# U.S. Elections

**GEORGE W. BUSH AND RICHARD CHENEY, PETITIONERS v. ALBERT GORE, JR., ET AL.**

**No. 00-949**

**SUPREME COURT OF THE UNITED STATES**

***531 U.S. 98; 121 S. Ct. 525; 148 L. Ed. 2d 388; 2000 U.S. LEXIS 8430; 69 U.S.L.W. 4029; 2000 Cal. Daily Op. Service 9879; 2000 Colo. J. C.A.R. 6606; 14 Fla. L. Weekly Fed. S 26***

**December 12, 2000, Decided**

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**PRIOR HISTORY:** ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The petition of appellant presidential candidate and others for writ of certiorari to the Florida Supreme Court was granted in a case ordering the manual recount of ballots cast in a presidential election in one county and the inclusion of votes identified for respondent presidential candidate in the certified vote total for two other counties.

**OVERVIEW:** The lower court had ordered a manual recount of votes cast in one county and had ordered that the votes for respondent presidential candidate identified in two other counties be included in the certified vote totals. The Court granted the writ of certiorari to determine whether the recount procedures adopted by the lower court were consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. In a per curiam opinion, the Court concluded that the lower court's decision violated the equal protection clause of U.S. Const. amend. XIV because the lower court failed to identify and require standards for accepting or rejecting contested ballots. Moreover, the decision to include a partial total from one county gave no assurance that the recounts included in the final certification were required to be complete. Thus, the recount procedures were inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. The Court reversed the judgment of the lower court and remanded for further proceedings.

**OUTCOME:** Judgment reversed and case remanded for further proceedings because recount procedures adopted by lower court were inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.

**COUNSEL:**

Theodore B. Olson argued the cause for petitioners.

Joseph P. Klock, Jr. argued the cause for respondents Katherine Harris, et al. in support of petitioners.

David Boies argued the cause for respondents Albert Gore, Jr., et al.

**JUDGES:** CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring. JUSTICE STEVENS, with whom JUSTICE GINSBURG AND JUSTICE BREYER join, dissenting.

**OPINION:** [*100] [**527] [***395] PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr.,

and Senator Joseph Lieberman, Democratic Candidates for President and Vice President. The Supreme Court noted that petitioner, Governor George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. *772 So. 2d, at 1243* (slip op., at 4, n. 6). The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered [***396] all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican Candidates for the Presidency and Vice Presidency, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari. *Post,* p. .

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush* v. *Palm Beach County Canvassing Bd., ante,* p. *(per curiam) (Bush I)*. On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner, Governor Bush, had received 2,909,135 votes, and respondent, Vice President Gore, had received 2,907,351 votes, a margin of [*101] 1,784 for [**528] Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent . . . of the votes cast," an automatic machine recount was conducted under § 102.141(4) of the election code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. § 102.166 (2000). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. § § 102.111, 102.112. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I, ante,* at - (slip. op., at 6-7). On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. *772 So. 2d 1243,* (slip op. at 30-31).

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. Fla. Stat. § 102.168 (2000). He sought relief pursuant to § 102.168(3)(c), which provides that "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. *Gore v. Harris, 779 So. 2d 270* [*102] *(2000)*. The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) [***397] with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). *779 So. 2d at 271* (slip. op., at 22-23). Noting the closeness of the election, the Court explained that "on this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id*. at (slip. op., at 35). A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter. '" *Id*. at (slip op., at 25). The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," Fla. Stat. § 102.168(8) (2000), the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes . . . to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *779 So. 2d at 270* (slip. op., at 38).

The Supreme Court also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, [**529] had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id.* at (slip. op., at 33-34). Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted [*103] past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the Court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Id*., at (slip op., at 34). The Supreme Court

therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

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

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. See Ho, More Than 2M Ballots Uncounted, [***398] AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only In A Very Close Election Do Mistakes And Mismarking Make A Difference, Omaha World-Herald (Nov. 15, 2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements. [*104]

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

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker, 146 U.S. 1, 35, 36 L. Ed. 869, 13 S. Ct. 3 (1892),* that [HN2] the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id. at 28-33.* History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id., at 35* ("There is no doubt of the right of the legislature to resume the power [**530] at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that [*105] of another. See, *e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966)* ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims, 377 U.S. 533, 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964).*

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme [***399] Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

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

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in

response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of [*106] the voter." *Gore v. Harris, 779 So. 2d at 270* (slip op., at 39). This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

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

The want of those rules here has led to unequal evaluation of ballots in various respects. See *Gore v. Harris, 779 So. 2d at 270* (slip op., at 51) (Wells, J., dissenting) ("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"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested [**531] ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached [***400] chads, switched to a rule that considered [*107] a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders, 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963).* The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie, 394 U.S. 814, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969),* where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *394 U.S. at 819.*

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, [*108] the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida [**532] [***401] Supreme Court's decision thus gives

no assurance that the recounts included in a final certification must be complete. Indeed, it is respondent's submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. See *779 So. 2d at 270, n. 21* (slip op., at 37, n. 21) (noting "practical difficulties" may control outcome of election, but certifying partial Miami-Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Bush I*, at respondents' own urging. The press of time does not diminish the constitutional concern. [HN6] A desire for speed is not a general excuse for ignoring equal protection guarantees.

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

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

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

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been [*110] addressed, although Chief Justice Wells called attention to the concern in his dissenting opinion. See *779 So. 2d at 270, n. 26* (slip op., at 45, n. 26).

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after [***402] opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, [**533] as required by Fla. Stat. § 101.015 (2000).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participate fully in the federal electoral process," as provided in *3 U.S.C. § 5. 779 So. 2d at 270* (slip op. at 27); see also *Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1273, 2000 WL 1725434,* *13 (Fla. 2000). [HN8] That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed. [*111]

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See post, at 6 (SOUTER, J., dissenting); *post*, at 2, 15 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of *3 U.S.C. § 5,* JUSTICE BREYER's proposed remedy -- remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2000).

* * *

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

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

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

**CONCUR BY:** REHNQUIST

**CONCUR:** [***403]

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

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision. [*112]

I

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs v. United States, 290 U.S. 534, 545, 78 L. Ed. 484, 54 S. Ct. 287 (1934),* we said:

"While presidential electors are not officers or agents of the federal government ( *In re Green, 134 U.S. 377, 379, 33 L. Ed. 951, 10 S. Ct. 586),* they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson v. Celebrezze, 460 U.S. 780, 794-795, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983)* (footnote omitted), we [**534] said: "In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "each State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, [*113] the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

* * *

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

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of [*114] State (Secretary), Fla. Stat. § 97.012(1) (2000), and to state circuit courts, § § 102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those [**535] bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law -- see, *e.g.*,

*Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)* -- there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

* * *

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take [*121] advantage of the safe harbor provided by *3 U.S.C. § 5. Bush* v. *Palm Beach County Canvassing Bd., ante,* at 6. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th -- four days before this deadline -- the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive -- perhaps delusive -- certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the election code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. § 102.168(8) (2000).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it [***409] must have meant relief that would have become final by the cut-off date of *3 U.S.C. § 5.* In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," *607 So. 2d at 509, n. 22* (slip op., at 38, n. 22), it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.g.*, *Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (1998)* (resolving contest of sheriff's race 16 months after the [*122] election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for [**539] the Presidential election simply do not permit even such a shortened process.

As the dissent noted:

"In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly 6 million voters who are able to correctly cast their ballots on election day." *707 So. 2d at 720* (slip op., at 55) (Wells, C. J., dissenting).

The other dissenters echoed this concern: "The majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.* at (slip op., at 67 (Harding, J., dissenting, Shaw, J. concurring).

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

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

**DISSENT BY:** STEVENS; SOUTER; GINSBURG; BREYER

**DISSENT:** [*123]

JUSTICE STEVENS, with whom JUSTICE GINSBURG AND JUSTICE BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may [***410] require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "each *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come -- as

creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker, 146 U.S. 1, 25, 36 L. Ed. 869, 13 S. Ct. 3 (1892),* that "what is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "the [State's] legislative power is the supreme authority except as limited by the constitution of the State." *Ibid.*; cf. *Smiley v. Holm, 285 U.S. 355, 367, 76 L. Ed. 795, 52 S. Ct. 397 (1932).* n1 The legislative [**540] power in Florida is subject to judicial review pursuant [*124] to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

* * *

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

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. § 101.5614(5) (Supp. 2001), is to be determined rises to the level of a constitutional violation. n2 We found such a violation [*125] when individual [***411] votes within the same State were weighted unequally, see, *e.g., Reynolds v. Sims, 377 U.S. 533, 568, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964),* but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, [**541] 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. n3

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[*126]

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated -- if not eliminated -- by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "the interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501, 75 L. Ed. 482, 51 S. Ct. 228 (1931)* (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ -- despite enormous differences in accuracy n4 [***412] -- might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

n4 The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. *Siegel v. LePore, No. 00-15981, 234 F.3d 1218, 2000 WL 1781946,* *31, *32, *43 (charts C and F) (CA11, Dec. 6, 2000). Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punch-card systems, and 2,353,811 votes were cast under optical-scan systems. *Ibid*.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, [*127] the appropriate course of action would be to remand to allow more specific procedures for

implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent -- and are therefore legal votes under state law -- but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante*, at 11. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra*, at 2. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, *22 J. Legis. 145, 166, n. 154 (1996)*. n5 Thus, nothing prevents the majority, [**542] even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante*, at 10.

* * *

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 2000 WL 1725434* (Fla., Nov. 21, 2000), did the Florida Supreme Court make any substantive [*128] change in Florida electoral law. n6 Its decisions [***413] were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do n7 -- it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume -- as I do -- that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

* * *

n7 "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison., 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).*

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, [*129] the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.