for the election of one's representatives at every level.¹¹⁰ Most devastating of all, no right exists to have a direct vote for the individual who is chosen to be President.¹¹¹ What there is, and what most people have now come to consider, the right to vote is the right to not be discriminated

107. See Walsh & Kurtz, *supra* note 105, at A31.

108. See *supra*, notes 73, 74, 85-87 and accompanying text.

109. See U.S. CONST.

110. See *id.* The federal right to vote, although not explicitly mentioned in the Constitution, can be seen as implicit in and inferable from the guarantee of Republican Government.

111. See *id.*

against in the exercise of the vote once the franchise has been extended.¹¹²

The overreaching of the Supreme Court and the resultant violation of Article III rises to a new level of impropriety through the use of what could be arguably characterized as racist tactics, to steal the election and to deprive the voters of access, meaningful ballots, and necessary recount. The Court and commentators argue that there exists no constitutionally guaranteed right to vote, or to participate in the electoral process.¹¹³ Yet, consider by way of illustration, the case of a popular vote victory by a black candidate who nonetheless fails to gain election because a predominantly racist electoral college votes against him.¹¹⁴ The obvious conclusion to be reached is that, even absent express constitutional guarantees of the right to vote, longstanding practice has enshrined this as a basic right of all United States citizens above the age of majority.

The case of *Marsh v. Chambers*¹¹⁵ stands for the proposition that historical practice can sometimes lend support to constitutional arguments.¹¹⁶ The Supreme Court held in this case that the long-established practice of beginning sessions of the Nebraska state legislature with a prayer delivered by a state-funded chaplain did not violate the Constitution's Establishment Clause.¹¹⁷ However, common law and historical practice

112. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

113. See, e.g., Eduardo Guzman, *Igarta De La Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote For the President and the Need to Reevaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 172 (2001) ("There is no constitutional right to vote for President.").

114. This analogous but extreme question has never been squarely faced, but it should be clear that Congress should not permit avowed racists to vote against the stated will of the voters or have that vote counted. A successful suit could be launched against their participation or counting their vote through Congressional rules or the *Marbury* decision. Further, the President could prevent their entrance into the voting area. In short, all three branches would be able to enforce the Constitution as amended.

115. 463 U.S. 783 (1983).

116. See *id.* at 786-95.

117. *Id.* The *Marsh v. Chambers* decision has been criticized as confusing "custom" and "history." See Jonathan A. Weiss, *History and Custom in Interpreting Church and State Questions*, in SCRITTI IN MEMORIA DI PIETRO GISMONDI 515 (Dott A. Giuffrè ed., 1991). Not to acknowledge that this historical practice had the force of conferring rights to participate in the Federal election is simply absurd. In the years after the adoption of the Constitution, with its flaws of disenfranchisement of women, and of slavery for a people counted as less than fully human, see U.S.

cannot always provide viable support for difficult constitutional arguments.¹¹⁸ It is absurd not to recognize that precedent in case law, legislation, constitutional amendments and historical practice all combine to sanctify the right of citizens to vote. Particularly for a Supreme Court so intent upon imposing a regime of New Federalism and states' rights, a regime that the authors contend is rife with racial overtones, the delegation of electoral procedure to the State of Florida, subject to the outcome of duly and properly conducted elections, should have been seen as an area of which to steer clear.

The assertion that there is no federal right to vote is based on the argument that the state governments would satisfy the federal concerns.¹¹⁹ Under any relevant reading of these provisions, the Supreme Court had no authority to interfere with the Florida court's attempts to insure that proper state procedure should be followed. Moreover, 3 U.S.C. § 2 (extended by the Seventeenth Amendment to senators) and 3 U.S.C. § 5 make explicit "who" can and cannot vote (not reaching the issue of revotes, recounts, and the relevant timing),¹²⁰ thereby making it clear that the ability to vote in federal elections is co-extensive with the ability to vote in state elections.

But, there is an *a fortiori* argument. Even while the Court was upholding the exclusion of women from voting,¹²¹ Congress passed the reconstruction package of the Thirteenth and Fifteenth Amendments and the Civil Rights Acts.¹²² These Amendments included the general right to "Equal Protection" set out in the Fourteenth Amendment,¹²³ and the specific right

CONST. Art. 1, § 2, cl. 3, there were a number of decisions, which seemed to indicate that there was no "right" to vote. *See, e.g.,* *Minor v. Happersett*, 88 U.S. 162 (1874) (upholding the denial of the right to vote to women, relying on the country's history of disenfranchisement as a basis for constitutional construction).

118. *See, e.g.,* *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965).

119. The right to vote is never explicitly mentioned in the Constitution. *See* U.S. CONST.; *see also supra* note 110.

120. U.S. CONST. amend. XVII. Under the Amendment there is a provision for proceeding without an elected President in power. The time between the election, voting of electors, inauguration render the "deadline" argument an obvious fallacious make weight - with particular irony juxtaposed to "all deliberate speed"

121. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

122. *See* The Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1994)); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1994)).

123. U.S. CONST. amend. XIV.

to be free from racial discrimination stated in the Fifteenth Amendment.¹²⁴ This meant that once the states created the "right" to vote they could not then violate equal protection in extending that right to its citizenry. In Black's and Murphy's persuasive dissents in *Adamson*, with acute analysis and appropriate history, it can be seen that these Amendments were designed to bring rights to all citizens as part of their federal prerogatives.¹²⁵ These Amendments and the Civil Rights Acts, which were designed to rectify the barbaric practice of slavery, disenfranchisement, and humiliation, justify a refusal to accept the vote as originally tabulated in Florida under the last election for president. When there is a blatant disregard of the constitutional guarantees of the right to vote and the use of racism to destroy the ballot box's integrity, the monstrosity of the *Bush v. Gore* decision becomes even clearer.

In part, the problems faced lie in the vagueness and lack of specificity of the Constitution regarding the right to vote. Even that second holiest amendment to blacks, the Fifteenth, does not require blacks be permitted to vote.¹²⁶ Rather, what it does, is prohibit the states from denying the right to vote "on account of race, color, or previous condition of servitude."¹²⁷ Once the states have chosen to conduct elections by popular vote, they are bound both by the enjoiner of the Fifteenth Amendment not to discriminate on a racial basis, as well as the Fourteenth Amendment's equal protection mandate. Thus, no state may extend or withhold the franchise to any group of individuals on any basis that does not comport with the requisites of equal protection.¹²⁸ Moreover, and more importantly, no state may provide a process within that state that gives more weight to the votes of one group of voters than it does to another.¹²⁹ The different methods of voting and counting ballots in Florida most certainly violated that requirement. The Fifteenth Amendment was also violated, although, perhaps, more covertly in the manner in which the State's disenfranchising mechanisms fell more

124. U.S. CONST. amend. XV.

125. See *Adamson*, 332 U.S. at 68-125.

126. See U.S. CONST. amend. XV.

127. *Id.*

128. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

129. See 42 U.S.C. § 1973(b) (1965), as cited in *Abrams v. Johnson*, 521 U.S. 74, 90 (1997).

heavily on blacks.¹³⁰ The Supreme Court majority attempted to dodge the equal protection bullet by the unprecedented announcement that *Bush v. Gore* would have application to that case only.¹³¹ One can reasonably predict how the majority would deal with the second bullet that could be fired at them out of the barrel of the Fifteenth Amendment, although it would be interesting to see them have to lift their robes and dance around it.

A recent report suggests that, during the November 2000 election, blacks were ten times as likely to have their ballots rejected due to disenfranchisement than whites.¹³² On its face, this is a clear denial of equal protection. It is also clear that there was a disproportionate effect in this process visited on black communities within Florida. When this is considered, in light of Florida's civil death penalty statute which disenfranchised 200,000 black males,¹³³ there can be no doubt as to the overall impact of all of this on the outcome of the election. Just as important, and apart from the issue of the treatment of those who have engaged in criminal activity, is the matter that a significant number of blacks were erroneously excluded from voting as "ex-felons."¹³⁴ This included persons who were "misidentified," or, at worst, had committed misdemeanor offenses. The pathetic picture of Justice Thomas attempting to explain to a group of high school students that the most naked and brutal exercise of partisan political power ever demonstrated by the Supreme Court since its establishment was, somehow, something other than that in no way diminishes that truth.¹³⁵ It would have been better for him and the other members of "the felonious five" to have simply acknowledged that, having the

130. See Lantigua, *supra* note 74, at 14.

131. 531 U.S. 98, 103, 110 (2000).

132. CIVIL RIGHTS COMMISSION, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001) (the commission found that the disenfranchisement of Florida voters fell most harshly on African Americans, claiming they were ten times more likely than white voters to have their ballots rejected in the November 2000 election).

133. Some writers put the figure as high as 400,000. See Gonzalez, *supra* note 87, at 14.

134. See Palast, *supra* note 82.

135. See Robert E. Thompson, *Politics v. Justice*, DESERET NEWS (Salt Lake City, UT.), Dec. 24, 2000, at AA01.

power of a majority, they decided to give the election to George W. Bush.

While not guaranteed as a fundamental right of citizenship in the Constitution as initially written, the right to vote, nevertheless, is now the foundation upon which our participatory democracy is built. The right to vote is so intertwined in the political system and is now so bound to the will of the electorate, it is simply a sterile academic exercise even to consider the possibility of any radical change in the "universal" process we now have. Most important, while it may be argued that the Fifteenth Amendment did not "give" blacks the right to vote in any election, it certainly did provide that right "shall not be denied . . . by any State on account of race" ¹³⁶ Given the pattern and practice of the State of Florida, that is precisely what has been done: blacks were denied the right to vote because of their race. ¹³⁷ And, it has been done in a most insidious fashion not only to blacks, who are undoubtedly the most affected, but also to poor people, regardless of race or ethnicity. ¹³⁸ Statutes, which appear neutral on their face, when applied, have had a devastating impact on the ability of Blacks and poor people to cast a vote in the State. ¹³⁹ When all that has been done by the State of Florida is considered, it is quite easy to project that as many as a half million people were denied the opportunity to vote because of their race in direct violation of the Fifteenth Amendment, or simply because they were prone to vote for the Democrats. ¹⁴⁰

136. U.S. CONST. amend. XV; *see also supra* note 110.

137. *See* Lantigua, *supra* note 74, at 14 (stating that some 200,000 Floridians were either not permitted to vote on questionable or possibly illegal grounds, or saw their ballots discarded and not counted, and a large and disproportionate number were black).

138. Sally Kestin Buddy & John Maines, *The Disenfranchised; Poor, Uneducated Rejected Most In 2000 Election*, SUN-SENTINEL (Fort Lauderdale, FL.), Nov. 18, 2001, at 1F.

139. For further explanation of this argument, *see* Elkan Abramowitz, *Felon Disenfranchisement v. Uniform Standards In Federal Elections*, N.Y. LAW JOURNAL, Jan. 2, 2001, at 3.

140. The U.S. Civil Rights Commission Report found that 31% of African-American men in Florida were unable to vote. *See* Commission Report, *supra*, note 81. Nationwide, 1.4 million African-American men have lost the right due to disenfranchisement. Virginia de Leon, *Felons Want Right To Vote; Gonzaga Law Student Helping To Craft Argument Against Law That Bars Felons From Casting Ballots*, THE SPOKESMAN-REVIEW (Spokane, Wa.), Nov. 4, 2000, at B1. In 2000, this

Because the electorate is often so closely divided nationally, the votes of blacks, particularly given the penchant to vote as a Democratic bloc, is often the decisive factor in the outcome of elections at all levels of government.¹⁴¹ In the last national elections, 90% of black voters supported the Democratic Party,¹⁴² thus constituting nearly 20% of all votes cast for Al Gore. In George W's own home State of Texas, where presumably he is best known, and where it was certain he was going to win, the Democratic vote among blacks reached 91%.¹⁴³

The civil rights battles fought in the South, from the end of Reconstruction forward, have been more about the right to vote than any other issue. A disenfranchised people, even where a majority, as was and is the case in many Southern counties, are a helpless people. They lack the ability to impact the mechanisms of government that control their lives. A right of control, which by their numbers and the majoritarian rule of elections, should have been theirs as a birthright has been denied by strictly controlling access to the ballot. Even where not a majority, the black vote was significant enough to dictate the outcome in close elections and could, thereby, decide which white politician would be elected.¹⁴⁴

Nothing can compensate for the brutal injustices suffered by Black Americans (and by other minorities such as Native Americans). The only balm that salves the wounds a bit is the belief in the elective process and the knowledge that a bloc vote has an impact that can, and often does, determine the outcome in local as well as national elections.¹⁴⁵ Now, to be told through

meant 57,7000 "ex-felons" were prohibited from voting in Florida. Palast, *supra* note 82.

141. See, e.g., Earl O. Hutchison, *Mayoral Candidates Can't Ignore Black Vote*, DAILY NEWS OF L.A., Apr. 19, 2001, at N15.

142. Gore won 90% of the black vote. Lee Hubbard, *The GOP Couldn't Win the Black Vote - And That Made the Difference*, THE S.F. CHRON., Nov. 15, 2000, at A23.

143. See Exit Polls for Texas, at <http://www.cnn.com/ELECTION/2000/results/TX/frameset.exclude.html> (last visited April 15, 2002).

144. Black voters seem to sense which non-Black candidate in an election where there is no Black running, represents their best interest. Thus, you will seldom see the Black votes evenly split for two White candidates. Once the internal barometers of Black voters detect which is the best choice among the White candidates, a kind of silent signal goes out quickly to that electorate and that is how the overwhelming majority will vote.

145. See, e.g., Hutchison, *supra* note 140, at N15.

words and deeds that the Black vote can be rendered a nullity by the machinations of Florida officials is a hurt too painful for Blacks to bear.

John Lantigua's excellent article, *How the GOP Gamed the System in Florida*, recalls how Republicans set out, years in advance of November 2000, to systematically disenfranchise more than 200,000 persons likely to vote Democratic.¹⁴⁶ Other than disclosing what was done and railing against the unmitigated gall of its perpetrators, little can now be done to rectify the past election. Lantigua quotes civil rights veteran Elmore Bryant of Marianna, Florida as saying in reference to the effectiveness of the Republican purge of voters, "They done got us."¹⁴⁷ And, so they did. That is a tragedy. But, it would be an even worse tragedy if nothing were done to prevent Blacks from being gotten again. And, *they* will do it if action is not taken to prevent the continuation and expansion of the purges.

VII. What Should Have Been Done?

We do not care to dwell on what could have been had the Supreme Court not been under the control of right wing conservatives determined to dictate a victory for George W. Bush. Rather, let us look at an entirely different course of action that should have been considered and which was under the control of President Bill Clinton. Quite simply, President Clinton should have sent Federal troops to Florida to protect the recount process, particularly in Miami-Dade County once it became apparent that an imported mob was determined to stop it.¹⁴⁸ Precedent for such action, particularly as a means for protecting those who are asserting rights guaranteed them constitutionally and statutorily certainly exists. Troops were sent to Little Rock, Arkansas and to Oxford, Mississippi to ensure the entry of black students into schools that had been ordered opened to them by the federal courts.¹⁴⁹

146. See Lantigua, *supra* note 74, at 14-17.

147. *Id.* at 15.

148. For information about the protests in Miami-Dade, see Tim Padgett, *Mob Scene in Miami*, TIME, Dec. 4, 2000, at 36.

149. See http://www.encyclopedia.com/html/section/integrat_1954to1963.asp (last visited Apr. 15, 2002).

There are no less than three types of quasi-practical arguments advanced against the invocation of troops to prevent black disenfranchisement and preservation of the sanctity of the ballot:

- A. Timing - when could it have been done?;
- B. Unseemly - how would it look, what else might happen?; and
- C. The Rule of Law.

The three appear to rest on the factual basis that all that happened should have been seen coming and something done earlier. Neither Clinton, nor Gore, nor the Civil Rights Department did anything before the election in Florida about the use and misuse of "felony" convictions to exclude from voting as racially biased nor the use of "misdemeanor" convictions treated as "felonies" with a disproportionate effect on the Black community. Felonies were, of course, originally serious common law crimes - they now cover a multitude of presumed sins - often reflecting right wing or racist propaganda.¹⁵⁰ Thus, this doctrine of them and others ("animals" conflates quite effectively

The most notable instance was the defiance in 1957 of federal orders by Governor Orval Faubus of Arkansas, who called out the Arkansas National Guard to prevent integration in Little Rock. President Eisenhower responded by sending federal troops to enforce the court order for integration . . . In 1962-63 violence erupted in Mississippi, precipitating a serious crisis in federal-state relations. Against the opposition of Governor R. Barnett, James H. Meredith, a black who was supported by federal court orders, registered at the Univ. of Mississippi in 1962. A mob gathered and attacked the force of several hundred federal marshals assigned to protect Meredith; two persons were killed. The next day federal troops occupied Oxford and restored order. Meredith became the first African American to attend a Mississippi public school with white students in accord with the 1954 court decision.

Id.

150. Professor Joseph Goldstein properly argued that we have a law of crimes. "You do the Crime, you do the time." *See, generally*, Jonathan A. Weiss, *The Justification of Punishment*, 25 REV. OF METAPHYSICS 527 (1972). Unfortunately, that has now been distorted so that sentencing becomes a civil matter where the "victim" gets to demand his "vengeance" as a factor rather than the state's interest and individual needs. Due to such thinking many of our prisons now violate the relevant U.N. Treaty. *See* John M. Glionna, *The State Inmate Paper Angers Facility Media: Sex Predators' Journal Alleges Abuses At Atascadero State Hospital*, L.A. TIMES, March 11, 2002, at B6. The leeway given by treating others as "them" has even led to the framing of policeman because of their association with "undesirables." *See* Craig Horowitz, *A Cop's Tale*, NEW YORK MAG., Jul 16, 2001, at 3. Such thinking of "them and us" led to the now justly criticized War on Drugs (criticized as unconstitutional in Jonathan A. Weiss & Steve Wizner, *Pot Prayer Privacy*

with racism, to which this Court and this decision has given its blessing).

No agency, group, or movement noted or protested the disparity of what ballots were used there. No Court actions were brought when people were kept from the polls in Black communities by "failures" and "early closings."¹⁵¹ No protests were lodged anywhere about a brother and his cronies being in charge of how ballots were to be counted, collected, and employed (of course there was the oblique reference when brother Jeb promised brother George he wouldn't break his promise and not to worry when the exit polls gave the State to Gore as reported by a Bush crony). The legal objections were made piecemeal - a chad here, an exclusion there, a miscount over yonder. All these problems were festering, foreseeable, and deplorable. The conclusion from this limited sample of corruption is that, therefore, the invocation of troops would have been too much too late. But early failure, continued cowardice or paralysis, does not preclude a remedy to preserve democracy if it were to work and be constitutional. Such factual claims cannot be accepted as a successful constitutional argument to prevent the application of an appropriate remedy. Let us examine each argument in order.

A. *Timing*

1. The most obvious use of troops should have occurred when Representative DeLay imported protesters to intimidate those recounting the ballots in Dade County.¹⁵² Even political ostriches could have seen the thugs coming. Police are regularly deployed to protect abortion clinics. How hard would it have been to create a zone around those recounting and make their exit safe? (To a feeble right wing claim that troops could be called out to surround any recount and that those who "stopped" later said it was "voluntary," the proper answer is that troops should create free zones whenever there are democratic

and Police, Or the Right to Cut Your Own Throat in Your Own Way, 54 IOWA L. REV. 709 (1969).

151. *Problems Detailed With Florida Election*, MILWAUKEE JOURNAL SENTINEL, Mar. 10, 2001, at 9A.

152. See Louis Freedberg, *As Congress Reconvenes, GOP Wants to Keep Grip on Power*, S.F. CHRONICLE, Dec. 9, 2000, at A7.

processes threatened by thugs and later declarations do not solve actions intended to prevent a proper count in a democracy.) It is likely that the threat by Clinton to take such action in Florida would have been sufficient to prod Governor Jeb Bush into action.

2. Regardless of when it became obvious that there was widespread destruction of the proper balloting and unequal treatment of voters and ballots during the voting and recounting, Florida could have been placed under a Federal type of martial law to protect a fair recount. This country had no trouble creating a thousand mile Japanese free territory on lying claims that placed those evacuated in concentration camps.¹⁵³ This country now executes and imprisons well out of international norms so that even though the rate of crime,¹⁵⁴ and particularly juvenile crime,¹⁵⁵ has dropped (but with the same number of juveniles in jail, probably as a consequence of the increase of inferior employment opportunities) prisons continue next to armaments as America's greatest growth industry, again with disproportionate minorities behind bars,¹⁵⁶ in chains, and in chain gangs. A statewide recount could then have been taken, if necessary by outsiders operating under uniform conditions with their activities protected by troops and all other necessary means.

3. Once it became evident that the vote as counted was not accurate (and some claim what the vote really was may never be known as an excuse against recounting) the whole State's vote should have been invalidated. Either the Florida votes should have been excluded by Congress, or so requested by the President. (What should happen if Jeb Bush and Jean Harris had simply said "the vote is wrong" - here are our electors - would that be the end of the matter and no federal power avail-

153. Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Forgiveness" In The Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); see also, *Korematsu v. United States*, 323 U.S. 214 (1944).

154. John Caher, *Crimes Rates Add To Parole Debate*, N.Y. L.J., Aug. 9, 2001, at 1.

155. Shirley Downing, *Violent Crime By Juveniles Down, Arrests Of Girls Rise*, COMMERCIAL APPEAL, Mar. 21, 2002, at B1.

156. Mandatory drug sentencing, among other factors, may be to blame for the numbers. See Randy Diamond, *Some Non-Violent Drug Offenders Getting A Break*, THE RECORD, Sept. 7, 2001, at A03.

able or a revote ordered?) At that time, troops could have been deployed, just as they are used to protect the franchise in what the United States mocks as "banana republics." Any of these actions might have kept an election honest. Any could have been done.

B. *Unseemly*

But how would it look in a country that holds itself out as a peaceful democracy? To whom? (Perhaps those that make this argument should have read foreign news accounts and the continuing revulsion that one sees in the foreign press about the administration and what happened.)¹⁵⁷ The *New York Times* and those even to the right who control the mass media should have been as horrified as they were by "communists" in the McCarthy era,¹⁵⁸ "the yellow peril" of Chinese immigration,¹⁵⁹ and by the Spaniards and Mexicans when wars of conquest were commenced. (It is no coincidence that the present administration talks of "manifest destiny" to justify "offensive" and "defensive" weapons in outer space as it jettisons the nuclear treaties that offered mankind some hope from massive annihilation.)¹⁶⁰

President Andrew Jackson once remarked about a decision by Justice Marshall: "John Marshall has made his decision: now let him enforce it!"¹⁶¹ How unseemly was that? Why not use

157. A government spokesman, Jonathan Moyo, suggested on British Broadcasting Corporation radio, in 2000, that the United States could learn from Zimbabwe how to run a presidential election. Moyo said his country could not have acted in a similar fashion without the threat of sanctions. "World seeks lessons from U.S. vote," available at http://news.bbc.co.uk/1/hi/en...world/americas/newsid_1016000/1016830.stm (last visited March 21, 2002). Troops could have been employed if a revote had been ordered to ensure equal access, proper ballots, and counting.

158. See Frank Wilkinson, Symposium, *Revisiting The "McCarthy Era": Looking at Wilkinson v. United States In Light of Wilkinson v. Federal Bureau of Investigation*, 33 LOY. L.A. L. REV. 681 (2000).

159. See Saito, *supra* note 152.

160. For example, Republican Senator Bob Smith (N.H.) recently said "[s]pace is our next manifest destiny." Albert L. Huebner, *Nuclear Space Threat*, HUMANIST, Mar. 11, 2002, at 6.

161. The decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), struck down a Georgia statute that attempted to destroy the Cherokee Indians' political community and land possession. The decision was never enforced against Georgia. Amy Sender, *Australia's Example of Treatment Towards Native Title: Indigenous People's Land Rights In Australia and the United States*, 25 BROOK. J. INT'L L. 521, 554 n.132 (1999) (quoting HORACE GREELEY, *THE AMERICAN CONFLICT* 106 (1846)).

the troops to enforce democracy when the same Court made a mockery of the democratic process? Is that less unseemly?

We rightfully condemn star chambers and the rigged courts of dictators. This country has invaded nations when dictators and the courts, as simply their agents, violated "human rights" that affected "American interests," for example, in the Dominican Republic¹⁶² and Grenada.¹⁶³ Was that "unseemly?" Here we do have a separation of power; here the President is the Commander in Chief of the Armed Forces (and armies are proud of following orders as they now defend My Lai and other American army activities). What could be more seemly than the President, with his separate constitutional powers, acting to prevent a *coup d'état* (by the same "politicians" who threatened to try to invalidate an election if the electoral college went against the popular vote until the popular vote went so clearly against their own candidate)? It was his duty and therefore seemly.

Some minor legalistic points could be made in rebuttal, such as: "John Marshall in *Marbury v Madison*¹⁶⁴ said the Supreme Court was the final arbiter of constitutional interpretation." That decision, right or wrong, was based on the rationale that Justices specialize in the analysis of language. Language was not at stake here but a whole process of democracy denied. The Court's role is to determine how laws are to be applied, not how rights are to be preserved. The Constitution specifically allows for the suspension of habeas corpus during war,¹⁶⁵ recognizing special circumstances and delegates the keeping of order and the democratic process to the Commander in Chief (those who oppose our position do not oppose the imposition of "martial law" to keep down minorities and protesters, who should in fact be protected by a number of Amendments). To this point could be added that the Thirteenth, Fourteenth and Fifteenth Amendments were passed for equal protection and to rid this country of the poisonous effects of slavery and discrimination. Congress further passed the Voting Rights and the Civil Rights

162. The U.S. invaded in the 1970's to put down a left-wing coup. Mike Williams, *U.S., Globalization Cast Dark Shadow*, ATLANTA J. & CONST., Nov. 25, 2001, at B6.

163. President Ronald Reagan ordered the invasion in 1983. Georgie Anne Geyer, *Images of War*, HARRISBURG PATRIOT, Dec. 17, 2001, at A08.

164. 5 U.S. (1 Cranch) 137 (1803).

165. U.S. CONST. art. I, § 9, cl. 2.

Acts. Constitutional interpretation arrogated to the Supreme Court does not mean their nullification.

Was it a *coup d'état*? Yes. One Justice stopped a recount and then he and his fellow travellers used the necessity for a speedy final resolution (a doctrine without constitutional basis).¹⁶⁶ Indeed, with the recent Amendment¹⁶⁷ for an acting President when the present one is incapacitated there exist constitutional remedies for the executive branch's continuity and continuation in the absence of an elected President. Perhaps Papa Doc giving Baby Doc Haiti was not a *coup d'état* but only nepotism. Here, the Court showed only its belief in its unchecked (i.e., contempt for the separation of powers, one man, one vote, and Articles I-III) authority rather than a rule of law. A trial lawyer can no longer respect the Court after that act. No rationale can be found to justify that decision and doctrines announced which expressly have no precedential effect nor will have.¹⁶⁸ The Court interfered in the process, such as it was, designed to correct some of the egregious miscarriage of the franchise. This was not its duty. It was beyond unseemly and scandalous. Rather, it was a *coup d'état* in favor of a favored family's regaining control of a separate branch of the government.

However, the pusillanimous pundits contend that there was no shedding of blood (forgetting that people have died for these rights). Why is there any reason to believe that the rightful act of a President with the troops at his command would cause bloodshed? Who would revolt? The chattering heads on television? Those crazy right-wingers who blow up federal buildings? The Republicans who bear arms? Not much evidence exists for this fear - and what a fear for a country which

166. In a 1960 election, which was very close, Hawaii's electors were not named until January 4th. Nevertheless, the Supreme Court majority said the recount had to be completed by December 12 in the 2000 election. See Doug G. Savage & Henry Weinstein, *Supreme Court Ruling: Right or Wrong?*, L.A. TIMES, Dec. 21, 2000, at A24.

167. U.S. CONST. amend. XXV, § 3.

168. In *Marbury*, Justice Marshall declared that the Supreme Court will be the final interpreter of the Constitution. See *supra* notes 24-30 and accompanying text.

reduced Cambodia back to the Stone Age,¹⁶⁹ bombs Iraq,¹⁷⁰ and has cops shooting innocent people in the back.¹⁷¹ Will there be less of this bloodshed now? Where were the problems when troops massacred innocents at the Pullman strike,¹⁷² at the Robeson concert in upstate New York,¹⁷³ and now when they protest "globalization"¹⁷⁴ - when free speech is involved rather than the ballot box reduced to a mockery? (An allied, non-legal point: suppose the Supreme Court issued an injunction which would not only be outside its power or jurisdiction, against a co-equal branch, but really cause constitutional confusion in the right-wing pundits. Such an injunction could be properly ignored as President Jackson purportedly said about a Marshall decision: "Where are the troops?" The Commander in Chief is in charge of them and if we have really reached the point where the fear of an unauthorized act by five mistaken dishonest Justices would cause a rebellion in the troops against his orders, we face anarchy and did really experience a *coup d'etat* by five intellectual frauds. But we doubt this.)

C. *The Rule of Law*

The law is not what a few fanatics appointed by Presidents say it is in realms where they should not go. The rule of law means that laws are followed. They were broken in Florida and by the Supreme Court. In a country of "laws" and not men, unless by "men" we mean those who have made a mockery of democracy, there are limits to what any institution, no matter what respect it is supposed to claim, may do. Although there

169. The Nixon Administration authorized the bombing of Cambodia in the 1970's. See Chuck Klosterman, *Communists Took Over After Coup In 1975*, AKRON BEACON J., Jan. 7, 2002, at A4.

170. See, e.g., Robert Burns, *U.S. and Britain Bomb Iraq*, GRAND RAPIDS PRESS, Aug. 10, 2001, at C8.

171. For example, the killing of Amadu Diallo in New York. See Tara George, *Diallo Kin Suing For \$61m*, N.Y. DAILY NEWS, Apr. 19, 2000, at 16.

172. For a background of the strike, see William J. Adelman et al., *The Pullman Strike: Yesterday, Today and Tomorrow*, 33 J. MARSHALL L. REV. 583 (2000).

173. See RING LARDNER, *THE ECSTASY OF OWEN MUIR* 199-209 (Prometheus Books, 1997).

174. See Michael M. Phillips & Yaroshav Trofimov, *Trading Places: Police Go Undercover To Thwart Protesters Against Globalization*, WALL ST. J., Sept. 11, 2001, at A1.

exist intellectually “respectable” arguments for *Dred Scott*,¹⁷⁵ many maintain its ruling should not have been followed.¹⁷⁶ If the Supreme Court ordered all black men to be put to death, all Chinese to be deported, or declared a war on Afghanistan, would that be considered the rule of law? No. The Supreme Court would have broken the rule of law in those instances just as it did here. The President is supposed to enforce the law. He had the troops to do it. He had the legal authority and the moral obligation to take action. He did not. It is his and the country’s shame, now glossed over by the lazy liberal legalisms, a right-wing press, and a supine group of “elected” representatives. The troops should have been called out.

Because they were not, we no longer have the “rule of law.” Treaties are broken, racists are running civil right departments, and environmental promises are ignored. The list goes on. Elect thugs, let thugs destroy an election, let them run the country, but then do not claim you have upheld the rule of law. The rule of law required that this not happen. Now it has happened and it is not clear whether we can ever reverse the damages and revert to the rule of law, to the principles of democracy, to the eradication of racism, unless we admit the cowardice and failure of the President not to follow his duty under the law to use troops in order to prevent the perpetuation of a corrupted election which will stand out forever as America’s most recent shining example of shame.

VIII. What Should We Do Now?

It may be too late to reconsider what should have been done as a guide to current actions. We cannot call back anything that has happened and redo it. As to the past and what might have been done differently, we can only lament. But, as to the future, we can prepare and we can take action.

First, there should be a complete and thorough investigation by the Justice Department, based on the recommendations

175. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (denying citizens status to African Americans). The Court endorsed the view that blacks were unfit to associate with whites in social and political relations. *See id.* at 407.

176. *See* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (Yale Univ. Press 1975).

of the Civil Rights Commission.¹⁷⁷ Second, there should be an all out assault on the felony disenfranchisement process. Regardless of how this Court may be expected to act, the effort should be undertaken, just as it was when the cases were pursued before hostile courts in the dark days of the civil rights movement.¹⁷⁸ Even Justice Thomas may be pried away from his adopted twin, Antonin Scalia, when confronted with the overwhelming evidence of a practice and pattern that has a devastating and overwhelmingly disproportionate effect on black males. More important, every civil rights organization must join this fight.

Jesse and Al, Maxine and Mfume must yell loudly about the injustice perpetrated on black males and other minorities by this and other devices. They are right to do so. Who, though, cares for “ex-felons”? In Florida, the disenfranchisement of these persons has resulted in 31% of that State’s black voting-age males being struck from, or as is often the case, never being placed on the voting roles.¹⁷⁹

One would like to think that one of the ways to integrate an ex-felon back into society would be to provide some sense of responsibility and participation in the body politic. Yet, in those states, such as Florida, where a disenfranchisement death penalty is imposed, just the opposite is the case.

The United States Supreme Court has already held that the disenfranchisement action is constitutional,¹⁸⁰ thus no frontal attack on this practice is likely to succeed at this time. That notwithstanding, this practice must be exposed for exactly what it is – a powerful mechanism for disenfranchising black men. It is the poll tax, the literacy test and the grandfather clauses all over again and all rolled into one.

177. See CIVIL RIGHTS COMMISSION, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

178. The civil rights movement looked to the courts as primary venues of advancing their goals. While many of the cases brought were not successful, the litigation campaign led to the huge victory in *Brown v. Board of Education*, 348 U.S. 886 (1954). For a historical look at the use of litigation in advancing the Civil Rights Movement, see Eskridge, *supra* note 95.

179. This number is derived from a 1998 study conducted by the Sentencing Project & Human Rights Watch. In total, 57,700 ex-felons were prohibited from voting. See de Leon, *supra* note 139, at B1.

180. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

Further, there must be a rigorous scrutiny of the next presidential election in Florida to determine the impact of the changes the state promised to implement.¹⁸¹ If the fight for the vote cannot be won through the legal process in the courts, and it would be extremely premature to assume that it cannot, given the ammunition that is now available for the assault on the current methods of disenfranchisement, then it must be won politically and in the streets if necessary.

The essential right to vote for a democracy required the proper response by the executive – sending troops to prevent all the intimidation, exclusion, miscounting, and so on. Such an act was not only the President's duty but also a means of preserving the democracy and the franchise. Compare instead what the current Attorney General and the administration have done in the name of "security" to destroy democratic and constitutional rights of due process, free expression and privacy. Such destruction has been flimsily justified by one terrorist act which was probably predictable and preventable through intelligence and communication. This is where the remedies should lie, not in the current destruction of civil liberties and rights by those who are in power simply because the President did not use the troops to save the democratic electoral process.¹⁸²

181. Florida Governor Jeb Bush promised immediate action towards election reform in December of 2000. See Mark Hollis, *Governor Bush Vows To Modernize Voting System*, SOUTH FLA. SUN-SENTINEL, Dec. 15, 2000, at 10A; David Wasson, *Jeb Bush Promises Election Reform*, TAMPA TRIBUNE, Dec. 15, 2000, at 10. In 2001, Florida's legislature adopted wide-ranging election reforms, which, among other things, outlawed the punch-card ballot. Linda Kleindienst & Bob LaMendola, *Voting Reform Funds In Doubt Next Year*, SOUTH FLA. SUN-SENTINEL, Feb. 23, 2002, at 8B.

182. The current airline searches have shown that only clumsy amateurs are caught. Some random violence has appeared in every society as complex as ours and cannot be prevented by any measures, but only inhibited and detected by sophisticated and particularized shared information and safeguards. The answer is not in increasing the arbitrary power of those now in control. One of the authors will be publishing a lengthy analysis of privacy, and the Fourth and Fifth Amendments in a forthcoming issue of the Seton Hall Legislative Journal. Right now a list of articles about infringement of civil liberties by the present administration would be longer than this article—what has occurred because the troops were not sent and the election was not proper has been far more destructive than any imaginable consequence of sending the troops.