

**BOOKS WON'T
FURNISH A ROOM**
JOSEPH EPSTEIN

the weekly

Standard

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Our Robbed Masters

**Travesty in the Florida
Supreme Court**

WILLIAM KRISTOL • ROBERT N. HOCHMAN • NELSON LUND



December 18, 2000 • Volume 6, Number 14

2	Scrapbook. . . . <i>Bill Clinton, Washington Post, and more.</i>	6	Correspondence. . . . <i>On Florida, P.G. Wodehouse, etc.</i>
4	Casual <i>Christopher Caldwell, ghost of Christmas past.</i>	9	Editorials. <i>A President by Judicial Fiat A "Constitutional Crisis"</i>

14 Our Robed Masters

17 Travesty in Tallahassee

18 Goodbye Friends, Hello Foes

20 The PLO vs. the Christians

21 Dead Wrong, but Still Kicking

23 The Gangsta as Nobel Nominee

A black and white photograph of a man, likely a judge, standing at a podium. He is wearing a dark judicial robe over a suit and tie, and has glasses. He is looking slightly to his left. Behind him is a large American flag. The setting appears to be a formal courtroom or a public hearing.

26 An Emerging Democratic Majority? *The information age winners are trending Democratic.* BY DAVID BROOKS31 Books Won't Furnish a Room *The end of my days as a bibliomane*. BY JOSEPH EPSTEIN36 EPA vs. WPA *The new left battles the old left over murals in Washington.* BY STEPHEN SCHWARTZ

38 Coming to America *What do they know of England, who only England know?*..... BY MALCOLM BRADBURY

40 Parody.....*The new United States Constitution.*

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Travesty in Tallahassee

How wrong was the Florida supreme court?

Let us count the ways. **BY NELSON LUND**

NO DISINTERESTED OBSERVER can believe that any known method of counting the six million votes cast in Florida would provide certainty. The only sane approach is to count the votes according to the laws in place on November 7, and accept that result. But that's the one thing Florida's supreme court will not tolerate.

That court has now accomplished the unthinkable by topping its own previous post-election rewrite of the state's election law. The first time around, the justices replaced Florida's statute with new rules they thought were better. This time, they replaced the statute with *nonrules* that they believe are even better than rules. To make the farce complete, they've managed to rig the way these nonrules operate.

The opinion issued by the Florida court on Friday contains many mysteries, but it makes a few things clear. What we know for sure is that the Leon County Circuit Court has been ordered to begin an immediate review of about 9,000 ballots from Miami-Dade County, looking for "legal votes" that the counting machines missed. We also know that the circuit court has been ordered to make sure that Gore is credited with 215 (or maybe 176, the justices are not sure) additional votes from Palm Beach County, and that Gore gets 168 additional votes from Miami-Dade. The circuit court is apparently also expected to order some kind of statewide recount, or perhaps a recount only in counties that used punch-card ballots. But maybe not, since the circuit court

has only been authorized rather than ordered to do whatever it is that the supreme court has in mind.

The theory behind all of this seems to be a notion that a hunt for previously undiscovered "legal votes" must be conducted, and that every new vote that is "found" must be added to the totals recorded by the counting machines. Whatever number turns up when time runs out will apparently be considered "better" than the number arrived at under the rules in place on November 7.

This theory has at least four fatal flaws, apart from the serious practical difficulties that the circuit court will have in complying with its overlord's instructions.

First, the supreme court's decision is based on an untenable supposed "interpretation" of the Florida election statute. Two dissenting opinions, representing the views of three of the supreme court's seven justices, explore some of the legal defects in the reasoning, which are too numerous to summarize here.

Second, Florida's supreme court did not even pretend to know what constitutes a "legal vote." The only guidance it provides is the Delphic statement that a legal vote is one containing a "clear indication of the intent of the voter." But that means almost nothing without a rule for applying this standard to the now-famous varieties of chad.

The supreme court's nonrule about counting chad might not be a fatal defect if the circuit court were authorized to establish a rule that at least provided some consistency in whatever recount is conducted. But that is apparently precluded by the supreme court's order adopting the additions

to Gore's total from the partial recounts in Palm Beach and Miami-Dade. Those counties used different and *inconsistent* standards in evaluating ballots, and the supreme court has endorsed them *both*.

Third, the supreme court has systematically rigged the recount. The trick lies in the court's decision to limit the manual recounts to ballots that the machines did not count for any presidential candidate. Under almost any rule for identifying which varieties of chad manifest an intent to vote, some fraction of these "under-vote" ballots will be reclassified as votes. Whatever rule is chosen, however, should also be applied to ballots containing both a machine readable hole for one candidate and an indication of "an intent to vote" for another candidate. These ballots, which the machine counted as votes for one candidate, should be reclassified as "over-votes" and therefore deducted from that candidate's total.

Palm Beach actually used this approach, in which undervotes that are changed to votes are at least partially offset by votes changed to over-votes. This is one reason why Gore picked up fewer than 200 votes from the recount in heavily Democratic Palm Beach, much to everyone's surprise. The Florida justices, however, have made sure that won't happen again because they only ordered undervotes to be manually recounted. How convenient.

Fourth, Florida's supreme court ignored the decision of the U.S. Supreme Court *and* it simply ignored the counterclaims that Gov. Bush has filed against the recounts in several counties. But pretending that they don't exist doesn't make it so.

Whatever the Florida courts do next, some combination of the Florida legislature, the U.S. Congress, and the U.S. Supreme Court may be able to salvage the lawful result of this election. But if those who have an interest in claiming Gore "actually" won the election get even one judicially approved set of numbers for their quiver of poison arrows, they'll know whom to thank. ♦

Nelson Lund is a professor at George Mason University School of Law.