Making Sense of Bush v. Gore

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Making Sense of *Bush v. Gore*

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Many of the post-mortem assessments of *Bush v. Gore,* to put it mildly, have not been kind. Consider, for example, Jeffrey Rosen, in the *New Republic:*

On Monday, when the Supreme Court heard arguments in *Bush v. Gore,* there was a sense in the courtroom that far more than the election was at stake. I ran into two of the most astute and fair-minded writers about the Court, who have spent years defending the institution against cynics who insist the justices are motivated by partisanship rather than reason. Both were visibly shaken by the Court’s emergency stay of the manual recount in Florida; they felt naive and betrayed by what appeared to be a naked act of political will. Surely, we agreed, the conservatives would step back from the abyss.

They didn’t. Instead, they played us all for dupes once more. And, by not even bothering to cloak their willfulness in legal arguments intelligible to people of good faith who do not share their views, these four vain men and one vain woman have not only cast a cloud over the presidency of George W. Bush. They have, far more importantly, made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O’Connor.  

Randall Kennedy, of the Harvard Law School, pronounced: “The U.S. Supreme Court’s intervention into the presidential election was and is a scandal.”  

Cass Sunstein, a law professor at the University of Chicago, called the decision “illegitimate, undemocratic, and unprincipled.”  

Lawyer/novelist Scott Turow was perhaps a little more even-handed: “In the Sunshine State, partisanship in the legal process was like an infection, escalating as it grew. What resulted was a nasty series of begats: The excesses of Florida Secretary of State Katherine Harris drove the Florida

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* Professor of Law, University of South Dakota School of Law. This Article is a longer version of a paper presented at a USD Student Bar Association and South Dakota Law Review Forum on *Bush v. Gore.* Because this is the place where one normally discloses biases which might have affected the analysis that follows, let me acknowledge that I am a Republican. Worse yet, I voted for George W. Bush. If the reader believes that is enough in these politically charged times to disqualify me, then read no further.

3. Randall Kennedy, *Contempt of Court,* reprinted in Dionne & Kristol, supra note 2, at 336 [hereinafter Kennedy].
Supreme Court to action, which in turn inspired the U.S. Supreme Court to step well beyond the lines it had long drawn for itself."\(^5\)

Nor did the severity of the criticism subside as the more extensive treatments of the case began to appear. Professor Alan Dershowitz wrote:

> [T]he decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants. This was cheating, and a violation of the judicial oath. The other dreadful Supreme Court decisions, dangerous as they were, do not deserve to be placed into the special category of judicial misconduct, though their impact on history may have been more serious and enduring.\(^6\)

Not to be outdone, former Charles Manson prosecutor, Vincent Bugliosi, argued that it was not enough to have “merely lost respect for and confidence in the Court.”\(^7\)

You mean you can steal a presidential election and your only retribution is that some people don’t have as much respect for you, as much confidence in you? That’s all? If, indeed, the Court, as the critics say, made a politically motivated ruling (which it unquestionably did), this is tantamount to saying, and can only mean, that the Court did not base its ruling on the law. And if this is so (which again, it unquestionably is), this means that these five Justices deliberately and knowingly decided to nullify the votes of the 50 million Americans who voted for Al Gore and to steal the election for Bush. Of course, nothing could possibly be more serious in its enormous ramifications. The stark reality, and I say this with every fiber of my being, is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and most serious crimes this nation has ever seen—pure and simple, the theft of the presidency. And by definition, the perpetrators of this crime have to be denounced criminals.\(^8\)

Pretty strong stuff. I will argue in this Article, however, that the real culprit in this fascinating story of high political drama was the Florida Supreme Court. I will also suggest that it is only through understanding the legal framework as it played out during the course of the litigation that any measured assessment of the United States Supreme Court’s decision can be made. My goal is to make the reasoning in *Bush v. Gore* intelligible to people of good faith who do not agree with the decision. That’s intelligible, not necessarily persuasive. The politics of the matter has probably put persuasion beyond reach.

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8. *Id.* at 48 (emphasis in original).
I. THE STORY UNFOLDS: THE COUNT AND THE FLORIDA COURTS

November 7, 2000, of course, was Election Day. By the next morning, there was no clear winner. Several states, including Florida, were too close to call. The Florida Division of Elections reported that its initial count gave Governor Bush a lead over Vice President Gore by 1,784 votes (2,909,135 to 2,907,351). Because the margin in the initial tally was less than one-half of one percent of the total votes cast, an automatic machine recount was conducted pursuant to Florida law. The machine recount, completed on November 9, increased the number of votes for both candidates, but reduced Bush’s lead to 327 votes (2,910,198 to 2,909,871).

The closeness of the count immediately gave rise to several agonizing “what ifs?” There was the now infamous “butterfly” ballot used in Palm Beach County. It appears likely that the confusion produced by the format of the ballot siphoned off a significant number of votes from the Gore ticket. The ballot, however, had been sent to the presidential campaign offices, local party officials, and 655,000 registered voters prior to the election and no one had complained about the layout of the ballot. There was also a likely erosion of Bush votes as a result of the call for Gore by the major news networks of Florida prior to the closing of the polls in the Central time zone area of western Florida, a Bush stronghold. In addition, there was a likely erosion of Gore votes in majority-black precincts because of spoiled ballots (due to voter error) that were invalidated at a substantially higher rate than in majority-white precincts. As one Gore supporter acknowledged: “[G]et-out-the-vote drives can prove unrewarding unless they are accompanied by voter education drives.” Finally, in contrast to those who were eligible to vote but were

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9. Dionne & Kristol, supra note 2, at xi.
10. FLA. STAT. § 102.141(4) (2000). The Florida election laws, including this section, have been substantially revised as a result of the events discussed in this Article. See Florida Election Reform Act of 2001, 2001 Fla. Sess. Law Serv. Ch. 2001-40. All statutory references herein will be to the laws as they existed at the time of the election in November of 2000.
11. Dionne & Kristol, supra note 2, at xi.
13. MIAMI HERALD REPORT, supra note 12, at 42; DERSHOWITZ, supra note 6, at 25. The lawsuit challenging the legality of the “butterfly” ballot was ultimately dismissed. See Fladell v. Palm Beach County Canvassing Bd., 772 So.2d 1240 (Fla. 2000) (holding ballot did not constitute substantial noncompliance with the statutory requirements and, therefore, did not mandate the voiding of the election).
14. Megan Garvey & Elizabeth Jensen, TV’S Election Night Errors Still Ignite Partisan Rancor, LOS ANGELES TIMES, Feb. 13, 2001, at A5. See also BILL SAMMON, AT ANY COST: HOW AL GORE TRIED TO STEAL THE ELECTION, 19 (2001) [hereinafter SAMMON]: “By prematurely declaring Gore the winner shortly before polls had closed in Florida’s conservative western panhandle, the media ended up suppressing the Republican vote,’ concluded John R. Lott, Jr., senior research scholar at Yale University Law School. Lott put Bush’s net loss at a ‘conservative estimate of 10,000 votes.’”
15. MIAMI HERALD REPORT, supra note 12, at 114-15.
16. Id. at 114.
unable to effectuate their franchise, there were "thousands" of illegal votes cast on November 7 by unregistered voters, voters who voted twice, and ineligible felons. 17 What if those illegal votes had not been counted? What if . . . 18

The closeness of the margin between the candidates after the machine recount led almost inevitably19 to several legal challenges.20 Florida law established two methods for the challenge of election results. Before a winner is certified by a canvassing board, a candidate may file a protest and request a manual recount.21 After certification, a candidate may also file an election contest in circuit court.22 Gore ultimately chose to do both.

A. THE PROTEST OF THE ELECTION VOTE TOTALS

Under Florida election law, a county is required to submit its vote totals to the Florida Secretary of State by 5:00 p.m. on the seventh day after the election.23 In 2000, that meant by November 14. The seven day state deadline was adjusted, however, by a federal consent decree which required overseas ballots received within ten days of the election to be counted and added to the previous totals.24 A candidate or other qualified person could challenge the results as erroneous through a written protest filed with the canvassing board25 or could request a manual recount from the board.26

On November 9, Gore sought manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia counties.27 These counties had gone heavily for Gore and it was thought that additional votes would be found through manual recounts. The filing of the request did not, in and of itself however, trigger county-wide manual recounts. Each county canvassing board had the discretion to decide whether to authorize a

17. Id. at 97. “A computerized review by the Herald of 2.3 million ballots from twenty-two counties found 1,241 votes cast by felons. If the pattern repeated itself statewide, more than 2,500 felons most likely cast illegal ballots.” Id. at 104.

18. Yet another “what if” involved the impact of Ralph Nader on the Florida vote. Nader received 97,488 votes in Florida. According to the Miami Herald, “[i]f 1 of every 150 [Nader] voters had switched to Gore, Gore would be president today.” Id. at 14.

19. It is instructive to recall that in the 1960 Presidential election, Richard Nixon declined, on public interest grounds, to file legal challenges to the results in Alabama and Illinois, even though there was reason to believe that election fraud had occurred to such a degree as to have possibly affected the outcome in those states. See STEPHEN E. AMBROSE, NIXON: THE EDUCATION OF A POLITICIAN 1913-1962, 606-07 (1987).

20. There were many other legal challenges brought by parties affiliated with or sympathetic to Vice-President Gore’s candidacy. Some of these challenges will be discussed below. See infra note 102.


24. Dionne & Kristol, supra note 2, at 21-22.

25. FLA. STAT. § 102.166(4)(a). The request for the manual recount must be made before certification by the board or within 72 hours after the date of the election, whichever occurs later. FLA. STAT. § 102.166(4)(b).

26. Id.

27. Dionne & Kristol, supra note 2, at xi.
limited manual recount. If any board decided to authorize a manual recount, it would first conduct a limited sampling of precincts chosen by the person requesting the recount. If the recount indicated "an error in the vote tabulation which could affect the outcome of the election," then the county canvassing board was to take one of three actions: (1) correct the error and recount the remaining precincts with the vote tabulation system; (2) request the Secretary of State to verify the tabulation software; or (3) manually recount all ballots. Thus, before proceeding to the account of the manual recounts, there was a preliminary question of whether the canvassing boards had the authority to conduct a manual recount of all ballots in the county.

1. Was There "an Error in the Vote Tabulation"?

In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore. In Palm Beach County, a recount of four sample precincts indicated a net increase of nineteen votes for Gore. None of the changes, however, were attributed to tabulation error, i.e., to an error made by the tabulator, either human or machine. As is now well-known, the reason for the differences between the prior machine count and the limited hand recount was the inclusion of votes not recorded by the machines because the chads were not fully punched through. The machines were programmed to reject such ballots. The question therefore was whether voter error could serve as a basis for "an error in the vote tabulation."

The Palm Beach Canvassing Board requested an advisory opinion from the Secretary of State's office as to whether "a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts [would] be considered an 'error in voting tabulation'..." The response from the Secretary of State's office (Division of Elections) was in the negative. Only an error in "the election parameters or software errors" would give the canvassing board the authority to conduct a county-wide manual recount. The Palm Beach Canvassing Board apparently then sought a second opinion from the

28. FLA. STAT. § 102.166(4)(c).
29. The recount must include at least three precincts and at least one percent of the total votes cast. Id. at § 102.166(4)(d).
30. Id. at § 102.166(5)(a)-(c).
31. Dionne & Kristol, supra note 2, at 25.
33. Voter error with respect to the punchcard ballots would include either the failure to follow instructions for casting a valid, machine readable vote or, in the event the voting machine did not allow the ballots to be punched through, the failure to seek assistance of one of the precinct election workers. Id. at 94-95.
34. FLA. STAT. § 102.166(5) (1999).
36. Id. at 13.
Florida attorney general, 37 who stated that an error in the vote tabulation could include “the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots.” 38

In any event, the canvassing boards decided to ignore the Secretary of State’s opinion and to proceed with the county-wide manual recount without resolving directly the question of whether the differences detected in the limited precinct samples were the result of an error in voting tabulation. It was apparently decided that the differences between the sample precinct manual count and the machine count could affect the outcome of the election, and on that basis alone, a manual recount of all ballots cast was authorized. 39
2. The Deadline for Certification of County Returns

On November 13, 2000, the Secretary of State's office also issued an advisory opinion that each canvassing board must certify its county returns to the State Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election. This then posed the practical problem of whether the manual recount could be completed before this deadline. The Palm Beach and the Volusia county boards, the Florida Democratic Party and Vice President Gore filed an action in state court on November 13 for a temporary injunction against the Secretary of State and the State Elections Canvassing Commission; the goal was to prevent the certification of the results of the election based only on returns received within the seven day period after the election (i.e., November 14, 2000).

The resolution of this lawsuit turned primarily on the interpretation of two statutes. Fla. Stat. section 102.111(1) stated, in pertinent part, that "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified." Section 102.112 of the Florida statutes provided, in pertinent part: "If the returns are not received by the department by the time specified (i.e., within the seven day period), such returns may be ignored and the results on file at that time may be certified by the department." On November 14, the circuit court concluded that the latter section (section 102.112) prevailed on the issue of discretion and that the Secretary of State had discretion to include or to ignore late filed returns. If the Secretary of State had discretion, then she could not, before the deadline, decline to exercise that discretion. The circuit court thus directed the Secretary of State "to withhold determination as to whether or not to ignore late filed returns, if any, ... until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion."

There was an additional problem with the seven day rule in that, by consent decree with the Federal Government, absentee overseas ballots had to be counted if received up to ten days after the election. Thus, the apparently clear state mandate of certification within seven days was in conflict with what was, in effect, a federal mandate. In any event, November 14 passed without certification of the results by the Secretary of State.

Subsequent to the circuit court's order, the Secretary of State announced that the county boards must submit to her a written statement

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41. (Emphasis added).
42. (Emphasis added).
43. Id. at 20 n.1. (The circuit court's order may be found at McDermott v. Harris, 2000 WL 1693713).
44. Dionne & Kristol, supra note 2, at 23.
45. Id. at 21.
of "the facts and circumstances" justifying any belief on their part that they should be allowed to submit amendments to the certified returns previously filed.46 The four counties submitted statements. On November 15, the Secretary rejected the requests based upon certain written criteria47 and again announced that she would not accept amended returns, but would rely on the previously submitted certified totals for the four counties. She further announced that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on November 18, 2000.48

On November 16, the Florida Democratic Party and Vice President Gore filed a motion in state court seeking to compel the Secretary of State to accept the amended returns. The circuit court denied the motion on November 17 stating, in pertinent part:

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My [previous] order requires nothing more.49

This order was immediately appealed to the court of appeals and the matter was quickly "passed through" to the Florida Supreme Court.50 On November 17, the Florida Supreme Court, on its own motion, enjoined the Secretary of State and the Elections Canvassing Commission from certifying the election results until further order of the court.51 The court added: "It is NOT the intent of this Order to stop the counting and

46. Id. at 26.
47. The criteria considered by the Secretary of State were as follows:
   Facts & Circumstances Warranting Waiver of Statutory Deadline
   1. Where there is proof of voter fraud that affects the outcome of the election. [...]  
   2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. [...]  
   3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. [...]  
   Facts & Circumstances Not Warranting Waiver of Statutory Deadline
   1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. [...]  
   2. Where there exists a ballot that may be confusing because of the alignment and location of the candidate's names, but is otherwise in substantial compliance with the election laws. [...]  
   3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." [...]  

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000). Dionne & Kristol, supra note 2, at 26 n.5.

48. Id. at 27.
49. Id. at 27 n.6. The circuit court's order may be found at McDermott v. Harris, 2000 WL 1714590.
50. Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1220, 1227 (Fla. 2000).
51. Palm Beach County Canvassing Bd. v. Harris, 2000 WL 1716480 (Fla. 2000).
conveying to the Secretary of State the results of absentee ballots or any other ballots.\textsuperscript{52}

3. \textit{The Florida Supreme Court Rules on the Protest}

If this had been an "ordinary" state case, the next step would have been obvious. The Florida Supreme Court would have affirmed the trial court's conclusion that there had been no abuse of discretion on the part of the Secretary of State and would have rejected the appeal. But this clearly was not an "ordinary" state case. Relying primarily on the Florida Constitution, the Florida Supreme Court, on November 21, 2000, ordered that amended certifications could be filed with the Elections Canvassing Commission by 5:00 p.m. on November 26 and that the Secretary and the Commission "shall" accept such amended certifications in certifying the final state vote totals.\textsuperscript{53}

In its decision, the court addressed the question of whether the canvassing boards had the authority to order a county-wide manual recount. The court noted the Division of Elections' advisory opinion and observed: "Florida courts generally will defer to an agency's interpretation of statutes and rule the agency is charged with implementing and enforcing."\textsuperscript{54} The court declined to give deference, however, because the agency's opinion was said to be "contrary to law."\textsuperscript{55} "Errors in the vote tabulation" include "errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery."\textsuperscript{56} Note that voter error becomes an error in vote tabulation because of the "failure" of the voting machinery to read a ballot that has not been properly completed. If this is failure, it is programmed failure because the vote tabulation machine was programmed not to count improperly or insufficiently marked ballots. The problem, if any, lay with the voter using the voting machine or the voting machine itself. There was no identifiable "problem" with the vote tabulation machinery. Nevertheless, the court held: "An 'error in the vote tabulation' includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4)."\textsuperscript{57} As a practical matter, the court's decision on this point gives any challenger a near automatic right to a county-wide manual recount, so long as the canvassing board is willing to consider ballots that the vote tabulation machinery is programmed to reject.\textsuperscript{58} In any event, this holding is properly a matter for the Florida

\textsuperscript{52} Id. (emphasis supplied by the court).
\textsuperscript{53} \textit{Harris}, 772 So.2d at 1240.
\textsuperscript{54} Id. at 1228.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 1229.
\textsuperscript{57} Id.
\textsuperscript{58} It should not come as a surprise that the canvassing boards in these four heavily Democratic counties each had a majority of Democrats on the board. See, \textit{e.g.}, \textit{MIAMI HERALD
Supreme Court. Its reading of the statute is conclusive, even if questionable.

The court then turned to the question of whether the Elections Canvassing Commission had discretion to reject returns from the canvassing boards after the seven-day deadline set forth in the statute. The court found statutory ambiguity in two areas. With respect to a recount, the time frame for conducting a manual recount was said to be in conflict with the time for submitting county returns:

[A] candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with sections 102.111 and 102.112, which state that the Boards “must” submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties.

With respect to the Secretary of State’s discretion, the court found that the mandatory language in section 102.111 conflicted with the permissive language in section 102.112. Unlike the circuit court, which ordered the Secretary to exercise her discretion with respect to the receipt of late returns, the Florida Supreme Court held that the Secretary’s discretion to ignore late returns was limited. Specifically, it held:

The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary.

The result was an order extending the deadline until November 26, at 5:00 p.m., for submission of returns and requiring the Elections Canvassing Commission to include the amended returns accepted by this date. How could the court arrive at such a conclusion that was seemingly at odds with the election statutes? It turned a statute with a specific deadline and discretion vested in the Secretary to waive the deadline into a statute in which the Secretary must ignore the deadline (unless certain court specified circumstances existed). It also extended the deadline date an

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REPORT, supra note 12, at 15:

Though outnumbered in state and many county governments, Democrats also pressed for every advantage. When it came time to challenge the election, they insisted that every vote must count, but they did not demand a recount of every vote. Instead they sought manual recounts only of undervotes and only in four large, predominantly Democratic counties.

Id.

59. Harris, 772 So.2d at 1232-33.
60. Id. at 1233-34.
61. Id. at 1239-40 (emphasis added).
additional 12 days beyond the statutorily required deadline. The answer lies in the court’s liberal invocation of the Florida Constitution.

The court cited Article I, section 1 of the state constitution, which begins: “All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.” The court then commented: “The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.” The legislature may enact laws regulating the electoral process, but only if there are no “unreasonable or unnecessary” restraints on the right to vote. Accordingly, the electoral laws must be construed in favor of the right to vote. In light of these principles, the authority of the Secretary of State to ignore amended returns was said to be severely limited.

The approach here is to pit the rules set forth by the Florida Legislature and the actions of the executive branch against the broad statement of the Florida Constitution regarding the power of the people. As the Florida Supreme Court stated: “[T]he will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.” While this begs the question, it is more important to note how the will of the people, ordinarily expressed through the legislature, now has a different mouthpiece—the judiciary generally and the Florida Supreme Court specifically. The court is thereby able to invalidate legislative rules on public policy grounds. This raises serious separation of powers questions because the legislature normally determines public policy in connection with statutory matters. However, since Marbury v. Madison, it is ultimately the province of the judiciary to say what the law is. It is their call, even if the call is questionable. In other words, right or wrong, this ordinarily would have been the final word on Florida law.

4. The United States Supreme Court Vacates the Protest Decision

The Florida Supreme Court’s decision was not the last word, however. Again, this was not an ordinary case. Governor Bush filed a petition for a writ of certiorari in the United States Supreme Court to review the Florida decision. The Supreme Court granted certiorari to consider two questions:

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62. Id. at 1236 (emphasis supplied by the court). It is of interest that the right to vote as such is not explicitly set forth in the Florida Constitution.
63. Id.
64. Id.
65. Id. at 1237.
66. Id.
67. Id. at 1227.
68. Compare with Veeder v. Kennedy, 589 N.W.2d 610, 616 (S.D. 1999): “We are unable to locate a single case in this jurisdiction where this Court has struck down a statute as a violation of public policy.”
69. 5 U.S. 137 (1803).
Whether the decision of the Florida Supreme Court, by effectively changing the State’s elector appointment procedures after election day, violated the Due Process Clause or 3 U.S.C. § 5, and whether the decision of that court changed the manner in which the State’s electors are to be selected, in violation of the legislature’s power to designate the manner for selection under Art. II, § 1, cl. 2 of the United States Constitution.

In a unanimous opinion issued on December 4, 2000, after a highly expedited process, the Supreme Court vacated the Florida decision and remanded for further proceedings.

Like the Florida Supreme Court, the United States Supreme Court acknowledged that deference is ordinarily accorded to what happened below. But, whereas the Florida court dropped the deference because this was an election case where the will of the people could not be thwarted by the legislature or an executive agency (a self-fulfilling prophecy with respect to the Division of Elections), the United States Supreme Court dropped the deference because this was a presidential election and the Florida Legislature was acting, in addition, under a direct grant of authority contained in Article II of the United States Constitution. This provision reads: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representative to which the State may be entitled in the Congress...” The provision suggests that the state legislature has direct authority to make rules for the presidential election, an authority that is superior to the Florida Constitution. It suggests that the Florida Supreme Court cannot trump the legislative rules with the state constitution because the Florida Legislature’s authority, in presidential elections, derives from a direct grant of authority in the United States Constitution. The Court drew back from a decision on the merits, however, because it said that the basis for the Florida court’s decision was “unclear.”

On the second question—whether the Florida decision was in violation of federal law—section 5 of Title 3 of the United States Code provides that if the state legislature has provided for final determination of contests or controversies by a law made prior to election day, then that determination shall be conclusive if made at least six days prior to the time of the meeting of the electors of the electoral college. The Supreme Court stated that the principle of finality contained in the federal law (also

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70. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 73 (2000). Because the United States Supreme Court is a court of limited jurisdiction, it did not have authority to review the Florida supreme court's interpretation of Florida law as such. It limited the review to whether the Florida's actions violated federal law or the United States Constitution.

71. Id. at 78. In light of the subsequent charges of partisanship made against the Court, it is worth noting that this decision was unanimous.

72. Id. at 76.

73. U.S. CONST., art. II, § 1, cl .2 (emphasis added).

74. Bush, 531 U.S. at 76.

75. Id. at 78.
known as the "safe-harbor provision") "counseled" against any construction of Florida law that might be deemed as a change in the law after the election. This section does not prohibit changes, but since the benefit of no change in the law was obvious, the Court posited that perhaps the Florida Supreme Court overlooked the impact of this section. In any event, the remand essentially told the Florida court that the principle of legislative supremacy in presidential elections would require them to base their decision on Florida statutes, not on the Florida Constitution.

So far, so good. What we have thus far is a lawsuit that raised questions regarding the Florida election law process, which could not be resolved solely on the basis of Florida law (on which the Florida Supreme Court would have the last word). Because of the presence of a federal constitutional issue and a federal statutory provision, the United States Supreme Court would have the last word, if it chose to speak. Before the Supreme Court would make that decision, however, it wanted a clarification of the precise grounds on which the Florida Supreme Court had based its decision. Thus, the remand.

B. THE CONTEST OF THE ELECTION VOTE CERTIFICATION

The Supreme Court remanded the protest case on December 4, 2000, but what had happened in the meantime as a result of the extension of the deadline to November 26? First, the overseas ballots were counted and it was announced on November 18 that the Bush lead had increased to 930 votes. On November 23, the hand recount in Miami-Dade County was halted because the Canvassing Board believed that it would not be able to comply with the November 26, 5:00 p.m. deadline established by the Florida Supreme Court. On November 26, the Elections Canvassing Commission, on the basis of the amended returns then submitted by Volusia and Broward counties, certified Bush the winner of Florida's electoral votes with a margin of 537 votes. The Commission did not include in its certification the partial amended results from Palm Beach County received before the deadline, nor the remainder of the results received after the deadline. On November 27, Vice President Gore filed suit in state court contesting this certification on the basis that certain illegal votes were included in the certification while certain legal votes were improperly excluded. The case was assigned to Judge N. Sanders.

76. Id.
77. Dionne & Kristol, supra note 2, at xii. The challenges to the overseas ballots as a result of a directive from Democratic Party officials undercut their stated goal which was to "count all the votes." Id. at 244, 333. The failure of the Gore campaign team, and Vice-President Gore in particular, to publicly repudiate such efforts (of which they and he were well aware) was not a high point in their post-election litigation strategy.
78. Id. at xiii.
79. Gore v. Harris, 772 So.2d 1243, 1247 (Fla. 2000).
80. Dionne & Kristol, supra note 2, at 54.
81. Id.
Sauls.

1. The Election Contest in Circuit Court

After certification of election results, any unsuccessful candidate or any qualified voter may contest the certification in state circuit court.82 One of the grounds for an election contest is the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."83 This ground was essentially the same as the ground for the protest of the election—i.e., that the manual recount found additional ballots where the voter's intent could be "clearly discerned" and some of these additional votes had not been included in the certified results. One of the consequences of the protest litigation had been to extend the time for certification and thus to delay the election contest. The delay was significant because the December 12 deadline for certification of the electors left very little time to litigate the election contest.84

In the contest litigation, Gore sought to compel the Miami-Dade Canvassing Board to include the partial manual recount totals in its amended returns as well as to continue with the remaining manual recounts. This was a challenge of the Board's decision to stop the manual recount because it believed that it could not comply with the Florida Supreme Court's extended November 26 deadline. Gore also sought to compel the Palm Beach Canvassing Board to include in its amended certification additional votes counted before the November 26 deadline and votes counted after the November 26 deadline.85 The issues here were whether partial recount totals could be submitted and whether recount totals submitted after the extended deadline could be counted.

After two days of hearing evidence and oral argument, Judge Sauls issued his ruling on December 4, just prior to the Supreme Court's vacating of the Florida Supreme Court decision on the same day. The judge rejected the plaintiff's arguments, holding that in order to contest an

84. Professor Alan Dershowitz assessed the dilemma facing Gore as follows:

Time was of the essence because several deadlines loomed on the horizon. The first was the Florida statutory deadline for certification of the official vote. This deadline—seven days after the election—carried with it both legal and political consequences, which seemed to point in opposite directions for Gore. Legally, certification marks the end of the period in which a candidate may protest an election and the beginning of the period in which the candidate may contest it. If Gore was behind at the time of certification, he would benefit from a longer contest period, which would suggest that he should accept certification as soon as possible and then move to contest. Politically, however, it was important for Gore to delay official certification until he had a chance to pull ahead by having votes handcounted.

DERSHOWITZ, supra note 6, at 29.
85. The Palm Beach Canvassing Board had worked very hard, but had taken off Thanksgiving Day, believing there would be sufficient time to finish. This miscalculation called into question both what they had accomplished by the deadline as well as what was accomplished after the deadline. See Steven Thomma, Peter Wallsten & Ron Hutcheson, Florida Certifies Bush; Gore to Contest Result; Partial Tally Rejected as Palm Beach County Misses Deadline, CHARLOTTE OBSERVER, NOV. 27, 2000, at 1A.
election, a challenger must show that but for irregularity or inaccuracies, "the result of the election would have been different." There was a Catch-22 problem here for Gore in that he needed the results of the manual recount to show that legal votes had been rejected (by the vote tabulation machines), but the order for a manual recount was a remedy available only after a showing that one of the grounds for the contest had been established. Judge Sauls believed the basic call on the manual recounts was entrusted to the discretion of the respective canvassing boards and that no abuse of discretion had been shown. With respect to the Palm Beach Canvassing Board, he found that there was no authority under Florida law for submission of partial returns nor for a further extension of the deadline already extended by the Florida Supreme Court. This decision was immediately appealed by the plaintiffs and the Florida Supreme Court agreed to hear the appeal on an expedited basis.

2. The Decision by the Florida Supreme Court

It is this case—the appeal from the contest decision of Judge Sauls and not the prior remanded case regarding the election protest—which ultimately led to the decision in Bush v. Gore, which is the principal subject of this Article. What this means is that the Florida Supreme Court did not have to address the specific concerns of the remand (because this was a different case), but it had to be mindful of the concerns expressed by the United States Supreme Court. In other words, it had to write an opinion that was grounded on Florida statutes, rather than the Florida Constitution.

The Florida Supreme Court issued its decision on December 8, 2000. While not responding directly to the United States Supreme Court's vacating of its prior decision (understandable because this was a different case), the court nonetheless stated: "The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today." The court also noted the safe-harbor provision in order to indicate to all, including the United States Supreme Court, its awareness of the federal statute. Finally, to underscore its asserted compliance with the higher Court's concerns, the court stated: "This case today is controlled by the language set forth by the Legislature in section 102.168, Florida

86. Dionne & Kristol, supra note 2, at 55.
87. Id.
88. Id.
89. Gore v. Harris, 772 So.2d 1243, 1247 (Fla. 2000).
90. The court did issue an opinion on December 11, 2000, addressing the remand of the protest case which essentially reaffirmed its prior holding. See Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1273 (Fla. 2000).
91. Gore, 772 So.2d at 1248.
92. Id.
The court dealt with the first of three procedural issues raised by Gore—whether the trial court’s review of county canvassing board actions in an election contest proceeding was governed by the “abuse of discretion” standard. The court distinguished the protest proceeding which is initially filed by the county board and reviewed by the circuit court from the election contest, in which the proceeding is filed initially with the circuit court. The local board’s actions may be viewed as “evidence,” but the review is “de novo,” not deferential. As such, the court held that it was error for the circuit court to relinquish “an improper degree of its own authority to the Boards.”

The next question involved Gore’s request for a manual review of the Miami-Dade County “undervote,” which consisted of approximately 9,000 ballots in which the tabulating machines had not detected a vote for any of the presidential candidates. The trial court had held that in the absence of evidence that the statewide result would have been different, there was no basis for a remedy regarding the Miami-Dade undervotes. The court interpreted this as tantamount to a requirement of a statewide manual recount of all ballots. The court held that the review was limited to the “undervotes,” but agreed that undervotes in all counties should be reviewed. “This election should be determined by a careful examination of the votes of Florida’s citizens and not by strategies extraneous to the voting process.” In light of the thousands of “undervotes,” Gore had established to the satisfaction of the Florida Supreme Court that there were a sufficient number of potential “legal votes” as to place in doubt the certified result of the election.

The third procedural matter concerned the contestant’s burden of proof. The circuit court had held that the contestant must “establish by a preponderance of a reasonable probability that the results of the statewide election . . . would be different from the result which has been certified by the [state canvassing] commission.” The Florida Supreme Court clarified:

A person authorized to contest an election is required to demonstrate that there have been legal votes cast in the election that have not been counted (here characterized as “undervotes” or “no vote registered” ballots) and that available data shows that a number of legal votes would be recovered from the entire pool of the subject

93. Id. at 1255.
94. Id.
95. Id.
96. Dionne & Kristol, supra note 2, at 55.
97. Gore, 772 So.2d at 1252.
98. Id. at 1253.
99. Id. This is undoubtedly a reference to the fact that the Gore legal team chose to ask for manual recounts in four heavily Democratic counties only.
100. Id. at 1255.
101. Id.
ballots which, if cast for the unsuccessful candidate, would change or
place in doubt the result of the election.\textsuperscript{102}

If the margin of victory is less than the total number of “undervotes,” then
the threshold showing has been met.

The court then addressed the question left open in the procedural
discussion—whether the ballots for which the vote tabulating machines
had discerned no vote for President were in fact “legal votes.” The court
declared: “Section 101.5614(5), Florida Statutes (2000), provides that ‘no
vote shall be declared invalid or void if there is a clear indication of the
intent of the voter, as determined by the canvassing board.’” This
principle found support in Florida case law as well as case law from other
jurisdictions.\textsuperscript{103} The application of this principle, of course, had become
the primary focus of disagreement in the litigation.\textsuperscript{104} In any event, the
rejection of such votes by a machine, according to the court, would satisfy
one of the grounds for an election contest.\textsuperscript{105}

In Miami-Dade County, the Canvassing Board had begun a manual
recount of all ballots on November 19. The Florida Supreme Court’s order
issued on November 21 extended the deadline for amended returns until
November 26. The board then limited its review to the 10,750
“undervotes.” It examined approximately 1,750 ballots before suspending
its efforts, believing that the November 26 deadline could not be met.\textsuperscript{106}
The preliminary results from this review had netted Gore a net gain of 168
votes. If this rate held up, there would be more than enough additional
votes for Gore in Miami-Dade County alone.\textsuperscript{107} The circuit court found

\textsuperscript{102} Id. at 1256.

\textsuperscript{103} Id. at 1256-57.

\textsuperscript{104} It had also become the primary political theme of the Gore camp—“Count all the
votes.” The sincerity of this theme was severely tainted by the fact, acknowledged by Gore
supporters, that their interest was actually to count Gore votes. See, e.g., DERSHOWITZ, supra
note 6, at 29. The strategy of requesting a recount only in heavily Democratic counties was
strong evidence that they were not interested in counting \textit{all} the votes.

Other examples of actions running counter to this theme were the attempts to minimize or
disqualify absentee ballots believed to be favoring Bush. First, there was the challenge to
military absentee ballots, largely on the ground that the postmark was lacking (through no fault
of the voter) on certain ballots. See, e.g., Associated Press, \textit{Florida Tosses 1,000 Ballots; Bush
Slightly Adding to His Narrow Margin}, AKRON BEACON JOURNAL, Nov. 18, 2000, at A3; Steven
Thomma, \textit{Gore and Bush Don’t Match the Facts on Key Arguments}, LEXINGTON
HERALD-LEADER, Nov. 29, 2000, at A14. For a reporter’s account of the effort to challenge
ballots on what could only be described as “hyper-technical” grounds, see SAMMON, supra
note 14, at 137-56. Second, there were the lawsuits filed by Democrats to invalidate thousands of
absentee ballots because the request for the ballots, not the ballots themselves, were not made in
strict compliance with the absentee ballot laws. See Jacobs v. Seminole County Canvassing Bd.,
773 So.2d 519 (Fla. 2000); Taylor v. Martin County Canvassing Bd., 2000 WL 1793409 (Fla. Cir.
Ct.). For a reporter’s account of these challenges, see MIAMI HERALD REPORT, supra
note 12, at 155-66. Again, these were attempts to invalidate votes where the clear indication of voter
intent could not be denied. In fairness, it should be noted that the Bush attacks on these
challenges sounded a lot like the Gore rhetoric regarding the recounts, \textit{i.e.}, don’t allow
hyper-technical requirements to thwart the recognition of clear voter intent. In any event, the
failure of Vice-President Gore to publicly repudiate these efforts to invalidate ballots was not an
encouraging indication of his qualities of leadership.

\textsuperscript{105} Gore, 772 So.2d at 1257.

\textsuperscript{106} Id. at 1258.

\textsuperscript{107} That this proved not to be so is a good example of why partial returns from a county are
that the board did not abuse its discretion in deciding to stop the manual review. The Florida Supreme Court held that, regardless of the court-imposed deadline, the Board should have completed the manual recount. Accordingly, the court remanded the case to the circuit court to “tabulate by hand the approximate 9000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed . . . .” “In tabulating the ballots and in making a determination of what is a ‘legal’ vote, the standards (sic) to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a ‘legal’ vote if there is ‘clear indication of the intent of the voter.’” In addition, the circuit court had jurisdiction to order other canvassing boards “in all counties that have not conducted a manual recount or tabulation in this election to do so forthwith . . . .” This, of course, would multiply the logistical difficulties that had been encountered with the manual recounts in the selected counties.

With respect to the partially completed recount totals from Miami-Dade County and the split returns from Palm Beach County, the Florida Supreme Court stated that it never intended for the deadline “to prohibit legal votes identified after that date through ongoing manual recounts to be excluded [from the official results] . . . .” The court therefore ordered that the “legal votes” which had been identified should be added to the certified vote totals. What this suggested for the manual recount of the other counties is that whatever “legal votes” had been identified by the “deadline” would be added to the certified totals.

Looking at the opinion, it is fair to say that the court made a serious attempt to base the decision on Florida statutes. In light of the criticism from “above” for reliance on the state constitution rather than legislative provisions, the court’s shift to the statutes was less than convincing, but at least placed the decision on firmer ground. The interpretation of what is a “legal” vote was authoritative, although, under the circumstances, question-begging. The interpretation of the election contest provision was also authoritative, even if questionable as a matter of statutory construction. Likewise, the procedural rulings were within acceptable interpretative boundaries. As such, the decision appeared on its face to be insulated from review by the United States Supreme Court. Before turning to that review, however, it is necessary to consider the criticism of

 unreliable, particularly in a county with distinctly diverse areas. According to the Miami Herald review, Gore would have netted no more than 49 votes if the recount had been completed. MIAMI HERALD REPORT, supra note 12, at 178.

108. Gore, 772 So.2d at 1259.
109. Id. at 1262.
110. Id. (citing FLA. STAT. § 101.5614(5) (1994)).
111. Id.
112. The Palm Beach returns included the amended returns from those ballots reviewed before the November 26 deadline and the additional returns from the remaining ballots reviewed after the deadline.
113. Gore, 772 So.2d at 1260.
114. Id.
the decision from within the court.

Chief Justice Wells wrote a blistering dissent in which he stated at the outset:

My succinct conclusion is that the majority’s decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns this case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown.115

So, even if the interpretation of Florida law is “authoritative,” the question remains whether the Florida Supreme Court usurped the province of the Florida Legislature and authored a post-election change in the election laws. Further, there is the question of whether the “interpretation” by the court has left a process so ridden with ambiguity as to raise federal constitutional issues.

Chief Justice Wells noted that there was no common right to contest an election and thus “any right to contest an election must be construed to grant only those rights that are explicitly set forth by the Legislature.”116 He also read the prior Florida decisions as requiring judicial deference toward election officials and a heightened burden of proof for a challenger.117 The reason for this is that elections are primarily the business of the other two branches of government. Lowering the threshold for a court’s involvement in elections raised serious separation of powers issues.118 Thus, for Chief Justice Wells, judicial restraint in this area was a necessity.119

The Chief Justice then turned to the question of whether the plaintiffs were entitled to a manual recount under the election contest statute. The only express provision for a manual recount is in the election protest statute.120 Section 102.168(8) permits the circuit court in an election contest to “fashion such orders as he or she deems necessary to ensure that the allegations upon which the complaint is brought are investigated, examined, or checked.”121 This was not a general grant of authority, however, for the circuit court. In Broward County Canvassing Board v. Hogan,122 the Florida Court of Appeals had reversed a circuit court’s order for a manual recount after the local canvassing board had declined, stating:

Although section 102.168 grants the right of contest, it does not

115. Id. at 1263 (Wells, C.J., dissenting).
116. Id.
117. Id. at 1263-64.
118. Id. at 1264.
119. Id.
121. Fla. Stat. § 102.168(8).
change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.  

Thus, according to the Chief Justice, the decision to conduct a manual recount is within the discretion of the board, even in connection with an election contest.  

Chief Justice Wells argued that the majority had confused the grounds for an election contest with the remedy available once a successful contest had been established.  

"Plaintiffs asked the trial judge to grant the very remedy—a recount of the undervotes—they prayed for without first establishing that remedy was warranted."  

Moreover, by abandoning the established recount procedures under the protest statute, the majority had in essence ordered a manual recount without addressing any of the procedural logistics, such as who recounts, what is to be recounted, and how the ballots will be evaluated.

The majority's lodestar principle that "no vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board" was also criticized. The proposition came from a statutory provision dealing with damaged or defective ballots. In the absence of any evidence that the ballots in question were damaged or defective, this proposition was possibly taken out of context. In any event, the proposition begs the question and thereby fails to provide a meaningful standard:

There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Chief Justice Wells also predicted that "the majority's decision cannot withstand scrutiny which will certainly immediately follow under the United States Constitution."  

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123. Id. at 510.
124. Gore, 772 So.2d at 1265 (Wells, C.J., dissenting).
125. Id. at 1265-66.
126. Id. at 1266.
127. Id.
128. Id. at 1267.
129. Id. In light of the charges of partisanship leveled at certain members of the United States Supreme Court, it should be noted that Chief Justice Wells was a registered Democrat.
Justice Harding, together with Justice Shaw, also dissented. Justice Harding focused on the language of the election contest provision. First, he noted that the statute dealt with an election contest "and, as such, it is not a local contest seeking to define the correct winner of the popular vote in any individual county." By its very nature, the election contest sought to determine whether the Secretary of State certified the correct winner in the statewide election. Only the "unsuccessful candidate" may contest an election. If the contest provision may be utilized selectively, then Gore was not the "unsuccessful candidate" in the counties he chose. Justice Harding read the statute as applying to a contest of the statewide results in statewide elections, not to a contest of county results in a statewide election. As a consequence, the burden on the party contesting the election results is not to show that the potential number of uncounted "legal votes" in selected counties could change the outcome, but rather to show that the outcome of the statewide election could be changed by the relief sought:

Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the "no-vote" in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient. It would be improper to permit Appellants to carry their burden in a statewide election by merely demonstrating that there were a sufficient number of no-votes that could have changed the returns in isolated counties. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether a sufficient number of uncounted legal votes could be recovered from the statewide "no-votes" to change the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the subset of counties most favorable to that candidate.

In short, the election contest statute, when applied to a statewide election, does not provide for a recounting in selected counties. Justice Harding's reading of the election contest provision is far more persuasive than the majority's interpretation. The force of his argument is also probably reflected in the majority's order to expand the recount of the undervotes to all counties statewide when such a remedy had not even been requested by Gore.

Again, notwithstanding these vigorous dissents, the Florida Supreme Court had the putative last word on the meaning of the Florida election laws. This "last word," however, was shaky because it was very, very close
to the line between interpretation and revision. So, the question remained:
what impact, if any, did federal law and the United States Constitution
have on the implementation of Florida election laws in a federal election?
The question would be answered in some form because Bush immediately
made an application for a stay of the Florida decision to the United States
Supreme Court.

II. THE UNITED STATES SUPREME COURT DECIDES

There was not much time to contemplate this question as the United
States Supreme Court acted, with astonishing speed, on the next day
(December 9, 2000) to stay implementation of the Florida Supreme
Court's decision and to hear oral argument on December 11.\textsuperscript{134} The Court
was not unanimous in this procedural order and it is worth examining the
respective opinions regarding the stay.

A. THE STAY OF THE FLORIDA DECISION

The order of the Court granted Bush's application for a stay of the
Florida decision and treated the application as a petition for certiorari,
which was thereupon granted.\textsuperscript{135} There were two opinions discussing the
order—a concurring opinion by Justice Scalia and a dissenting opinion by
Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined.
Justice Scalia noted 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."\textsuperscript{136}

Justice Stevens dissented from the Court's action, arguing that the
majority's decision to stop the counting of the votes was a departure from
"three venerable rules of judicial restraint that have guided the Court
throughout its history."

On questions of state law, we have consistently respected the
opinions of the highest courts of the States. On questions whose
resolution is committed at least in large measure to another branch
of the Federal Government, we have construed our own jurisdiction
narrowly and exercised it cautiously. On federal constitutional
questions that were not fairly presented to the court whose judgment
is being reviewed, we have prudently declined to express an opinion.
The majority has acted unwisely.\textsuperscript{137}

Justice Stevens made the traditional argument that "a stay should not
be granted unless an applicant makes a substantial showing of a likelihood
of irreparable harm. . . . Counting every vote cannot constitute irreparable
harm."\textsuperscript{138} In fact, Justice Stevens argued that there was a danger that the

\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} (Stevens, J., dissenting).
\textsuperscript{138} \textit{Id.}
stay would result in irreparable harm to Gore if the delay in counting amounted to a decision on the merits.\textsuperscript{139} Justice Scalia responded in his concurrence that the issue was not "whether counting every legally cast vote could cause irreparable harm," but what constituted a legally cast vote, "under a reasonable interpretation of Florida law."\textsuperscript{140} This is problematic because the Florida Supreme Court's ruling of what constitutes a "legal" vote would ordinarily be conclusive. But there still is the federal overview, and thus preservation of the status quo (the circuit court's decision to deny relief to Gore) until this review can be accomplished is not unreasonable. According to Justice Scalia: "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.\textsuperscript{141}

B. THE OPINION OF THE COURT

The Supreme Court heard oral argument on December 11, 2000, and issued its decision the next day. The exchange between the Justices regarding the stay had suggested to outside observers that a majority of the Court was leaning towards Bush on the merits. Indeed, the ultimate outcome corresponded, for the most part, with the split on the stay order. The Court held that "standardless manual recounts" constituted a violation of the Equal Protection Clause.\textsuperscript{142} The decision was per curiam (as were the other three principal decisions discussed in this Article),\textsuperscript{143} with a concurring opinion by Chief Justice Rehnquist and dissenting opinions from each of the four dissenting Justices.

The Bush petition presented the Court with the question of whether the Florida Supreme Court had established new standards for resolving presidential election contests and whether "the use of standardless manual recounts violates the Equal Protection and Due Process Clauses."\textsuperscript{144} The opinion of the Court concluded that there was a violation of the Equal Protection Clause.\textsuperscript{145}

Although there is no federal constitutional right of the citizen to vote for President, the right to vote, once given, is protected against arbitrary and disparate treatment by the state.\textsuperscript{146} For purposes of resolving the

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{143} There was a suggestion by one commentator, anxious to find fault at every turn, that the per curiam decision of the Court signified a Court "on the run and in a guilty state of mind . . . ." Bugliosi, supra note 7, at 53. Actually, the use of the per curiam opinion was more reminiscent of another important decision made under the constraints of an accelerated briefing, argument, and decision schedule—New York Times Co. v. United States, 403 U.S. 713 (1971) (The Pentagon Papers case).
\textsuperscript{144} Bush v. Gore I, 531 U.S. at 103.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 104.
equal protection challenge, the Court stated that it was not necessary to decide whether the Florida Supreme Court's definition of what constituted a "legal" vote and whether its mandate of recount procedures to implement that definition was authoritative. The Court accepted the Florida court's definition as unobjectionable in and of itself. However, "[t]he 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 lack of rules "has led to unequal evaluation of ballots in various respects." The main problem, of course, was the evaluation of the "dimpled chads." Testimony in the record showed that the standards varied not only from county to county, but also within a single county. Palm Beach County, for example, changed its standard of evaluation during the recount process several times:

[The canvassing board] 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.

The Florida court ratified the unequal treatment by including the recount totals from counties using different standards in the certified total. The Court also criticized the Florida court's inclusion of partial returns in the certified totals. It noted that the Florida court's order did not expressly require that recount figures in the final certification be complete and, in fact, could be read as permitting inclusion of partial county returns. The inclusion of some "legal" votes, but not others within the same county, is indeed an equal protection problem, unless one says that a particular ballot does not become a "legal vote" until its intent is "discerned" by the canvassing board.

147. Id. at 105.
148. Id. at 106.
149. Id.
150. Id.
151. Id. at 106-07. For a reporter's account of the changing standards in Palm Beach County, see SAMMON, supra note 14, at 99-117.
153. Id. at 108. The inclusion of the partial Miami-Dade numbers by express order of the Florida Supreme Court supported this reading. The use of partial county returns, particularly in a politically diverse county, is problematic. See supra note 106. In the context of a rapidly approaching deadline the "count whatever legal votes are found" approach would inevitably favor the counties that started earlier. In this case, this would favor the heavily Democratic counties.
154. One may be reminded of the line by baseball umpire Bill Klem: "It ain't nothin' till I call it." B. ABEL & M. VALENTI, SPORTS QUOTES: THE INSIDERS' VIEW OF THE SPORTS WORLD 201 (1983). My indispensable source for this quote is my esteemed colleague John F. Hagemann, Professor of Law and Law Librarian at the McKusick Law Library, University of South Dakota School of Law.
The Court relied on its one person, one vote jurisprudence for the equal protection framework. In *Gray v. Sanders*, the Court had found an equal protection violation when the State "accorded arbitrary and disparate treatment to voters in different counties." Similarly, in *Moore v. Ogilvie*, the Court invalidated a county-based procedure that had the effect of diluting the vote in larger counties in connection with the presidential nominating process. The basic proposition is that "one group can[not] be granted greater voting strength than another..." This, together with the general prohibition against arbitrary and disparate treatment, is the essential ground of the Court's equal protection assessment.

The Court also cited the actual recount procedures as another equal protection concern:

[The Florida court's] order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams 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 Court emphasized that the issue was not whether there could be local variation in the implementation of the election laws. Rather, it was whether the implementation of the laws had sufficient constitutional safeguards:

[W]e 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.

The lack of rules was probably not an oversight by the Florida court. In the ordinary case, it would have fleshed out the basic standard with a set of rules, like the United States Supreme Court itself has provided in the abortion cases, for example. However, the presence of the federal constitutional and statutory provisions circumscribed the Florida court's options. It could not risk giving more definition to the "clear indication of the intent of the voter" standard without running into the claim that it had usurped the province of the state legislature and that it had changed the law after the election.

In light of these constitutional problems, the Court defended its
issuance of the stay order to halt the counting:

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.\footnote{162}{Bush v. Gore 1, 531 U.S. at 109.}

That is, it made sense to halt the recount if it was being conducted in an unconstitutional manner.

The Court concluded that the problems could not be fixed in the time remaining. As it spoke on December 11, 2000, it was well aware of an important deadline looming on December 12—certification of the vote would be unchallenged in the electoral college (the so-called "safe harbor") if the selection process was completed six days prior to the meeting of the electoral college on December 18.\footnote{163}{Id. See also 3 U.S.C. § 5 (1948).}

The Florida Supreme Court had represented that its interpretation of the election laws was consistent with the safe harbor provision and the Court took that as an indication of the intent to comply with the deadline.\footnote{164}{Bush v. Gore 1, 531 U.S. at 110. David Boies, counsel for Gore, had also acknowledged in oral argument before the Florida Supreme Court that the December 12 deadline had to be taken seriously. See DERSHOWITZ, supra note 6, at 38.}

Compliance with this deadline in a constitutional manner was not possible at that point:

[December 12] 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.\footnote{165}{Id. at 134 (Souter, J., dissenting); id. at 145-46 (Breyer, J., dissenting).}

In addition to the five Justices who signed on to this resolution of the case, there were two other Justices who agreed that the recount procedures were unconstitutional, but who disagreed with the majority's conclusion that they could not be fixed in time.\footnote{166}{Id. at 110.}

Thus, as to the equal protection deficiencies of the Florida recount mandate, the split of the Court was 7 to 2.

C. THE CONCURRING OPINION

There was a separate concurring opinion by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, which accepted the Article II legislative supremacy argument as well as the 3 U.S.C. § 5 argument. They, of course, had joined the per curiam opinion, but Rehnquist wrote separately to express additional grounds that required reversal of the
Florida court’s decision.\textsuperscript{167}

Chief Justice Rehnquist’s opinion emphasized the uniqueness of the presidential election.\textsuperscript{168} He acknowledged that the Court ordinarily was compelled by principles of federalism “to defer to the decisions of state courts on issues of state law.”\textsuperscript{169} But here, the Constitution has conferred a power on a particular branch of state government. 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.\textsuperscript{170} The text was said to be, in effect, a reversal of the normal rule that it is the province of the judiciary to say what the law is. Strengthening this conclusion was the impact of the “safe-harbor” provision which required that the determination be made “under laws enacted prior to election day.”\textsuperscript{171} The interpretation of the statutes by the Florida judiciary was thus not necessarily authoritative on the election law in Florida regarding the selection of the President. In this specific instance, Rehnquist argued that it was the duty of the Court to determine whether the Florida court’s actions had infringed upon the Florida Legislature’s authority conferred in Article II.\textsuperscript{172}

After outlining the statutory provisions for election protests and contests, Rehnquist observed that the initial extension of the statutory certification deadline by the Florida court lengthened the protest period and, necessarily, shortened the contest period.\textsuperscript{173} The implication was 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.” The court’s latest decision, however, made certification virtually meaningless because it made the circuit court’s review in the election contest essentially de novo.\textsuperscript{174} The election code “clearly vests discretion whether to recount in the [canvassing] boards, and sets strict deadlines subject to the Secretary’s rejection of late tallies . . . .”\textsuperscript{175} The acceptance of late vote tallies regardless of deadlines, even the November 26 deadline set by the Florida court, essentially eliminated the deadline and the secretary’s discretion to accept or reject such tallies. “[I]n doing so, [the Florida court] departs from the provisions enacted by the Florida Legislature.”\textsuperscript{176}

Going to the heart of the Florida court’s decision, Rehnquist concluded that “the court’s interpretation of ‘legal vote,’ and hence its decision to order a contest-period recount, plainly departed from the

\begin{footnotes}
\footnotetext[167]{\textsuperscript{167} Id. at 111 (Rehnquist, C.J., concurring).}
\footnotetext[168]{\textsuperscript{168} Id. at 112.}
\footnotetext[169]{\textsuperscript{169} Id.}
\footnotetext[170]{\textsuperscript{170} Id. (emphasis added by the Court).}
\footnotetext[171]{\textsuperscript{171} 3 U.S.C. § 5.}
\footnotetext[172]{\textsuperscript{172} \textit{Bush v. Gore I}, 531 U.S. at 114.}
\footnotetext[173]{\textsuperscript{173} Id. at 117-18.}
\footnotetext[174]{\textsuperscript{174} Id. at 118.}
\footnotetext[175]{\textsuperscript{175} Id.}
\footnotetext[176]{\textsuperscript{176} Id.}
\end{footnotes}
legislative scheme."

The ballots that were the subject of the recount order were "improperly marked" and contrary to the express instructions given to each voter. Thus, the failure to count these ballots was not an "error in the vote tabulation":

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.

Under the Florida court's opinion, "legal" votes are predictably not tabulated "so that in close elections manual recounts are regularly required." Rehnquist then added his assessment of the court's interpretation: "This is of course absurd." He also characterized it as a "peculiar" interpretation and contrasted it with the "reasonable interpretation" of the statutes made by the Secretary of State, who was "authorized by law to issue binding interpretations of the election code." The court's interpretation of "legal vote" was flawed because, as pointed out by Chief Justice Wells in his dissent, the main statutory support cited was "entirely irrelevant." The Attorney General had confirmed in oral argument that "undervotes" had never before been the basis for a manual recount. "For the court to step away from this established practice... was to depart from the legislative scheme."

Finally, Rehnquist chided the Florida court for ordering a remedy whose logistical and legal necessities would "jeopardize" the legislative desire to come within the "safe harbor" provision of 3 U.S.C. § 5. To conduct a statewide recount of the undervotes and to allow time for judicial review would almost certainly take the process outside of the safe harbor. This was also contrary to the legislative intent previously identified by the Florida court.

Although this concurring opinion was subjected to derision by some commentators, it is a serious attempt to deal with the issues raised by the Florida court's actions. The shift in grounds from the protest decision, with its reliance upon the Florida Constitution, to the contest decision, with its "discovery" that the answers had been in the statutes all along was suspect. In light of the forceful and persuasive dissents from within the

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177. Id.
178. Id. at 119 (citation omitted).
179. Id.
180. Id.
183. Id.
184. Id.
185. Id. at 120-21.
186. Id. at 122.
187. See, e.g., BUGLIOSI, supra note 7, at 151-52.
188. As Judge Posner pointed out:
Florida court, it is not unreasonable to conclude that a majority of the Florida Supreme Court had re-written the Florida election laws. The importance of the December 12 deadline had been acknowledged in the Florida court's statement that the Secretary of State could ignore late vote returns if the delay would "result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5." Even if one disagrees with the conclusions of the concurring opinion, as is common in cases involving constitutional interpretation, it is well within the range of modern constitutional analysis (whatever that means).  

D. THE DISSenting OPINIONS  

The four dissenters were the same ones who dissented from the issuance of the order staying the Florida Supreme Court's decision regarding the recount. But there was division among the dissenters, in part because they all had concurred in the initial vacation and remand of the Florida Supreme Court's election protest decision. The problems of that decision were not entirely resolved in the lower court's election contest decision, at least for two of the dissenting Justices—Souter and Breyer. I will take the opinions in the order they appeared in the official reports—by seniority.  

1. Justice Stevens  

The Constitution assigns the responsibility for selecting the presidential electors to the States. When questions arise concerning state law, "it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers." The legislature's decision to use a single code for all elections shows that it intended the state supreme court, as it historically had done in election disputes, to resolve any questions. Thus, the exercise of appellate jurisdiction by the Florida Supreme Court was within the grant of authority in Article II.  

Justice Stevens argued that the failure to specify in greater detail the precise manner in which the "intent of the voter" is to be determined is not a problem. "[T]here 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." To the extent that there are differing standards, the problem
will be "alleviated—if not eliminated—by the fact that a single impartial
magistrate will ultimately adjudicate all objections arising from the recount
process."194

Even if the majority is right on the equal protection issue, its own
reasoning suggested that the appropriate disposition would have been to
remand "to allow more specific procedures for implementing the
legislature's uniform general standard to be established."195 Stevens
contended that, in the name of finality, the majority disenfranchised an
unknown number of voters on the basis of deadlines set forth in 3 U.S.C. §
5.196 He pointed out that this section simply provides rules of decision for
Congress to follow when selecting among conflicting slates of electors.197
The Court itself had the power to order an appropriate remedy for an
equal protection violation "without depriving Florida voters of their right
to have their votes counted."198

Stevens believed that the basic problem was "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."199 He
concluded on this note:

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.200

2. Justice Souter

Clearly changing his mind with respect to the earlier decision—Bush
v. Palm Beach County Canvassing Board—Justice Souter stated that the
Court should not have taken that case or this case and should have allowed
Florida to follow the course indicated by the opinions of the Florida
Supreme Court.201 He believed this was essentially a political matter and

193. Id. at 125.
194. Id. at 126.
195. Id. at 127.
196. Id.
197. Id.
198. Id.
199. Id. at 128.
200. Id. at 128-29.
201. Id. at 129 (Souter, J., dissenting).
would have been worked out in Congress following the procedure provided in 3 U.S.C. § 5. In any event, Souter outlined three issues before the Court: (1) whether the Florida court's interpretation violated 3 U.S.C. § 5; (2) whether the court's interpretation of the statute impermissibly changed the law from what the state legislature had provided, in violation of Article II; and (3) whether the manner of interpreting the markings on disputed ballots violated the Equal Protection Clause.

As to the first issue, Souter believed the answer was easy. Section 5 of Title 3 does not require the state to do anything. It is a rule of procedure for Congress. The only “sanction” for failure to satisfy the conditions of section 5 is the loss of the safe harbor. Thus, it is not to be regarded as a rule to govern interpretation of the state contest provisions.

With respect to the Article II issue, Souter concluded that although other interpretations of the elections statutes were possible, “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 itself did not define a “legal vote.” The determination the legislature meant “a vote recorded on a ballot indicating what the voter intended” instead of “votes properly executed in accordance with the instructions provided” was a reasonable interpretation. The interpretation of “rejection” as a failure to count was “within the bounds of common sense, given the objective to give effect to a voter’s intent if that can be determined.” The phrase “‘votes sufficient to change or place in doubt’ the results of the election” suggests that possibility, not probability, is the appropriate standard for an election challenge. In any event, these interpretations did not “supplant” the law enacted by the legislature for Article II purposes.

Justice Souter found merit, however, in the equal protection argument. Although equal protection allows for variation in voting mechanisms, the problem here was of a “different order of disparity”: when determining a voter’s intent, differing rules were applied and continued 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).” Souter could see “no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights.” The state action appeared “wholly arbitrary.”

Where Justice Souter disagreed with the majority was with the remedy. For him, the decisive deadline was December 18—when the electoral votes were to be cast, not December 12—when the benefits of the safe harbor provisions would last be available. If so, it was not clear from

202. Id. at 130.
203. Id. at 131.
204. Id. at 131-32.
205. Id. at 132.
206. Id. at 134.
207. Id.
208. Id.
the record whether this deadline could be complied with in a constitutional manner. "To recount these 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."209

3. Justice Ginsburg

This opinion deals primarily with the arguments in Chief Justice Rehnquist’s concurring opinion. With respect to the equal protection issue, Ginsburg simply observed that it is an imperfect world and that the recount ordered by the Florida court would be no less fair or precise than the result already certified.210 She also joined Justice Stevens’s two paragraph discussion of the equal protection issue.211

The basic theme of this dissenting opinion was deference to the Florida court on state law issues, even when the Court disagrees with the interpretation. Justice Ginsburg reminded the Court of its many decisions where a “cautious approach” where federal courts address matters of state law was important to “building cooperative judicial federalism.”212 Acknowledging that there were rare instances where the Court had rejected a state supreme court’s interpretation of its own law, Ginsburg was particularly critical of the Chief Justice’s placing this case in the same company as those from “the Jim Crow South.”213 She also denied that Article II called for the kind of scrutiny undertaken by the Court.214

With respect to the Court’s disposition of the case, Justice Ginsburg agreed with the other dissenting Justices that the Court’s concern with the December 12 deadline was misplaced.215 She felt that the deadline problem was exacerbated by the Court’s own stay of the recounting and suggested that the Court’s reluctance to let the recount go forward rested on its judgment of the practicalities, not on the judgment of those much closer to the process.216 The main deadline, in her opinion, was January 6,

209. In light of his previous conclusion that the counting that had been done and that was continuing to be done was constitutionally flawed, this is an odd statement to the extent it implied criticism of the Court’s issuance of the stay. Until the problem is fixed through articulation of and then application of uniform standards, there is no point in continuing the count. In light of the determination by seven Justices that the equal protection clause was violated by the state, there was no harm in staying further counting until the problem was addressed and fixed.

211. Id. at 143.
212. Id. at 139 (citing Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974)). There is, of course, considerable irony here with this reversal of roles. The Justices who signed on to the concurring opinion and its disagreement with the “unreasonable” interpretation of the Florida supreme court usually favor arguments to strengthen the role of states and state courts in the federalism balance. See, e.g., Michael J. Klarman, Bush v. Gore: Through the Lens of Constitutional History, 89 CALIF. L. REV. 1721, 1734-35 (2001).
214. Id. at 141-42.
215. Id. at 143.
216. Id.
2001—when Congress would review the results of the electoral process.\textsuperscript{217} She also dismissed the Court’s concern over the lack of an “orderly judicial review of any disputed matters that might arise.”\textsuperscript{218} She praised the Florida officials and especially the Florida Supreme Court for their “good faith and diligence” in performing their duties.\textsuperscript{219} In an ending perhaps indicative of her feelings about the Court’s decision, she omitted the traditional “respectfully” in her final words: “I dissent.”\textsuperscript{220}

\textbf{4. Justice Breyer}

“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.”\textsuperscript{221} So began Justice Breyer. He did, however, find some merit in the equal protection argument and gave this measured assessment:

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.\textsuperscript{222}

“Basic principles of fairness”—a very simple approach to the equal protection problem, bringing to seven the number of Justices that found fault with the standardless recount.

Justice Breyer, however, disputed the majority’s disposition of the case. He believed that there was time to recount all undercounted votes in Florida, whether or not previously recounted, and to do so under a uniform standard to be established by the Florida Supreme Court.\textsuperscript{223} He

\begin{itemize}
\item \textsuperscript{217} \textit{Id.} at 144.
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.}
\item By contrast, the other dissenting Justices, in opinions equally impassioned, ended their writings with the words: “I respectfully dissent.” \textit{Id.} at 129, 135, and 143.
\item \textsuperscript{220} \textit{Id.} (Breyer, J., dissenting).
\item \textsuperscript{221} \textit{Id.} at 145-46.
\item \textsuperscript{222} \textit{Id.} at 146. The choice of which uniform standard would also impact the outcome given the closeness of the vote. The Miami Herald found in its review after the election that, ironically, Bush’s lead would have diminished as the standard tightened:

\begin{quote}
\textit{Bush almost certainly would have won the presidential election even if the U.S. Supreme Court had not halted the statewide recount of undervotes ordered by the Florida Supreme Court. But in one of the great ironies of the long and bitter 2000 election, Bush’s lead would have withered—and perhaps vanished altogether—if those ballots had been counted under the severely restrictive standard advocated by some Republicans.}
\end{quote}

\begin{quote}
\textit{MIAMI HERALD REPORT, supra note 12, at 167-68 (emphasis in original). The ultimate resolution of the uniform standard question was sent to the legislature. In its opinion issued on December 22, 2000, in connection with the remand, the Florida Supreme Court stated: “[U]pon reflection, we conclude that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.” Gore v. Harris, 773 So.2d 524, 526 (Fla. 2000).}
\end{quote}
conceded that it was too late to be accomplished by December 12, but that was not dispositive because December 18, the date the electors were to meet, was the crucial date. Whether this deadline could be met was a matter for the state courts to determine. By halting the recount, the Court ensured that “uncounted legal votes will not be counted under any standard . . . .”

The remainder of Justice Breyer’s opinion was directed at the concurring opinion. He argued that section 5 of Title 3 was a rule governing Congress’s determination in the event of conflicting slates of electors. As such, it did not have the force of law for the Court and he chided the concurring Justices for overreaching with the shift in language from the permissive “counsel against” in the first opinion to the mandatory “must ensure” in the second. Justice Breyer also disputed the concurring opinion’s contention that the Florida Supreme Court had “distorted” the Florida election laws in violation of the legislative supremacy directive of Article II. In each instance of disagreement with the Florida Supreme Court, there were alternate interpretations and the concurring Justice’s preferred interpretation amounted to “second-guess[ing].”

In sum, the dissenting Justices made a number of important and persuasive points, especially regarding the real deadline and whether constitutional compliance was possible. The abbreviated equal protection analysis by Stevens, joined by Ginsburg, was less compelling. Still, the opinions reflected honest disagreement in what proved to be uncharted territory for the Court.

III. THE AFTERMATH

The practical effect of the Court’s ruling was to end the recount process and leave in place the Secretary of State’s certification of Governor Bush as the winner of Florida’s electoral votes. With all the other electors determined by this point, it meant that Bush would become the next President of the United States.

The Miami Herald’s own reconstruction of the recount indicated that under most, but not all, scenarios, Bush would have won if the recount had gone forward. This, of course, was not enough to satisfy the critics. Alan Dershowitz, for example, stated:

Nor it is relevant to the point of this book that had the Supreme Court not stopped the hand count, Bush might well have won—according to some accounts, by even more of a margin than the

225. Id.
226. Id. at 147.
227. Id. at 148.
230. Id. at 149.
official count gave him. The Supreme Court did not know what the result of the hand count would be when it stopped it. A hijacking occurs when someone unlawfully seeks to divert a vehicle from its course. The fact that the vehicle ultimately ends up at its intended destination does not mitigate the hijacker’s culpability. There is evidence that the majority will not be welcomed in some quarters in legal academia. A group of 673 law professors published a statement denouncing the Court’s decision and the flow of legal commentary is just beginning.

IV. CONCLUSION

In light of the foregoing description of the various court actions, did the United States Supreme Court make “intelligible” legal arguments to support its decision? Probably the most concise explanation of the Court’s equal protection ruling comes from the dissenting opinion of Justice Souter. There was evidence in the record that “identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as ‘hanging’ or ‘dimpled’ chads) were counted differently.” Souter concluded that this appeared to be “wholly arbitrary.” If the response is that the differences are attributable to human judgment (and error) then it must be remembered that the standard being implemented is a “clear indication of the intent of the voter . . .,” It is somewhat like a coin toss, with evidence of one election board calling it tails and another board calling the same toss inconclusive. What is the state interest in treating the same indication of voter intent differently?

The criticism that the majority overturned the Florida court’s authoritative determination of what constitutes a “legal vote” is off the mark because the problem rested with the lack of standards to implement what was otherwise an unobjectionable definition. The lack of standards was almost certainly the product of a strategic decision by the Florida court. It was well aware of the higher Court’s scrutiny for creation of “new” law and had chosen to “finesse” the issue by remanding without instructions for dealing with the central issue of the litigation. Given the logistical headstart for the manual recount with the ballots from the heavily Democratic counties and the Court’s approval of including any

231. DERSHOWITZ, supra note 6, at 11-12.
235. Id.
236. Gore v. Harris, 772 So.2d 1243, 1256 (Fla. 2000) (quoting Fla. Stat. § 101.5614(6)).
237. Moreover, there was the possibility (probably substantial) that some of the calls would be politically motivated.
“legal” vote discovered at any point up to the deadline, the Florida court’s decision was extremely favorable to Gore’s chances, if not intentionally so.

The invective directed at the Supreme Court is sincere, but it is unprincipled to the extent that it denounces the judicial activism of the majority without expressing any concern whatsoever about the activism of the Florida court. The switch from the state constitution as the basis for the Florida court’s decision to the state statutes without any explanation of why the “interpretation” had not suggested itself initially was suspicious. Their “interpretation” bordered on revision and the dismantling of their reading of the statutes by Chief Justice Wells and Justice Harding deserves some acknowledgment by the Court critics. Instead, the critics leveled their displeasure over what they considered questionable interpretation at the Court alone. There was special censure of the Justices for utilizing an equal protection argument when they themselves had often been skeptical of equal protection claims, as if there was some kind of intellectual property rights that could attach to certain arguments. If so, the “infringement” by the majority was more than offset by the appropriation of the anti-judicial activism argument by those who have long championed judicial activism. The charge of partisanship could also be applied with equal force to the Florida court and yet there was not a hint of disapproval of the Florida court from the critics. What this suggests is that the underlying basis for the tirades was the result, and not the method.

The Supreme Court undoubtedly expended some of its “capital” in furtherance of what the majority believed was the right thing to do. Chief Justice Wells’s dissent predicted a constitutional crisis if the path directed by the Florida Supreme Court was pursued. The abrupt ending in the United States Supreme Court may well have averted that crisis. Whether this was prudent will be debated for a long time. In light of the heated rhetoric that greeted the Court’s decision, I believe that it is important to have a basic understanding of the law and the litigation so that debate will be informed and productive.

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238. See, e.g., DERSHOWITZ, supra note 6, at 142-45, 147-48; KENNEDY, supra note 3, at 336.
239. Gore, 772 So.2d at 1263.
240. POSNER, supra note 32, at 137-47.