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# ***Bush v. Gore*: What Happened, and What Does The Supreme Court's New Equal Protection Standard Mean for State Election Officials?**

**Michael Louis Newman\***

Benjamin Franklin once mocked the property ownership requirement for voting by stating:

Today, a man owns a jackass worth fifty dollars and he is entitled to vote; but before the next elections, the jackass dies. The man in the mean time has become more experienced, his knowledge of the principles of government, and his acquaintance with mankind, are more extensive, and he is therefore better qualified to make a proper selection of rulers-but the jackass is dead and the man cannot vote.<sup>1</sup>

"Now, gentlemen," Franklin then asked, "pray tell me, in whom is the right of suffrage? In the man or in the jackass?"<sup>2</sup> According to the United States Supreme Court's decision in its recent and instantly infamous case of *George W. Bush v. Albert Gore* (hereinafter "*Bush v. Gore*"),<sup>3</sup> the right to vote is vested in neither of the two beings Franklin suggested.<sup>4</sup> Rather, the state legislature, acting pursuant to the United States Constitution,<sup>5</sup> has the sole right to decide how a state's presidential election will be administered.<sup>6</sup> With a few glaring historical exceptions,<sup>7</sup> the apparatus for selecting presidents utilizing the electoral college has worked exceedingly well, with the state legislatures delegating the power to administer elections to state election officials operating under the auspices of the executive branches of state

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1. BENJAMIN FRANKLIN, *THE CASKET, OR FLOWERS OF LITERATURE, WIT AND SENTIMENT* 4 (Philadelphia, 1828); *reprinted in* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 3 (2000).

2. *Id.*

3. *George W. Bush and Richard Cheney v. Albert Gore, Jr. and Joseph Lieberman*, 531 U.S. 98 (2000) [hereinafter "*Bush v. Gore*"].

4. *Id.* at 104.

5. U.S. CONST., art. II, cl. 2.

6. *Bush v. Gore*, 531 U.S. at 104.

7. See Part III, *infra*.

governments.<sup>8</sup>

In the 210 years since the first Supreme Court convened, the Court had never, before December 12, 2000, selected the President of the United States. On that date, the Court set forth a new interpretation of the Equal Protection clause as it applies to the administration of Federal Elections by state elections officials. Over the next two years, in preparation for the 2004 presidential elections, state officials must interpret and apply this new standard to avoid any further legal or political conflict. What must state elections officials do to comply with this new standard? The purpose of this article is to highlight the role of state elections officials historically and hypothesize the future application of the *Bush v. Gore* Equal Protection standard in future elections by state elections officials. Part II of this paper will review the historical background of federal election administration by the states, while part III will provide a brief history of American presidential elections. In part IV, the facts behind the titular case of this article will be discussed, and part V will be a discussion of the Supreme Court's historic decision. Part VI will highlight the Court's new Equal Protection doctrine. Finally, in part VII, I will discuss how the Court's new standard will be applied to the administration of the 2004 election and beyond.

## II. THE HISTORICAL BACKGROUND OF ELECTION ADMINISTRATION IN GENERAL

At the time the Constitution was drafted, a debate raged in the Continental Congress regarding how the President of the United States should be elected in order to best represent the people.<sup>9</sup> Four methods for choosing the President were debated, but ultimately rejected.<sup>10</sup> The first method was to allow Congress to select the President, but this method was thought to be too divisive and undermined the separation of powers principles of the Constitution.<sup>11</sup> The second method was to allow the state legislatures to make the selection, but the drafters feared this method would result in a national executive that would be beholden

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8. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 329-30 (2000).

9. WILLIAM KIMBERLING, *THE ELECTORAL COLLEGE 2* (A history of the Electoral College), available at <http://www.fec.gov/pdf/eleccoll.pdf> (last visited Feb. 7, 2002).

10. *Id.*

11. *Id.*

to the states.<sup>12</sup> The third method was to elect the President by direct national election.<sup>13</sup> However, this method was rejected due to the likelihood that too many candidates would garner enough votes to render the eventual plurality 'winner' illegitimate.<sup>14</sup> The fourth method was to institute an indirect election with each state represented by electors who would then directly vote for President.<sup>15</sup>

The Electoral College was therefore a compromise solution, giving the smaller, less politically powerful states the ability to check the influence of the very large and powerful states.<sup>16</sup> The drafters of the Constitution felt that their ingenious creation of the Electoral College was among the most significant accomplishments of the Continental Congress.<sup>17</sup> Alexander Hamilton begins *The Federalist* No. 68, *The Mode of Electing the President*, by gleefully, almost boastfully, explaining:

The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure or which has received the slightest mark of approbation from its opponents . . . . I venture somewhat further and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent. It unites in an imminent degree all the advantages the union of which was to be desired. It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust as to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture . . . . All these advantages will be happily combined in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government who shall assemble within the State, and vote for some fit person as President.<sup>18</sup>

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 3.

17. THE FEDERALIST No. 68 (Alexander Hamilton).

18. *Id.*

Hamilton felt that “[t]his process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who has not in an imminent degree endowed with the requisite qualifications.”<sup>19</sup> The national legislature mostly ignored the process of presidential elections, with a few notable exceptions where the Congress was called upon to decide elections in case of a tie.<sup>20</sup> “The founding fathers, in writing the Constitution, declined to institute any national suffrage standard at all: for pragmatic political purposes of their own, they left to the states the power to determine the contours of the franchise.”<sup>21</sup> Indeed, in the more than 200 years since the drafting of the Constitution, “[t]he right of Americans to vote [has been] shaped by an historically evolved and somewhat jerry-rigged-amalgam of state and federal laws.”<sup>22</sup> Federal laws have formed a backbone of limitations on state abuses of administrative discretion, such as discrimination at the polling place on the basis of race or gender, but state laws have filled in the details regarding the administration of elections, and state officials have the task of carrying out the actual process of electing the President.<sup>23</sup>

Administrative law is the legal branch that controls the administrative functions of the government by ensuring that agencies exercise their powers within their legal limits, while additionally protecting citizens against any abuse of agency powers. Congress and State legislatures promulgate and define the administrative agency as strictly a legislative creature . . . .<sup>24</sup>

The founders clearly intended that the states have an active role in deciding presidential elections. The founders stated, “[t]he election of

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19. *Id.*

20. THE FEDERALIST No. 68 (Alexander Hamilton). The votes of the electors were to be transmitted to the Congress:

[A]nd the person who may happen to have a majority of the whole number of votes will be President. But as a majority of the votes might not always happen to center on one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall elect out of the candidates who shall have the five highest number of votes the man who in their opinion may be best qualified for the office.

*Id.*; see also Part III, *infra*.

21. KEYSSAR, *supra* note 8, at 329.

22. *Id.*

23. *Id.*

24. Heather Rutland, *Civil Rights are Civil Rights are Civil Rights: The Inapplicability of Preclusion to Unreviewed State Administrative Decisions*, 20 J.NAALJ 210 (Fall 2000).

the President . . . will depend, in all cases, on the legislatures of the several States.”<sup>25</sup> “Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must, in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it.”<sup>26</sup> Indeed, the process by which a President is elected has always been decided, state-by-state, by the state legislatures. In fact, when the 2000 election spiraled out of control in Florida, there was serious consideration given by the Bush camp to lobby the Florida Legislature to select the state’s electors without attaining a final vote count, effectively short-circuiting the process.<sup>27</sup> “What counts, [John Yoo, University of California at Berkeley Law Professor] and others maintained, is that the Legislature has the power to [choose a slate of electors], regardless of what the final, official vote count and regardless of state legal process that might produce twenty-five Al Gore electors.”<sup>28</sup>

In *McPherson v. Blacker*,<sup>29</sup> an 1892 case cited frequently throughout the 2000 Election litigation, the United States Supreme Court reviewed a Michigan legislative enactment that allowed state election administrators to hold the election of presidential electors for the state of Michigan in differing manners in the several districts in the state.<sup>30</sup> The Court held that the Constitution mandated that it is for “the legislature exclusively to define the method of effecting” the appointment of presidential electors.<sup>31</sup> The Court explained that the legislature of each state has the “plenary authority to direct the manner of appointment” of electors<sup>32</sup> because the framers of the Constitution specifically granted them this power.<sup>33</sup> This case formed an important underpinning of the system we utilize today, as in the case, the Supreme Court gave the

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25. THE FEDERALIST No. 44 (James Madison).

26. THE FEDERALIST No. 45 (James Madison).

27. John Yoo, *A Legislature’s Duty*, Wall Street Journal, Dec. 4, 2000, at A24, reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 224 (E.J. Dionne, Jr. and William Kristol, eds., Brookings Institution Press, 2001).

28. Thomas Oliphant, *Gov. Bush’s Cynical End-Around in the Florida Legislature*, Boston Globe, Dec. 3, 2000, at D8, reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 238, 240 (E.J. Dionne, Jr. and William Kristol, eds., Brookings Institution Press, 2001).

29. 146 U.S. 1 (1892).

30. *Id.* at 1; see also Brief for Petitioners, George W. Bush and Richard Cheney at 19-20, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

31. *Id.* at 27.

32. *Id.* at 25.

33. *Id.*; see also U.S. CONST. art. II, cl. 2: “Each State shall appoint, in such Manner as the Legislature thereof may direct . . . .”

legislatures of the several states very broad authority to decide the manner in which electors for President are chosen and delegate the authority for administering elections as they see fit.<sup>34</sup>

### III. HISTORICAL BACKGROUND OF CONTESTED FEDERAL PRESIDENTIAL ELECTIONS

#### *The Election of Thomas Jefferson in 1800*

In the election of 1800, incumbent Federalist President John Adams, successor to our first President, faced Republican Thomas Jefferson for the second time.<sup>35</sup> The Republican party won the election.<sup>36</sup> The Republicans in the Electoral College split their votes evenly, which resulted in a tie for President between Thomas Jefferson and Aaron Burr.<sup>37</sup> The crisis moved to the House of Representatives.<sup>38</sup> In the case of ties in the Electoral College, the House of Representatives has the responsibility of choosing a President from the top five vote-getters.<sup>39</sup> Federalists in Congress, “desiring to embarrass Jefferson voted for Burr, forcing the ballot 35 times over six days.”<sup>40</sup> Finally, a group of fellow congressman convinced Alexander Hamilton to switch his vote and support Jefferson. This broke the tie, making Jefferson the third President of the United States.<sup>41</sup>

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34. *Id.* at 26.

35. DAVID MCCULLOUGH, JOHN ADAMS 556-62 (Simon & Schuster, 2001).

36. *Id.*

37. THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, TALLY OF THE 1824 ELECTORAL COLLEGE VOTE, at <http://www.nara.gov/education/cc/electcol.html> (last visited Mar. 20, 2002) [hereinafter NARA].

38. U.S. CONST. art. II, cl. 3.

39. *Id.*

40. NARA, *supra* note 37, at <http://www.nara.gov/education/cc/electcol.html> (last visited March 20, 2002).

41. *Id.* NARA describes the election as follows:

The election of 1800 had several lasting effects on the Electoral College system. It was the first time that a two-candidate ticket was promoted by a party, as well as the beginning of the practice of nominating electors who pledged to automatically vote the party ticket. This new development was directly opposed to the framers' original version of the electors as “free agents” or informed, respectable, independent citizens from each state. By 1804, the 12th Amendment was passed, making up for the weakness in the original Clause 3. Never again would such a tie be possible, as separate ballots would now be cast for president and vice-president.

*Id.*; see also TREASURES OF CONGRESS: THE HOUSE SELECTS A PRESIDENT, available at [http://www.nara.gov/exhall/treasuresofcongress/page\\_7.html#](http://www.nara.gov/exhall/treasuresofcongress/page_7.html#) (last visited March 20, 2002).

*The Election of John Quincy Adams in 1824*<sup>42</sup>

In the election of 1824, several major candidates ran and split the vote so that no single candidate managed to garner the requisite number of electoral votes.<sup>43</sup> The Republican party, through a secret caucus, nominated William H. Crawford. However, the majority of the party gave its support to others, including Andrew Jackson, Henry Clay, and John Quincy Adams.<sup>44</sup> In the presidential election, Andrew Jackson garnered 40.3% of the national popular vote and more electoral votes than any of the other candidates.<sup>45</sup> But because Jackson did not achieve the requisite number of electoral votes, the election was thrown into the House of Representatives.<sup>46</sup> Henry Clay supported John Quincy Adams in the House by pledging his electors to Adams and Adams won the election.<sup>47</sup>

*The Election of Rutherford B. Hayes in 1876*

In the election of 1876, an ally of Rutherford B. Hayes spread rumors that Hayes won the electoral vote even though it is likely that he did not garner the required number of votes while his opponent, Samuel Tilden, did.<sup>48</sup> The root of the problem was rampant “fraud, violence, and intimidation” by both Democrats and Republicans, especially in Florida, Louisiana, Oregon, and South Carolina.<sup>49</sup> With no statutes setting formal resolution procedures and no state officials responsible for election administration, chaos ensued.<sup>50</sup> Hayes earned 165 electoral votes, Tilden earned 184, and each candidate claimed the 20 disputed

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42. Bruce Morton, *U.S. Has Survived Disputed Elections Before*, at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/09/morton.transition/index.html> (last visited March 20, 2002).

43. NARA, *supra* note 37, at <http://www.nara.gov/education/cc/electcol.html> (last visited March 20, 2002).

44. *Id.* Under the current system, most states make their presidential nominations in primary general elections, though a very small minority still use the process of nominating conventions. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (“While he was never able to prove any actual bribery or corruption occurred, the accusation endured and influenced the next election, as well as Clay’s political career.”).

48. Rutherford B. Hayes Presidential Center, *Disputed Election of 1876*, available at <http://www.rbhayes.org/dispute.htm> (last visited Mar. 20, 2002) (excerpt of ARI HOOGENBOOM, RUTHERFORD B. HAYES: WARRIOR AND PRESIDENT, Chapter 17 (1995)).

49. *Id.*

50. *Id.*



votes which were needed to win.<sup>51</sup> Each party jockeyed for position. The election finally fell to Hayes after back-room political negotiating.<sup>52</sup> Instead of strict adherence to the Constitutional process utilized in the 1800 or 1824 elections, the politicians of 1876 created an Electoral Commission, composed of fifteen members, including five Senators, five Representatives, and five Supreme Court Justices.<sup>53</sup> With the votes on the commission split evenly between seven Democrats and seven Republicans, Justice Joseph P. Bradley decided to cast his vote for the Republicans, thus giving the presidency to Rutherford Hayes.<sup>54</sup>

Congress responded to this crisis with the Electoral Count Act of 1887.<sup>55</sup> The Act designated states, “through ‘judicial’ or other means,” as the primary jurisdiction in which to settle legal election contests.<sup>56</sup> Should a dispute be unresolved at the state level, “Congress is the body primarily authorized to resolve remaining disputes.”<sup>57</sup> According to Justice Breyer in his dissent in *Bush v. Gore*, “[t]he legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts.”<sup>58</sup> Indeed, the Electoral Count Act seems to indicate an early move toward removing the power of adjudication of election controversies from the courts and firmly placing it within the jurisdiction of the legislatures, with the last resort being not the Supreme Court, but the National Legislature:

The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented. Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?<sup>59</sup>

Despite the clear intention early on to place the duty of resolving

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51. *Id.*

52. *Id.*

53. *Bush v. Gore*, 531 U.S. at 156 (2000) (Breyer, J., dissenting).

54. *Id.*

55. 3 U.S.C. §§ 5, 6, and 15 (2002).

56. *Bush v. Gore*, 531 U.S. at 154 (Breyer, J., dissenting).

57. *Id.*

58. *Id.*

59. 18 CONG. REC. 30-31 (1886) (remarks of Representative Caldwell, sponsor of the Electoral Count Act, upon introducing the Bill in the House of Representatives).

post-election disputes in the legislative branch, the states and the federal government have together allowed a patchwork of state regulations to crop up in the 125 years since the election dispute of 1876. These regulations lead to a body of case law waiting for a close election to touch off a judicial-legislative controversy over the resolution of electoral disputes, and the 2000 election looked, even before election day, like that kind of an election.

#### IV. *THE FACTS BEHIND BUSH V. GORE*

The election of 2000 was a very close race down to the wire.<sup>60</sup> In fact:

Everyone knew it was going to be close. For weeks the two major-party candidates for president, Republican governor George W. Bush of Texas and Democratic vice president Al Gore, had been running neck and neck in national polls. Most showed Bush ahead by a few percentage points; two polls had Gore ahead; all were within the statistical margin of error. The cover of *Newsweek* magazine's pre-election special issue featured a single-word headline: "Cliffhanger." More important than these national opinion polls, however, were polls showing how close the vote would be in the Electoral College. The candidates had comfortable leads in many states, but too many states were just too close to call, and neither candidate had a predictable majority of these crucial votes. . . . most press accounts assumed that the presidency would be decided in. . . "battleground" states – Pennsylvania, Michigan, and Florida.<sup>61</sup>

On election night, the television networks set up their familiar scenario for monitoring exit polls, spot polls of a randomly selected group of voters at randomly selected precincts in a state, and projecting a winner of a state's electoral votes just after polls close and several hours before state vote tallies became final.<sup>62</sup> "At 7:50 P.M., after the polls had closed throughout most of Florida but while polls were still

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60. Keating Holland, *Tracking Poll: Bush leads Gore by 5 Points, 2 days before election* (Nov. 5, 2000), available at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/05/tracking.poll/index.html> (last visited Feb. 7, 2002).

61. HOWARD GILLMAN, *THE VOTES THAT COUNTED* 17 (The Univ. of Chicago Press 2001).

62. Associated Press, *Flubs Put Spotlight on How Networks Call Elections* (Nov. 17, 2000), available at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/17/vns.ap/index.html> (last visited Feb. 7, 2002).

open in the western portion of the state's panhandle . . . , the Associated Press and the television networks declared that Gore was the projected winner of the state."<sup>63</sup> As more and more states seemed to fall into the Gore column of electoral wins and the media began to predict a Gore win, Bush went on the air to explain that he thought the Florida call was too early and that "Americans ought to wait until they count all the votes" before celebrating a Gore win.<sup>64</sup> Later during election night, the tide turned when "the media took the unprecedented step of withdrawing their earlier projection of a Gore victory in Florida" and stated that the vote count in Florida was too close to call.<sup>65</sup> As the night wore on, it became clear that Florida's twenty-five electoral votes would determine the outcome of the presidential election of 2000.<sup>66</sup> At 2:16 A.M., the networks began to call Florida in favor of Bush after more precinct results poured in indicating an expanding Bush lead.<sup>67</sup> After Gore privately conceded to Bush, and as he prepared to make his public concession speech, his campaign manager William Daley received a message that the vote tally narrowed again, and that Gore should not make a concession.<sup>68</sup> The networks placed Florida back into the "too close to call" column, and Gore called Bush back to retract his private concession, explaining that Florida state law required a recount of the ballots and "[he] was going to wait it out."<sup>69</sup> Indeed, Bush's lead continued to shrink in recounts over the next few days until the margin of victory was too close to be decisive, and the campaign foes turned into post-campaign combatants.<sup>70</sup>

In order to ascertain a winner, Florida's seemingly simple post-election recount mechanism was put into action. Florida has a typical format for deciding the appointment of electors to represent the state in the Electoral College. Under Florida's statutory administrative scheme, the Secretary of State is the "chief election officer," and has the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws."<sup>71</sup> Under this scheme,

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63. GILLMAN, *supra* note 61, at 18.

64. *Id.* at 18-19 (citing Mark Z. Barabak, *Candidates Struggle for Bare Margin of Victory*, L.A. TIMES, Nov. 8, 2000, at A21). Time is Eastern Standard Time.

65. *Id.* at 19.

66. *Id.*

67. *Id.* Time is Eastern Standard Time.

68. *Id.*

69. *Id.* at 19-20.

70. *Id.* at 20.

71. FLA. STAT. ANN. § 97.012 (West Supp. 2002).

the Secretary has delegated to individual county canvassing boards the traditional duties of administering elections.<sup>72</sup> Under the Florida Supreme Court's ruling in *Boardman v. Esteve*,<sup>73</sup> deference is to be given to decisions by the executive branch, specifically the Florida Elections Canvassing Commission.<sup>74</sup> The *Boardman* court stated that "[t]he election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties . . . . [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct . . . ."<sup>75</sup>

Under Florida's statutory scheme, the county canvassing boards conduct a mandatory recount wherever the margin of victory in a race is one half of one percent or less of all legally cast votes.<sup>76</sup> Following the final vote tabulation, the county canvassing boards, to fit within a so-called "safe-harbor" provision, must file certified results of the vote tabulation with the Department of State by five o'clock p.m., on the seventh day after the election.<sup>77</sup> The state Canvassing Commission must then certify the results of the counties.<sup>78</sup> As in all states, the state legislature has enacted provisions governing the methods for challenging both election returns<sup>79</sup> and the certified results of an election.<sup>80</sup>

Under a protest, which must be filed prior to the certification of election results,<sup>81</sup> the county canvassing board has the discretion to allow a manual recount.<sup>82</sup> If a sample recount shows an error in tabulation, three options are allowed for the county administrators.<sup>83</sup> First, they can attempt to correct the error and then recount the remaining precincts with the same vote tabulation mechanisms.<sup>84</sup> Second, they can request that the Florida Department of State verify the

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72. FLA. STAT. ANN. § 102.141 (West Supp. 2001) (amended 2002).

73. 323 So.2d 259 (Fla. 1975).

74. *Id.* at 268, n. 5.

75. *Id.*

76. FLA. STAT. ANN. § 102.141(4) (West Supp. 2000) (amended 2002).

77. FLA. STAT. ANN. § 102.112(1) (West Supp. 2000) (amended 2002). Time is Eastern Standard Time.

78. FLA. STAT. ANN. § 102.111(1) (West Supp. 2000) (amended 2002).

79. FLA. STAT. ANN. § 102.166 (West Supp. 2000) (amended 2002).

80. FLA. STAT. ANN. § 102.168 (West Supp. 2000) (amended 2002).

81. FLA. STAT. ANN. § 102.166(4)(b) (West Supp. 2000) (amended 2002).

82. FLA. STAT. ANN. § 102.166(4)(c) (West Supp. 2000) (amended 2002).

83. FLA. STAT. ANN. § 102.166(5) (West Supp. 2000) (amended 2002).

84. *Id.*

tabulation mechanisms.<sup>85</sup> Finally, they have the option of manually recounting all of the ballots.<sup>86</sup>

Florida's election dispute machinery creaked into motion on the day after the election, November 9, 2000, with a statewide machine recount giving Bush an official lead of 327 votes, with 2,910,198 votes to Gore's 2,909,871 votes.<sup>87</sup> After the release of those official totals, Gore sought manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia counties.<sup>88</sup> Bush reacted to this by requesting, on November 11, that a Federal District Court block all manual recounts.<sup>89</sup> This request was denied on November 13.<sup>90</sup> In a series of Advisory Legal Opinions regarding the legality of the recount process, Director of the Division of Elections of the State of Florida, L. Clayton Roberts, established a deadline for certification of all votes of November 14,<sup>91</sup> defined the official description of an error in tabulation,<sup>92</sup> and set forth procedures for manual recounting and partial certification of county returns.<sup>93</sup> In order to rectify what he saw as an opinion "so clearly at variance with the existing Florida statutes and case law," Florida Attorney General Robert Butterworth issued his own official Advisory Opinion to a judge considering one of the recount cases.<sup>94</sup>

In the first case addressing the manual recounting, a Leon County Circuit Court judge, Terry Lewis, issued a declaratory judgment on November 14 that Florida Secretary of State Katherine Harris could certify the vote totals of each of the counties involved in the manual

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85. *Id.*

86. *Id.* The procedures for a manual recount are set forth in FLA. STAT. ANN. § 102.166(7) (West 2000) (amended 2002).

87. BUSH V. GORE: THE COURT CASES AND THE COMMENTARY xi (E.J. Dionne, Jr. & William Kristol eds., 2001).

88. *Id.*

89. *Id.* at xii.

90. *Id.*

91. Florida Department of State Division of Elections Advisory Opinion DE 00-10: Deadline for Certification on County Results, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 9 (E.J. Dionne, Jr. & William Kristol, eds., 2001).

92. Florida Department of State Division of Elections Advisory Opinion DE 00-11: Definitions of Errors in Vote Tabulation, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 11 (E.J. Dionne, Jr. & William Kristol eds., 2001).

93. Florida Department of State Division of Elections Advisory Opinion DE 00-13: Manual Recount Procedures and Partial Certification of County Returns, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 12 (E.J. Dionne, Jr. & William Kristol eds., 2001).

94. Florida Attorney General Advisory Legal Opinion AGO 2000-65: Manual recount of ballots, error in voter tabulation, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 14 (E.J. Dionne, Jr. & William Kristol eds., 2001).

recount, but that the counties could amend their vote totals at the discretion of Harris when she certified the statewide vote totals.<sup>95</sup> Harris immediately certified the then-current county totals and issued a set of criteria for allowing extensions that included voter fraud, failure to comply with election procedures and acts of nature and excluding extensions where the delay resulted from voter error, confusing ballots, and “where there is nothing more than a mere possibility that the outcome of the election would have been effected.”<sup>96</sup>

After concluding their manual recounts, Broward, Miami-Dade, Palm Beach, and Volusia county submitted requests to amend their previously certified totals pursuant to Judge Lewis’s order,<sup>97</sup> but Secretary Harris rejected all four counties based on her belief that none complied with her set of criteria.<sup>98</sup> Gore immediately requested that Judge Lewis hold Harris in contempt of court, but Lewis ruled that Harris has “exercised her reasoned judgment to determine what relevant factors and criteria should be considered. . . .”<sup>99</sup> The Florida Supreme Court then reversed Lewis and Harris and on November 21, 2000, they imposed a November 26 deadline for manual recounts and ordered that Harris accept all manual recount totals submitted prior to the new deadline.<sup>100</sup> The November 26 certification showed Bush leading by a total of 537 votes and Harris declared Bush the winner of Florida’s twenty-five electoral votes and therefore the presidency.<sup>101</sup> Bush appealed the Florida Supreme Court’s decision to the United States Supreme Court, but the Court remanded the case for further consideration on the issue of Florida state law, refusing to directly reinterpret the Florida court’s interpretation of its own state laws and denying Bush the relief he had requested.<sup>102</sup> The certification of November 26 therefore stood as official, and the Gore team focused on the next phase of the legal battle, the contest.

As in most states, to challenge the certification of an election in

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95. *McDermott v. Harris*, No. CV 00-2700, 2000 WL 1693713, at \*4 (Fla. Cir. Ct. Nov. 14, 2000).

96. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 n.5 (Fla. 2000).

97. *McDermott v. Harris*, No. CV 00-2700, 2000 WL 1693713, at \*4 (Fla. Cir. Ct. Nov. 14, 2000).

98. See Florida Department of State Division of Elections Advisory Opinion DE 00-11: Deadline for Certification on County Results, *supra* note 92.

99. DIONNE, JR. & KRISTOL, *supra* note 87, at xii.

100. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1240.

101. DIONNE, JR. & KRISTOL, *supra* note 87, at xiii.

102. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

Florida, a contest must be filed in a circuit court,<sup>103</sup> with the local canvassing board or state canvassing board as the party defendant.<sup>104</sup> To establish grounds for a contest, the challenger must show the “[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.”<sup>105</sup> To this end, “[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.”<sup>106</sup>

In his concurring opinion in *Bush v. Gore*, Justice Rehnquist states, “[i]n [p]residential elections, the contest period necessarily terminates on the date set by [Congress] for concluding the State’s ‘final determination’ of ‘election controversies.’”<sup>107</sup> Title 3, Chapter 1, Section 5 of the United States Code, entitled “Determination of controversy as to appointment of electors,” states:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.<sup>108</sup>

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103. FLA. STAT. ANN. § 102.168(1) (West 2000) (amended 2002).

104. FLA. STAT. ANN. § 102.168(4) (West 2000) (amended 2002).

105. FLA. STAT. ANN. § 102.168(3)(c) (West 2000) (amended 2002).

106. FLA. STAT. ANN. § 102.168(8) (West 2000) (amended 2002).

107. *Bush v. Gore*, 531 U.S. at 117 (2000) (Rehnquist, C.J., concurring) (citing 3 U.S.C.A. § 5 (Supp. 2000)).

108. 3 U.S.C. § 5 (2001). There are, at the time of writing, several pieces of legislation pending in Congress attempting to amend this section, including Senate Bill 1320, which attempts to change the date for federal elections and establish national polling hours; Senate Bill 175, which attempts to set a uniform time for poll closing and regulate absentee ballot counting; Senate Bill 50, which attempts to set a national poll closing time; and House Resolution 50, a sister bill of Senate Bill 50, which similarly attempts to set a national poll closing time. S. 1320, 107th Cong. (2001); S. 175, 107th Cong. (2001); S. 50, 107th Cong.

On November 27, the day after Secretary Harris certified the vote totals and awarded Florida's electoral votes to Bush, Gore filed suit in the Leon County courtroom of Judge N. Sanders Sauls contesting the statewide certification and specifically challenging the vote totals in Miami-Dade, Nassau, and Palm Beach counties.<sup>109</sup> Judge Sauls stated:

[I]t is the established law of the state of Florida, as reflected in *State v. Smith*, that where changes or charges of irregularity of procedure or inaccuracy of returns in balloting and counting processes have been alleged, the court must find as a fact that a legal basis for ordering any recount exists before ordering such a recount.<sup>110</sup>

Judge Sauls then concluded that there was no such legal basis.<sup>111</sup> On December 8, the Florida Supreme Court reversed Sauls, holding that there was a factual and legal basis to order a recount because enough ballots remained in dispute to sway the election to either Bush or Gore.<sup>112</sup> The Florida court ordered manual recounts to continue and ordered Secretary of State Harris to include results from recounts in Miami-Dade and Palm Beach counties in the state's certified vote totals.<sup>113</sup>

On December 9, the day after the Florida Supreme Court's final ruling, the Supreme Court granted a request by the Bush legal team to stay the Florida court's order.<sup>114</sup> In a highly unusual move, the Court treated the application for a stay as a writ of certiorari, and then granted this writ of certiorari, effectively summoning the parties to argue before the Justices, despite the fact that neither party requested the ability to conduct oral arguments before the Court.<sup>115</sup> It was clear that battle lines had already been drawn when one conservative, Justice Scalia, and one liberal, Justice Stevens, each drafted an opinion to accompany the per curiam grant of stay.<sup>116</sup>

Justice Scalia foreshadowed the final result, explaining, "the issuance of the stay suggests that a majority of the Court, while not deciding the

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(2001); H.R. 50, 107th Cong. (2001).

109. DIONNE, JR. & KRISTOL, *supra* note 87, at xiii.

110. *Id.* at 53-55 (published transcript of oral judgment in *Gore v. Harris*, No. CV 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000)).

111. *Id.* at 55.

112. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *cert. and stay granted*, *Bush v. Gore*, 531 U.S. 1046 (2000), *and rev'd*, *Bush v. Gore* 531 U.S. 98 (2000).

113. *Id.* at 1262.

114. *Bush v. Gore*, 531 U.S. 1046 (2000) (application for stay of order).

115. *Id.*

116. *See Id.* (Scalia, J., concurring) and (Stevens J., dissenting).



issues presented, believe that the petitioner has a substantial probability of success.”<sup>117</sup> Justice Scalia framed the legal question as “whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, ‘legally cast votes,’” suggesting a federal reinterpretation of a state court’s interpretation of its own state laws.<sup>118</sup> Justice Scalia further commented (as the Court would ultimately frame its decision in *Bush v. Gore*) that he doubted the “constitutionality of letting the standards for determination of voters’ intent – dimpled chads, hanging chads, etc. – vary from county to county, as the Florida Supreme Court opinion . . . permits.”<sup>119</sup>

Justice Stevens, in a dissent to the Court’s acceptance of the case for oral arguments and determination, explained, “the majority has acted unwisely,” as it violates three “venerable rules of judicial restraint”:

On questions of state law, we have consistently respected the opinions of the highest courts of the States. On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously. On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion.<sup>120</sup>

Justice Stevens emphasized that the Florida Supreme Court’s ruling was not only consistent with prior Florida case law, but was also consistent with rulings in other states that upheld “the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted.”<sup>121</sup>

## V. THE UNITED STATES SUPREME COURT’S MANY DECISIONS

### *The Per Curiam Opinion*

The per curiam opinion of the Court held that the manual ballot tabulation did not satisfy the minimum requirements set forth by the Equal Protection Clause.<sup>122</sup> The Court focused its review on the

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117. *Id.* (Scalia, J., concurring).

118. *Id.*

119. *Id.*

120. *Id.* (Stevens, J. dissenting).

121. *Id.*

122. *Bush v. Gore*, 531 U.S. 98, 103 (2000).

question of “whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5,” and also “whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.”<sup>123</sup> The Court answered each of these questions by stating, “[w]ith respect to the equal protection question, we find a violation of the Equal Protection Clause.”<sup>124</sup>

The Court began its analysis by sharply focusing blame for the election fiasco on the punch-card balloting system, explaining “punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.”<sup>125</sup>

The Court then entered into its discussion of the constitutional rights involved by making the seemingly shocking assertion that “[t]he individual citizen has no federal constitutional right to vote” unless granted the privilege by his or her state legislature.<sup>126</sup> The Court cites to an early case, *McPherson v. Blacker*,<sup>127</sup> as stating that the power to select electors for the President of the United States resides in the state legislature, and only the legislature has the ability to grant the citizens of a state the privilege of voting in a general election.<sup>128</sup> However, once the legislature vests the right in the people of the state to vote, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution<sup>129</sup> requires that a state not “value one person’s vote over that of another.”<sup>130</sup> The Court then focuses in on the Warren Court’s holding in *Reynolds v. Sims*<sup>131</sup> 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.”<sup>132</sup> The Court characterizes its deliberations in *Bush v. Gore* as attempting to decide “whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid

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123. *Id.*

124. *Id.*

125. *Id.* at 104.

126. *Id.*

127. 146 U.S. 1 (1892).

128. *Bush v. Gore*, 531 U.S. at 104.

129. U.S. CONST. amend. XIV, c1. 1.

130. *Bush v. Gore*, 531 U.S. at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

131. 377 U.S. 533 (1964).

132. *Bush v. Gore*, 531 U.S. at 105 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

arbitrary and disparate treatment of the members of its electorate,”<sup>133</sup> which was decried in *Harper v. Virginia Bd. of Elections*.<sup>134</sup>

The Court is compelled in its per curiam opinion to respond to an extremely sensitive criticism in the wake of its acceptance of certiorari of a case in which a state supreme court analyzed state statutes governing the administration of elections in its own state, as this type of analysis is nearly always given deference by the Court.<sup>135</sup> The Court defends itself by explaining:

For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida’s basic command for the count of legally cast votes is to consider the “intent of the voter.”<sup>136</sup>

The Court explained that the issue is “not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count.”<sup>137</sup> To this end, the Court explained that having various standards among the different Florida counties, even among different vote-counters in each county, was an unfair and disparate treatment of the rights of the voters.<sup>138</sup> The per curiam opinion offered the example of one county involved in the manual recount:

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.

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133. *Id.* at 104-05 (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)).

134. 383 U.S. 663, 665 (1996).

135. *See infra* note 213.

136. *Bush v. Gore*, 531 U.S. at 105-06 (citing *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000)).

137. *Id.* at 106.

138. *Id.* at 106-07.

This is not a process with sufficient guarantees of equal treatment.<sup>139</sup>

The final and critical rule of *Bush v. Gore*, as restated from *Harper*,<sup>140</sup> is that, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>141</sup> The Court therefore accuses the vote counters in Florida of being inherently biased in their counting, or at best, incapable of committing to a fair and equal treatment of each ballot under one per se rule. The Court especially points to the inherent unfairness of counting the “undervotes,” or ballots on which a machine tabulation recorded no vote for president, but not counting the “overvotes,” or ballots on which a machine tabulation recorded more than one vote for President.<sup>142</sup>

The Court concludes its remarkable opinion in a remarkable case with a fittingly remarkable limitation of its decision when it stated that its “consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”<sup>143</sup> The Court seems to worry about an application of the principles it espoused in its Equal Protection discussion to other cases, even ones involving factually similar disputes, despite its cryptic urging earlier in the decision that pushes for a nationwide review of the voting system: “After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”<sup>144</sup>

The Court finally discusses the impracticality of continuing vote counts because of the extreme administrative pressures that would have to be placed on elections officials in the state of Florida and the lack of time.<sup>145</sup>

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139. *Id.*

140. Interestingly, *Harper* has nothing to do with the counting of votes, but rather the creation on voting districts. In *Harper*, the Court rejected a gerrymandered voting district as “inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1996).

141. *Bush v. Gore*, 531 U.S. at 104-05.

142. *Id.* at 107-08.

143. *Id.* at 109.

144. *Id.* at 104.

145. *Id.* at 110. The Court expressed concerns about time limiting the ability to redress the injustices it claimed tainted the vote counting, yet inexplicably, when blaming Gore for creating time constraints on the process by pressing a challenge to the certification of the vote counts stated, “[t]he press of time does not diminish the constitutional concern.” *Id.* at 108. The Court is therefore willing to take the time to hear the case and decide that the actions taken in Florida were unconstitutional, but is not willing to make the time to properly

### *The Concurring Opinion*

Chief Justice Rehnquist, joined by fellow conservatives Scalia and Thomas, wrote an opinion concurring with the per curiam opinion, and immediately recognized that the nature of the disputed 2001 elections was different from any previous case because it dealt with “an election for the President of the United States.”<sup>146</sup>

In order to explain its unusual decision to address an issue of state law and its nearly unprecedented reversal of a state supreme court on a matter of the interpretation of a state law, the conservative faction of the Court put forth an explanation that began with a caveat:

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Of course, in ordinary cases, the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government. This is one of them.<sup>147</sup>

The Chief Justice cited *Erie Railroad Company v. Tompkins*<sup>148</sup> for the proposition that state court decisions on matters of state law and administration should be given great deference by federal courts, but immediately moved away from this deferential presumption by explaining that, in the context of the appointment and election of presidential electors, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”<sup>149</sup> The concurrence recognizes that “Art. II, § 1, cl. 2, ‘convey[s] the broadest power of determination’ and ‘leaves it to the legislature exclusively to define the method’ of appointment,”<sup>150</sup> but that in its decision in the case below,<sup>151</sup> the Florida Supreme Court made a

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resolve the dispute.

146. *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

147. *Id.* (citations omitted).

148. 304 U.S. 64 (1938).

149. *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring)

150. *Id.*

151. 772 So. 2d 1243 (Fla. 2000)

“significant departure from the legislative scheme for appointing Presidential electors [that] presents a federal constitutional question.”<sup>152</sup>

The concurrence noted that the Florida Legislature decided prior to the November 6, 2000, election date to hold a statewide election for the state’s 25 electors, and that the Legislature further “delegated the authority to run the elections and to oversee election disputes to the Secretary of State, and to state circuit courts.”<sup>153</sup> The concurrence then states that, though certain areas of the code are subject to interpretation by either the Secretary of State or by the state courts, “the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies.”<sup>154</sup> Justice Rehnquist asserts that, though a state court may use its own discretion in deciding the level of deference it would give to the Secretary of State in a state election, the United States Constitution requires that the courts “must be both mindful of the legislature’s role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.”<sup>155</sup>

The concurrence then made its own interpretation of Florida election law and addressed the administrative law implications of the protest and contest phases.<sup>156</sup> The critical issue, according to the concurrence, was one of oversight by the Florida courts of the administration of the election by the State Secretary of State, Katherine Harris.<sup>157</sup> In the first Florida Supreme Court case to address the protest phase,<sup>158</sup> the Florida justices extended the certification deadline established by the Florida Legislature.<sup>159</sup> Justice Rehnquist surmises that there was implicit value placed on the certification action taken by the Secretary of State if justice required an extension of the deadline in order to count all of the

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152. Bush v. Gore, 531 U.S. at 113 (Rehnquist, C.J., concurring).

153. *Id.* at 113-14 (Rehnquist, C.J., concurring) (citations omitted). The delegation of authority to the Secretary of State took place pursuant to section 97.012(1) of the Florida Statutes, and the delegation to the state circuit courts pursuant to sections 102.168(1) and 102.168(8) of the Florida Statutes. FLA. STAT. ANN. § 97.012(1) (West 2001); FLA. STAT. ANN. § 102.168(1), 102.168(8) (West 2000) (amended 2002).

154. Bush v. Gore, 531 U.S. at 114 (Rehnquist, C.J., concurring).

155. *Id.*

156. *Id.*

157. *Id.* at 117-18.

158. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000) [hereinafter *Harris I*].

159. Bush v. Gore, 531 U.S. at 117-18 (Rehnquist, C.J., concurring).

votes and incorporate a full manual count in a certified total.<sup>160</sup> The concurring Justices reinforced the idea that the Secretary of State, following the provisions set forth by the state legislature, is the final arbiter of the meaning and enforcement of the laws governing election administration.<sup>161</sup> The concurrence made a point of criticizing the Florida Supreme Court's lack of deference to the Secretary of State's decisions, as well as the deadlines set by the Florida legislature and even its own earlier decisions.<sup>162</sup>

Continuing to dismantle the Florida Supreme Court's decision, Rehnquist's concurrence pointed out that the Florida Supreme Court "plainly departed from the legislative scheme" in ordering a recount during the contest phase of the election, when Justice Rehnquist felt that "Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots."<sup>163</sup> Rehnquist asserted that such remedial measures after the election are or should be unnecessary,<sup>164</sup> as Florida statute provides that each precinct advise voters "on how to properly cast a vote,"<sup>165</sup> have a model of the voting machine it uses available for preparatory practice voting,<sup>166</sup> and prepare a sample ballot for each voting booth.<sup>167</sup> Furthermore, the punchcard ballots were accompanied by an admonition to voters to be vigilant with regard to eliminating all chad,<sup>168</sup> and Rehnquist rejected the Florida Supreme Court's efforts to order the recounting of all of these ballots:

No reasonable person would call it "an error in the vote tabulation," Fla. Stat. Ann. § 102.166(5) (Supp.2001), or a "rejection of . . . legal votes," § 102.168(3)(c), when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are

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160. *Id.* at 118.

161. *Id.*

162. *Id.*

163. *Id.* at 118-19.

164. *Id.* at 119.

165. FLA. STAT. ANN. ch. 101.46 (1992).

166. FLA. STAT. ANN. ch. 101.5611 (Supp. 2002).

167. FLA. STAT. ANN. ch. 101.46 (2002).

168. *Bush v. Gore*, 531 U.S. at 105, 119; *see also* Brief on the merits of Katherine Harris, Sec'y of State, at 2000 U.S. Briefs 949 (Lexis-Nexis) at 10-11, *Bush v. Gore*, 531 U.S. 98 (2000).

required to be “capable of correctly counting votes,” § 101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd.<sup>169</sup>

The concurrence then explained that the Secretary of State “is authorized by law to issue binding interpretations of the Election Code,” effectively granting to an executive agency the unmitigated and unreviewable authority to interpret state law.<sup>170</sup> The concurrence called Secretary of State Harris’s interpretation “reasonable,” while maligning the opinion of a unanimous Florida Supreme Court in the first election case, *Harris I*, as “peculiar.”<sup>171</sup> Justice Rehnquist explained that the Secretary of State’s opinions were the equivalent of the legislative scheme, and the court erred in differing with Secretary Harris.<sup>172</sup>

Finally, the concurrence explained that, beyond overstepping the bounds of administrative procedures for elections, the Florida Supreme Court’s proposed remedy of manually counting votes to ensure accuracy of the final count was made impossible due to the time limitations imposed on the certification of electors.<sup>173</sup> The Court was concerned not with achieving a fair count of the votes as asserted by the Florida Supreme Court majority in the second decision it issued<sup>174</sup> but rather achieving a certifiable vote count before the so-called “safe-harbor” provision<sup>175</sup> protecting the legitimacy of each state’s electors.<sup>176</sup> The concurrence interpreted Florida’s statutory scheme as requiring a final certification prior to the expiration of the “safe-harbor” provision and explained that, “the remedy prescribed by the Supreme Court of Florida cannot be deemed an ‘appropriate’ one as of December 8,” because it “significantly departed from the statutory framework in place on November 7,” as the Court and Secretary of State Harris interpreted it, “and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.”<sup>177</sup>

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169. Bush v. Gore, 531 U.S. at 119 (Rehnquist, C.J., concurring).

170. *Id.* at 119-20 (citing *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993)).

171. Bush v. Gore, 531 U.S. at 120 (Rehnquist, C.J., concurring).

172. *Id.*

173. *Id.* at 120-21.

174. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000) [hereinafter *Harris III*].

175. 3 U.S.C. § 5 (1994).

176. Bush v. Gore, 531 U.S. at 121 (2000) (Rehnquist, C.J., concurring).

177. *Id.* at 122.



### *The Dissenting Opinions*

The concurring opinion of Rehnquist, Thomas, and Scalia, written in support of the per curiam opinion on their behalf and that of non-writing Justices O'Connor and Kennedy, provoked a firestorm among the four dissenting Justices, each of whom wrote a dissenting opinion. These opinions picked apart Justice Rehnquist's opinion and the per curiam opinion, generally argued that the Court should not have adjudicated the case and that the Florida counties should have been given the time to complete a final contest phase manual recount under a uniform standard.

### Justice Stevens' Opinion

Stevens characterized the issue presented as a question arising "about the meaning of state laws," and that it is the "settled practice [of the United States Supreme Court] to accept the opinions of the highest courts of the States as providing the final answers" regarding an interpretation of state laws.<sup>178</sup> Stevens unequivocally anchored his dissent in the principle that the issues surrounding the election of 2000 in Florida were issues of state law interpretation, more properly decided by a state supreme court, not the Federal one.<sup>179</sup> According to Stevens' dissent, any "federal questions that ultimately emerged in this case are not substantial."<sup>180</sup> Stevens referred to *McPherson v. Blacker*,<sup>181</sup> in which the Court held that actions required or forbidden to be done by a state through its legislature are to be reviewed under their state's constitution, implicitly by their state supreme court.<sup>182</sup> Stevens explained that "nothing in Article II of the Federal Constitution frees the state legislature from the restraints in the State Constitution that created it."<sup>183</sup> Also, the Florida Legislature's decision not to exempt the Florida election code from the rest of the code, according to Stevens, displayed "that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving [all other types of] electoral disputes."<sup>184</sup> Justice Stevens concluded that "[t]he Florida Supreme Court's exercise of appellate jurisdiction

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178. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

179. *Id.*

180. *Id.*

181. 146 U.S. 1 (1892).

182. *Bush v. Gore*, 531 U.S. at 123 (Stevens, J., dissenting) (citing *McPherson v. Blacker*, 146 U.S. 1, 25 and *Smiley v. Holm*, 285 U.S. 355, 367 (1932)).

183. *Bush v. Gore*, 531 U.S. at 124 (Stevens, J., dissenting).

184. *Id.*

therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.”<sup>185</sup> Stevens pointed out that the Court has never before questioned the standard by which a state determines whether a vote has been legally cast and how it will be counted.<sup>186</sup> Stevens charged that the majority’s decision oversteps the authority of the Court.<sup>187</sup>

Stevens asserted that the *Bush v. Gore* holding is applicable to future cases in other states because the Florida standard is similar to the standard applied by a large majority of the states,<sup>188</sup> either as an “intent of the voter”<sup>189</sup> or an “impossible to determine the elector’s choice”<sup>190</sup> standard. Stevens further pointed out that the majority’s decision in *Bush v. Gore* has the impact of negating all recent history of election administration, eliminating the ability of state officials to govern the administration of federal elections in their states.<sup>191</sup> If the majority’s decision were taken to heart by courts and legislatures around the country, “Florida’s decision to leave to each county the determination of what balloting system to employ . . . might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot designs.”<sup>192</sup>

Stevens concluded his dissent by pointing out that that the majority

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185. *Id.*

186. *Id.* at 124-25.

187. *Id.*

188. *Id.* at 125 n.2.

189. *Id.* Footnote 2 summarizes:

The following States use an “intent of the voter” standard: (standard for canvassing write-in votes); (standard for absentee ballots, including three conclusive presumptions); Mass. Gen. Laws § 70E (1991) (applying standard to Presidential primaries); (Cum. Supp. 1998) (looking to voter’s intent where there is substantial compliance with statutory requirements); (standard for write-in votes), § 20A-4-105(6)(a) (standard for mechanical ballots); (standard for write-in votes); Wyo. Stat. Ann. § 22-14-104 (1999).

*Id.*

190. *Id.* Footnote 2 summarizes:

The following States employ a standard in which a vote is counted unless it is “impossible to determine the elector’s [or voter’s] choice”: (1992); (standard for rejecting ballot); Cal. Elec. Code Ann. § 15154(c) (West Supp. 2000); (standard for paper ballots), § 1-7-508(2) (standard for electronic ballots); (standard for primaries), § 5/17-16 (standard for general elections); (not counting votes if “elector’s choice cannot be determined”).

*Id.*

191. *Id.* at 126.

192. *Id.*

itself, by its own reasoning, should have concluded that “the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature’s uniform general standard to be established.”<sup>193</sup> Stevens lamented the fact that the majority, acting solely “[i]n the interests of finality . . . effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines.”<sup>194</sup> Stevens pointed to the 1960 Hawaii event, in which two slates of Presidential Electors were certified, each one after the expiration of the “safe harbor” provision, and the Congress chose to adopt the slate of electors certified on January 4, 1961, well after the deadline the per curiam adopted.<sup>195</sup>

Stevens ended by explaining that the administrative procedures set forth prior to the election functioned properly and should have been left to function on their own by the conservative justices, in an effort to comply with the Florida “legislature’s intent to leave no legally cast vote uncounted.”<sup>196</sup> Stevens reiterated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>197</sup> Stevens left a remarkable and lasting impression to his condemnation of the majority by explaining that, to sustain Bush’s “federal assault on the Florida election procedures,” the majority of the Court must possess a “lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit.”<sup>198</sup>

### Justice Souter’s Opinion

Justice Souter’s opinion<sup>199</sup> is less polemic than Justice Stevens’ but no less fervent in support of the Florida Supreme Court. Souter stated in the first sentence of his dissent that “[t]he Court should not have reviewed either *Bush v. Palm Beach County Canvassing Board*<sup>200</sup> or this

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193. *Id.* at 126-27.

194. *Id.* at 127.

195. *Id.* at 127 n.5 (citing Josephson & Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 166 n.154 (1996)).

196. *Bush v. Gore*, 531 U.S. at 127-28.

197. *Id.* at 128 n.7 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

198. *Bush v. Gore*, 531 U.S. at 128.

199. *Id.* at 129 (Souter, J., dissenting).

200. 531 U.S. 70 (2000) (vacating Florida Supreme Court order to certify post-deadline vote totals and requesting that the Florida Supreme Court clarify the relationship between the Florida Constitution, the United States Constitution, and the law of the State of Florida

case, and should not have stopped Florida's attempt to recount all undervote ballots by issuing a stay of the Florida Supreme Court's orders during the period of this review. . . ." <sup>201</sup> Souter advocated an approach more in line with the Rehnquist Court's more traditional federalist tendencies <sup>202</sup> and rejected the idea that political questions such as the one presented in *Bush v. Gore* merited any special consideration by the Court. <sup>203</sup>

Souter narrowed his opinion to three issues and remarked that "[n]one of these issues is difficult to describe or to resolve." <sup>204</sup> Souter's issues were:

[First] whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. § 5; [Second] whether that court's construction of the state statutory provisions governing contests impermissibly changes a state law from what the State's legislature has provided, in violation of Article II, § 1, cl. 2, of the National Constitution; and [Third] whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment. <sup>205</sup>

Each of these are issues of Federalism that Souter felt were best left to the state court to resolve, <sup>206</sup> but each also has important administrative law implications, most notably the third question.

In addressing the third issue, Souter asserted that the question was whether the process in place at the time of the election and the procedures that took place after the election violated the equal protection clause through maladministration of election laws. <sup>207</sup> The per curiam unequivocally condemned the procedures undertaken after the

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regarding the legislature's responsibility for voting regulations).

201. *Bush v. Gore*, 531 U.S. at 129 (Souter, J., dissenting) (citations omitted).

202. E.J. Dionne, Jr., *So Much for States' Rights*, WASH. POST, Dec. 14, 2000, at A35, reprinted in E.J. DIONNE, JR. & WILLIAM KRISTOL, EDs., *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* 287 (2001).

203. *Bush v. Gore*, 531 U.S. at 129 (Souter, J., dissenting).

204. *Id.* at 129-30.

205. *Id.*

206. *Id.* at 129.

207. *Id.* at 133-34.

election,<sup>208</sup> and the Rehnquist concurrence used very harsh language to condemn the actions taken by the Gore campaign to disrupt the administrative work undertaken by the Secretary of State.<sup>209</sup> Souter only begrudgingly addressed the administrative law issues, explaining that the recount process could have been dealt with properly at the state level had the Supreme Court given the process an appropriate amount of time.<sup>210</sup> Souter explained that, had the process not worked itself out at the state level, “it could have been considered by the Congress.”<sup>211</sup>

Souter encapsulates the central equal protection issue as whether “unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts.”<sup>212</sup> Different types of mechanisms for voting seem to be acceptable under established law even though they result in a disparity among local jurisdictions in accuracy and effectiveness.<sup>213</sup> However, Souter sees a critical and unacceptable arbitrary and disparate treatment of ballots out of the same voting mechanism once the post-election recounts commenced.<sup>214</sup> Souter “can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights,” explaining that “[t]he differences appear wholly arbitrary.”<sup>215</sup>

Souter therefore feels that the administrative process has serious faults, and that a uniform standard for counting the ballots must be established.<sup>216</sup> He further explains that the responsibility of rectifying the situation lay most properly with the courts of Florida where he would remand the case “with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments.”<sup>217</sup> Though he seems to agree with the majority, Souter established his independence by declaring that he feels that Florida’s courts could comply with the needs of the Equal Protection doctrine for fairness and a procedure that is not arbitrary within the amount of time between the Court’s decision and the date of the meeting of the electors

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208. *Bush v. Gore*, 531 U.S. 98, 105-09 (2000).

209. *Bush v. Gore*, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., concurring).

210. *Bush v. Gore*, 531 U.S. at 133-34 (Souter, J., dissenting).

211. *Id.* at 133.

212. *Id.* at 134.

213. *See id.*

214. *Id.*

215. *Id.*

216. *See id.* at 134-35.

217. *Id.*

for president, a time span of six days.<sup>218</sup> Souter concludes by reiterating his theme of allowing the state the time and opportunity to rectify its own situation without imposing federal constraints that impede its ability to operate: "There is no justification for denying the State the opportunity to try to count all disputed ballots now."<sup>219</sup>

### Justice Ginsburg's Opinion

Justice Ginsburg's angry opinion is also firmly rooted in ideas of federalism, urging along with Justice Souter that Florida be granted the opportunity to fix its own failed process. She begins by accusing Chief Justice Rehnquist of failing to respect "the state high court's province to say what the State's Election Code means, The Chief Justice maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging."<sup>220</sup> Ginsburg emphatically states:

[D]isagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," and no cause to upset their reasoned interpretation of Florida law.<sup>221</sup>

Ginsburg supports her position that the Court properly defers to statutory interpretations in several situations including the realm of administrative law:

[W]hen reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein

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218. *Id.* at 135. The time span is from December 12, 2000, the date of the decision, to December 18, 2000, the date of the meeting of the electors in Washington, D.C. *Id.* The electors for president did meet in their respective states and successfully concluded their task in an uneventful manner on December 18, 2000. "Amid Fanfare and Ceremony, Electoral College Members Cast Votes," at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/18/electoral.feature/index.html> (last visited Feb. 7, 2002).

219. *Bush v. Gore*, 531 U.S. at 135 (Souter, J., dissenting).

220. *Id.* at 135-36 (Ginsburg, J., dissenting).

221. *Id.* at 136 (citing *Sumner v. Mata*, 449 U.S. 539, 549 (1981)).

granted shall be vested in a Congress of the United States.” Surely the Constitution does not call upon us to pay more respect to a federal administrative agency’s construction of federal law than to a state high court’s interpretation of its own state’s law. And not uncommonly, we let stand state-court interpretations of federal law with which we might disagree.<sup>222</sup>

Ginsburg’s ultimate point is that, along with being an issue of administrative law which might qualify for deference under traditional notions,<sup>223</sup> the decisions of Florida’s Supreme Court and elections administrators are issues of state laws and interpretation most properly left to the states and not the federal judiciary. Ginsburg reiterates a statement made by the Court in an earlier case that “there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.”<sup>224</sup> Ginsburg even cites to a case in which the Supreme Court upheld an Illinois Supreme Court decision which recognized the waiver of federal constitutional rights. Ginsburg explained that “the state court’s declaration ‘should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it.’”<sup>225</sup> Ginsburg similarly cites to *Gurley v. Rhoden*,<sup>226</sup> where the Court declared that a state supreme court “is the final judicial arbiter of the meaning of state statutes,” and “[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute’s reasonable interpretation it will be deemed conclusive.”<sup>227</sup> In fact, Ginsburg refers to the Court as “an outsider” that should certify questions of state law “to a state’s highest court, even when federal rights are at stake.”<sup>228</sup>

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222. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)) (emphasis in original).

223. See, e.g., Naaman Asir Fiola, *Christensen v. Harris County: Pumping Chevron For All It’s Worth- Defining the Limits of Chevron Deference*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 151 (Spring 2001).

224. *Bush v. Gore*, 531 U.S. at 136-37 (Ginsburg, J., dissenting) (citing *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976) (citations omitted)).

225. *Id.* at 138 (citing *Cent. Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925)).

226. 421 U.S. 200 (1975).

227. *Bush v. Gore*, 531 U.S. at 138 (Ginsburg, J., dissenting) (citing *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975)).

228. *Id.* (citations omitted).

Ginsburg's implicit point is that the Supreme Court of the United States should not be in the business of interpreting state law and telling states how to operate their state administrative functions. She criticizes the cases Rehnquist uses to illustrate his assertion that deference does not need to be given to a state supreme court as "hardly comparable to the situation here," and reiterates that "this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court."<sup>229</sup>

Ginsburg returns to the primary principle of all the dissenters' arguments; that each vote that was legally cast be counted by a fair mechanism.<sup>230</sup> She explains that the Florida Supreme Court's interpretation of the legislative history of the Florida Election Code yielded a reasonable conclusion that should be recognized by the Court as the state's official position.<sup>231</sup> She criticized the majority for not recognizing that, though they view the legislature as the final arbiter of election law, "in a republican government, the judiciary. . . construe[s] the legislature's enactments."<sup>232</sup> She accuses the Chief Justice, by his concurring opinion, of trying to disrupt Florida's government and administrative procedures: "By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the state from another, The Chief Justice contradicts the basic principle that a State may organize itself as it sees fit."<sup>233</sup> Ginsburg also writes, if a state court departed from a proper interpretation of law, it would be the duty of Congress, not the Supreme Court, to constrain the state from acting outside its bounds.<sup>234</sup> Ginsburg explains her own position by emphatically stating, "Article II does not call for the scrutiny undertaken by this Court," and "Federal courts defer to state high courts' interpretations of their state's own law."<sup>235</sup> She refers to these principles as "the core of federalism, on which we all agree."<sup>236</sup>

Ginsburg suggests that the conservative members of the Court departed from their normal federalist tendencies in order to rule in favor of the Bush position, remarking that, "[w]ere the other Members of this

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229. *Id.* at 139-41.

230. *Id.* at 141.

231. *Id.*

232. *Id.* at 139-41.

233. *Id.*

234. *Id.* at 141 n.2.

235. *Id.* at 142.

236. *Id.*



Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.”<sup>237</sup>

With regards to the equal protection claim pursued by Bush, Ginsburg explains:

[I]deally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world . . . . I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount.”<sup>238</sup>

Ginsburg agrees with Justice Souter that the state should have the ability to decide whether and how it wants to resolve a dispute provided for in its statutes, and that the majority improperly short-circuited the vote counting by issuing a stay on December 9, prior to hearing oral arguments in *Bush v. Gore*.<sup>239</sup> Ginsburg condemns the majority for inappropriately relying “on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.”<sup>240</sup> Ginsburg ends her opinion by restating her interest in seeing the process of election administration through according to the Florida Election Code as properly interpreted by the Florida Supreme Court, as opposed to the United States Supreme Court allowing the “untested prophecy” of a constitutionally inadequate recount to “decide the Presidency of the United States.”<sup>241</sup>

### Justice Breyer’s Opinion

Justice Breyer succinctly summarizes at the outset of his opinion in simple terms: “The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.”<sup>242</sup> He then explains that, aside from “the absence of a uniform, specific standard to guide the recounts . . . the federal legal questions presented

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237. *Id.* at 142-43.

238. *Id.* at 143.

239. *Id.*

240. *Id.*

241. *Id.* at 144.

242. *Id.* (Breyer, J., dissenting).

... are insubstantial.”<sup>243</sup> Breyer points out that the majority departs from the widely accepted and uniform standard of the “clear intent of the voter” in order to enact a new “uniform subsidiary standard.”<sup>244</sup> Breyer agrees with the majority that a uniform standard needs to be determined, but suggests that this is an administrative issue to be worked out by the state government entities charged with this responsibility.<sup>245</sup> Breyer states that “there is no justification for the majority’s remedy, which is simply to reverse the lower court and halt the recount entirely,” but rather, the case should have been remanded with instructions to the Florida Supreme Court to establish a single uniform standard and direct a recount of all undercounted ballots in the state of Florida.<sup>246</sup> He criticizes the majority for making factual findings not based on facts in the record, such as the fact, asserted by the majority, that Secretary of State Harris lacked time to review and approve of the use of equipment for separating undervotes.<sup>247</sup> “The majority,” explains Breyer, “finds fact outside of the record on matters that state courts are in a far better position to address,” most notably matters relating to the administration of elections procedures.<sup>248</sup>

Breyer also remarks, along with Justice Stevens, that the principles adopted by the majority seem to implicitly recognize and condemn the disadvantage to voters in jurisdictions using punchcard machines:

Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties’ selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court’s recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.<sup>249</sup>

Justice Breyer’s dissent seems to imply that the entire system has to be either fair with some inherent problems or wholly unfair and in need of a complete overhaul that removes control of the election process from

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243. *Id.* at 144-45.

244. *Id.* at 145.

245. *Id.* at 145-46.

246. *Id.* at 146.

247. *Id.*

248. *Id.*

249. *Id.* at 147 (citations omitted).

the province and authority of state administrators. He criticizes the majority for laying all responsibility for the administration of elections at the feet of the legislature, saying, that “neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker*, leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.”<sup>250</sup>

Addressing the implications of the per curiam and especially the concurring opinion with regard to the administration of elections in the future, Justice Breyer explained that the “safe harbor” provision is one that, prior to *Bush v. Gore*, state elections officials could take advantage of, and that state legislatures could have adopted, but that the majority has improperly turned it into “a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.”<sup>251</sup>

Breyer addresses the three concerns the majority expressed about the manner in which the “Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.”<sup>252</sup>

[W]hat precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of “undercounted” ballots that could not have been fully completed by the December 12 “safe harbor” deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.<sup>253</sup>

Breyer criticizes the majority for “second-guess[ing] the way in which the state court resolved a plain conflict in the language of different statutes.”<sup>254</sup> Breyer then explains that election administration is best left to the states, as the state courts were perfectly capable of conducting a recount under the Florida Supreme Court’s interpretation.<sup>255</sup> Regarding the third “distortion,” Breyer writes that the Florida statutes specify that “the ‘grounds for contesting an election’

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250. *Id.* at 148 (citing *McPherson v. Blacker*, 146 U.S. 1 (1892)).

251. *Id.* at 149.

252. *Id.* (citing *Bush v. Gore*, 531 U.S. 98, 115-16 (2000) (Rehnquist, C.J., concurring)).

253. *Id.*

254. *Id.*

255. *See Id.* at 150.

include the 'rejection of a number of legal votes sufficient to . . . place in doubt the result of the election.'"<sup>256</sup> Breyer disputes the majority's contention that the state's chief election administrator, Secretary of State Katherine Harris, maintains broad discretion where the statutes are subject to broad interpretation. The majority interprets the statute as favoring the count of as many votes as can be counted.<sup>257</sup> Breyer points out that the Florida Supreme Court's conclusion that "the term 'legal vote' means a vote recorded on a ballot that clearly reflects what the voter intended . . . differs from the conclusion of the Secretary."<sup>258</sup> However, Breyer notes that "nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter," suggesting that a court adjudicating an election issue has the same administrative jurisdiction as the state's election administration after an election has gone awry.<sup>259</sup>

Breyer reiterates the minority's concern that the Court should never have taken the case, and seems to provide a generally applicable warning to future election combatants when he says, "[o]f course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election."<sup>260</sup>

Breyer explains that the proper method of adjudicating elections is through the state courts, as elections are administered by states and the American "road-map [of election administration] foresees resolution of electoral disputes by *state* courts."<sup>261</sup> He likens the Supreme Court's intervention into the 2000 election dispute to the manner in which Justice Joseph P. Bradley's single vote gave the election of 1876 to Rutherford B. Hayes after the power to adjudicate the election was removed from Congress to a special Electoral Commission.<sup>262</sup> Breyer concludes by reiterating that the Court should not have gotten involved in the 2000 election, because election administration and the interpretation of state election laws should be adjudicated by the states, without the heavy hand of the Supreme Court.<sup>263</sup>

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256. *Id.* (citing FLA. STAT. ANN. § 102.168(3) (West Supp. 2001)).

257. *Id.* at 150-51.

258. *Id.* at 151 (citing *Gore v. Harris*, 772 So. 2d 1243, 1254 (Fla. 2000)).

259. *See id.*

260. *Id.* at 153.

261. *Id.* (italics in original).

262. *Id.* at 156; *see supra* notes 48-59.

263. *See id.* at 157-58.

### *Final Adjudication on Remand to the Florida Supreme Court*

In the final adjudication of *Bush v. Gore*, the Florida Supreme Court recognized that the United States Supreme Court found that the lack of specific standards for recounting the votes rendered any attempted recount a violation of the equal protection clause.<sup>264</sup> The Florida court explained that, with the statutory deadline of December 12 having passed on the day of the Supreme Court's decision, the task of the recount "could not possibly be met."<sup>265</sup> Finally, the Florida justices concluded that, "the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature."<sup>266</sup>

### VI. THE NEW EQUAL PROTECTION STANDARD

"The historical primary of state voting laws . . . accounted for the before-the-fact opinion of most commentators that the Supreme Court would not decisively intervene in the case."<sup>267</sup> However, as seen before the release of the Supreme Court's opinion, "[t]he most obvious alternative [to a reinterpretation of Florida's election law by the Supreme Court] is equal protection analysis – more precisely, the fact that the vote counts mandated by the Florida Supreme Court would follow no intelligible, fair procedure."<sup>268</sup>

One commentator explains that the holding of *Bush v. Gore* "sets forth a very simple, noncomplex proposition – that if there are varying standards to count the votes, this violates the Equal Protection Clause of the Fourteenth Amendment."<sup>269</sup> One conservative supporter of Bush, in criticizing the majority and Rehnquist's concurring opinion, stated that the ruling's equal protection standard seemed to mandate "uniform national standards," and that "inter-county and intra-county differences in election procedures, which are common in every state . . . [now

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264. *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000).

265. *Id.*

266. *Id.*

267. KEYSSAR, *supra* note 8, at 330.

268. Michael Greve, *The Equal-Protection Card: The Worst Grounds May Be the Best*, National Review Online, December 11, 2000, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 260, 261 (E.J. Dionne, Jr. and William Kristol eds., Brookings Institution Press 2001).

269. VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT*, 59 (Thunder's Mouth Press/Nation Books 2001).

require] strict scrutiny from federal courts.”<sup>270</sup> It seems that, despite an attempt by the Court to limit the application of the principles it set forth in *Bush v. Gore* to the facts of a presidential election, a new standard was set forth, and should be applied in future cases addressing the counting of votes, that mandates the equal tallying of votes. Though it may not have been intended and was certainly not foreseen by the founders of this country that the right to vote would be extended to every citizen, including initial disenfranchises, women, Blacks, and non-property holders, the vote is now in the hands of hundreds of millions of Americans. Having extended the right to vote to all of these people over two hundred years, the nation’s leaders have now had to address the method of counting those votes. The Supreme Court has chimed in to register its discontent with the way in which votes are cast and counted, explaining that the disparity in counting violates the right of the people to be treated equally. An extension of this principle of equality to vote counting now seems to mandate that all people who cast ballots in an election be provided the same technology with which to register their vote.

Lawsuits have already been filed with attorneys relying on *Bush v. Gore* in their pleadings and judges relying on it in their holdings. Most of the cases brought in the state courts have been used to challenge the legality of the machinery used to conduct elections.<sup>271</sup> The American Civil Liberties Union, not often a friend of the concurring Justices, explained that the abiding principle of *Bush v. Gore* was that “every vote must be given equal weight under the Constitution . . . . The ACLU and other civil rights organizations are now taking the Supreme Court at its word.”<sup>272</sup> According to Richard Hasen, a law professor at the University of California at Los Angeles, the legacy of *Bush v. Gore* is the creation of “a third level of equality” in election cases:

Various amendments to the Constitution and Supreme Court cases decided by the Warren Court established the first level of equality, requiring that if a jurisdiction holds an election, every citizen, adult resident has the right to vote in that election. The Warren Court . . .

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270. John J. DiIulio, Jr., *Equal Protection Run Amok: Conservatives Will Come to Regret the Court’s Rationale for Bush v. Gore*, *The Weekly Standard*, Dec. 25, 2000, reprinted in *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* 321, 322 (E.J. Dionne, Jr. and William Kristol eds., Brookings Institution Press 2001).

271. B. J. Palermo, *Bush v. Gore Prompts Voter-Access Suits by Civil Rights Groups*, *BROWARD DAILY BUS. REV.*, May 23, 2001 at 9.

272. *Id.*

established the second level of equality – the right to an equally weighted vote. In *Bush v. Gore*, the Court . . . move[d] to a third level of equality – equality in the procedures and mechanisms used for voting.<sup>273</sup>

It is clear, then, that the lasting impression of *Bush v. Gore* is that the mechanics of elections, currently decided by each county, must be uniform or at least equal in order for an election to pass constitutional muster. In fact, “[t]here’s nothing in the equal protection clause that limits its application to presidential or even federal elections . . . manual recounts without clearly defined standards are now suspect in every election in America.”<sup>274</sup> “The Supreme Court has called into question not only the manual-recount procedure adopted by the legislature of Florida but our entire decentralized system of voting – in which different counties use different technologies to count different ballots designed differently and cast at different hours of the day.”<sup>275</sup> To cope with the rapid changes in election law and administration, each state has a commission or department that is normally tasked with handling election administration.<sup>276</sup> In the wake of *Bush v. Gore*, however, the

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273. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 392-93 (2001) (citations omitted).

274. Marcia Coyle, *Gauging Bush v. Gore Fallout: Will Equal Protection Language Open a Can of Electoral Worms?*, THE NAT. L. J., Dec. 25, 2000-Jan. 1, 2001, at A4 (quoting Vice Dean Michael Dorf of Columbia University School of Law).

275. Jeffrey Rosen, *The Supreme Court Commits Suicide*, THE NEW REPUBLIC, Dec. 25, 2000, reprinted in BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 311, 314 (E.J. Dionne, Jr. and William Kristol eds., Brookings Institution Press 2001).

276. See, e.g. National Association of Secretaries of State Index of Secretary of State Web Sites, at <http://www.nass.org/sos/sosflags.html> (last visited Feb. 7, 2002); Office of the Secretary of State of the State of Alabama, Elections Division, at <http://www.sos.state.al.us/election/index.cfm> (last visited Feb. 7, 2002); State of Alaska Division of Elections, at <http://www.gov.state.ak.us/ltgov/elections/homepage.html> (last visited Feb. 7, 2002); Arizona Elections Services Division, at <http://www.sosaz.com/election/> (last visited Feb. 7, 2002); Arkansas Secretary of State Elections Website, at <http://www.sosweb.state.ar.us/elect.html> (last visited Feb. 7, 2002); California Secretary of State- Elections Division, at <http://www.ss.ca.gov/elections/elections.htm> (last visited Feb. 7, 2002); Colorado Department of State Elections Division at <http://www.sos.state.co.us/pubs/elections/main1.htm> (last visited Mar. 5, 2002); Connecticut Secretary of State Election Services Division, at <http://www.sots.state.ct.us/ElectionsDivision/ElectionIndex.html> (last visited Feb. 7, 2002); State of Delaware Department of Elections, at <http://www.state.de.us/election/index.htm> (last visited Feb. 7, 2002); District of Columbia Board of Elections and Ethics, at <http://www.dcboee.org/> (last visited Feb. 7, 2002); Florida Department of State Division of Elections, at <http://election.dos.state.fl.us/> (last visited on Feb. 7, 2002); Georgia Secretary of State Elections Division, at <http://www.sos.state.ga.us/elections/> (last visited Feb. 7, 2002); State of Hawaii Office of Elections, at <http://www.hawaii.gov/elections/> (last visited Feb. 7, 2002); Idaho Secretary of State Election Division, at <http://www.idsos.state.id.us/elect/eleindex.htm> (last visited Feb. 7, 2002); Illinois State Board of Elections, at <http://www.elections.state.il.us/> (last visited Feb. 12, 2002); Indiana Secretary of State

Elections Division, at <http://www.state.in.us/sos/elections/> (last visited Feb. 7, 2002); Iowa Secretary of State Voter Center, at [http://www.sos.state.ia.us/elections/elect\\_info.html](http://www.sos.state.ia.us/elections/elect_info.html) (last visited Feb. 7, 2002); Kansas Secretary of State- Elections, at <http://www.kssos.org/elewelc.html> (last visited Feb. 7, 2002); Commonwealth of Kentucky Elections Home Page, at <http://www.kysos.com/INDEX/main/elecdiv.asp> (last visited Feb. 7, 2002); Louisiana Secretary of State Elections Division, at <http://www.sec.state.la.us/elections/elections-index.htm> (last visited Feb. 7, 2002); Maine Department of Secretary of State Bureau of Corporations, Elections, and Commissions- Department of Elections, at <http://www.state.me.us/sos/cec/elec/> (last visited Feb. 7, 2002); Maryland State Board of Elections, at <http://www.elections.state.md.us/> (last visited Feb. 7, 2002); Secretary of the Commonwealth of Massachusetts Elections Division, at <http://www.state.ma.us/sec/ele/eleidx.htm> (last visited Feb. 7, 2002); Michigan Secretary of State- Elections, at <http://www.sos.state.mi.us/election/elect.html> (last visited Feb. 7, 2002); Minnesota Secretary of State- Elections, at <http://www.sos.state.mn.us/election/index.html> (last visited Feb. 7, 2002); Mississippi Secretary of State Elections Home Page, at <http://www.sos.state.ms.us/elections/elections.html> (last visited Feb. 7, 2002); Missouri Secretary of State- Elections, at <http://mosl.sos.state.mo.us/sos-elec/soselec.html> (last visited Feb. 7, 2002); Montana Secretary of State Election Information, at <http://sos.state.mt.us/css/ELB/Contents.asp> (last visited Feb. 7, 2002); Nebraska Secretary of State Election Administration, at <http://www.nol.org/home/SOS/Elections/election.htm> (last visited Feb. 7, 2002); Nevada Secretary of State Elections Division, at <http://sos.state.nv.us/nvelection/> (last visited Feb. 7, 2002); New Hampshire Secretary of State Elections Division, at <http://webster.state.nh.us/sos/elections.htm> (Feb. 7, 2002); State of New Jersey Department of Law & Public Safety Division of Elections at <http://www.state.nj.us/lps/elections/electionshome.html> (last visited Feb. 7, 2002); New Mexico Office of the Secretary of State Bureau of Elections, at <http://www.sos.state.nm.us/elect.htm> (last visited Feb. 7, 2002); New York State Board of Elections, at <http://www.elections.state.ny.us/> (last visited Feb. 7, 2002); North Carolina State Board of Elections, at <http://www.sboe.state.nc.us/> (last visited Feb. 7, 2002); North Dakota Secretary of State-Elections, at <http://www.state.nd.us/sec/Elections/Elections.htm> (last visited Feb. 7, 2002); Ohio Secretary of State Election Services, at [http://www.state.oh.us/sos/election\\_services.htm](http://www.state.oh.us/sos/election_services.htm) (last visited Feb. 7, 2002); Oklahoma State Election Board, at <http://www.state.ok.us/~elections/index.html> (last visited Feb. 7, 2002); Oregon Secretary of State Elections Division, at <http://www.sos.state.or.us/elections/elechp.htm> (last visited Feb. 7, 2002); Pennsylvania Department of State- Commissions, Elections & Legislation Election Information Site, at <http://www.dos.state.pa.us/bcel/elections/elections.html> (last visited Feb. 7, 2002); State of Rhode Island and Providence Plantation Office of the Secretary of State Elections Division, at [http://155.212.254.78/ELECTIONS/elections\\_division.htm](http://155.212.254.78/ELECTIONS/elections_division.htm) (last visited Feb. 7, 2002); South Carolina Election Commission, at <http://www.state.sc.us/scsec/> (last visited Feb. 7, 2002); South Dakota Elections Information, at <http://www.state.sd.us/sos/Elections%20home%20page.htm> (last visited Feb. 7, 2002); Tennessee Secretary of State Division of Elections, at <http://www.state.tn.us/sos/election.htm> (last visited Feb. 7, 2002); Texas Secretary of State Elections Division, at <http://www.sos.state.tx.us/elections/index.shtml> (last visited Feb. 7, 2002); Utah State Elections Office, at <http://elections.utah.gov/> (last visited Feb. 7, 2002); State of Vermont Office of the Secretary of State Elections and Campaign Finance Division, at <http://www.vermont-elections.org/soshome.htm> (last visited Feb. 7, 2002); Virginia State Board of Elections, at <http://www.sbe.state.va.us/> (last visited Feb. 7, 2002); Washington State Election Information, at <http://www.vote.wa.gov/> (last visited Feb. 7, 2002); West Virginia Secretary of State, at <http://www.wvsos.com/> (last visited Feb. 7, 2002); Wisconsin State Elections Board, at <http://elections.state.wi.us/> (last visited Feb. 7, 2002); Wyoming Secretary of State Election Administration, at <http://soswy.state.wy.us/election/election.htm> (last visited Feb. 7, 2002).



National Association of Secretaries of State adopted a resolution regarding the reform of election law across the country,<sup>277</sup> and many states have established special task forces or set forth plans for the purpose of reassessing the manner in which they run elections.<sup>278</sup>

## VII. CONCLUSION: THE FUTURE OF FEDERAL ELECTIONS- A NATIONALLY UNIFORM ADMINISTRATION?

In *Bush v. Gore*, a majority of the Supreme Court made clear their distaste for varying standards for counting votes cast in Florida counties. But it is not clear from their decision how the Justices propose to solve the problem of varying standards for counting the votes cast in each county in a Presidential election. It is therefore left to the administrative agencies governing each state's elections procedures to analyze the decision and define an equal protection standard with which they feel comfortable complying.

Within months of the collapse of the electoral system in November of 2000, commentators began to look forward to how elections officials could recover from the debacle. State officials failed in 2000 by placing in the field "[u]nder-trained election workers [who] were sorely tested by massive voter turnout and malfunctioning equipment."<sup>279</sup> Undoubtedly, in order to pass the new equal protection standard, State Secretaries of State must establish:

[C]lear, objective standards for counting votes—standards that:

- Are well articulated and uniform throughout the state;
- Do not require interpretation as you go along;
- Are tailored to the different types of voting equipment in use;
- Are consistent with the instructions voters are given;

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277. National Association of Secretaries of State Election Reform Resolution, Adopted Feb. 6, 2001, available at [http://www.nass.org/pubs/pubs\\_electionres.html](http://www.nass.org/pubs/pubs_electionres.html) (last visited Feb. 7, 2002).

278. See, e.g. National Association of Secretaries of State Index of State Election Reform Resources, at [http://www.nass.org/Issues/issues\\_elections.html](http://www.nass.org/Issues/issues_elections.html) (last visited on Feb. 7, 2002). The website has various election reform statements and plans from a number of states, including Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, and Washington. The NASS website is updated as states release election reform plans and more states may release plans or statements after the printing of this article.

279. William S. Morrow, Jr., *News from the Circuit: Charting the Course of Election Reform After Bush v. Gore*, 26 ADMIN. & REG. L. NEWS 22 (Summer 2001).

and

- Include procedures for resolving disputes in a precise and uniform manner.<sup>280</sup>

Also, state elections rules and codes “will need to be supplemented to comply with the court’s decision . . . . [T]his may mean creating a statewide canvassing board . . . .”<sup>281</sup> Another task of state legislatures will be “to enumerate what qualifies as a vote on a system-by-system basis” prior to elections, in a generally applicable manner.<sup>282</sup>

In fact, this process has already begun in the state that raised the nation’s awareness as to the deficiencies of election administration by the states, as Florida Governor Jeb Bush, on May 10, 2001, enacted the Florida Election Reform Act of 2001,<sup>283</sup> which:

[P]rohibits the use of punchcard voting systems; provides funding for upgrading county voting systems; requires a uniform ballot design for each voting system; provides standards for equipment testing; substantially modifies the standards and procedures for manual recounts; provides for poll worker recruitment and training; and funds a statewide voter registration database.<sup>284</sup>

Writing for the American Bar Association, William S. Morrow forecasts, “[i]f other States follow Florida’s example, the chances of repeating a near- Presidential election crisis will diminish. If not, then as Yogi Berra would say, ‘It’s déjà vu all over again.’”<sup>285</sup> Indeed, it would be to each State Secretary of State’s benefit to review the election process codified in their state and make sure that they rectify any possible post-election inequities in vote-tallying. States should also take prophylactic measures, such as selecting a uniform method of casting ballots, to make sure that differing methods of voting, such as punchcard and optical scan, do not create differing levels of statistical anomalies that could support claims such as the Bush campaign’s. Most importantly, each state needs to develop a uniform method of counting cast ballots after an election so as to ensure that each properly cast ballot is counted in a meaningful manner. Should the states not be able to

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280. *Id.*

281. *Id.*

282. *Id.* (quoting statements made by George Terwilliger, an attorney for the Bush team during the Florida legal battle).

283. 2001 Fla. Sess. Law Serv. Ch. 2001-40 (West).

284. Morrow, Jr., *supra* note 279 at 22-23.

285. *Id.*

successfully achieve this uniformity, voices will be raised in Washington, D.C. and around the country for the Federal Government to step in and set forth uniform standards for election administration.<sup>286</sup> Will this task be completed in time for what is sure to be another close election in 2004? Only time will tell.

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286. Proposals for Electoral College Reform: H.J. Res. 28 and H.J. Res. 43 Before the House Subcomm. on the Constitution, Comm. On the Judiciary, 104th Cong. (1997) (citing testimony of Akhil Reed Amar, Professor, Yale Law School), *available at* <http://www.house.gov/judiciary/222315.htm> (last visited Mar. 7, 2002).