Yet Another Article on *Bush v. Gore*

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Many legal and lay commentators have hurled unusually harsh criticism at the U.S. Supreme Court decision in Bush v. Gore. *Typical detractors claim that a bare majority of five Justices decided the case based on their political preference, not precedent. This article examines this opinion to see if these charges are justified, and demonstrates that seven Justices (not five), concluded that the Florida Supreme Court acted unconstitutionally. Moreover, their conclusion was hardly surprising, given a long line of precedent applying the equal protection and due process guarantees to prevent states from manipulating voting results, diluting ballots based on geography, or counting them with no articulated standard or an ever-changing one. In addition, this article analyzes the additional ground for decision that three Justices embraced, and confirms that there is ample precedent empowering federal courts to reject state court rulings interpreting state law when those decisions are not reasonably anticipated from prior law and do not rest on an adequate and independent state ground.*

I. INTRODUCTION

What is the connection, if any, between *Bush v. Gore*[1]—the case that held that the Florida Supreme Court's rules for recounting presidential election ballots violated the Constitution—and the terrorist attacks of September 11, 2001? If you said "none," that would have been my choice as well. But that is not the way that Deborah Dosh of Flagstaff, Arizona sees things. In response to an article mourning the death of Barbara Olson, who was a passenger on the hijacked plane that the terrorists crashed into the Pentagon,[2] Ms. Dosh sent to the author, Ann Coulter, an email that said in part:

> I usually consider myself a good person, one who would never be happy at the demise of another human being, but, I have to say, that the first thing that came to mind *when I heard about Barbara Olson being on that [hijacked] plane* [that crashed into the Pentagon on September 11, 2001], was, *I hope Ted was with her*. Do you realize . . . [that] he is responsible for us having a dictator in the White House[?][3]

Ted Olson, who is now the Solicitor General, had argued *Bush v. Gore*[4] on behalf of the petitioner. Many of us might be surprised to learn that Mr. Olson's role as a lawyer[5] in that case would inspire such shocking email. Yet, this incident illustrates how negatively some people continue to feel about *Bush v. Gore* nearly a year after the decision.

Academics may think that they are above such hyperbole, but many of them share this odium for this decision and make no effort to sugarcoat their criticism. Thus, Professor Alan Dershowitz of Harvard Law School asserts:

> [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.[6]

While some law professors have defended the decision,[7] hundreds of others have accused the Justices of acting not as judges but as "political proponents for candidate Bush."[8] Over seven months after *Bush v. Gore*—a time when tempers had time to cool—a former Congressperson persuaded the Oregon Democratic Party to endorse an effort to impeach the five U.S. Supreme Court Justices who joined the per curiam opinion.[9]

It is no little thing to call an opinion "corrupt" and accuse its authors of cheating and violating their oath. And impeachment is no small matter. The denunciations from laypeople like Ms. Dosh, from many media commentators,[10] and from distinguished academics like Professor Dershowitz, are serious. Are they valid? Is it fair to say that a majority of the U.S. Supreme Court Justices cheated, ignored the law, and violated precedent in concluding that the Florida Supreme Court's ruling was unconstitutional? Is it correct, as detractors of this decision maintain, that only a bare five-person majority (the number who joined the per curiam opinion) concluded that the Florida Supreme Court recount order violated the Constitution?[11] Or, is even this assertion part of the hyperbole; in other words, did five or seven members of the U.S. Supreme Court conclude that the Florida recount procedures violated equal protection?

Three members of the Florida Supreme Court dissented from the ruling that the U.S. Supreme Court later reversed. Were these three state justices (none Republicans) acting as political puppets of George W. Bush, when they argued that their colleagues' ruling (1) substantially changed the law that had been in place before the election for deciding such disputes, and (2) created severe equal protection problems?[12] Or were they following existing precedent? These are the issues that we will be exploring.

There has been much written about this case, and I do not purport either to canvas the literature or write the definitive article on this decision. However, I will examine the opinion and demonstrate that this decision is not a surprise, given prior Supreme Court case law dealing with equal protection (the one person, one vote decisions), as well as decisions dealing with procedural due process.[13] People may certainly criticize the case—we live in a free country, after all—but, whatever one thinks of *Bush v. Gore*, there was no "cheating, and a violation of the judicial oath."[14] Instead, the seven Justices (that's right—seven, not five) followed the existing precedent.

A. *Undervotes and Overvotes*

First, a little nomenclature. People who vote sometimes do not follow instructions and do not complete the ballot correctly. In the various opinions that culminate in *Bush v. Gore*, issued on December 12, 2000, there was no claim that the voting machines were defective. The machines counted the punch card ballots as they were designed to do. However, some voters did not punch the ballot for any presidential candidate.

When there is no punch, that is called an "undervote." The voting machine reads this ballot as a blank, but, if the human eye rather than the voting machine examined the ballot, one might see an indentation, a pin prick, or a dimple near a candidate's name. The voter may have decided not to vote for any candidate for that office and therefore intentionally made no punch but still created an indentation accidentally while handling the ballot. Or, the voter may not have followed the instructions to punch through the ballot with the stylus that is attached in the voting booth. Or, the voter may have intended to vote for one candidate but did not follow the instructions and thus did not punch the card correctly but left an indentation. In addition, when ballots are handled during the manual count, indentations will occur, either by accident (people are handling the ballot and that affects them) or on purpose (someone with a corrupt motive can add an indentation by simply using one's fingernail).[15]

If the voter punches two holes for two different candidates for the same office, that double-punch is called an "overvote." The voter may have made a mistake. Or, the voter may intentionally cast an overvote, if he or she does not want to vote for anyone for that particular office and wants to make sure that the machine reads no vote for that office.[16] The Florida ballot, as is typical throughout the country, does not allow the voter to cast a ballot "for none of the above." So a voter can exercise that choice and vote for "none of the above" only by casting an intentional overvote or undervote.

The Florida Supreme Court, on December 8, 2000, decided that there should be a manual recount of all undervotes in all of Florida and partial recounts of both overvotes and undervotes in some counties, with no standards to judge when a ballot has a valid marking. The Florida Supreme Court had no problem with a partial recount that included whatever votes have been recounted, even though a partial recount would include a biased sample of votes.[17] The U.S. Supreme Court, on December 12, 2000, held that this recount violated equal protection and due process.[18] More about this later in this article.

B. *The Unofficial Recounts of 2001*

The claim by some academics and laypeople that the Supreme Court really chose the next president by stopping this asymmetrical recount is, in a sense moot, because various newspapers later collected the ballots and did their own manual recounts of the Florida undervote ballots (which is what the Florida court ordered) and concluded that President Bush still won a majority of the Florida vote; Bush also won using various other standards.[19]

We also know that these unofficial manual recounts took many months.[20] Justice Souter had speculated that the recount could have been completed by December 18, 2000![21] Had the recount been ordered by a court, that official recount would have taken even many months longer than the unofficial news media account, because, with an official manual recount, the losing party would have had a right to appeal to the intermediate appellate court and whoever lost that appeal would seek a further appeal to the Florida Supreme Court, and the losing party would then have a right to seek U.S. Supreme Court review.

Of course, what we know now is not what we knew at the time the U.S. Supreme Court decided *Bush v. Gore*. At the time, no one knew for certain if then-Governor Bush would win a new recount if the U.S. Supreme Court had not taken the case and if the Florida court had been able to implement a manual recount using different (and ever-changing) standards in different parts of the state to determine when to treat an undervote or an overvote as valid.[22] We only knew, at that point in time, that Vice President Gore had never been in the lead in the Florida balloting and in the recounts—either in the machine recount of the entire state, or in the court-ordered partial manual recounts of selected precincts. But, the margin of victory for Governor Bush was very small, as a percentage of votes cast, and Vice President Gore would gain or lose some votes depending on what standard one used in deciding which ballots to count.

Normally, we should know the rules for counting *before* we count.[23] That way we cannot be accused of making up rules just to reach a particular result. We call it heads or tails when the coin is in the air, not after it has hit the ground. The time to

decide whether to count overvotes, or undervotes, and to decide what should be the standards to determine when to treat an indentation on a ballot as a "vote" is before we begin the count. That is why the U.S. Supreme Court stopped the manual recount, until it could decide what the rules for manually counting ballots should be *before* there was a recount,[24] and if those rules could be implemented by December 12, the date that Vice President Gore and the Florida Supreme Court had earlier regarded as the ending time.[25] For a court to authorize a manual count of the ballots before it creates the uniform standards that will govern the recount would have poisoned the political air, for it would have allowed the winner of that flawed process to claim a victory even if the court later decides that the hand count was faulty or corrupt.

But, before we consider these issues in more detail, let us summarize what the Florida Supreme Court did and what it ordered to be counted. Then, we will determine how many Justices concluded that the Florida Supreme Court promulgated an unconstitutional recount order. Yes, even the number of Justices who took that position is a matter of controversy in the literature.[26]

The road to the final Supreme Court decision was not a straight one but a meandering one filled with many detours and dead-ends along the way. First, let us take a bird's eye view of that road and then look more specifically at what the Florida Supreme Court finally ordered in its four to three decision of December 8, 2000.[27]

II. THE LONG AND WINDING ROAD TO *BUSH V. GORE*: AN INTRODUCTION TO THE CASES LEADING TO THE DECEMBER 12, 2000 DECISION

On November 8, 2000, the day following the presidential election, the Florida Division of Elections reported that Governor Bush had received 2,909,135 votes for president, and Vice President Gore had received 2,907,351 votes, a margin of 1784 for Governor Bush. Florida statutes provide for an automatic machine recount because Bush's margin of victory was less than "one-half of a percent . . . of the votes cast."[28] This recount showed Governor Bush still winning the race but by a lessened margin.[29]

Vice President Gore then sought manual recounts limited to four counties, Volusia, Palm Beach, Broward, and Miami-Dade, pursuant to Florida's election protest provisions. (This was the "protest" period for objecting to election returns.) A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State, who declined to waive the November 14 deadline imposed by statute. The Florida Supreme Court, however, reset the deadline to November 26. The U.S. Supreme Court unanimously vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based, and this uncertainty raised constitutional problems, discussed below.[30]

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's twenty-five electoral votes. On November 27, Vice President Gore filed a complaint in Leon County Circuit Court contesting the certification. (This was the "contest" period for objecting to election returns.) Gore sought relief under a state statutory provision that provided "[r]eceipt 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.[31]

The Florida State Circuit Court denied relief, finding that Vice President Gore had failed to meet his burden of proof. He appealed to the appellate court, which certified the matter to the Florida Supreme Court, which held (four to three) that the results of the election were "in doubt." The Florida Court held that a "legal vote," is "one in which there is a 'clear indication of the intent of the voter.' "[32] According to the state court, the manual counters are supposed to count punch-card ballots where the voters did not follow instructions, or were not careful in punching out the hole next to the candidate, or any other circumstance where the ballot showed an indentation. The manual counters were supposed to determine what the voter intended.

The Florida Supreme Court issued a ruling that allowed the manual counters to count as a valid vote a ballot where the voter, either accidentally or on purpose, failed to follow the voting instructions. For example, some voters do not punch the stylus clearly through the punch card. Others may not punch at all, but leave an indentation (what became known as a "pregnant chad") near the name of a candidate. Some voters may not want to vote for any candidate and therefore intentionally place no marking by the name, but, when the manual counters handle these ballots, there may still be an indentation created accidentally (in all good faith), corruptly, or on purpose (by a manual counter or someone else). If a manual counter intuited that an indentation should be read as a vote, then that counter would recast the ballot and count that vote as a valid vote for a candidate. The manual counter would interpret the "intent" of the voter by looking at a piece of paper that had not complied with the voting rules, because it did not have a clean punch, or had more than one clean punch.

The Florida court had never before ruled that a manual recount should be conducted on the grounds that the voters may not have followed directions in punching the voting card[33]; its interpretation resulted in a conclusion that "machine tabulations will *always* be erroneous if any voter failed to follow the instructions for marking the ballot, which always happens."[34] The Florida Supreme Court made clear that an "error in the vote tabulation" would occur even if all the machines

were properly functioning and doing exactly what they had been designed to do. The Florida Court specifically rejected the lower court ruling that an "error in the vote tabulation" only means "a counting error resulting from incorrect election parameters or an error in the vote tabulating software,"[35] or "errors resulting from the voting machinery."[36]

Thus, in the view of a majority of the Florida Supreme Court, there is *always* an "error in the vote tabulation" if a manual recount of ballots of a sample of the precincts shows a difference between the machine tabulation and the human eye's counting. The Florida Supreme Court did not explain why (given its interpretation of the statute) the law bothered to require a second *machine* count: the statute (the Florida Court told us) always requires a hand count in any close election. Voting machines were invented because machines are not partisan, but the human eye is. And, in any close election, the Florida court tells us that the partisan human eye must make the final decision about what indentations on a ballot mean.

The Florida Supreme Court's interpretation of the statute mandating hand recounts, coupled with its refusal to define or articulate what standards the manual voter counter is supposed to use when counting, facilitated the ability of a manual vote counter to be partisan, because all the manual counter is told is that he or she is supposed to discern the "clear indication of the intent of the voter." This non-test allows the manual counters to determine the voters' intention using inconsistent standards.

For example, two counters could pick up identical ballots, look at them, and come up with different conclusions. The manual counter, of course, can never interview the voter. One might count an indentation near the Gore punch (a quasi-punch, where no light showed through) as a vote for Mr. Gore.
Another might look at an identical ballot and determine that the indentation was not a vote. The first counter might pick up an identical ballot and, this time, interpret the indentation differently. Multiply this procedure by hundreds of thousands of ballots that the machine did not read (because the voter did not follow directions or did not want to punch any chad for that office) and you begin to understand the procedure that the Florida Supreme Court created.

Even if every one of the counters acted honestly and consistently with themselves and with one another, the procedure that the Florida Court created has inherent problems. You can look at a ballot and claim that the voter really wanted to vote for a candidate, but another person, with equal plausibility, can assert the voter (in casting an undervote or an overvote) really wanted to vote for none of the above. If the manual counter asserts the voter wanted to vote for a candidate, the counter then has to make a judgment as to which candidate, apparently based on how close the indentation was to a particular candidate's name, or the direction or depth of the indentation.

Reading the phrase, "the intent of the voter," to mean that the voter need not follow the instructions to punch a hole next to the candidate's name really means that the election instructions are simply advisory. For example, let us assume that a voter picks up the ballot and marks nothing on it. He then gives it to the election judge and says, "I know what the election instructions say, but I'm not following them. I am telling you that I intend to vote this unmarked ballot for Governor Bush; that is my intent." The majority of the Florida justices appear to say in their ruling that this ballot must be counted for Bush, although it is an unmarked ballot. In fact, their opinion appears to conclude that this intentionally blank ballot *must* be counted because in this situation we expressly know the intentions of this voter: he told us when he handed in the blank ballot. And, the intention of the voter controls.

In this hypothetical, determining intent is easy because the voter told us her intent when handing in the ballot. In reality, determining intent is much more difficult, because one cannot cross-examine a piece of paper, and that is all that the manual voter counter can "question." Even a mind-reader can only read minds, not a piece of paper.

Nonetheless, the Florida Court ordered a hand recount of the 9000 ballots in Miami-Dade County. It also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 legal votes (Palm Beach) and 168 legal votes (Miami-Dade) for Vice President Gore.[37] The Florida Supreme Court rejected the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted past the November 26 deadline that the Florida Supreme Court itself had earlier set because, the Florida Supreme Court now said, that its deadline was not really 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," and so should be counted.[38]

The issue that came before the U.S. Supreme Court was twofold: (1) did the Florida Supreme Court establish new standards for resolving presidential election contests, thus violating Article II, Section 1, Clause 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5; and (2) did Florida's use of standardless manual recounts, with no procedure for judicial review of disputed ballots and no uniform procedures for deciding what a ballot "meant," violate the Equal Protection and Due Process Clauses? On December 11, 2000, the Supreme Court, in a per curiam opinion, decided the second issue and found a violation of equal protection and due process. The Court did not decide the first issue, although a concurring opinion reached that question and found a violation there too.[39]

III. WHAT THE FOUR JUSTICES ON THE FLORIDA SUPREME COURT ORDERED TO BE COUNTED MANUALLY

Now, with this general background, let us look more closely to what the Florida Court actually ordered (four to three) on December 8.

First, the Florida Supreme Court ruled that Vice President Gore should be credited by the net additional 215 votes that he had secured because Palm Beach County had conducted a recount of all ballots (overvotes and undervotes).[40] Palm Beach had not completed its recount by the deadline that the Florida Supreme Court had earlier given it, but these four justices ruled that the earlier deadline did not really matter.[41] Nor was it important that Palm Beach, during the course of the recount, had several times changed its standards for counting ballots and used different standards than other counties.

Second, Miami-Dade County had started a manual recount of both overvotes and undervotes of the entire county but never completed it. The election officials (who were Democrats) did not choose randomly the precincts where they would begin the manual recount. Instead, they cherry-picked and started counting only in those precincts that had voted overwhelmingly for Gore.[42] This partial recount and geographic discrimination favored Gore because there was no manual recount of the remaining precincts, including those that had overwhelmingly favored Bush, so Bush was denied the opportunity to pick up net votes from ballots that were designated as overvotes. The four Florida justices announced that Gore should be credited with the net gain of 168 votes for this biased sample: the admittedly "partial recount"[43] of overvotes and undervotes only in those precincts that had overwhelmingly voted for Gore.

At this point, Governor Bush was only 537 votes ahead,[44] so the fact that these four Florida justices ordered that 383 votes be added to Vice President Gore's total was significant.

There is another significant fact about these votes. The Florida Supreme Court earlier had ordered that these votes be given to Gore, but the U.S. Supreme Court decision had vacated that order. On November 21, 2000, the Florida Supreme Court ruled that, for various reasons, the deadline and restrictions that appeared to exist in Florida statutory law did not apply in this instance. On December 4, 2000, the U.S. Supreme Court, unanimously vacated this decision and remanded for clarification,[45] because (the U.S. Supreme Court said) this Florida Supreme Court ruling, giving its unclear reasoning, may have violated Article II, Section 2, Clause 2 or a federal statute.[46] On December 8, 2000, when the Florida court again awarded these 383 votes to Vice President Gore, it had not yet clarified its earlier decision, which the Supreme Court had vacated. These votes were not yet valid because the state court was awarding them based on its earlier decision that the U.S. Supreme Court had vacated and not yet reinstated. (In fact, the U.S. Supreme Court never reinstated it.)

Logically, how can the Florida Supreme Court add the votes from Miami-Dade and the votes from Palm Beach *before* it clarified its earlier ruling? These votes were still in dispute—they were still in play—because the Florida Supreme Court had not answered the question that the U.S. Supreme Court had certified to it. First, the Florida Supreme Court would have had to clarify its ruling pursuant to the remand. Then, after it made that decision, the losing party (Governor Bush, if the state court reaffirmed its earlier ruling using a different rationale) could seek review before the U.S. Supreme Court. Until the U.S. Supreme Court affirmed or denied review (or the time to seek review had passed) those votes could not be validly added to Vice President Gore's totals. Four members of the Florida Supreme Court just ignored the U.S. Supreme Court mandate and added those disputed votes to the Gore column by ipse dixit, as if the U.S. Supreme Court had already affirmed the earlier decision, but that had not yet happened, and, in fact, never happened.[47]

Third, these same four Florida justices ruled that there should be a manual recount of approximately 9000 Miami-Dade ballots that the voting machines earlier had counted and had registered as non-votes.[48] These four justices did not explain why the recount as to these ballots would be limited to undervotes, while in other counties the recount (or the partial recount) included the overvotes. If the purpose of the recount is to "count every vote"[49] and if one is able to discern the "intent of the voter," then why limit the recount to undervotes?[50] And, if one limits the recount to undervotes (thereby excluding the 110,000 overvotes statewide),[51] why count only some overvotes in only some counties?

Fourth, these four justices ordered a statewide manual recount of all counties that had not yet conducted a manual recount. Vice President Gore had limited his recount request to three overwhelmingly democratic counties[52] and one other small county that actually had equipment and software failures.[53] These four Florida justices now ordered a manual recount of all the other counties (something no party ever requested) and then announced that the recount as to these other counties would be limited to the undervote ballots while the other counties were not so limited.[54]

IV. THE NUMBER OF JUSTICES WHO CONCLUDED THAT THE FLORIDA SUPREME COURT'S RULING VIOLATED EQUAL PROTECTION AND DUE PROCESS

On the night of December 12, 2001, when the Supreme Court released its opinion, many pundits instantly claimed that the

Court had divided five to four, and that this division had been on political grounds.[55] That claim is simply not true. If we believe what the Justices said, on the constitutional question, the Court ruled seven to two that Florida's recount violated equal protection and due process because Florida's distinctions were—as Justice Souter said—"wholly arbitrary."[56]

Seven Justices—yes, seven, not five—agreed that what the Florida Supreme Court was requiring violated these constitutional guarantees. We do not know why Justices Souter and Breyer labeled their separate opinions as "dissenting" opinions rather than opinions "concurring in part and dissenting in the judgment,"[57] but it is clear that both of these Justices concluded that the Florida Supreme Court was ordering a recount that violated basic procedural and equal protection guarantees found in the U.S. Constitution.

The five Justices who joined the per curiam opinion, and Justices Souter and Breyer, believed that a system for manually recounting votes that had no objective standards to guide the search for voter intent by different vote counters was totally arbitrary and that this disparate treatment of similarly cast votes was not related to any legitimate governmental interest. Because the Court was reviewing a government action that could severely impair a fundamental right (the right to vote), the Court would not grant a presumption of constitutionality to the system that the Florida court established. Rather, these seven Justices chose to independently examine the standardless recount procedure to determine if it would create arbitrary classifications and disparate treatment of similarly situated voters.[58]

Consider this statement from one of the Court's opinions: "I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."[59] That was Justice Souter speaking, joined by Justice Breyer. These two Justices (one appointed by Republican President George Herbert Walker Bush, and the other by Democratic President William Jefferson Clinton)[60] agreed that the manual recount violated basic equal protection and due process.

Souter went on to explain:

> It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. *But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics* (such as "hanging" or "dimpled" chads). (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); (similarly describing varying standards applied in Miami-Dade County); (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard).[61]

Justice Souter made no effort to mince words or otherwise moderate his criticism of the Florida court: "*I can conceive of no legitimate state interest* served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."[62]

Souter would not simply remand the case: he insisted that Florida first adopt uniform standards to count the votes and "establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order."[63] However, as discussed below, that proposed solution of creating uniform standards raised another problem: If the Florida Supreme Court created new standards *after* the election, it would be clear that they were changing the law, because no standards existed before the election; there were no procedures to determine when to count so-called "dimpled" chads, *i.e.*, markings or indentations that were near a candidate's name but did not comply with the state requirement of a clean punch on a ballot.

And then there is the time problem. We know now that a recount would have taken months; the various unofficial recounts that later occurred took many months, and those recounts (because they were unofficial) required no court tests, appeals, remands, and new appeals.[64] A real recount would be accompanied by court tests of the standards and court challenges to the implementation of those standards, and judicial appeals up to, and perhaps including, the U.S. Supreme Court.

Justice Breyer's separate opinion agreed that "basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem."[65] He too was not concerned about the lack of time to sort out and count all the "undervotes," but he insisted on a "single-uniform standard" to be used when recounting the votes.[66] Interestingly, not only Souter but also Stevens and Ginsburg joined this part of Breyer's opinion. Hence, all nine Justices agreed that there must be a "single-uniform standard" used to count the votes. For example, there should be "a uniform determination whether indented, but not perforated, 'undervotes' should count."[67] During the December 11, 2000, oral argument in *Bush v. Gore*, one of the

Justices noted: "It was clear that Broward and Palm Beach counties had applied different criteria to dimpled ballots. One of them was counting all dimpled ballots, the other one plainly was not."[68] Yet, this untidy fact did not bother the four members of the Florida Supreme Court, which had refused to create or articulate any single uniform standard.

Justices O'Connor, Kennedy, Scalia, Thomas, and Chief Justice Rehnquist agreed that Florida's "standardless manual recounts" and the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right."[69] This per curiam opinion did not object to Florida's basic *leitmotif* that the manual counter must consider the "intent of the voter."[70] This mantra:

> 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.[71]

As this per curiam opinion[72] noted, the Florida ruling created other problems as well, because the state court refused to articulate any process explaining the procedure by which the votes are to be counted and objections are to be heard. The Florida "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."[73]

Moreover, the Florida order specifically precluded judicial review of any objections to the way any counter treated a ballot. "*Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount*."[74] This restriction is amazing. If poll watchers representing either Vice President Gore or Governor Bush objected when a manual vote-counter treated an indentation on a ballot as a vote for a candidate, there was nothing that the poll watchers could do. They would simply observe the possible violation of law and then, apparently, sit on their hands and vegetate while the ballot was counted for a candidate and then thrown into and mixed with a pile with the other ballots. Yet, during oral argument, Mr. Boies, the lawyer for Vice President Gore, explicitly conceded that one judge would have to make the initial final decision on all disputed ballots, and this decision would be subject to appeal.[75]

There are those who claim that only conservative Republican-appointed Justices ruled against Vice President Gore in this case.[76] Not only is that claim inconsistent with the position of Justices Breyer and Souter,[77] it is inconsistent with the position of three of the Florida justices who dissented. No justice on the Florida Supreme Court was a Republican-appointee, but three of them concluded that the recount that Vice President Gore wanted was unconstitutional. Three of the seven Florida Supreme Court justices also found an equal protection violation when the manual ballot-counters used different procedures to examine identical ballots and count them differently: "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."[78]

Chief Justice Wells, in his dissent, had warned that changing standards for counting dimpled chads from county to county "is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress."[79] That is, of course, what happened.[80]

During oral argument, Vice President Gore's lawyer acknowledged that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[81] None of this appeared to bother Vice President's Gore's lawyers, who argued before the U.S. Supreme Court that it was proper for some counties to manually count both overvotes *and* undervotes, while other counties did not do so. Indeed, they argued that it was proper for a county to apply different rules for manually counting during the course of the count.[82] Indeed, Gore's lawyer argued during oral argument that the rules for a valid vote could "vary from individual to individual."[83]

So, within the same county, two ballots could have identical indentations and one would count as a vote and the other one would not, simply because the standard changed during the course of the counting. Yet, it is basic equal protection law that we must treat votes equally, and not count some more than others because of arbitrary reasons, such as where a vote was cast in a state-wide election.[84] Nearly a third of a century earlier, the Supreme Court held, in another case, that a voting system that dilutes the votes of the voters in one county compared to the voters of another county violates equal protection.[85] Once a state grants the vote, it may not "by later arbitrary and disparate treatment, value one person's vote over that of another."[86]

But the Florida procedures allowed identical ballots to be treated differently, valuing one person's vote differently than another person's ballot. In addition, by counting all overvotes and undervotes in some counties (or parts of some counties) and only undervotes in other counties, the Florida Court was skewing the election results by favoring some counties over others. Nearly four decades ago, the Court held 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."[87]

The Attorney General of Florida, who was not merely a Gore supporter but ran in Florida as a Gore presidential elector, warned of the serious equal protection problems that exist by Florida "treating voters differently, depending upon what county they voted in."[88] He said: "I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions."[89] Despite this warning, the Florida Supreme Court ordered this two-tier system of counting.

This violation of equal protection exists even if the human beings who are doing the hand-count are non-partisan, completely objective, never make a mistake, and are always consistent. In fact, we know that they are not.[90] For example, even before the selective hand recount, Palm Beach County had certified 800 more votes than its precinct-by-precinct canvas reported on election night.[91]

On election night, Governor Bush had a 1784 vote lead over Vice President Gore, but after the machine recount, that margin went down to 327 votes. How did that happen? A University of Nevada professor calculated that the chance that Vice President Gore would have increased his Florida vote total as much as he did was forty-three million to one.[92] How did Vice President Gore beat the odds?

We may never know the full story. One thing we know now is that, when the ballots were recounted by machine, Pinellas County (a Gore stronghold) showed an extra 417 votes for Gore. How can that be? It turns out that the very-human election officials decided to help things along by altering the ballots before they were resubmitted to the machine. They removed, from many ballots, the chad (the little piece of paper the voter is supposed to push through the computer ballot) *by hand* thus giving Vice President Gore an extra 417 votes. As far as we know, no other Florida county (including the counties that voted disproportionately for Governor Bush) did that. The election officials treated the Gore ballots (that is, ballots much more likely to be in the Gore camp) differently from the Bush ballots were treated in other counties, where the election officials were not so helpful.[93]

V. CHANGING THE STATE LAW AFTER THE ELECTION

Three of these seven Justices in *Bush v. Gore*,[94] wrote a separate concurring opinion, and discussed a ground that the other Justices did not reach. The question was whether the Florida Supreme Court was merely "interpreting" the relevant statutes or really "making" new law after the election. This is not a situation where Governor Bush complained that the rules were changed in the middle of the game; instead, the charge is that the Florida Supreme Court was trying to change the rules of the game *after* the game—after the last inning had been ended and the players (the voters) had gone home.

While some commentators (and the respondent in this case) focused on the metaphysical question whether judges ever "make law," or "find law" in the brooding omnipresence of the common law or in the jurisprudential ether,[95] that academic distinction is besides the point, because Supreme Court precedent going back many years supports the right of federal courts to reject a state court's purported interpretation of state law when that interpretation is not an adequate and independent state ground, when the state court's interpretation of its own statutes is not reasonably foreseeable, and is not reasonably anticipated from the prior case law.

For example, the Constitution provides that states may not "impair[] the Obligation of Contracts."[96] What constitutes an "impairment" is a matter of federal law, but the definition of a "contract" is primarily, but not completely, a state-law question. The federal law incorporates by reference the state court's interpretation, but that state court ruling is subject to a federal interpretation to make sure that the state court does not evade federal constitutional requirements.

Consider, for example, the Supreme Court's decision in *Indiana ex rel. Anderson v. Brand*.[97] Petitioner sued to keep her job as a public school teacher. Her contract for previous years had contained a clause incorporating the state's Teachers' Tenure Law, and she claimed that, by virtue of that act, she had a contract indefinite in duration that could be canceled only for specific causes. The state supreme court rejected that argument because it concluded that the Teachers' Tenure Law had been repealed as to teachers in township schools and the repeal did not deprive the teacher of any vested property right nor impair the obligation of contracts. In other words, the state court argued that she had no contract within the meaning of state law and, there not being any contract, there could be no impairment.

The U.S. Supreme Court first concluded that it had the right to reject the state court's interpretation of state law: "[W]e are bound to decide for ourselves" the nature of the contract, "in order that the constitutional mandate may not become a dead letter."[98] The Court then concluded—after its own "appraisal of the statutes of the State and the decisions of its courts"[99]—that it would not accept the state court's decision that there was no contract (and hence no impairment) because that decision was neither fairly grounded in, nor fairly anticipated from, the prior case law.

The U.S. Supreme Court in *Brand* clearly rejected the state court's interpretation of its own state statute. The language is worth quoting at length:

> As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it. . . . On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, *in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions*, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts. . . . [W]e are of the opinion that the petitioner had a valid contract with the respondent, the obligation of which would be impaired by the termination of her employment. . . . The state courts in earlier cases so declared. The title of the act is couched in of contract.[100]

The Court then discussed in detail various state cases (including *lower* state court decisions, even one case going back to 1873),[101] as well as the language of various state statutes. The Court disagreed with the state court on the meaning of state law, and then reversed and remanded.[102]

Oddly enough, no Justice cited *Indiana ex rel. Anderson v. Brand*, although the case is certainly on point. *Brand* made clear that the Supreme Court need not defer to a state's interpretation of state law when that interpretation does not appear to be fairly grounded in the prior precedent. Perhaps no Justice cited this case because no lower court, and no brief of any party or amicus, cited it. The state and federal cases were written with dispatch, given the desire of all parties for prompt decision, and that may explain this omission. Yet even without knowledge of this case, the Justices knew that it was important whether the state court had changed the law when it reversed the trial courts.

Did the Florida Supreme Court change the law? When Palm Beach County determined to conduct a manual recount, it was concerned that the recount could not be completed prior to a deadline set forth in a Florida statute requiring all county returns to be certified by the seventh day after an election. So, it sought, from the Division of Elections, an advisory opinion allowing it to count past the deadline. The Division refused to extend this deadline, and Florida Secretary of State Katherine Harris relied on it when she issued a statement confirming the statutory deadline. Various Florida counties unsuccessfully sued, on behalf of Vice President Gore, in an effort to require the Secretary of State not to comply with the statutory deadline.[103] When the Secretary announced that she was going to certify the returns and comply with the deadline, Vice President Gore and others sued again, seeking to compel the Secretary to accept returns amended after the deadline. On November 17, 2000, the lower court once again denied the relief.[104]

At this point, Bush's vote totals were growing, because the absentee ballots were being counted, and they disproportionately favored the Governor. The mood among the Gore lawyers was "extremely glum."[105] Then, on November 17, 2000, the Florida Supreme Court, on its own motion, enjoined the Secretary of State from certifying the results of the election.[106] The Gore lawyers had not asked for this emergency stay, for there was no basis in state law for giving it sua sponte, and yet the Florida Supreme Court was taking the case "out of nowhere."[107] The Gore legal team gave a "whoop and a cheer."[108]

This surprising order, giving Vice President Gore something that he did not request, may have marked the beginning of what looked like the Florida Supreme Court creating new law. We do know that, as the Vice President's lawyers later acknowledged, even with this victory, "the end-game strategy for the Gore team was political, not legal."[109]

Later, on November 17, 2000, the Florida Supreme Court scheduled its oral argument for November 20.[110] On that day, the lawyers preparing for the oral argument learned, from a "knowledgeable source close to the Florida high court,"[111] that the Florida justices had already decided the case in favor of Gore, had already drafted the opinion, and had decided to mandate a recount and extend the deadline for five days. The next day, the Bush lawyers argued the case and the justices acted "as if their minds were still open."[112]

We know that the decision that the court issued later that day marked the first time that Florida ever had a manual recount "for anything other than arithmetic tabulation error. This is something that is unprecedented in the State of Florida."[113]

Consider this moment in the oral argument before the U.S. Supreme Court. It was one of the most significant moments, and it came when Justice Scalia asked Paul Hancock, the attorney for the Florida Attorney General's Office, if he knew of any "elections in Florida in which recounts were conducted, manual recounts, because of an allegation that some voters did not punch the cards the way they should have through their fault? No problem with the machinery—it's working fine. You know, there were what, pregnant chads, hanging chads, so forth?"[114]

The complete response: "No, Justice."[115] Then Justice Scalia asked again: "Did it ever happen?" Again, the unqualified answer: "No, I'm not aware of it ever happening before."[116] The Florida trial judges were also unaware that the law should be

interpreted to count pregnant chads or dents in the voting cards. In the two Florida Supreme Court cases, the Florida court overruled both trial court judges, who were applying the law as it existed at the time, before they were both reversed by the Florida Supreme Court. This, again, looks like a change in the prior law.

The attorney representing the Florida Attorney General also confirmed in oral argument that never before the present election had a manual recount been conducted on the basis of the contention that undervotes should have been examined to determine voter intent.[117] Again, this looks like a change in the prior law.

Case law before the 2000 election had ruled that there must be no recount simply because of a failure of the machinery to count ballots with "hanging paper chads."[118] Recall that in both Florida Supreme Court decisions the Florida Court has to overrule two different trial courts, because those judges as well did not anticipate that manual counters could accept ballots with hanging paper chads or ballots with not even hanging chads but merely a dimpled chad.

The Florida Supreme Court "changed" the law governing the counting of ballots in the same way that the Indiana Supreme Court had changed the law. In both cases, the new law was not fairly anticipated from the prior case law. And that change violated the federal statute that forbids post-election changes in election law.[119] The federal statute refers to "law" and not "statute"[120] because it would make little sense to say that the state legislature cannot change the prior law but the state supreme court had *carte blanche*. In order that the statutory and constitutional mandate "may not become a dead letter, we are bound to decide for ourselves" whether the election law was changed after the election.[121]

Florida law empowers the Secretary of State to issue binding interpretations of election law,[122] and prior Florida case law required the Florida Supreme Court to defer to the Secretary's interpretation.[123] The Secretary determined that the election law did not require the counting of ballots that did not follow the plain instructions, when the voting machines performed exactly as they were designed to perform.[124] The Florida Supreme Court, however, simply did not defer to the Secretary's interpretation of the election code and instead required, in this instance, a recount even though the voting machines were working exactly as they have been designed to work. In other words, in every election, voting machines regularly will not count overvotes and undervotes, which are simply another name for ballots that do not comply with the instructions. Prior elections did not demand a manual recount in this circumstance,[125] but the Florida court treated this election differently.

Chief Justice Rehnquist's concurring opinion, after canvassing the prior state law, concluded that the Florida Supreme Court's interpretation of what was a "legal vote" was not well-grounded in the prior law. Indeed, the Florida Supreme Court required that illegal votes—votes that did not comply with the statutory requirements—must be counted as "legal votes." The instructions prominently displayed in each polling place and personally given to each voter in all capital letters, provided:

> AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.[126]

The Florida Supreme Court, however, stepped away from the prior practice, the prior case law, and the prior rulings.

Later the Florida Supreme Court itself acknowledged, by way of dictum, that it should not create a new standard for counting votes—that the job of doing that belonged to the legislature. "[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 . . . ."[127]

This acknowledgment by the Florida Supreme Court is interesting. In a sense, the dissent in the U.S. Supreme Court acknowledged this problem as well. Justice Breyer's separate opinion speculated that the Florida Supreme Court may have been reluctant to adopt a specific standard because it feared that it would exceed its authority under Article II. But then, he appears to say that in "these very special circumstances" the court should have been allowed to adopt "a uniform standard to address the problem."[128] Justice Breyer, joined by Justices Stevens, Ginsburg, and Souter on this point, argued that, "even at this late date," the U.S. Supreme Court should give "instructions" to the Florida Supreme Court that it should create "a single-uniform substandard,"[129] presumably without worrying about requirements of Article II[130] and a related federal statute requiring that the state's electors must be chosen by laws that exist prior to the election in order for the state to be assured that its electoral votes will count.[131] Justice Breyer also seemed to place no weight on the Florida Supreme Court's repeated statements that it wanted the recount completed by December 12.[132]

One can read this paragraph by Justice Breyer as suggesting that the Court should allow the Florida Supreme Court to change the election law by creating new standards and not treat that as precedent in "these very special circumstances."

The majority in *Bush v. Gore* does not accept the notion that it should create a ruling without precedent. The majority does say that it is only deciding the issue presented—whether the Florida Supreme Court's procedures for conducting the recount violate equal protection. The Court tells us that its ruling is limited to this issue: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[133]

Critics of this decision have argued that this language means that the Supreme Court was telling us that it was making a unique decision, and that this case is not precedent.[134] The majority was not saying that this case is not precedent. Not even the dissent made that claim. A fair reading of the quoted language simply states that the Court is not deciding an issue that is not part of this case—whether a state can use different types of voting mechanisms in different parts of the state when electing someone to a state-wide office (*e.g.*, punch cards in some counties, optical character readers in other counties).

Justice Souter, by the way, does decide the issue that the majority avoids. He says:

> It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.[135]

Whether one agrees with the majority's decision to not reach this question, or Justice Souter's decision to decide the question is not really the issue. The point is that not even the dissent accuses the majority of trying to treat the case as if it is not precedent. And Justice Souter (along with Justice Breyer and the five Justices in the per curiam opinion in creating that precedent) agrees that when conducting a recount of a statewide election, the manual counters must use the same standards throughout the state.

VI. THE REMEDY

The U.S. Supreme Court ultimately concluded (1) that the recount could not be completed by December 12, 2000, and (2) that the Florida Supreme Court had already decided, as a matter of state law, that the legislature wanted all recounts to be completed by December 12. Because critics of this decision focus on these two issues, it is worthwhile to quote the relevant language at length.

A. *The Procedures for a Valid Recount*

First, what must be done before there can be a valid recount that treats ballots equally and that is run according to fair, consistent procedures:

> [T]he recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the [Florida] 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, as required by [a Florida statute].[136]

B. *When Must the Recount Be Completed*

If that could be done, the next question is whether it must be completed by December 12. Here is what the majority said:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So. 2d, at 1289; *see also Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000). 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.[137]

Was the Court correct when it said that December 12, 2000, is the date that the Florida Supreme Court had earlier decided was the date any recount must be completed under Florida law?

In the first citation to which the U.S. Supreme Court refers, the Florida Court said, on December 11, 2000: "[I]n this case involving a presidential election," the decision to accept amended election returns (the manual recount) because of the press of time, must take into account "the deadlines set forth in 3 U.S.C. § 5."[138] That statute requires the certification of the voting to be completed at least six days before the presidential electors vote. The electors vote on December 18, so the Florida Court

was simply telling us that the recount must be completed by December 12.[139] The U.S. Supreme Court accepted that state court interpretation of its own law. The Florida Court repeated this admonition several times in this November 21 decision.[140]

The second citation is yet another instance when the state court cited the federal statute assuring states that their electoral votes would be counted if all election challenges were completed by December 12. The Florida Supreme Court concluded that Florida statutory law intends to take advantage of that safe harbor by completing any recounts by that date.[141]

Later, in its December 8 opinion, the Florida justices repeated the need to comply with the December 12 deadline: "Of course, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict."[142]

Later, on December 11, 2000, the day *before* the U.S. Supreme Court issued its ruling, the Florida justices repeated their statement that what is a "reasonable time" is different in presidential elections because "the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors."[143] The Florida Court *repeats* this deadline later in the same opinion.[144] If repetition were analogous to talking loudly, the Florida Court would be screaming the deadline by now.

Indeed, by December 8, 2000, the Florida Supreme Court agreed that "all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000."[145]

Chief Justice Wells elaborated on this issue in his dissent: "The safe harbor deadline day is December 12, 2000. Today is Friday, Dec. 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today."[146] None of his colleagues in the majority contested this statement; instead, they endorsed it, and emphasized that they had already held, in their earlier decision of November 21, 2000,[147] that "all returns must be considered unless their filing would . . . endanger the counting of Florida's electors in the presidential election."[148]

On December 22, 2000, the Florida Supreme Court spoke once again, on the remand from the case from the U.S. Supreme Court. If the Florida Court had thought that state law did not intend December 12 to be the deadline for concluding election contests for choosing presidential electors, the Florida Court might have mentioned it. Instead, it simply acknowledged that a manual recount could not be completed by that date, and that, "upon reflection," the legislature should develop a uniform standard to "ensure equal application" of the law.[149] Justice Shaw, concurring, did argue that, in his opinion, "December 12 was not a 'drop-dead' date under Florida law."[150] He thought the drop-dead date was January 6, 2001. But—and this is the significant point—*not one other Florida justice joined that opinion*, nor embraced this belated argument. Of course, even if one accepted January 6, no one could complete a manual recount, with opportunity for judicial redress, by that date either.

Given Florida's repeated statements in various judicial opinions that the Florida legislature wanted to take advantage of a federal statute that required all recounts to be completed by December 12, the U.S. Supreme Court accepted what the state court had earlier ruled.

Justices Souter and Breyer were willing to extend the recount until December 18, but *only if* the Florida court established new procedures to cure the constitutional violations in the earlier recount that the U.S. Supreme Court had stopped.[151] It was on the remedy that these two Justices disagreed, but one could not have complied with this remedy, even by December 18—six days *after* the time that the state court had said was the final deadline—if there would be judicial review of the validity of the new procedures, a manual recount of millions of votes, and judicial challenges to individual ballots.[152] When the news media counted the ballots (and they did not have to worry about the time taken with judicial challenges to the recount rules and the application of those rules), they did not complete the task for months.[153]

VII. CONCLUSION

Some who criticize *Bush v. Gore* argue that there was no federal issue. Anyone who saw the televised hearing with Florida Judge Sauls, the trial judge who ruled against Vice President Gore in the contest phase of the recount, knew that he and the attorneys regularly talked about equal protection treating voters equally.[154] The question is whether, in a federal election for president of the United States,[155] a state court's order requiring a manual recount using standardless procedures, and an order accepting partial recounts in a skewed selection of precincts, violates equal protection. It is hard to think of anything more federal than that.

While the Florida court spoke vaguely about finding the "intent" of the voter, it was not examining a human being but looking at scratches on an inanimate object. As the Miami-Dade Elections Supervisor said: "We look at the whole ballot and try to make judgments."[156] Any of the people who were examining the ballots could add a scratch, either intentionally or unintentionally, by the way he or she held the ballot.

The lack of rules allows people to manipulate the vote.[157] If a person representing the candidate was unencumbered by ethical self-restraint, and was trying to change the vote total, he or she could eyeball a disputed ballot before picking it up to officially inspect it. If the hanging chad indicated a vote for the other side, the person would pick up the ballot very gently, so he could argue that the voter really never intended to vote for the opponent. If the hanging chad was a vote for his side, the person would handle the ballot vigorously, so that the chad soon was no longer hanging.

But one need not assume intentional ballot-altering. Because no rules governed this search for "intent," different counties used different rules, which changed over time, so the vote totals would change all within the changing rules. When the people were counting, they knew how many more votes the Vice President would need to catch up, and they changed the way they counted votes with this knowledge in mind. The Supreme Court noted:

> Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.[158]

If human beings instead of machines count the punch cards, how do you count them where there is no hole, not even a pinprick, just a dimple? In Palm Beach County, if the hand counters saw a card with several punches on it, and a dimple near Vice President Gore's name, the election officials said that they did not count it because that voter knew how to punch a card and did not punch a hole next to Gore. The machine worked correctly when it did not read it because that is what it is designed to do. Later, Palm Beach decided to ignore a 1990 guideline that forbade counting ballots where the chads were completely attached, and there was a dimple. Then it decided, for some of the ballots, to use no per se rule and just decide, ballot by ballot, what to count.[159]

Not so in Broward County, which used, in the words of the Court, "a more forgiving standard," and "uncovered" nearly three times as many votes, an outcome that was greatly disproportionate to the population difference between these two counties.[160] If some of the vote counters saw several clean punches for other Democrats and no punch for Gore, not even an indentation, but they saw a "scratch" near his name, they treated that ballot for Gore. The Florida Supreme Court approved this unequal treatment of votes, and even exacerbated it by ordering that additional votes from Broward County should be added to Gore's certified total even though he had never even contested that county's certification.[161] This selective recount, the Court concluded, violated the Equal Protection Clause because it treats two voters differently, depending in which counties they live.

One way to think of this decision is to assume that it is a month (or day) before the election. The candidates of the two major parties gather in a room and someone makes a proposal. Assume, we are told, that we learn, after the machine count, that the election hinges on Florida, and the popular vote is very close. The losing candidate asks for a second machine recount, but he still loses. The question is this: If you do not know whether you are the candidate who is slightly ahead, or slightly behind, would you approve of a statutory scheme that allows the loser to ask for a manual recount that is limited to the counties where he is very popular? That way, if each side gains votes from the manual ballot count that is in proportion to their machine total, you would expect that the loser to pick up more votes from the county that already voted for him disproportionately.[162]

In addition to limiting this manual recount to the counties where the loser is more popular, we learn that the people manually recounting (many of whom are members of his political party)[163] will be allowed to count as valid votes any ballot based on what they perceive might have been the voter's intent.[164] In other words, would any rational candidate—*before* the election (at a time he or she does not know who will be the loser or the winner of the machine count)—agree to a hand count of the votes before there exists any uniform standards for counting the votes? Would any rational candidate agree to have a manual recount in some counties of all the votes and a recount in other counties of just the undervotes?

Let me answer my rhetorical question. No rational candidate—*before* the election (at a time he or she acts objectively)—would agree to that lop-sided procedure. No one would conclude that such a system is more fair or accurate than a machine count or a hand count of all votes using the same standard throughout the state. For that reason, we would not expect a rational legislature to create such a system. But that is what the Florida Supreme Court ordered, *after* knowing how people voted. The Florida court interpreted the statute to reach a conclusion that no legislature could intend.

To this scenario let me add another fact—the Florida statute, which states it is the Secretary of State's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws."[165] The election laws for a statewide election cannot be uniform when special rules apply to certain counties, those that had overwhelmingly voted in favor one of the candidates. That is yet another reason we would not expect a reasonable candidate to agree to the procedure that the Florida Court had mandated and why we would be surprised that a court would interpret the state law to require manual recounts that preclude "uniformity in the application, operation, and interpretation of the election laws."[166]

The Supreme Court, in *Bush v. Gore*, simply ruled that a state cannot set different standards for counting votes in different parts of the state, particularly when it sets these standards *after* the fact—after it knows the results of the machine count for each county. The state legislature's power to determine how the electors are chosen does not allow the state court to violate the Equal Protection Clause. Vote-counters and judges (who are human and put on their judicial robes, two legs at a time, just like the rest of us) can be partisan. The Equal Protection and Due Process Clauses, buttressed by the U.S. Supreme Court, imposed objective rules on recounting in order to take this fact of life into account.

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[1] 531 U.S. 98 (2000) (Dec. 12, 2000) (per curiam).

[2] Ann Coulter, *This is War*, NAT'L REV. ONLINE, Sept. 13, 2001, *at* http://www.nationalreview.com/coulter/coulter091301.shtml.

[3] Email from Deborah Dosh to Ann Coulter (Sept. 16, 2001, 04:00:59 PM) (on file with author) (emphasis added). The full email to Ms. Coulter states:

> Ms. Coulter,
>
> I had the ill pleasure to read your article about "your good friend" Barbara Olson and her sweetie pie of a husband, Ted.
>
> I usually consider myself a good person, one who would never be happy at the demise of another human being, but, I have to say, that the first thing that came to mind when I heard about Barbara Olson being on that plane, was, I hope Ted was with her.
>
> Do you realize how many people hate those two individuals? At least half of America, that's who. She was a hate monger and he is responsible for us having a dictator in the White House.
> I have read or listened to ultra right wing, hateful, demoralizing rhetoric from you, Barbara Olson, Cheney and Ingraham, for so long, that it is gratifying to know that I will no longer need to see that woman's face on TV again. Actually, I was happy when CNN showed that awful frowning photograph of her on the news the day before. It showed her true nature as a hate monger.
>
> You want to call people like me terrorists, because we celebrate her passing, well, go ahead. I am ten times more patriotic than you will ever dream of being. I have two flags flying outside my house, I will even go so far as to support Bush's bosses, to a degree, but when it comes to killing innocent boys, in the name of Bush's corporate donors, and the gains to be made from warfare, I will take down those flags and fly them upside down. For then, our country will truly be in distress.
>
> You need to keep your overbearing mouth shut. You and all of your Paul-Whyrich and Scaife, Arkansas Project cronies are a detriment to this country. Isn't it ironic that she died at the hands of terrorists, after all the money and time you all committed to this terrorist supporting group of asses?
>
> Sincerely,
> Deborah Dosh
> Flagstaff, Az

[4] *Bush*, 531 U.S. at 98 (Dec. 12, 2000).

[5] As a matter of legal ethics, a lawyer's representation of client does not constitute endorsement of client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002); RONALD D. ROTUNDA, LEGAL ETHICS § 3-1.3, at 72–73 (2002).

[6] Quoted in, David Savage, *Book Review*, NAT'L L.J., Sept. 8, 2001, *available at* 2001 WL 25926104; Peter Berkowitz & Benjamin Wittes, *The Professors and Bush v. Gore*, THE WILSON Q., Autumn 2001, at 76, 80. Professor Dershowitz wrote: ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (depicting *Bush v. Gore* as a decision based on the Justices' partisan views); *see also* Gary Kamiya, *Against the Law*, SALON.COM (July 4, 2001), *at* http://www.salon.com/books/feature/2001/07/04/ dershowitz/index.html (arguing that the Supreme Court Justices were swayed by political motivations in deciding *Bush v. Gore*).

One should be clear that all of the Justices on the Supreme Court, while they have disagreed with each other on the merits, have defended the *Bush v. Gore* decision as grounded in the law. Justice Breyer, for example, remarked to a law school audience that the explanation for this case "isn't ideology and it isn't politics." Linda Greenhouse, *Election Case a Test and a Trauma for Supreme Court Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

[7] *See* Berkowitz & Wittes, *supra* note 6, at 79; Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1219 (2002) (defending *Bush v. Gore* as a decision grounded in legal principle and precedent); *see also* Max Boot, *Law Professors v. the Supreme Court*, WALL ST. J., Aug. 13, 2001, at A13 (describing the partisan label that some law professors attach to *Bush v. Gore* as "disingenuous"); Robert J. Pushaw, Jr., *Politics, Ideology, and the Academic Assault on* Bush v. Gore, 2 ELECTION L.J. 97 (2003). *Compare* Steven K. Balman, Bush v. Gore*—A Response to Dean Belsky*, 37 TULSA L.J. 777 (2002) (arguing that the constitutional criticisms of *Bush v. Gore* are without foundation), *with* Martin H. Belsky, Bush v. Gore*—A Critique of Critiques*, 37 TULSA L.J. 45 (2002) (postulating that *Bush v. Gore* damaged the American polity's conception that society is governed by laws and not by political parties).

[8] On January 13, 2001, over 550 law professors from 120 American law schools placed a full-page advertisement in the *New York Times* claiming that the Justices had acted as "political proponents for candidate Bush, not as judges." *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7. The advertisement did not mince words: "By taking power from the voters, the Supreme Court has tarnished its own legitimacy." Dave Sweifel, *Court's Decision Still Rankles Law Profs*, CAP. TIMES (Madison, Wis.), Jan. 24, 2001, at 6A; Berkowitz & Wittes, *supra* note 6, at 80; *see also* Joel Edan Friedlander, *The Rule of Law at Century's End*, 5 TEX. REV. L. & POL. 318, 338 (2001); Lund, *supra* note 7, at 1219 n.2

(listing professors who have attacked *Bush v. Gore*, with many of the attackers being "particularly vituperative"). Professor Lund's article presents an extensive and thorough analysis and defense of the decision and I am indebted to him.

[9] *See Oregon Moves to Impeach Justices: Democrats Seek a Query Into High Court's Ruling*, WASH. POST, July 23, 2001, at A7. Former Congressperson Charles Porter (D. Ore.) led this effort.

[10] Comments from a typical column attacking the decision: "the majority of the Court [with *Bush v. Gore*] . . . has . . . become quite openly the most dangerous branch." Renata Adler, *Irreparable Harm*, NEW REPUBLIC, July 30, 2001, at 29.

Other columnists defended the decision and charged that there were voting irregularities that favored Vice President Gore. *See, e.g.*, George Will, *A Long Election Day in Missouri*, WASH. POST, Jan. 23, 2002, at A17:

> Nov. 7, 2000—Election Day—will forever call to mind Florida's butterfly ballots and pregnant chads. But the day was eventful in St. Louis, too.
>
> The night before, Democratic Rep. William Clay had told a Gore-Lieberman rally that a lawsuit would be filed to force the polls to stay open longer than Missouri law allows. The next afternoon such a suit was filed, claiming that minorities were having trouble voting. Clay had been prescient about those troubles—or those troubles were fictitious, and he was part of a carefully planned operation.
>
> The suit's lead plaintiff, Robert D. Odom, complained of being denied the right to vote. But someone noted that his problem might have something to do with the fact that he died in 1999.

[11] *See, e.g.*, Sanford Levinson, *Return of Legal Realism*, NATION, Jan. 8, 2001, 2001 WL 2132174:

> The Court's decision in *Bush v. Gore*, however, seems an exercise in low rather than high politics . . . . [It] is all too easily explainable as the decision by five conservative Republicans—at least two of whom are eager to retire and be replaced by Republicans nominated by a Republican president—to assure the triumph of a fellow Republican who might not become president if Florida were left to its own legal process.

[12] *See, e.g.*, Gore v. Harris, 772 So. 2d 1243, 1263 (Fla. Dec. 8, 2000) (per curiam) (Wells, C.J., dissenting):

> 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.

See also id. at 1272 (Harding, J., dissenting, joined by Shaw, J., and on this point by Wells, C.J.):

> I have serious concerns that appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection . . . .
>
> . . . [T]he selective recounting requested by appellant is not available under the election contest provisions of section 102.168. Such an application does not provide for a more accurate reflection of the will of the voters but, rather, allows for an unfair distortion of the statewide vote. It is patently unlawful to permit the recount of "no-votes" in a single county to determine the outcome of the November 7, 2000, election for the next President of the United States. We are a nation of laws, and we have survived and prospered as a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.

[13] *Cf.* Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of* Cousins v. Wigoda, 53 TEX. L. REV. 935 (1975) (discussing cases holding that state laws regulating presidential elections must conform to equal protection and due process guarantees).

[14] Berkowitz & Wittes, *supra* note 6, at 80 (quoting Professor Dershowitz). *See generally* DERSHOWITZ, *supra* note 6.

[15] The voter would cast the overvote to prevent a manual counter from later adding an indentation (which is easily placed on the ballot with a finger nail). Yes, it happens that some people are not honest, and not all manual counters have the virtues of Pericles.

[16] *See, e.g.*, Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992) (per curiam):

> Appellant explained that voter errors in the piercing of computer ballot cards created loose or hanging paper chads which, although present on the first count, subsequently fall away on a recount, thereby causing the difference in count. Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes.

[17] *See* Bush v. Gore, 531 U.S. 98, 108 (Dec. 12, 2000) (per curiam) (citing *Gore*, 772 So. 2d at 1261–62 n.21 (Dec. 8, 2000)).

[18] *See* Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. Dec. 8, 2000) (per curiam), *rev'd sub nom.*, Bush v. Gore, 531 U.S. 98, 98 (Dec. 12, 2000) (per curiam).

[19] After this case, several newspapers hired auditors who examined the ballots and reported their findings in April 2001. The *Miami Herald*, a major sponsor of this recount, reported its finding:

> Republican George W. Bush's victory in Florida, which gave him the White House, almost certainly would have endured even if a recount stopped by the U.S. Supreme Court had been allowed to go forward. In fact, a comprehensive review of 64,248 ballots in all 67 Florida counties by *The Herald* and its parent company, Knight Ridder, in partnership with *USA Today*, found that Bush's slender margin of 537 votes would have tripled to 1,665 votes under the generous counting standards advocated by Democrat Al Gore.

Martin Merzer, *Review Shows Ballots Say Bush*, MIAMI HERALD, Apr. 4, 2001, at A1. The newspaper's managing editor said: "In the end, I think we probably confirmed that President Bush should have been president of the United States." *Id.* He added: "I think that it was worthwhile because so many people had questions about how the ballots had been handled and how the process had worked." *Id.*; *see also* CNN, *Recount of Florida Undervotes Confirms Bush Victory*, CNN.com, *at* http://www.cnn.com/2001/ALLPOLITICS/04/03/florida.recount/ index.html (Apr. 4, 2001) [hereinafter, CNN Recount].

The *Wall Street Journal*, joined by seven other newspapers and the National Opinion Research Center at the University of Chicago, conducted

the recount that the Florida Supreme Court had ordered—all the ballots that did not register as votes when they were counted by machine. Jackie Calmes & Edward P. Foldessy, *Florida Revisited: In Election Review, Bush Wins Without Supreme Court Help*, WALL ST. J., Nov. 12, 2001, at A1. They reviewed 175,010 Florida ballots. The conclusion:

> The results suggest that if the U.S. Supreme Court had allowed the vote counting ordered by the Florida Supreme Court to continue, as many Democrats had advocated, Mr. Bush still would have won the election by 493 votes. That's only a handful less than the official victory margin of 537 votes. The study also suggests that if then-Vice President Al Gore had won his original request for hand counts in just four heavily Democratic Florida counties, Mr. Bush still would have won, by 225 votes.

Id.

[20] The *Miami Herald*'s team began counting the undervotes on December 18, 2000, and concluded on March 13, 2001. *See* Merzer, *supra* note 19; CNN Recount, *supra* note 19.

In the case of the consortium of newspapers that included the *Wall Street Journal*, the project "took more than nine months and cost nearly $1 million, [and] is likely to be as close as anyone will ever get to a comprehensive understanding of what really happened in Florida last fall." *See* Calmes & Foldessey, *supra* note 19, at A1.

[21] *See Bush*, 531 U.S. at 135 (Dec. 12, 2000) (Souter, J., dissenting).

[22] *See Gore*, 772 So. 2d at 1269 (Fla. Dec. 8, 2000) (Wells, C.J., dissenting):

> Another significant problem is that the majority [provides] . . . for a recount with no standards. . . . A continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist . . . .

[23] When people voted by hand, before we had voting machines, any recounts were pursuant to specific rules. The typical rule is that the voter had to place an "X" in a box, and the two lines had to cross within the box. If the voter put another mark (such as a check mark) or had the two lines cross outside the box, the vote was not counted. Because human eyes can be very discretionary, the law set forth very specific standards, allowed no deviation, and sought to eliminate any aspect of human discretion.

Later, the media conducted their own unofficial recount of the ballots, and Governor Bush still won. However, the process of conducting this recount illustrated how biased manual counters can be:

> Although some accounts stress that the counters agreed on 96 percent of punchcard ballots, that 4 percent error rate greatly exceeded the election margin of .001 percent. This is rather like trying to recheck a microscope's measurement of an electron's width using the human eye and a yardstick. Moreover, the 96 percent figure is artificially inflated by agreements on ballots where there was no marking to dispute. On ballots where at least one counter saw a potential vote for Bush or Gore, the counters disagreed a third of the time.
>
> Political affiliation mattered. Though the NORC counters were supposed to be impartial, Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democrats were 25 percent more likely to deny a mark was for Bush. This bias may well be utterly unconscious, but it remains a problem for any manual recount process.

Einer Elhauge, *Florida 2000: Bush Wins Again!*, WKLY. STANDARD, Nov. 26, 2001, at 29, 29.

[24] *See Bush*, 531 U.S. at 111 (Dec. 12, 2000):

> 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 134 (Souter, J., dissenting); *post*, at 145–146 (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. Ann. § 102.168(8) (Supp. 2001).

[25] "The Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5. 772 So. 2d at 1289; see also *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000)." *Id.* at 110.

[26] In this Symposium, for example, several speakers insisted that the vote was five to four. One speaker said that he would take "them [Souter and Breyer] at their word" when they said that that they dissented (panel discussion on March 22, 2002, at The Ohio State University, Michael E. Moritz College of Law). Of course, why not take them at their word when they both said that the Florida Supreme Court acted unconstitutionally?

Professor Alan Dershowitz argued that the decision was five to four and the Justices in the majority "appointed precisely because their biographies showed them to be right-wing ideologues and Republican partisans." *See* Savage, *supra* note 6. If the decision was seven to two, and one of the seven was a Clinton appointee, Professor Dershowitz's argument is less compelling.

[27] *See* Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. Dec. 8, 2000) (per curiam), *rev'd sub nom.*, Bush v. Gore, 531 U.S. 98 (Dec. 12, 2000) (per curiam).

[28] FLA. STAT. ANN. § 102.141(6) (West 2002).

[29] It is interesting that nearly a year later, when voters were asked from whom they had cast their ballots, they told the pollsters that they recalled voting for Bush by a margin of 42% to 30%. *See Washington Wire*, WALL ST. J., Dec. 14, 2001, at A1.

[30] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (Dec. 4, 2000) (per curiam) (*Bush* I).

[31] FLA. STAT. ANN. § 102.168(3)(c) (West 2002).

[32] *Gore*, 772 So. 2d at 1257 (Dec. 8, 2000).

[33] *See* Oral Argument, Bush v. Palm Beach County Canvassing Bd., No. 00-836, 2000 WL 1763817, at *15. The Florida Attorney General (who was also an elector pledged to vote for Gore) stated, during oral argument that "never before the present election had a manual recount been conducted on the basis of the contention that 'undervotes' [ballots with no punches on them] should have been examined to determine voter intent." Bush v. Gore, 531 U.S. 98, 120 (Dec. 12, 2000) (Rehnquist, C.J., concurring).

[34] Lund, *supra* note 7, at 1231.

[35] Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1273, 1283–84 (Fla. Dec. 11, 2000).

[36] *Id.* at 1284.

[37] *Gore*, 772 So. 2d at 1260 (Dec. 8, 2000).

[38] *Id.*

[39] *See* Bush v. Gore, 531 U.S. 98, 111–22 (Dec. 12, 2000) (Rehnquist, C.J., concurring).

[40] *Gore*, 772 So. 2d at 1248 (Dec. 8, 2000). Then-Governor Bush claimed that the audited total was only 176 votes. The per curiam opinion, in the text, awards 215 votes to Vice President Gore, but then, in a footnote, notes the dispute and directs the trial court to consider the issue on remand. *See id.* at 1248 n.6, 1260 n.19.

[41] *See id.* at 1260.

[42] *See* Siegel v. Lepore, 234 F.3d 1163, 1194–203 (11th Cir. Dec. 6, 2000) (Carnes, J., dissenting); *see also Gore*, 772 So. 2d at 1272 (Dec. 8, 2000) (Harding, J., dissenting, joined by Shaw, J., and, on this point, by Wells, C.J.) (arguing that a partial recount is an "unfair distortion of the statewide vote").

[43] *See Gore*, 772 So. 2d at 1248, 1260 (Dec. 8, 2000).

[44] *Id.* at 1247.

[45] Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. Nov. 21, 2000) (per curiam), *vacated by* Bush v. Gore, 531 U.S. 70 (Dec. 4, 2000) (per curiam) (*Bush* I).

[46] The Court required the Florida Supreme Court to clarify its decision:

> [W]e [the United States Supreme Court Justices] are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2 [the provision of the U.S. Constitution granting the legislature of the state the authority to appoint electors in presidential and vice-presidential elections]. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5 [the statute providing a safe-harbor for the slate of state electors so long as the contests were decided by a law enacted prior to the time when the electors were chosen].

Bush, 531 U.S. at 73, 78 (Dec. 4, 2000).

[47] On December 8, 2000, the Florida Supreme Court awarded Vice President Gore the votes that were still in dispute from the opinion (Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (Dec. 4, 2000)) that the U.S. Supreme Court had vacated. *See Gore*, 772 So. 2d at 1248 (Dec. 8, 2000). On December 9, 2000, the U.S. Supreme Court accepted certiorari in that case and stayed the Florida Supreme Court's order. *See* Bush v. Gore, 531 U.S. 1046 (Dec. 9, 2000). This order also set the date for oral argument for December 11. On December 11, 2000, three days *after* the Florida Supreme Court knew that the U.S. Supreme Court had stayed the Florida Supreme Court decision, the Florida Supreme Court purported to answer the issues raised by the December 4 ruling. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. Dec. 11, 2000) (per curiam). In that case, Chief Justice Wells dissented "from issuing a new decision while the United States Supreme Court" considered *Bush v. Gore*, *id.* at 1292 (citation omitted), and he "[did] not concur in the reissued opinion." *Id.* at 1292 (citing the U.S. Supreme Court stay order of December 9, 2000) (Wells, C.J., dissenting). The issue was no longer relevant given the U.S. Supreme Court's ruling the day after this December 11 Florida ruling.

[48] *See Gore*, 772 So. 2d at 1262 (Dec. 8, 2000).

[49] The "count every vote" slogan is one that supporters of Vice President Gore articulated. However, these supporters were not necessarily consistent. On November 15, a Gore campaign lawyer circulated a memorandum providing a five-point guide to disqualifying military ballots on various grounds, some quite technical. Ultimately, they were able to disqualify 788 military absentee ballots. *See* Bob Zelnick, *The Myth of a Stolen Election*, WALL ST. J., July 17, 2001, at A18; *cf.* Rowan Scarborough, *Daschle Denies Blocking Bill on Military Voting; GOP Aides Say Measure Is Being 'Held'*, WASH. TIMES, Dec. 13, 2000, at A1: "The office of Senate Minority Leader Tom Daschle yesterday denied he is blocking a bill on military polling places but could not guarantee that Democrats will let the measure come to a vote before the congressional session ends in two weeks."

[50] Justice Breyer said that he was not concerned that the recount of the remaining counties would be limited to undervotes because "petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes." Bush v. Gore, 531 U.S. 98, 145 (Dec. 12, 2000) (Breyer, J., dissenting). This statement is amazing because the Florida Supreme Court assigned "legal votes" to Vice President Gore that came from overvotes! The manual recount had identified overvotes from the partial recounts.

[51] *See id.* at 107, 108.

[52] *See* Siegel v. Lepore, 234 F.3d 1163, 1194 (11th Cir. 2000) (Carnes, J., dissenting, joined by Tjoflat, Birch, and Dubina, JJ.) Justice Carnes argued that "the selective manual recounts in some of the Florida counties that use the punch card system of voting violate the equal protection rights of the voters in the other punch card system counties." *Id.*; *see also id.* at 1203–04 (counties chosen for recount because they were disproportionately pro-Gore).

[53] *See id.* at 1196; *see also id.* at 1215–16 chart C (ranking the punch card counties by percentage of "no vote" in the presidential race).

[54] *See* Gore v. Harris, 772 So. 2d 1243, 1253 (Fla. Dec. 8, 2000) (per curiam).

[55] *See Bush*, 531 U.S. at 98 (Dec. 12, 2000); *see also, e.g.*, Daniel Schorr, *The Supreme Fix Was In*, CHRISTIAN SCI. MONITOR, Dec. 15, 2000, at 11.

[56] *Bush*, 531 U.S. at 134 (Souter, J., dissenting, joined by Breyer, J.).

[57] All of the Justices were operating under tight deadlines. These two Justices did dissent on the particular remedy and, perhaps, they wanted to emphasize that point. Or, it may just be an error: when things are rushed, people act differently than they do when matters are more calm.

[58] *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.31, at 51–70 (3d ed. Supp. 2002) (discussing the Equal Protection Clause issues in the 2000 presidential election with respect to the right to vote).

[59] *Bush*, 531 U.S. at 134 (Dec. 12, 2000) (Souter, J., dissenting, joined by Breyer, J.).

[60] Yet, many critics of this decision appear to ignore the participation of Justices Breyer and Souter. *See, e.g.*, Levinson, *supra* note 11 ("The Court's decision in *Bush v. Gore* . . . is all too easily explainable as the decision by five conservative Republicans . . . .").

[61] *Bush*, 531 U.S. at 134 (Dec. 12, 2000) (Souter, J., dissenting joined by Breyer, J.) (emphasis added) (internal citations omitted).

[62] *Id.* (Souter, J., dissenting, joined by Breyer, J.) (emphasis added) (internal citations omitted).

[63] *Id.* at 134–35 (Souter, J., dissenting, joined by Breyer, J.).

[64] In the case of the consortium of newspapers that included the *Wall Street Journal*, the project took more than nine months. *See* Calmes & Foldessy, *supra* note 19. The *Miami Herald*'s recount team began counting the undervotes on December 18, 2000, and concluded on March 13, 2001. *See* Merzer, *supra* note 19.

[65] *Bush*, 531 U.S. at 146 (Dec. 12, 2000) (Breyer, J., dissenting joined by Souter, J.).

[66] *Id.* (Breyer, J., dissenting, joined by Stevens, Ginsburg, & Souter, JJ.).

[67] *Id.* at 145 (Breyer, J., dissenting, joined by Souter, J.).

[68] Oral Argument at 55, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/949trans.pdf.

[69] *Bush*, 531 U.S. at 103, 105 (Dec. 12, 2000).

[70] Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. Dec. 8, 2000) (per curiam).

[71] *Bush*, 531 U.S. at 106 (Dec. 12, 2000).

[72] *See generally* Laura Krugman Ray, *The Road to* Bush v. Gore: *The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 517 (2000) (cataloging the use of the per curiam opinion by the United States Supreme Court).

[73] *Bush*, 531 U.S. at 109 (Dec. 12, 2000).

[74] *Id.* (emphasis added).

[75] The Justice said: "does not the procedure that is in place there contemplates [sic] that the uniformity will be achieved by having the final results all reviewed by the same judge?" Mr. Boies responded:

> Yes, that's what I was going to say, Your Honor, that what you have here is you have a series of decisions that people get a right to object to is all going through a process, the people are there. They submit written objections, and then that's going to be reviewed by a court.

Oral Argument at 54, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/949trans.pdf.

[76] For example, Professor Alan Dershowitz argued that the decision was five to four and the Justices in the majority "were appointed precisely because their biographies showed them to be right-wing ideologues and Republican partisans." *See* Savage, *supra* note 6. The three Florida justices who dissented (and the Florida trial judge whom the Florida Supreme Court reversed) do not fit this profile.

[77] The two Justices disagreeing with their seven colleagues were also bipartisan: Justice Ginsburg, was appointed by President Clinton, and Justice Stevens, was appointed by President Ford. They acted in good faith, like their colleagues, but concluded that the Court should defer to the state court's interpretation of state law even when that interpretation implicated important federal rights. However, when federal law incorporates state law by reference it also places federal limitations as to what that state law might mean. *See infra* Part V.

[78] Gore v. Harris, 772 So. 2d 1243, 1267 (Fla. Dec. 8, 2000) (Wells, C.J., dissenting); *see also id.* at 1272–73 (Harding, J., dissenting, joined by Shaw, J., and, on this point, by Wells, C.J.) (arguing that a partial recount is not acceptable because the standards set forth by the majority would render the recount inaccurate).

[79] *Id.* at 1267 (Wells, C.J., dissenting) (footnote omitted).

[80] In fact, there is evidence that even the dissenters on the U.S. Supreme Court did not really dispute that there was an equal protection violation. First, Justice Stevens. "Admittedly," he said, "the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns . . . " but we should "allow[] a little play in its joints." Bush v. Gore, 531 U.S. 98, 126 (Dec. 12, 2000) (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.) (quoting Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931)). "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 . . . ." *Id.* (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.).

Justice Ginsburg's defense of the Florida recount was hardly enthusiastic, for she referred to it as: "flawed as it may be." *Id.* at 143 (Ginsburg, J., dissenting, joined by Stevens, J.). Remember, that comes from someone who was *defending* the four-person majority of the Florida court. She

argued that the flawed recount would be no worse than the certification that preceded it. But it is not a ringing endorsement of the Florida Supreme Court to say that its decision was no worse than its earlier decision, because the U.S. Supreme Court had earlier unanimously reversed and remanded that decision. Like Justice Stevens, she did not believe that time was of the essence and would grant no deference to Florida's decision that it wanted to take advantage of the federal safe harbor by certifying a winner by December 12, 2000.

[81] *Id.* at 106.

[82] *See* *id.* at 106–07.

[83] Oral Argument at 50, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/949trans.pdf.

[84] *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 378–79 (1963) (holding that the Equal Protection Clause prohibits the state from giving more weight to voters from county to county); Reynolds v. Sims, 377 U.S. 533, 567–68 (1964) (determining that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State").

[85] *See* Moore v. Ogilvie, 394 U.S. 814, 818–19 (1969); *see also* O'Brien v. Skinner, 414 U.S. 524, 531 (1974). In *O'Brien*, Chief Justice Burger, writing for the Court, held that New York statutes, construed as denying to persons detained *within* counties of their residence absentee registration or voting, while granting these rights to persons similarly detained *outside* counties of their residence, were arbitrary, imposed an unconstitutionally onerous burdens on exercise of franchise, and denied equal protection. *See O'Brien*, 414 U.S. at 531.

[86] *Bush*, 531 U.S. at 104–05 (Dec. 12, 2000) (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966)).

[87] *Reynolds*, 377 U.S. at 555.

[88] Letter from Robert A. Butterworth, Attorney General, to Hon. Charles E. Burton, Chair, Palm Beach Canvassing Board 14 (Nov. 14, 2000), *in* Appendix to Brief of Intervenors Glenda Carr et al., Bush v. Gore, No. 00-949 (00A504), at 14, *available at* http://election2000.stanford.edu/respcarr.949.pdf.

[89] The Florida Attorney General's letter states in part:

> If hand recounts have already occurred in Seminole County and an unknown number of other counties without the restraint of a legal opinion while similar hand counts are blocked in other counties due to a newly issued standard, a two-tier system for reporting votes results.
>
> A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.
>
> As the State's chief legal officer, *I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions.* This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a president.

Id. (emphasis added).

[90] The various newspapers hired a respected nonpartisan group to count manually the ballots. These counters were supposed to be impartial. However, the "Republican counters were 4% more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democrats were 25% more likely to deny a mark was for Bush. This bias may well be utterly unconscious, but it remains a problem for any manual recount process." Elhauge, *supra* note 23, at 29.

[91] *See* John H. Fund, *The People Have Spoken; Will Gore Listen?*, WALL ST. J., Nov. 10, 2000, at A18.

[92] *See* Jace Radke, *Statistics Point to More Than Random Error in Florida Vote*, LAS VEGAS SUN, Nov. 10, 2000, *at* http://www.lasvegassun.com/sunbin/stories/archives/2000/nov/ 10/511018638.html.

[93] "In Pinellas County, when election officials removed the chaff from ballots before they were submitted for recount by the machines, Gore picked up an additional 417 votes." Richard Lacayo, *In the Eye of the Storm*, TIME.COM, Nov. 12, 2000, *at* http://www.time.com/time/campaign2000/story/0,7243,87787,00.html.

[94] *See* Bush v. Gore, 531 U.S. 98, 111–22 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.).

[95] The "ether" was the medium that pre-modern, medieval scientists once supposed to fill all space (because "nature abhors a vacuum"); this ether was supposed to support the propagation of electromagnetic waves.

[96] U.S. CONST, art. I, § 10, cl. 1.

[97] 303 U.S. 95 (1938).

[98] *Id.* at 100; *see also, e.g.*, Phelps v. Bd. of Educ., 300 U.S. 319, 322–23 (1937) (noting that the Court "is not bound by the decision of a state court as to the existence and terms of a contract").

[99] *Brand*, 303 U.S. at 100.

[100] *Id.* at 100, 104–05 (emphasis added) (footnotes omitted); *see also* 1 ROTUNDA & NOWAK, *supra* note 58, § 2.14(b), at 286–87 (discussing the *Brand* decision and the "adequate and independent state ground" doctrine).

[101] *See Brand*, 303 U.S. at 100 n.10.

[102] *See also, e.g.*, Terre Haute & I.R. Co. v. Indiana *ex rel.* Ketcham, 194 U.S. 579, 589 (1904), where the Court rejected the state court's interpretation ("untenable construction') of a corporate charter instead of the state's construction of a state statute. It would make no sense to make a distinction between the two because to "hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Id.*

[103] *See* McDermott v. Harris, No. 00-2700, 2000 WL 1693713, at *1 (Fla. Cir. Ct. Nov. 14, 2000), *cited in*, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1280 n.4 (Fla. Dec. 11, 2000).

[104] *See* McDermott v. Harris, No. 00-2700, 2000 WL 1714590, at *1 (Fla. Cir. Ct. Nov. 17, 2000).

[105] David Von Drehle et al., *Deadlock: A "Queen" Kept Clock Running*, WASH. POST, Jan. 30, 2001, at A1.

[106] *See* Stay Order, Nov. 17, 2001, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000), *available at* http://election2000.stanford.edu/stay.pdf. The order said: "In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission from certifying the results of the November 7, 2000, presidential election, until further order of this Court." *Id.* at 1.

[107] Von Drehle et al., *supra* note 105.

[108] *Id.*

[109] Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. REV. 1573, 1588–89 n.45. A year after the 2000 election, in November 2001, Ron Klain, the general counsel of the Gore recount team "acknowledged that the litigation would not have affected Congress's power to recognize the Bush certificate and that the end-game strategy for the Gore team was political, not legal. Gore hoped that if he won the recount he sought, Bush would concede the election notwithstanding his legal advantages." *Id.*

[110] Order Accepting Jurisdiction, Setting Oral Argument and Setting Briefing Schedule, Palm Beach County Canvassing Bd. v. Harris, No. 00-2346, Nov. 17, 2000, *available at* http:// election2000.stanford.edu/schedule.pdf.

[111] Von Drehle et al., *supra* note 105.

[112] *Id.*

[113] Oral Argument at 22, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/949trans.pdf (remarks of Theodore B. Olson).

[114] Oral Argument, Bush v. Palm Beach County Canvassing Bd. (No. 00-836), 2000 WL 1763666, at *40 (Dec. 1, 2000).

[115] *Id.*

[116] *Id.*

[117] *See id.* at *39–40.

[118] Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (per curiam). In the first election, the appellee won by three votes (1019 to 1016 votes). After the machine recount, appellee lost by five votes (1019 to 1014 votes): "The minutes of the hearing reveal that appellee stated that he wanted a recount because of the closeness of the election and the differences between the two machine counts." *Id.* at 509. Even though only five votes separated the winner from the loser, the Florida appellate court denied the manual recount and reversed the lower court although the loser had blamed voter errors in piercing the chads:

> All that should have been considered by the lower court was whether appellant failed to perform some mandatory statutory act or whether there were any electoral improprieties which had, not possibly might have, an influence on the ultimate choice of the voters. Appellant acted within its discretion in this case; and the trial court erred in reversing the initial denial of the manual recount request made by appellee.

Id. at 510. In that case there were fifty-eight overvotes and forty-two undervotes, more than enough to change the results.

[119] 3 U.S.C. §§ 1–10 (2000).

[120] 3 U.S.C. § 5 (2000).

[121] Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938).

[122] FLA. STAT. ANN. §§ 97.012, 106.23 (West 2002).

[123] Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844–45 (Fla. 1993): "We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law." (citations omitted).

[124] Opinion of the Florida Department of State, Division of Elections, (No. 00-13), cited in *Bush*, 531 U.S. 98, 119 (Rehnquist, C.J., concurring).

[125] Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (per curiam) (three to five vote difference with machine recount; no manual recount of ballots with hanging chads).

[126] *Bush*, 531 U.S. at 119 (Dec. 12, 2000) (Rehnquist, C.J., concurring).

[127] Gore v. Harris, 773 So. 2d 524, 526 (Fla. Dec. 22, 2000) (per curiam).

[128] *Bush*, 531 U.S. at 146 (Dec. 12, 2000) (Breyer, J., dissenting, joined by Souter, J.) (Part I.A.1).

[129] *Bush*, 531 U.S. at 146 (Dec, 12, 2000) (Breyer, J., dissenting, joined by Stevens, Ginsburg, & Souter, JJ.) (Part I.A.2).

[130] U.S. CONST. art. II, §1, cl. 2.

[131] *See* 3 U.S.C. § 5 (2000).

[132] *See infra* Part VI.

[133] *Bush*, 531 U.S. at 109 (Dec. 12, 2000).

[134] *See, e.g.*, Pamela Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in* Bush v. Gore, 64 OHIO ST. L.J. 265 (2003).

[135] *Bush*, 531 U.S. at 134 (Dec. 12, 2000) (Souter, J., dissenting, joined by Breyer, J.).

[136] *Id.* at 110 (per curiam) (citing FLA. STAT. ANN. § 101.015 (West 2002)).

[137] *Id.*

[138] Palm Beach City Canvassing Bd. v. Harris, 772 So. 2d 1273, 1289 (Fla. Dec. 11, 2000) (per curiam).

[139] The Florida Court said:

> Therefore, in this case involving a presidential election, we conclude that the reasoned basis for the exercise of the Department's discretion to ignore amended returns is limited to those instances where failure to ignore the amended returns . . . in the case of a federal election, will result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.

Id.

[140] *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237, 1239, 1239–40 (Fla. Nov. 21, 2000) (per curiam).

[141] "Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process . . . by precluding Florida voters from participating fully in the federal electoral process." *See id.* at 1237 (citing 3 U.S.C. §§ 1–10 (1994)) (footnote omitted).

[142] Gore v. Harris, 772 So. 2d 1243, 1254 n.11 (Fla. Dec. 8, 2000) (per curiam).

[143] *Palm Beach County Canvassing Bd.*, 772 So. 2d at 1286 n.17 (Dec. 11, 2000); *see also* Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 305–08 (2001) (maintaining that the Florida Supreme Court was acutely aware of the safe harbor provision codified in 3 U.S.C. § 5 and Florida's obligation to comply with its deadline of December 12).

[144] *See Palm Beach County Canvassing Bd.*, 772 So. 2d at 1290 n.22 (Dec. 11, 2000).

[145] *Gore*, 772 So. 2d at 1272 (Dec. 8, 2000) (per curiam) (Harding, J., dissenting, joined by Shaw, J. and on this point by Wells, C.J.). No member of the majority in this case disputed this statement by Justice Harding.

[146] *Id.* at 1268 (Wells, C.J., dissenting).

[147] *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237 n.55 (Fla. Nov. 21, 2000) (citing 3 U.S.C. §§ 1–10 (1994)).

[148] *Gore*, 772 So. 2d at 1260 (Dec. 8, 2000).

[149] Gore v. Harris, 773 So. 2d 524, 526 (Fla. Dec. 22, 2000) (per curiam).

[150] *Id.* at 528 (Shaw, J., concurring). One other justice did suggest that Congress might wish to consider if a thirty-five day time limit for final resolution of a presidential election contest is "realistic or reasonable." *Id.* at 530 n.14 (Pariente, J., concurring).

[151] Bush v. Gore, 531 U.S. 98, 134–35 (Dec. 12, 2000) (Souter, J., dissenting, joined by Breyer, J., on this issue).

[152] *See Gore*, 772 So. 2d at 1269 (Dec. 8, 2000) (Wells, C.J., dissenting), pointing out that in a very short time frame—

> 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 six million voters who were able to correctly cast their ballots on election day.

(footnote omitted) (citing FLA. STAT. ANN. § 102.166(6) (West 2000).

[153] *See* Merzer, *supra* note 19 (noting that the Herald's review of undervotes lasted from December 18 to March 13).

[154] *See, e.g.*, Gore v. Harris, No. 00-2808, (Fla. Cir. Ct. Dec. 3, 2000), at 6–7, *available at* http://election2000.stanford.edu/00-2431_transcript.pdf (order of Judge N. Sanders Sauls).

[155] *Cf.* Oregon v. Mitchell, 400 U.S. 112, 129–31 (1970). A very fragmented Court could not agree on the constitutionality of various provisions of the Voting Rights Act Amendments of 1970. However, a majority agreed that a federal law requiring states to lower the voting age to eighteen was valid as to federal elections (president and vice president, U.S. senators, U.S. representatives). The very fact that the election was for "federal" officials was sufficient to support federal regulation.

[156] Ronald D. Rotunda, *What It Takes to Win: Using the Psychic Hotline to Decide Contested Races*, CHI. TRIB., Nov. 26, 2000, § 1, at 19.

[157] *See* Von Drehle et al., *supra* note 105.

[158] Bush v. Gore, 531 U.S. 98, 106–07 (Dec. 12, 2000) (per curiam).

[159] *See id.*

[160] *See id.* at 107.

[161] *See id.* at 107–08.

[162] Unless the voting machines are working improperly—and the lawsuits did not involve that claim—recounting, either by machine or by hand, does not normally change the result. Instead, it simply raises the total number of votes counted, in proportion to the votes originally counted, *if* there is no mischief when the votes are recounted. Counting by hand increases the number of votes counted, because a human being will accept more ballots than will the machine. For example, the chad in the punch card may not be completely punched out, but the human vote counter can

recognize that and count the ballot. The hand count should increase the total for both candidates, but in a way that is statistically proportional to the results from the machine tabulation, if the human eye is nonpartisan.

[163] *See* Elhauge, *supra* note 23, at 30 (noting that there were “20 percent more Democratic counters than Republican counters, and that those Democratic counters were 25 percent more likely to deny a mark . . . for Bush”).

[164] A hand count of the ballots, *before* the standards for counting them are created, would have poisoned the political air, for it would allow the winner of that flawed process to claim victory even if a court later decides that the hand count was defective or corrupt.

[165] FLA. STAT. ANN. § 97.012 (West 2002).

[166] *Id.*