Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
Bush v. Gore

The problem of a President elected with a minority of the popular vote became a reality in the 2000 Election. The election itself was marred by controversy and allegations of widespread disenfranchisement of black voters in the crucial state of Florida. It was ultimately decided by the Supreme Court in the following case.

BUSH v. GORE

531 U.S. 98 (2000)

[The 2000 Presidential Election was among the closest in the nation's history. The Democratic candidate, Vice-President Al Gore, won the popular vote by approximately half a million votes over the Republican candidate, Texas Governor George W. Bush. However the electoral college majority ultimately turned on which candidate won the State of Florida. The morning after the November 7th election, Bush held a narrow lead of less than 2,000 votes statewide.

A complicated set of legal maneuvers then began between the two camps. Vice President Gore's lawyers filed election protests in several large predominantly Democratic Florida counties, seeking manual recounts of punch card ballots that had registered no vote for President on the machines but that might indicate the voter's intent. The Florida Secretary of State, Katherine Harris, who was co-chairman of George W. Bush's Florida state campaign committee, interpreted Florida law to require that all election protests had to be concluded within one week of the election on November 14. The Florida Supreme Court, whose seven members were Democrats, unanimously voted to extend the statutory deadline for election protests to November 26th and required the Secretary of State to include the manual recount totals in her certification. However, only one county completed a manual recount by the new deadline.

Governor Bush appealed to the United States Supreme Court, arguing that the Florida Surpreme Court's extension of time changed the law in place at the time of the November 7 election. It therefore was in violation of Article II, Section 1, Clause 2 of the Constitution, which provides that "[e]ach State shall appoint [electors for President and Vice-President] in such Manner as the Legislature thereof may direct." Governor Bush also argued that the decision violated U.S.C. Title 3 § 5, which creates a "safe

harbor" for the electoral votes of states if they appoint electors based upon "laws enacted prior to the day fixed for the appointment of the electors." The safe harbor, which made electoral results "conclusive" in any controversy involving counting of electoral ballots before the Congress, was available to states only if the determination of electors was concluded by December 12th, six days prior to the statutorily assigned date for electors to meet to cast their ballots on December 18th.

On December 4th, the U.S. Supreme Court unanimously vacated the Florida Supreme Court, asking for a more detailed explanation of the basis for the decision. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000). By the time the Court acted, however, the protest phase had already concluded, Secretary Harris had certified a 537 vote lead for Governor Bush, and Vice President Gore began an election contest in the Florida courts. Meanwhile, the leadership of the Republican-controlled Florida Legislature called for a special session to appoint a Republican slate of electors or pass a resolution confirming that the Republican slate was the correct slate if Gore succeeded in moving ahead of Bush in the recounts.

On December 8th, with only four days to go before the expiration of the safe harbor, the Florida Supreme Court reversed a lower court decision and by a vote of 4-3 ordered that a recount from Palm Beach county that concluded after the November 26th deadline and a partial recount from Miami Beach county be included in the certification. It then ordered a statewide manual recount of "undervotes"-- ballots on which earlier machine counts had registered no vote for President. In many parts of the state voters punched their preferences into punch card ballots using a stylus, and sometimes did not completely remove the "chad" but instead left a hanging chad or "dimple" without punching all the way through. In some cases, voters simply wrote their preferences on the ballot. The Florida Supreme Court ordered a recount supervised by judicial officials and held that in determining which ballots counted the test should be the standard of "the intent of the voter."

Governor Bush immediately appealed to the U.S. Supreme Court. The next day, on December 9th, five Justices voted to grant certiorari and ordered a stay of the proceedings. Bush v. Gore (*Bush I*), 121 S. Ct. 512 (2000). By the time the stay was announced Bush's lead had been cut to less than two hundred votes. The U.S. Supreme Court did not give its reasons for granting the stay, but Justice Scalia wrote a separate opinion noting that "[i]t suffices to say that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that the petitioner has a substantial probability of success." As to the requirement of irreparable injury,

Scalia argued that "[t]he counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner [George W. Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." Moreover, "permitting the count to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later, since it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate." Justice Stevens wrote an opinion dissenting from the stay, joined by Justices Souter, Ginsberg, and Breyer:

> Counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to [Vice-President Gore]--and, more importantly, the public at large--because of the risk that "the entry of the stay would be tantamount to a decision on the merits in favor of the applicants." Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.

On December 11th, the Court held oral arguments. On December 12th, the Florida House of Representatives passed a resolution appointing electors for George W. Bush. The Supreme Court handed down its opinion at 10:00 pm on December 12th, two hours before the expiration of the safe harbor deadline, stopping the recounts and effectively handing the Presidency to George W. Bush. The opinion was not signed, but is thought to be primarily the work of Justice Kennedy, joined by Justices O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.]

PER CURIAM.

I

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. This is the source for the statement in McPherson v. Blacker, 146 U.S. 1 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be

drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555 (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card--a chad--is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. As seems to have been acknowledged at oral argument, the standards for accepting

or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. Gray v. Sanders, 372 U.S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in Moore v. Ogilvie, 394 U.S. 814 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." Id., at 819.

The State Supreme Court ratified this uneven treatment [in mandating that recount totals from Miami Dade, Palm Beach and Broward Counties] be included in the certified total. [E]ach of the counties used varying standards to determine what was a legal vote. ...

In addition, the recounts in these three counties were not limited to so- called undervotes but extended to all of the ballots. ... A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so- called overvotes. ... At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way. ...

[T]he actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been addressed. ...

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. ...

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports

with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy--remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida election code ....

* * *

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. ...

CHIEF JUSTICE REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

We join the per curiam opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

I

...

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Of course, in ordinary cases, the distribution of powers among the branches of a State's

government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

In McPherson v. Blacker, 146 U.S. 1 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000): "Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State, and to state circuit courts. Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role

under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. ... Though we generally defer to state courts on the interpretation of state law there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law [when necessary to decide federal constitutional questions]. What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II. This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

II

[T]he Florida Supreme Court extended the 7-day statutory certification deadline established by the legislature. This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline ... are to be reviewed de novo, although the election code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline... thus virtually eliminating both the deadline and the Secretary's discretion to disregard

recounts that violate it.

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to require the counting of improperly marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, each polling place on election day contains a working model of the voting machine it uses, and each voting booth contains a sample ballot, In precincts using punch-card ballots, voters are instructed to punch out the ballot cleanly:

> AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

No reasonable person would call it "an error in the vote tabulation," Fla. Stat. § 102.166(5), or a "rejection of legal votes," Fla. Stat. § 102.168(3)(c), when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are required to be "capable of correctly counting votes," but which nonetheless regularly produces elections in which legal votes are predictably not tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary of State, who is authorized by law to issue binding interpretations of the election code, rejected this peculiar reading of the statutes. The Florida Supreme Court, although it must defer to the Secretary's interpretations, rejected her reasonable interpretation and embraced the peculiar one. ...

[I]n a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots. ... The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. For the court to step away from this established practice, prescribed by the Secretary of State, the state official charged by the legislature with "responsibility to ... [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take advantage of the safe harbor provided by 3 U.S.C. § 5. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th--four days before this deadline--the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive--perhaps delusive--certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. ...

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," it made no assertion that the seemingly inevitable appeals could be disposed of in that time. ...

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date. ...

For these reasons, in addition to those given in the per curiam, we would reverse.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial

intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Ibid. (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come--as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in McPherson v. Blacker, 146 U.S. 1, 25 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State." Ibid.; cf. Smiley v. Holm, 285 U.S. 355, 367 (1932).[a] The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II, assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of

---

[a]"Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view." [Smiley v. Holm, 285 U.S. 355, 367 (1932)] It is perfectly clear that the meaning of the words "Manner" and "Legislature" as used in Article II, § 1, parallels the usage in Article I, § 4, rather than the language in Article V. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995). Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision.

state law.

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. § 101.5614(5), is to be determined rises to the level of a constitutional violation.[b] We found such a violation when individual votes within the same State were weighted unequally, see, e.g., Reynolds v. Sims, 377 U.S. 533, 568 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient--or will lead to results any less uniform--than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.[c]

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated--if not eliminated--by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ--despite enormous differences in accuracy[d]--might run

---

[b]The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts.

[c]Cf. Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so").

[d]The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punch- card systems, and 2,353,811 votes were cast under optical-

afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent--and are therefore legal votes under state law--but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines.[e] Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees."

Finally, neither in this case, nor in its earlier opinion, ... did the Florida Supreme

---

scan systems.

[e]Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted.

Court make any substantive change in Florida electoral law. Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do --it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume--as I do--that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

Justice SOUTER, with whom Justice BREYER joins and with whom Justice STEVENS and Justice GINSBURG join with regard to all but Part C, dissenting.

The Court should not have reviewed either Bush v. Palm Beach County Canvassing Bd., or this case, and should not have stopped Florida's attempt to recount all undervote ballots, by issuing a stay of the Florida Supreme Court's orders during the period of this. If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15. The case being before us, however, its resolution by the majority is another erroneous decision. ...

A

The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. ... [N]o State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

B

[Our previous decision in Bush v. Palm Beach County Canvassing Board] does not ... claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character of a statute within the meaning of the Constitution. What Bush does argue, as I understand the contention, is that the [Florida Supreme Court's interpretation of the Florida Election Code-- which permits election contests when the certified result has been produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. § 102.168(3)(c) (2000)--] was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative act in question.

... None of the state court's interpretations is unreasonable ... [O]ther interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

The statute does not define a "legal vote." ... The State Supreme Court was therefore required to define it; [it] looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by a canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. It is perfectly true that the majority might have chosen a different reading. But even so, there is no constitutional violation in following the

majority view; Article II is unconcerned with mere disagreements about interpretive merits. The Florida court next interpreted "rejection" [of a legal vote] ... to mean simply a failure to count. That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. ... [Finally, t]he court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute. While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

C

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not

possibly comply with this requirement before the date set for the meeting of electors, December 18. [Recounting all the relevant ballots] manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice BREYER join as to Part I, dissenting.

I

THE CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging. ... But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," and no cause to upset their reasoned interpretation of Florida law.

[W]hen reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. ...

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full

measure of respect we owe to interpretations of state law by a State's highest court. ... In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification devise to afford state high courts an opportunity to inform us on matters of their own State's law because such restraint "helps build a cooperative judicial federalism."

Rarely has this Court rejected outright an interpretation of state law by a state high court. ... THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state court interpretations of state law. The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. ... By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. ... THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U.S. Const., Art. II, § 1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature thereof may direct," the electors for President and Vice President) (emphasis added). Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with Justice STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, e.g., McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 807 (1969) (even in the context of the right to vote, the state is permitted to reform " 'one step at a time' ") (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)).

Even if there were an equal protection violation, I would agree with Justice STEVENS, Justice SOUTER, and Justice BREYER that the Court's concern about "the December 12 deadline" is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward--despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment,"-- ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as Justice BREYER explains, the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, e.g., § 7 (specifying December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"--this year, December 27--as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. § 15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of

the United States.

I dissent.

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join except as to Part I-A-1, and with whom Justice SOUTER joins as to Part I, dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

I

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

A
1

The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). ... In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting all undercounted votes in Florida, ... whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single-uniform substandard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of any record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide.

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As Justice STEVENS points out, the ballots of voters in counties that use punch-card systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No-Vote Rates Higher in Punch Card Count, N.Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punch card ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

...

I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case, is justified by reference either to Art. II, § 1, or to 3 U.S.C. § 5. Moreover, even were such review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, § 1, and 3 U.S.C. § 5 to justify the majority's conclusion that this case is one of the few in which we may lay that fundamental principle aside. The concurrence's primary foundation for this conclusion rests on an appeal to plain text: Art. II, § 1's grant of the power to appoint Presidential electors to the State "Legislature." Ibid. But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, McPherson v. Blacker, 146 U.S. 1 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See id., at 41 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as Justice STEVENS points out, have we interpreted the Federal constitutional provision most analogous to Art. II, § 1--Art. I, § 4--in the strained manner put forth in the concurrence.

[N]owhere did we intimate, as the concurrence does here, that a state court decision that threatens the safe harbor provision of § 5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of § 5's "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature did express. ...

[The concurrence] says that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. § 102.166 (2001) (foreseeing manual recounts during

the protest period) with § 102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare § 102.112(1) (stating that the Secretary "may" ignore late returns) with § 102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ing]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminated the Secretary's discretion." The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to ... place in doubt the result of the election." Fla. Stat. §§ 102.168(3), (3)(c) (2000). And the parties have argued about the proper meaning of the statute's term "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. § 101.5614(5) (2000). Given this statutory language, certain roughly analogous judicial precedent, and somewhat similar determinations by courts throughout the Nation, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the Court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines

contained enough "legal votes" to place "the results" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable-however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation ... is investigated, examined, or checked, ... and to provide any relief appropriate." Fla. Stat. § 102.168(8) (2000) (emphasis added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature. ... I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. ... Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by

state courts.[citing the safe harbor provisions of 3 U.S.C. § 5]. But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5, 6, and 15.

The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts:

> "The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes.... The power to determine rests with the two Houses, and there is no other constitutional tribunal." H. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President).

The Member of Congress who introduced the Act added:

> "The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." 18 Cong. Rec. 30 (1886).
>
> "Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" Id., at 31.

The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a state submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been ... regularly given." 3 U.S.C. § 15. If, as occurred in 1876, one or more states submits two sets of electors, then Congress must determine whether a slate has entered the safe harbor of § 5, in which case its votes will have "conclusive" effect. Ibid. If, as also occurred in 1876, there is controversy about

"which of two or more of such State authorities ... is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." Ibid. If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." Ibid.

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to that think the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the presidential electors "was out of the question." Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.

Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley.

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. Bradley was

accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159-160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that " 'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch 185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive."

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, ... which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, supra. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!"

But we do risk a self-inflicted wound--a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

Discussion

1. *Stopping the counts*. Bush v. Gore has been severely criticized as unpersuasive and poorly reasoned. The major criticisms of the opinion have been three:

A. *The December 9th Stay*. The stay of the proceedings strongly suggested that five Justices had already made up their mind about the case. One effect of stopping the Florida recounts was to use up precious time that Vice-president Gore would need to mount a successful election contest. The stay essentially allowed the Court to decide the election without having to give reasons for its decision. Do you agree with Justice Scalia that if Gore had pulled ahead in the recounts, Governor Bush would suffer irreparable harm? Doesn't that claim turn on whether the Court had already decided that Bush should become president?

B. *The Equal Protection Argument*. Before Bush v. Gore federal courts generally deferred to state decisions about the composition and tabulation of ballots. The Court's equal protection argument was novel and relatively unexpected, especially coming from the more conservative members of the Court. It extends the one person one vote principle from the drawing of district lines to the tabulation of votes. What, precisely, is the theory behind this new doctrine? Is it that everyone should have an equal chance to have their ballot tabulated? If so, why isn't the real equal protection problem the different technologies used

in different parts of the State? Some places use ATM style machines that are relatively easy to use; others use punch card technology that is difficult for some voters to use and leads to more undervotes and spoiled ballots. If poorer counties have outmoded technology, that means that a larger percentage of citizens in those places will not have their votes counted. Does it make sense to distinguish between differences caused by different standards for tabulation in manual recounts and differences caused by different technologies? After all, one reason for having manual recounts is that the technologies in some places are likely to lead to more uncounted ballots.

Another possible principle of the case is that a standard of "intent of the voter" is simply too vague. What about the use of open standards like "negligence" in tort cases or "beyond a reasonable doubt" in jury cases, when similar facts can be evaluated differently by different juries? Does the "beyond a reasonable doubt standard" violate due process or equal protection?

Perhaps the Court was really concerned that under the guise of the "intent of the voter" standard county canvassing boards and judicial officials would read the ballots to favor one party over another. That is, standardless discretion will lead to partisan bias. If so, why doesn't the Court say this directly? Given that the recounts were to be conducted by judicial officials or under their supervision, is the Court implying that the Florida judiciary cannot be trusted to be unbiased?

Whatever the new principle underlying Bush v. Gore might be, the Court specifically limits its holding to the facts of the present case: "the special instance of a statewide recount under the authority of a single state judicial officer." Does this make the decision seem unprincipled? Does it undermine confidence that the Court was really serious about protecting equal protection values? Or is it merely a wise form of "minimalist" decisionmaking that decides as little as possble? Cf. Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999). Narrow holdings can sometimes bolster the Court's legitimacy by making it appear that it is not trying to decide too much. Does that principle apply here?

C. The Remedy. If the Court believes that a serious equal protection violation occurred, why doesn't it remand the case for a new count based on a fairer standard? The Court argues that the Florida Legislature wished to enjoy the benefits of the safe harbor provided by 3 U.S.C. § 5. But the Florida election law does not mention any such desire. Rather, the Court's authority comes from a statement in a December 11th opinion by the Florida Supreme Court. Given that the U.S. Supreme Court changed the law and made

meeting the safe harbor impossible, why not remand to the Florida Supreme Court and ask them which value-- counting every legal vote under a single constitutional standard or meeting the safe harbor-- is more important? Note that the Florida Election Code was revised in 1999. On the very day the Supreme Court handed down its decision, the 2000 Florida Legislature-- essentially the same body that created the 1999 statute-- was preparing to jettison the safe harbor by appointing its own slate of electors, which strongly suggests that they would have sacrificed the safe harbor if something more important was at stake. Is the best explanation of the Court's decision that it simply wanted to put an end to the election controversy and used the equal protection argument as the means to do this whether or not the remedy particularly made sense?

2. *Safe Harbors?* How important was meeting the safe harbor? In the 2000 Election 21 states did not submit their electors to the National Archives by the December 12th deadline. These included three states-- Wisconsin, New Mexico, and Iowa-- where the presidential election was particularly close. Four states-- California, Iowa, Maryland, and Pennsylvania-- did not sign the Certificates of Ascertainment establishing the identity of their electors until December 14th. The December 18th date may be more important than the safe harbor because Article II, section 1, clause 4 of the Constitution requires that Congress must choose a uniform day for electors to cast their votes. On the other hand, in 1960 Hawaii did not comply with this requirement and Congress still accepted its electoral votes. Should compliance with Article II, section 1 be regarded as a political question left to Congress?

3. *Democracy and Distrust.* It is possible that the five Justices in the majority simply did not trust the Florida Supreme Court and believed that the Florida Supreme Court would do anything to put Al Gore in the White House. Does this suspicion justify the failure to remand? Conversely, critics of the decision have suggested that the partisanship of the five U.S. Supreme Court Justices in the majority affected their judgment. How could one know whether this was true? Suppose the positions of Gore and Bush had been reversed, so that Gore was trying to stop the recounts and Bush was trying to count every vote, and the Florida Supreme Court were staffed by Republican Justices issuing the very same interpretations of Florida law. Do you think that the five Justices in the majority would have been as suspicious? Do you think that the outcome would have been the same?

4. *Distrust of Democracy*. Even if the majority's decision is unpersuasive, can the decision nevertheless be justified on the grounds that it was too dangerous to allow

uncertainty about who was to be President to go on much longer? Note that if the recounts had continued the Florida Legislature might very well have sent its own slate of electors to Congress. If Gore pulled ahead in the recounts, Congress would have had to decide between the multiple slates when it counted the electoral votes on January 6th, 2001. Was it wise for the Court to step in and end the controversy out of fear that the members of Congress would have been unable to resolve the crisis, that some members of Congress would have behaved very badly, or that there would otherwise have been a so-called "political train wreck?" Note that there were no riots in the streets during the election controversy, and that the Congress had gone through a very bitter impeachment trial of President Clinton without the country falling apart. Which way does this cut? Was the Supreme Court too distrustful of ordinary democratic politics? Was it too certain that it alone could save the country?

Consider the extent to which the prudential argument for stopping the recounts depends on the view that Bush was the likely winner anyway. If one thought Gore was the winner-- or that the outcome was genuinely in doubt-- does it make sense to deny Gore the Presidency out of a fear that his political opponents would misbehave?

5. *The Concurrence.* In a case of this importance the Chief Justice would normally write the majority opinion. Instead the Court settled for a per curiam opinion. Why do you think that Chief Justice Rehnquist was unable to get Justices O'Connor and Kennedy to join his Article II argument? Note that it is easier to justify the remedy under the Article II theory than under the Equal Protection theory. If the Florida Supreme Court changed the law by ordering the recounts the recounts must stop. The major problem with the Article II argument is that the Florida Election Code was substantially revised in 1999, meaning that most of the questions before the Florida Supreme Court were questions of first impression. Unless the text was unambiguously clear, it would be hard to say that any reasonable gloss marked a "significant departure" from the law, or "impermissibly distorted [it] beyond what a fair reading required." In fact, several key terms like "legal vote" were undefined. In addition, portions of the code concerning deadlines were contradictory and simply had to be reconciled if the Court was going to apply the law.

If Rehnquist's Article II theory is correct, could the Florida Supreme Court have crafted a uniform standard for manual recounts without running afoul of Article II? Note that the Equal Protection argument is premised on the assumption that nothing the Florida Supreme Court did changed the law sufficiently to take Florida out of the safe harbor (hence it was important to meet the December 12th deadline), while the Article II argument seems to be premised on the opposite assumption.

6. *High and Low Politics*. One frequent objection to the majority opinion in Bush v. Gore is that the Justices were engaged in "political" decisionmaking. They split 5 to 4, with the five conservatives effectively handing the Presidency to the Republican candidate, George W. Bush. In this light, compare Bush v. Gore with Brown v. Board of Education and United States v. Nixon, in which the Court chose to speak with one voice on a matter of great national importance. Given the political context of the case, should the Court have declined to take the case if it was going to be badly split (a fact that was obvious from the initial stay on December 9th) or should it have struggled to reach a compromise that was unanimous, as it did in *Brown* and U.S. v. Nixon?

In what sense is the opinion in Bush v. Gore more "political" than most hotly contested 5-4 decisions concerning civil rights and federalism? One possible answer might turn on a distinction between "high politics"-- the promotion of political principles in constitutional doctrine, and "low politics" – promoting the interests of a particular political party or making sure that particular people gain political power. See Sanford Levinson, "Return of Legal Realism," The Nation (January 8, 2001), at 8. In cases like *Adarand* (an affirmative action case discussed in Chapter Six), *Printz*, *Lopez*, and *Morrison*, the five conservatives in the Bush v. Gore majority have been promoting a relatively consistent set of ideological positions like colorblindness, respect for state autonomy from federal interference, and protection of state governmental processes from federal supervision. By contrast, a critic might argue, Bush v. Gore did not seem to further those values, at least not directly. Rather, the five conservatives seemed to adopt whatever legal arguments would further the election of the Republican candidate, George W. Bush. Although few people are shocked to learn that Justices' decisions are "political" in the sense that they promote "high politics"—larger political principles and ideological goals— one might object to Justices using the power of judicial review in so prominent a case to promote the interests of a particular political party and install its candidates in power.

A related criticism was that by handing the presidency to the Republican candidate, the five conservative Justices could choose the person who would nominate their colleagues and successors, as well as judges in the lower federal courts who effectively implement the Supreme Court's decisions. Given that many of the most important innovations of the Rehnquist court were decided by a slim 5-4 majority, the appointment of one or two Justices could either entrench and extend the Court's conservative approach for generations to come or lead to its rapid evisceration. Thus, the argument goes, the members of the Supreme Court faced a heightened conflict of interest because the president elected in 2000 would determine the fate of the Rehnquist Court's revolutionary changes.

Perhaps anticipating such criticisms, Justice Clarence Thomas has vehemently denied any improper motivation. Shortly after the Bush v. Gore decision was handed down, he was quoted as saying "I have yet to hear any discussion, in nine years, of partisan politics" among the Justices. "I plead with you that, whatever you do, don't try to apply the rules of the political world to this institution; they do not apply." In fact, he claimed that "[t]he last political act we engage in is confirmation." Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1. Should the Court have refrained from taking the case because of the appearance of a conflict of interest even if the Justices were not improperly motivated?

7. *The Supreme Court's Legitimacy.* Critics of Bush v. Gore have claimed that it undermines the Supreme Court's legitimacy. Do you think this is true? Even one concludes that Bush v. Gore was incorrectly decided, why should it have any effect on the Supreme Court's legitimacy? After all, the Supreme Court has made dozens (if not hundreds) of poorly reasoned decisions in its history. If you think that Bush v. Gore is a "bad" decision and poorly reasoned, is it any worse than– for example-- Roe v. Wade (if you think that abortion is murder) or Bowers v. Hardwick (if you believe strongly in gay rights)? In terms of the Court's misunderstanding of its role, is Bush v. Gore more or less defensible than cases like Dred Scott v. Sanford, or Prigg v. Pennsylvania? Would the Legal Tender Cases be a better analogy, since it seems clear that the overruling of Hepburn v. Griswold in Knox v. Lee can only be explained by the replacement of Democrats with Republicans?

Is the claim that the Court has lost "legitimacy" really a concern that some people will no longer trust the Court or is it premised on other grounds? After all, the Court is an amazingly resilient institution. The historical materials in Part I suggest that no matter how badly the Court misbehaves, it soon regains the confidence of the American public. Why should *Bush v. Gore* be any different? Put another way, if *Dred Scott* and the Legal Tender Cases did not hurt the Court's legitimacy in the long run, why should Bush v. Gore?

Bush v. Gore promises to be one of the most discussed cases in recent history, and the literature is already immense. For a sampling, *see* Jack M. Balkin, *Bush v. Gore* and the Boundary between Law and Politics, 110 Yale L. J. 1407 (2001); Symposium on *Bush v. Gore*, 68 University of Chicago L. Rev. 613 (2001); Symposium on *Bush v. Gore*, 29 Fla. State L. Rev.325 (2001); Michael Klarman, *Bush v. Gore* Through the Lens of Constitutional History, 89 Calif. L. Rev. 1721 (2001); Nelson Lund, the Unbearable Rightness of *Bush v. Gore*, 23 Cardozo L. Rev. 219 (2001).