CHAPTER

1

Do We Really Live in a Democracy, and Do We Really Have the Right to Vote?

Chapter Objectives

In this chapter you will learn . . .

- The differences between a democracy and a republic
- What the Constitution really says about the right to vote
- The process of electing the president of the United States
- What happens when state law conflicts with federal law
- The importance of case law

Introduction

Surely, you have heard the United States referred to as a democracy. Phrases such as, "after all, this is a democracy, isn't it?" and "we do live in a democracy, don't we?" are as common in describing the United States as referring to it as a "free country" (more on that later). Accordingly, you might be surprised to learn that, actually, the United States is really *not* a democracy, nor was it ever intended to be.

"Democratic republic" is a far more accurate description of our system of government than is "democracy." But, before we move beyond that phrase, let us define it by asking, what is a democracy and what is a republic?

Democracy

A democracy is a system of government in which all of the people rule. If the United States were a democracy in the purest sense of the word, then every American citizen would have the ability to vote on every issue, and the choice that received the most votes would prevail. By 2005, the U.S. population had grown to 300 million people. Imagine how long it would take 300 million people to vote on anything! Why, if you were to even count to 300 million, it would take you over 3 years—and that is counting every second and every minute of every day, month, and year, with no time for sleep, or even to have a snack! In other words, it would be impossible for anything to ever be accomplished in a nation of 300 million people if everyone had the opportunity to vote on every issue.

Of course, not everyone is eligible to vote anyway. For instance, as the Twenty-Sixth Amendment states, only those U.S. citizens who are at least 18 years old may vote. Eliminating minors and noncitizens might reduce the total number of eligible voters to 200 million, but that would hardly make things any easier. So, we can all agree that we do not live in a system of *pure democracy*, and that such a system would not work in a country so large. But what about a *representative democracy*; isn't that what we have here? That sounds a little more along the lines of our system of government. After all, we elect our representatives, and, hopefully, they will vote as we would expect them to, and so that is democracy at work—or maybe not.

You see, a democracy is based on the system of majority rule. So, let's see if this system of democracy works here. To illustrate, let's take a look at the First Amendment, which states (among other things) that Congress shall make no law respecting the establishment of religion. (By the way, we'll discuss Congress and the freedom of religion in more detail later—but let's continue with our example.) Considering that the vast majority of Americans are Christians, let's suppose that Congress decided to pass a law declaring Christianity as the official religion in the United States. As long as a majority voted in favor of that law, it would be enacted, right? Wrong. Because it would directly violate the Constitution, and it takes a whole lot more than majority rule to change the Constitution. That is a prime example of why the United States of America is *not* a democracy.

Republic

If the United States is not a democracy, then what is it? It is a *republic*, which is a representative form of government. In other words, it is a system of government whereby the power belongs to the people, but that power is exercised through their elected representatives. Unlike a democracy, not only are decisions not made by all of the people, but not all decisions are made by majority rule.

At this point, you might be thinking, "republic sounds a whole lot like democracy, so what's the difference?" The difference is that a democracy *may* have direct or representative participation (in other words, either you or your senator may make the law), whereas a republic *must* have representative democracy (your senator may make the law, but you may not). A second difference is that in a democracy, the majority rules. In a republic, that is not *necessarily* the case, although it often is. And in the

United States, because the majority often prevails, we tend to refer to our nation as a *democratic republic*.

The United States Is a Republic, First and Foremost

In that sense, the word *democratic* is the adjective, which describes the word *republic*, which is the noun. Republic is the more powerful word. A democratic republic is a republic that has democratic tendencies, whereas a republican democracy is a democracy that has republic traits. Still not sure? Consider this example. If you live in New York City, the weather in the wintertime might be 20°F or even lower on a typical day. But, suppose that during a particular winter the temperature is much warmer, reaching an average of 50°F nearly every day. You might be tempted to say that it is a *summery* winter. Conversely, you might spend the summer in New York when the temperature typically reaches the 80s, and sometimes the 90s. But during this particular summer, the temperature barely reaches above 70°F. In that case, you might describe it as a *wintery* summer. In either case, the first word is the less powerful one. A summery winter is still winter, and a wintery summer is still summer. No matter how you look at it, the weather in the wintery summer is still warmer than during the summery winter. Similarly, a democratic-republic is still more of a republic than a democracy.

If we can accept that the United States is a republic, not a democracy, the next question might be, does it really matter? As we will find out, it matters a whole lot, because we need to be clear about this notion as it is an important key in our adventure of understanding the Constitution.

The Right to Vote

There are many misconceptions about American history that, when repeated over and over again, are simply assumed to be true, but in fact are quite inaccurate. Among these is the notion that you, me, or anyone else has a Constitutional right to vote for, say, the president of the United States, or a politician from your congressional district seeking a seat in the House of Representatives. Along those lines, some might say, "Well, when Abraham Lincoln freed the slaves, the Fifteenth Amendment granted black men the right to vote." Notice the word *men*, because one might continue to say, "and the Nineteenth Amendment granted women the right to vote." It does not matter. Both statements are incorrect.

Let's begin with the Fifteenth Amendment. Read it carefully. Does it say anything like "black men hereby are granted the right to vote?" No, it says nothing of the kind. Instead, it says that the right to vote *may not be denied* based on race or color. Let's consider Charlie, a white man, and Joe, a black man: If both of them went to vote on Election Day, and the local officials let Charlie in but told Joe "you cannot vote because you are black," that would be a clear violation of Joe's Constitutional rights. Not because Joe has any right to vote, but because his right to vote *may not be denied* based on race. In other words, if the election official told both Charlie and Joe, "excuse me, gentlemen, neither of you can vote, because we passed a law that states that only college graduates have the right to vote, and neither of you is a college graduate." Or, "neither of you may vote because you have to write a book about American history before you are granted that right." In these cases, Joe would not be protected by the Constitution because he is being denied the opportunity to vote based on a factor *other* than race. He cannot turn to the Fifteenth Amendment for help.

Now, let's take a look at the Nineteenth Amendment. It states that the right to vote *may not be denied* based on sex (in other words, gender). So, if David and Sally went to vote and Sally was denied the opportunity *because* she is a woman, that would be a clear violation of her Constitutional rights. But if she was denied because, say, she needs to visit our nation's capital, Washington, D.C., before she would be eligible (and the same would be true for David and for everyone else, too, male or female), then her right to vote would not be denied based on her gender. The Nineteenth Amendment would not help her cause any more than the Fifteenth Amendment would help Joe in the example above.

Let's take a look at one more Amendment, the one we mentioned earlier, the Twenty-Sixth. This time, let's consider Judy, who is an 18-year-old Asian woman. Suppose that the local election official denies her the right to vote, stating that she must be 21. "If you're not old enough to legally drink a beer, I say you're not old enough to vote," snarled the official. That is a clear violation of Judy's Constitutional right according to the Twenty-Sixth Amendment, which guarantees that the right to vote will not be denied based on age for anyone 18 years or older. Also, the election official could not deny her the vote because she is Asian, or because she is a woman, as those would violate the Fifteenth and Nineteenth Amendments, respectively. But if the election official denied her the right to vote because she does not speak at least three foreign languages, then Judy would have no Constitutional recourse; she could not turn to the Constitution for help.

The Fourteenth Amendment

When faced with the shocking reality that nothing in the Constitution guarantees our right to vote, some point to the Fourteenth Amendment for the answer. That Amendment, best known for its Section 1, in which it guarantees all Americans equal protection under the law, contains provisions regarding voting in Section 2, as follows: if any male American citizen 21 years or older, who has not participated in a crime, is denied the right to vote, then the state that denies him will lose Representatives (House members) proportionately to the number of such individuals to whom it denies that right. Sounds confusing, right? Here's the simple version, in two steps:

1. Let's take the state of Massachusetts, which has 10 Representatives, as an example. If Massachusetts denied the right to vote to 30% of its American citizen noncriminal males who are 21 or older, then Massachusetts would lose 30% of its Representatives (3 in total), thereby reducing its total number of Representatives from ten to seven.

2. The Fourteenth Amendment was ratified in 1868; since then, women and all persons 18 years or older were guaranteed the right to vote by the Nineteenth and Twenty-Sixth Amendments, respectively. Therefore, if any of them were denied the right to vote, they would be part of the equation determining the reduction in Representatives as well.

The important point here is that the Fourteenth Amendment creates a severe penalty for denial of the right to vote, but does not expressly forbid it.

In fact, all of these examples help to illustrate that there is nothing in the Constitution that specifically guarantees anyone the right to vote. The only thing that is guaranteed is that the right to vote *may not be denied* on the basis of race, color, gender, and age. That makes a big difference, legally.

Technical Versus Practical Reality: Your Right to Vote Is on Solid Ground

The examples above might seem a bit troubling, especially if you can envision your state's legislature granting the right to vote to only those who can, say: (1) type 90 words per minute; (2) play the trombone; (3) slam dunk a basketball; and (4) fly an airplane. If you cannot do all four things, you cannot vote. Well, don't panic. Just because the Constitution cannot automatically strike down such laws, it does not mean they would get very far.

First, those laws actually would have to be passed by the particular state legislature. Can you imagine *any* state legislature creating such absurd requirements regarding the right to vote? But even if the requirements did not seem preposterous, the American people undoubtedly would not sit still for it. They would likely demand, at that point, a Constitutional Amendment that would once and for all establish a guarantee to vote.

Moreover, the stiff penalty imposed by the Fourteenth Amendment would make it even more unlikely that a state would deny any noncriminal American citizen age 18 or older the right to vote.

Nonetheless, just because there is no real threat of that happening does not mean that we have that right spelled out anywhere in the Constitution—we do not.

Let us now move on and talk a little more about the Constitution's sheer power. If you have the Constitution on your side, no other law, rule, or regulation can touch you.

The Supremacy Clause

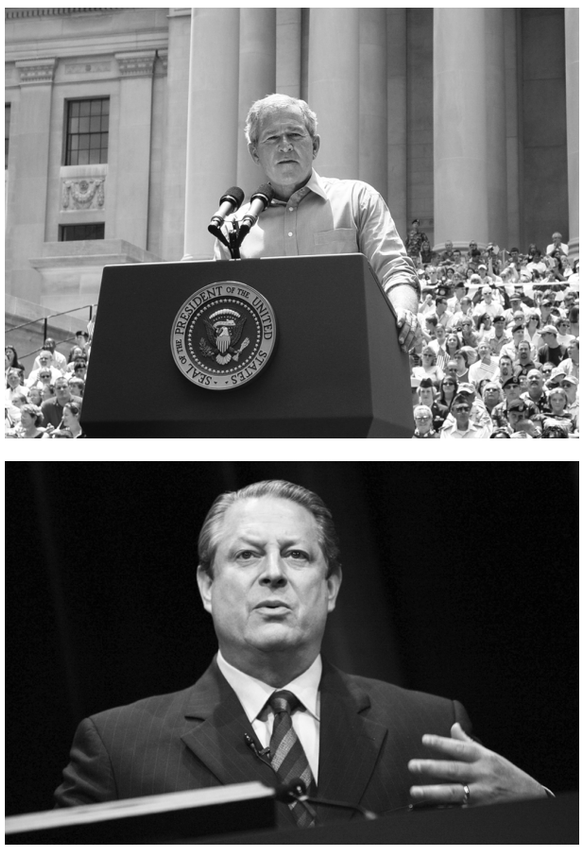
The Constitution is the most powerful legal bodyguard you can have. Article Six clearly states that the Constitution is the supreme law of the land, and no state law *to the contrary* shall be binding. This language, known as the Supremacy Clause, guarantees that if there is a conflict between the Constitution and any other law (for example, a state or local law), the Constitution will always prevail. Of course, that does not mean that a state law cannot be *different* from the Constitution; it simply means that it cannot directly conflict with it.

For instance, the Fourth Amendment guarantees the right to a jury trial in criminal cases. If a particular state *also* guaranteed jury trials in civil cases, that law would be *different from* what is written in the Constitution, but the two laws would not conflict. All the Constitution discusses is a guarantee of a jury criminal trial. The state law does not deny that, it merely *adds* to the rights. That is perfectly fine. However, if the state explicitly *denied* a right to criminal trial by jury, then that would be unconstitutional; a direct violation of the Supremacy Clause.

Returning to our examples about Joe, Sally, and Judy, suppose that the state in which they lived passed laws that denied them the right to vote based on race, gender, and age. Those laws would be struck down as unconstitutional; the Constitution would have served as their Guardian Angel. What if, however, their state passed a law that stated, "only those who have served in the U.S. military for a minimum of 4 years shall be eligible to vote." Suppose that none of those three individuals, not to mention millions of inhabitants in their state, would qualify. Could these disaffected citizens turn to the Constitution for help? It does not appear that they could, considering there is no language in the Constitution that either guarantees the right to vote, or explicitly states that the vote shall not be denied based on military service or lack thereof.

Electing the President of the United States

The 2000 presidential election, whose major candidates were incumbent Vice President Al Gore, the Democratic Party nominee, versus Texas Governor George W. Bush, the



George W. Bush and Al Gore. Bush defeated Gore in the close and controversial 2000 presidential election.

Republican. The election was arguably the most exciting, nerve-wracking, vindicating, and frustrating—depending on one's perspective—of our lifetimes. Even the 1960 election, which was about five times closer in terms of total vote count, was not surrounded by such drama. By examining the 2000 election, we can gain a better understanding of the voting process.

On the evening of November 7, 2000, it appeared that George W. Bush had won the election to become the 43rd president of the United States. But, one of the many unusual characteristics of that election was that his opponent, Al Gore, actually received more votes. The final tally was Gore: 51,003,926 and Bush: 50,460,110. That final total, however, was not tallied and did not become official until well over a month later, when the United States Supreme Court confirmed that Bush had in fact won. Without even addressing the controversy surrounding the recounting of votes, causing the Supreme Court to become involved and deciding the outcome in mid-December, let's examine the results on election night. Gore had received over 500,000 more votes than Bush. In an election that yielded over 100 million votes, 500,000 is not a very large number. Nonetheless, Gore received more votes. Why, then was he not declared the winner? Because Bush received more *electoral* votes: 271 to 266, to be exact. Accordingly, even though Gore received more votes than Bush, that fact is not good enough to be elected president. And this is further evidence that we *don't* really live in a democracy. Now, let's take a look at the whole *electoral* voting process.

The Electoral College

"The masses are asses." That is what Alexander Hamilton—one of the most prominent and, arguably, one of, if not *the* most brilliant of the Founding Fathers—said in support of his plan to prevent ordinary citizens from having too direct a role in the election process. It is not as if Hamilton had disdain for common, everyday folks; he simply did not think they were properly qualified to be entrusted with such a solemn and monumental decision.

Hamilton was the principal author of *The Federalist Papers*, which were a collection of anonymous letters written to New York newspapers, urging the adoption of the Constitution. Hamilton's *Federalist* system included the election of the president of the United States by electors. So, what does that really mean?

Electors are selected by their respective states, and by the District of Columbia (Washington, D.C.). Each state has as many electors as it has Senators and Representatives, and D.C., which has neither of each, has three total electors. Accordingly, the total number of electors is 538 (which is the total of 100 U.S. Senators, 435 U.S. Representatives, and 3 D.C. electors). On Election Day, the people vote directly for these electors, who have pledged to vote for a particular presidential candidate. Consider this example. Assume that it is 1984, and Larry would like to vote for Ronald Reagan for president. Larry will not simply go to the voting booth and vote for Reagan on Election Day. Instead, he will vote for Reagan's elector—let's call her Martha. Martha, in turn, has pledged that if she is "elected," she will cast her vote for Reagan.

Why this extra step? Why does Martha have to be involved at all? Why can't Larry simply vote for Reagan directly? Returning to Hamilton's "masses are asses" notion, the Founding Fathers feared that the general public might be caught up in some sweeping movement and decide to vote irresponsibly. In other words, the Founding Fathers believed, to some extent, that the people could not always be trusted to make a responsible decision.

For instance, suppose that famous National Football League (NFL) quarterback Peyton Manning felt strongly about nuclear weapons in the hands of foreign leaders, and he took a month-long trip to visit some of those countries. In speaking with their leaders, he returned to the United States with some promising news: the leaders were all very accommodating and promised him that negotiations would continue, and that they might even consider dismantling their nuclear weapons programs under the right circumstances.

Suppose, then, that this story made the front page of every newspaper in the country, and that the people were swept up with Manningmania! Suddenly, Manning became the front-runner in all polls, and was elected president of the United States!

With all due respect to Manning (because, after all, we could not definitively say whether he would be a great president, an awful one, or fall somewhere in between), it would be quite impulsive to vote for him based on one trip abroad that might potentially yield some good results, based on some inconclusive, unsubstantiated information. In other words, leaving it up to the American people's whims might lead to some catastrophic decisions.

Although our Constitution is based on the principle of "we the people," that policy is tempered by the concern that the people, if left unchecked, might be swept up by some impulse and, elect, say, the winner of the *American Idol* or *Survivor* television show as the next president of the United States.

Breaking the Piggy Bank and Sharing the Loot!

Imagine if every man, woman, and child in the United States divided up all the money in the country, that everyone would have about a hundred thousand dollars! That sounds like a pretty good deal, doesn't it? Of course, if everyone "broke the national piggy bank" and took the cash, there would not be any money to run the country: no money for the military, or to pay the president, or Congress. No money to pay judges, or FBI or CIA agents, or to launch rockets to the moon or to other points in outer space.

Some people might support the following statement: "So what? Let's divide the money! The president and Congress are doing a terrible job anyway. Why pay them? As far as the military goes, give peace a chance! We have been fighting all of these wars and where has that gotten us? Let's just lay down our arms and make love, not war. As for the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA), they investigate criminals and terrorists. Well, if we have no military, then terrorists will leave us alone. And if everyone has a hundred thousand dollars, they will not

need to commit any crimes, so we will not need a federal agency to stop crime. And as far as outer space, what's the big deal? No need to explore there, let's just keep the money!"

Do you see the potential of a "take the money and run" mentality? That is exactly why we do not live in a democracy. Because, if we did, the people could simply get tired of the government and decide to do away with it.

Getting back to the Electoral College, that is precisely why we have electors: to keep the people from doing something impulsive. So, how is it that someone can win an election by gaining more electoral votes than popular (one person, one vote) votes? Let's take a look.

In 2000, George W. Bush carried 30 states to Al Gore's 21 (plus Washington, D.C.). However, as we said before, Gore received more individual votes. Why then, did Bush win and Gore lose? Because *United States* means just that: in some ways, we are not one big country, but rather 50 small ones (states), united by a common bond in some ways. Perhaps this example might help to appreciate the distinction.

Many of you may be baseball fans, though some of you might know nothing about the game. So, here is a quick lesson: The object in baseball is to score *runs* (baseball's version of "points"), and the team with the most runs wins the game. Each year, the best team in each league (the American League and the National League) plays against each other in the World Series. Whichever team wins four games first, wins; this means that the teams might play up to seven games (the maximum number of games it would take so that one team wins at least four games).

Suppose that the two teams in the next World Series are the Texas Rangers from the American League and the New York Mets from the National League. Now, take a look at the games and see who wins (**Table 1-1**).

The Mets won the World Series, four games to three. They won games one, three, five, and seven, whereas the Rangers won games two, four, and six. However, if you look at the total runs scored in the entire series, the Rangers scored 38 runs while the Mets only scored 22. Why, then, did the Mets win? Because they won more *games*, even though they scored fewer total *runs*. Similarly, Bush won more *states*, whereas Gore won more *votes*.

To this point we have determined that: (1) Americans do not have a Constitutional right to vote; and (2) at least for the office of the president of the United States, the people vote for electors who, in turn, vote for president.

Again, just because the Constitution does not *guarantee* the right to vote, that does not mean that individual states cannot guarantee that right in their own state constitutions. After all, as long as a state law *does not directly conflict* with the Constitution, then it is fine. And the Constitution certainly does not expressly *deny* anyone the right to vote, so a state law expressly granting voting rights would not be contradictory.

Regarding our voting for electors rather than for the president, from a practical perspective, it is basically the same thing. In other words, though it is technically possible, it is realistically extremely improbable in this day and age that electors will change their votes and decide to elect, say, the actor Martin Sheen as president at the very last minute (because they like the job he did playing the role of president on the TV show *West Wing*). There would be a better chance of you being injured on your way to the voting booth because you were attacked by a giraffe that had escaped from the zoo and was running down the street.

Before we move to the cases at the end of the chapter, which include the one about the 2000 presidential election, let's have a quick overview about how to read and understand a court *opinion* (decision).

The Importance of Case Law

As we will discuss later, case law is vital to understanding the Constitution. Law is generally made in one of two ways: either by the legislative branch of government, or by the courts, as a result of interpreting the law already in existence. As for the Constitution, which requires a long and difficult process to amend, law is usually established by an interpretation by the United States Supreme Court, the highest court in the country.

When a legal dispute usually winds up in court, it is at the *trial* level, where *questions of fact* are decided (such as: did the driver run the red light, did the defendant rob the grocery store, and so forth). A person who brings a lawsuit is the *plaintiff*, and the person against whom the lawsuit is brought is the *defendant*. If either the plaintiff or the defendant loses at trial, he or she has the right to *appeal* the decision to a higher court. At that point, the person bringing the appeal is known as the *petitioner*, and the person against whom the appeal is brought is the *respondent*. The petitioner and respondent are also referred to as the appellant and appellee, respectively.

Cases decided on appeal are known as *opinions*, and they are helpful to study because they resolve *questions of law* (such as, does a woman have a right to an abortion, may a minor who committed murder be sentenced to death, and so forth). Unlike questions of fact, which are really limited to a particular case (for example, just because one defendant set fire to a barn does not mean another defendant 5 years later did the same thing), questions of law are blueprints for all of us to follow.

Table 1-1
Scores for the World Series

	Game 1	Game 2	Game 3	Game 4	Game 5	Game 6	Game 7
Rangers	2	10	4	9	1	6	6
Mets	3	1	5	2	2	2	7

Not all judges (or Justices, in the case of the Supreme Court) always agree on the decision, which is why many cases contain multiple opinions.

First, let's take a look at the judgment. It is either a *majority* or a *plurality* opinion. A majority is any number greater than 50%. In the case of the Supreme Court, which is comprised of nine Justices, the number would be five. A plurality consists of the highest number, even though it may not be a majority. For instance, if four Justices decided one way, three another way, and two yet another way, the opinion in which four took part would prevail, though it would be a plurality opinion, not a majority one.

A *dissenting* opinion is one that flatly disagrees with the reasoning of the prevailing (majority or plurality) opinion.

A *concurring* opinion is one that agrees with the prevailing opinion (judgment), but for different reasons, or focuses on something that the judgment did not mention extensively, if at all. Consider the following example, to illustrate:

The National Television Association (NTA) was going to issue an award for the best police TV drama of all time. In a snub to more modern police shows, the NTA selected three finalists, all shows from the 1970s: *Kojak, Mod Squad*, and *Starsky & Hutch*. The final decision was left to a panel of nine judges. Here is how they voted:

- Four judges voted for *Starsky & Hutch*, because it combined good plots, action-packed scenes, and good humor.
- Two other judges also voted for *Starsky & Hutch*, but advised that a different program should have been nominated, *Columbo*. *Columbo* was labeled more a mystery drama than a police show, but the two concurring judges disagreed, and elaborated on how great *Columbo* was as a police show.
- Finally, three other judges disagreed completely, and voted for *Kojak*. They disagreed with the other six judges that *Starsky & Hutch* was a better show, citing the socially relevant storylines that rendered *Kojak* superior.

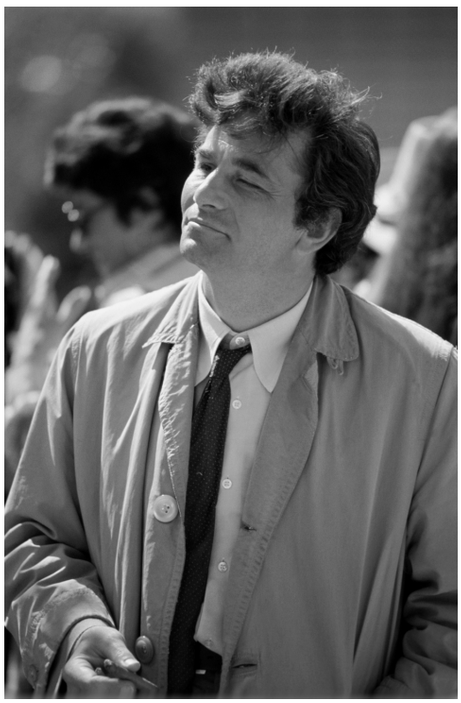
The decision by the six judges would stand and the winner would be *Starsky & Hutch*, as the best TV police drama of all time. Because there were nine judges, however, the decision was a majority, because the two concurring judges joined with the four who rendered the judgment, to make six in total.

The three judges who voted for *Kojak* formed the dissenting opinion, because they flatly disagreed with the decision.

The two concurring judges who voted for *Starsky & Hutch* were not in dissent, because they agreed with the decision, but they pointed out that *Columbo* should have been nominated as well.

Does that clear things up a bit? There is the judgment, the dissent opposes it, and the concurring agrees with it, but for different reasons.

One final word about reading cases: read them slowly and carefully. At first, you may have to read a case two or three times to fully understand it. There are a lot of Latin terms sprinkled throughout them, and many other cases are cited, which throw in volume numbers and page numbers mixed in with the text, often disrupting a flowing reading pattern. If at first you find reading cases to be frustrating, don't worry as soon enough it will come as natural to you as tying your shoelaces.



***Starsky & Hutch:* A great police television drama in the 1970s. Was *Columbo* better?**

Conclusion: Our Vote Does Count!

We have spent the entire chapter talking about how we do not really live in a democracy, how we do not really have a Constitutional right to vote, and that, even to the extent to which we are allowed to vote, we do not elect the president of the United States directly. If the previous sentence were a summary of our American way of life, then it would seem that we really do not have much say in it at all. In reality, however, our ability to shape our own lives is not nearly as bleak.

The American People: The Most Powerful Political Force in the World

Individually, none of us is particularly powerful. And that is not even limited to ordinary citizens; it is also true of the mayor of our town, the governor of our state, or the president of the entire country. This is a good thing because, after all, this nation was designed to be a republic, not a dictatorship. But all together, we, the people, are the most powerful political force on earth. We continue to live in the world's most powerful nation, and, ultimately, what we say goes. If we the people are not happy with our electors, we can demand that different ones are appointed. And if Congress does not change the laws, we can vote those members out and elect new ones.

Even though there are limitations that prevent a sweeping wave of impulse from grasping the general public's imagination and resulting in reckless political consequences, ultimately, it is what we, the people, say that counts. Accordingly, a democracy does not mean that we do not have the power to decide how to live our lives. Rather, it means that we live in a republic, which safeguards the power of the people into political representatives who are, directly or indirectly, elected by the American people.

Later in the book we will discuss this incredible power that we, the American people, possess, and how to make better use of it. We will begin to consider our elected representatives—the mayor, the governor, the president, all of the members of Congress, and many others—as folks who work for us, not the other way around.

As for whether our individual vote "counts," consider this example. As we mentioned before, the 2000 presidential election was incredibly close. George W. Bush won by the slimmest of electoral margins, and he won Florida by only a few hundred votes. Those who were rooting for Bush all along were certainly glad to have gone to the polls to vote for him, and those who preferred Gore but chose not to vote surely must have kicked themselves for not doing so. Then there's Ralph Nader, who also ran for president as a third-party candidate, on the Green Party ticket. He received almost 100,000 votes. Had some voters chosen to vote for Bush or Gore instead, or if some Bush or Gore voters had voted for Nader or for another minor party candidate instead, the result might have been different.

In Chapter Two, we will learn about how and why the Constitution was written in the first place.

Questions for Review

1. What is a democracy?
2. What is a republic?
3. What is the difference between a democratic republic and a republican democracy?
4. Does the Constitution guarantee Americans the right to vote?
5. What does the Fifteenth Amendment say about the right to vote?
6. What does the Nineteenth Amendment say about the right to vote?
7. What does the Twenty-Sixth Amendment say about the right to vote?
8. What does the Fourteenth Amendment say about the right to vote?
9. What is the Supremacy Clause?
10. What is the Electoral College?

Constitutionally Speaking

The president of the United States is not directly elected by the American people, and must win a majority of electoral votes. Whether or not he or she wins the most actual individual votes does not matter. Moreover, the major political parties, Democratic and Republican, select their nominees through state-by-state primaries, on different days over the period of several months.

If the system were to change, and all Americans would vote for president directly, both in the primaries, on a single National Primary Day, and on general Election Day, what would be the advantages and disadvantages of changing to that type of system rather than leaving things the way they are?

Constitutional Cases

We discussed the controversial 2000 presidential election, in which George W. Bush ultimately emerged victorious over Al Gore. Below is the case, *Bush v. Gore*, which declared the election over and put a stop to the recount process.

The second case, *Williams v. Mississippi*, addresses the issue of voting rights for newly freed slaves following the end of the Civil War.

Bush v. Gore, 531 U.S. 98 (2000), *Per Curiam*.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic Candidates for President and Vice President. The Supreme Court noted that petitioner Governor George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. ___ So. 2d, at ___ (slip op., at 4, n. 6). The court

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further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican Candidates for the Presidency and Vice Presidency, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari. *Post,* p. ___.

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

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

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

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

The Supreme Court also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id*., at ___ (slip. op., at 33–34). Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date

through ongoing manual recounts. As to Miami-Dade County, the Court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Id.*, at (slip op., at 34). The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

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

II

A

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

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

B

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker, 146 U.S. 1*, 35 (1892), that the State legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28–33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

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

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

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

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for 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." *Gore v. Harris*, ___ So. 2d, at ___ (slip op., at 39). This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

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

The want of those rules here has led to unequal evaluation of ballots in various respects. See *Gore* v. *Harris,* ___ So. 2d, at ___ (slip op., at 51) (Wells, J., dissenting) ("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

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

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

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

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result,

the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

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

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

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

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

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

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

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 *U.S.C.* §5. ___ So. 2d, at ___

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(slip op. at 27); see also *Palm Beach Canvassing Bd. v. Harris*, 2000 WL 1725434, *13 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

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

* * *

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

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

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

It is so ordered.

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, concurring.

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

I

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

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

Likewise, in *Anderson v. Celebrezze, 460 U.S. 780*, 794–795 (1983) (footnote omitted), we said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

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

In *McPherson v. Blacker, 146 U.S. 1* (1892), we explained that Art. II, §1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id.*, at 27. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

3 U.S.C. §5 informs our application of Art. II, §1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd., ante*, at 6.

> "Since §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

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

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

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law—see, *e.g.*, *Mullaney v. Wilbur, 421 U.S.* 684 (1975)—there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449* (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioners had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.*, at 456. The purported state-law ground was so novel, in our independent estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id.*, at 457.

Six years later we decided *Bouie v. City of Columbia, 378 U.S. 347* (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP*, we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U.S., at 361–362. What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.[1]

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

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II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. §103.011 (2000). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature has designated the Secretary of State as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." §97.012. The state legislature has delegated to county canvassing boards the duties of administering elections. §102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. §102.111. Cf. *Boardman v. Esteva*, 323 So. 2d 259, 268, n. 5 (1975) ("The 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 . . .").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by .5% or less, conduct a mandatory recount. Fla. Stat. §102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the seventh day following the election. §102.112(1). The Elections Canvassing Commission must then certify the results of the election. §102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. §102.166(4)(b). Once a protest has been filed, "the county canvassing board may authorize a manual recount." §102.166(4)(c). If a sample recount conducted pursuant to §102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," §102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, §102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by §102.168. The grounds for contesting an election include "[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." §102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, Fla. Stat. §102.168(1), and the canvassing board or election board is the proper party defendant, §102.168(4). Section 102.168(8) provides that "[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." In Presidential elections, the contest period necessarily terminates on the date set by *3 U.S.C. §5* for concluding the State's "final determination" of election controversies."

In its first decision, *Palm Beach Canvassing Bd. v. Harris*, ___ So. 2d, ___ (Nov. 21, 2000) (*Harris I*), the Florida Supreme Court extended the 7-day statutory certification deadline established by the legislature.[2] This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the contest period was, presumably, the clear implication that certification was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo*, although the election code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. §102.112 (2000). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it.[3]

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, §101.46; each polling place on election day contains a working model of the voting machine it uses, §101.5611; and each voting booth contains a sample ballot, §101.46. In precincts using punch-card ballots, voters are instructed to punch out the ballot cleanly:

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

Instructions to Voters, quoted in *Touchston v. McDermott*, 2000 WL 1781942, *6 & n. 19 (CA11) (Tjoflat, J., dissenting). No reasonable person would call it "an error in the vote tabulation," Fla. Stat. §102.166(5), or a "rejection of legal votes," Fla. Stat. §102.168(3)(c),[4] when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," §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. The Secretary of State, who is authorized by law to issue binding interpretations of the election code, §§97.012, 106.23, rejected this peculiar reading of the statutes. See DE 00–13 (opinion of the Division of Elections). The Florida Supreme Court, although it must defer to the Secretary's interpretations, see *Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 844 (Fla. 1993), rejected her reasonable interpretation and embraced the peculiar one. See *Palm Beach County Canvassing Board* v. *Harris*, No. SC00–2346 (Dec. 11, 2000) (*Harris III*).

But as we indicated in our remand of the earlier case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the election code on which it relied, §101.5614(5), was, as the Chief Justice pointed out in his dissent from *Harris II*, entirely irrelevant. See *Gore v. Harris*, No. SC00–2431, slip op., at 50 (Dec. 8, 2000). The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush v. Palm Beach County Canvassing Bd.*, 39–40 (Dec. 1, 2000); cf. *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. Ct. App. 1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary of State, the state official charged by the legislature with "responsibility to . . . [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," §97.012(1), was to depart from the legislative scheme.

III

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

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

As the dissent noted:

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

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

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

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

Notes

1. Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council, 505 U.S.* 1003 (1992). In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813), we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain. See *id.*, at 623; *Hunter v. Fairfax's Devisee*, 1 Munf. 218 (Va. 1809).
2. We vacated that decision and remanded that case; the Florida Supreme Court reissued the same judgment with a new opinion on December 11, 2000, ___ So. 2d, ___.
3. Specifically, the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami-Dade County.
4. It is inconceivable that what constitutes a vote that must be counted under the "error in the vote tabulation" language of the protest phase is different from what constitutes a vote that must be counted under the "legal votes" language of the contest phase.

Justice Stevens, with whom Justice Ginsburg and Justice Breyer join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, §1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest

courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker, 146 U.S. 1*, 25 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State." *Ibid.*; cf. *Smiley v. Holm, 285 U.S. 355*, 367 (1932).[5] The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

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

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. §101.5614(5) (Supp. 2001), is to be determined rises to the level of a constitutional violation.[6] We found such a violation when individual votes within the same State were weighted unequally, see, *e.g., Reynolds v. Sims, 377 U.S. 533*, 568 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.[7]

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499*, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy[8]—might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

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

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state

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law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante*, at 11. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra*, at 2. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996).[9] Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante*, at 10.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris*, 2000 WL 1725434 (Fla., Nov. 21, 2000), did the Florida Supreme Court make any substantive change in Florida electoral law.[10] Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do[11]—it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

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

I respectfully dissent.

Notes

5. "Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view." 285 U.S., at 367. It is perfectly clear that the meaning of the words "Manner" and "Legislature" as used in Article II, §1, parallels the usage in Article I, §4, rather than the language in Article V. *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779*, 805 (1995). Article I, §4, and Article II, §1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision. As a result, petitioners' reliance on *Leser v. Garnett, 258 U.S. 130* (1922), and *Hawke v. Smith (No. 1), 253 U.S. 221* (1920), is misplaced.

6. The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. The following States use an "intent of the voter" standard: Ariz. Rev. Stat. Ann. §16—645(A) (Supp. 2000) (standard for canvassing write-in votes); Conn. Gen. Stat. §9—150a(j) (1999) (standard for absentee ballots, including three conclusive presumptions); Ind. Code §3—12—1—1 (1992); Me. Rev. Stat. Ann., Tit. 21—A, §1(13) (1993); Md. Ann. Code, Art. 33, §11—302(d) (2000 Supp.) (standard for absentee ballots); Mass. Gen. Laws §70E (1991) (applying standard to Presidential primaries); Mich. Comp. Laws §168.799a(3) (Supp. 2000); Mo. Rev. Stat. §115.453(3) (Cum. Supp. 1998) (looking to voter's intent where there is substantial compliance with statutory requirements); Tex. Elec. Code Ann. §65.009(c) (1986); Utah Code Ann. §20A—4—104(5)(b) (Supp. 2000) (standard for write-in votes), §20A—4—105(6)(a) (standard for mechanical ballots); Vt. Stat. Ann., Tit. 17, §2587(a) (1982); Va. Code Ann. §24.2—644(A) (2000); Wash. Rev. Code §29.62.180(1) (Supp. 2001) (standard for write-in votes); Wyo. Stat. Ann. §22—14—104 (1999). 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": Ala. Code §11—46—44(c) (1992), Ala. Code §17—13—2 (1995); Ariz. Rev. Stat. Ann. §16—610 (1996) (standard for rejecting ballot); Cal. Elec. Code Ann. §15154(c) (West Supp. 2000); Colo. Rev. Stat. §1—7—309(1) (1999) (standard for paper ballots), §1—7—508(2) (standard for electronic ballots); Del. Code Ann., Tit. 15, §4972(4) (1999); Idaho Code §34—1203 (1981); Ill. Comp. Stat., ch. 10, §5/7—51 (1993) (standard for primaries), *id.*, ch. 10, §5/17—16 (1993) (standard for general elections); Iowa Code §49.98 (1999); Me. Rev. Stat. Ann., Tit. 21—A §§696(2)(B), (4) (Supp. 2000); Minn. Stat. §204C.22(1) (1992); Mont. Code Ann. §13—15—202 (1997) (not counting votes if "elector's choice cannot be determined"); Nev. Rev. Stat. §293.367(d) (1995); N.Y. Elec. Law §9—112(6) (McKinney 1998); N. C. Gen. Stat. §§163—169(b), 163—170 (1999); N.D. Cent. Code §16.1—15—01(1) (Supp. 1999); Ohio Rev. Code Ann. §3505.28 (1994); 26 Okla. Stat., Tit. 26, §7—127(6) (1997); Ore. Rev. Stat. §254.505(1) (1991); S. C. Code Ann. §7—13—1120 (1977); S.D. Codified Laws §12—20—7 (1995); Tenn. Code Ann. §2—7—133(b) (1994); W. Va. Code §3—6—5(g) (1999).

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

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

9. Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

10. When, for example, it resolved the previously unanswered question whether the word "shall" in Fla. Stat. §102.111 or the word "may" in §102.112 governs the scope of the Secretary of State's authority to ignore untimely election returns, it did not "change the law." Like any other judicial interpretation of a statute, its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted. *Rivers* v. *Roadway Express, Inc., 511 U.S. 298*, 312—313 (1994).

11. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison.*, 1 Cranch 137, 177 (1803).

Justice Souter, with whom Justice Breyer joins and with whom Justice Stevens and Justice Ginsburg join with regard to all but Part C, dissenting.

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd., ante*, p. ___ (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see *ante* at ___, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush v. Gore, post* at ____ (slip op., at 1). If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in *3 U.S.C. §15*. The case being before us, however, its resolution by the majority is another erroneous decision.

As will be clear, I am in substantial agreement with the dissenting opinions of Justice Stevens, Justice Ginsburg and Justice Breyer. I write separately only to say how straightforward the issues before us really are.

There are three issues: 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*; 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 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*. None of these issues is difficult to describe or to resolve.

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A

The *3 U.S.C. §5* issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under *3 U.S.C. §15*. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to §5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of §5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

B

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. §102.168 (2000); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, §102.166, which was involved in the previous case, *Bush v. Palm Beach County Canvassing Board*. The issue is whether the judgment of the state supreme court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the national Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U.S. Const., Art. II, §1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character of a statute within the meaning of the Constitution. Brief for Petitioners 48, n. 22, in *Bush v. Palm Beach County Canvassing Bd., et al.*, 531 U.S. ___ (2000). What Bush does argue, as I understand the contention, is that the interpretation of §102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative act in question.

The starting point for evaluating the claim that the Florida Supreme Court's interpretation effectively rewrote §102.168 must be the language of the provision on which Gore relies to show his right to raise this contest: that the previously certified result in Bush's favor was produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. §102.168(3)(c) (2000). None of the state court's interpretations is unreasonable to the point of displacing the legislative enactment quoted. As I will note below, other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, §101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by a canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. *Gore v. Harris*, __ So. 2d __ (slip op., at 23–25) (Dec. 8, 2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.
2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. ____ So. 2d, at___ (slip op., at 26–27). That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection" should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest

contests be so easy to claim that every election will end up in one. Cf. *id.,* at ____ (slip op., at 48) (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute.[12] While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. §102.168(8) (2000), to "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." As Justice Ginsburg has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of the Florida court's determinations in this case.

C

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *Per Curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because the course of state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan v. Zimmerman Brush Co., 455 U.S. 422* (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.*, Tr., at 238–242 (Dec. 2–3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); *id.*, at 497–500 (similarly describing varying standards applied in Miami-Dade County); Tr. of Hearing 8–10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

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

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes, *Gore v. Harris, supra*, ___ So. 2d, at ___ (slip op., at 66), the

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number at issue is significantly smaller. The 170,000 figure apparently represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61–62. But as Justice Breyer has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

Note

12. When the Florida court ruled, the totals for Bush and Gore were then less than 1,000 votes apart. One dissent pegged the number of uncounted votes in question at 170,000. *Gore v. Harris, supra*, __ So. 2d __, (slip op., at 66) (opinion of Harding, J.). Gore's counsel represented to us that the relevant figure is approximately 60,000, Tr. of Oral Arg. 62, the number of ballots in which no vote for President was recorded by the machines.

Justice Ginsburg, with whom Justice Stevens joins, and with whom Justice Souter and Justice Breyer join as to Part I, dissenting.

I

The Chief Justice acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante*, at 3. But instead of respecting the state high court's province to say what the State's Election Code means, The Chief Justice maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore v. Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 45–55) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd. v. Harris*, __ So. 2d __, __ (Fla. 2000) (slip op., at 34) (on remand) (confirming, 6–1, the construction of Florida law advanced in *Gore*). I might join The Chief Justice were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner v. Mata, 449 U.S. 539*, 549 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837*, 843 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view 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.'" *Stone v. Powell, 428 U.S. 465*, 494, n. 35 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 *Harv. L. Rev.* 441, 509 (1963)); see *O'Dell v. Netherland, 521 U.S. 151*, 156 (1997) ("[T]he *Teague* doctrine validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler v. McKellar, 494 U.S. 407*, 414 (1990)); O'Connor, Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge, 22 *Wm. & Mary L. Rev.* 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp. v. Romein, 503 U.S. 181* (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court." *Id.*, at 187 (citation omitted). And in *Central Union Telephone Co. v. Edwardsville, 269 U.S. 190* (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, we 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." *Id.*, at 195. [13]

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an "'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein, 416 U.S. 386*, 391 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English v. Arizona, 520 U.S. 43*, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification devise to afford state high courts an opportunity to inform us on matters of their own State's law because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers*, 416 U.S., at 391.

Just last term, in *Fiore v. White, 528 U.S. 23* (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.*, at 25–26. Instead of resolving the state-law question on which the federal claim depended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.*, at 29; *id.*, at 28 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). The Chief Justice's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans*, 520 U.S., at 77, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers*, 416 U.S., at 391, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813), *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449* (1958), and *Bouie v. City of Columbia, 378 U.S. 347* (1964), cited by The Chief Justice, are three such rare instances. See *ante*, at 4, 5, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, *Constitutional Law*, 61–62 (13th ed. 1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). *Patterson*, a case decided three months after *Cooper v. Aaron, 358 U.S. 1* (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is without any fair or substantial support." 357 U.S., at 455. *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U.S., at 350, 354.

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The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As Justice Breyer convincingly explains, see *post*, at 5–9 (dissenting opinion), this case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

The Chief Justice says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state court interpretations of state law. *Ante*, at 5 ("To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; *The Federalist* No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, §4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet The Chief Justice today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, The Chief Justice contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g.*, *Gregory v. Ashcroft, 501 U.S. 452*, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608*, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").[14] Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe, 526 U.S. 489*, 504, n. 17 (1999) (citing *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779*, 838 (1995) (Kennedy, J., concurring)). The Chief Justice's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U.S. Const., Art. II, §1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President) (emphasis added); *ante*, at 1–2 (Stevens, J., dissenting).[15] Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

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

Even if there were an equal protection violation, I would agree with Justice Stevens, Justice Souter, and Justice Breyer that the Court's concern about "the December 12 deadline," *ante*, at 12, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward—despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante*, at 8—ultimately

turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

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

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante*, at 12. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.

Notes

13. See also *Lucas v. South Carolina Coastal Council, 505 U.S. 1003*, 1032, n. 18 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude . . . beneficial uses in the circumstances in which the land is presently found"); *Bishop v. Wood, 426 U.S. 341*, 344–345 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley v. Rhoden, 421 U.S. 200* (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of the meaning of state statutes," we said that "[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." *Id.*, at 208.

14. Even in the rare case in which a State's "manner" of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint. See U.S. Const., amend. XII; *3 U.S.C. §1–15*; cf. *Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565*, 569 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, §4); *Luther v. Borden*, 7 How. 1, 42 (1849).

15. "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution . . . grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, §4, cl. 1 . . ., and allows States to appoint electors for the President, Art. II, §1, cl. 2." *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779*, 841–842 (1995) (Kennedy, J., concurring).

Justice Breyer, with whom Justice Stevens and Justice Ginsburg join except as to Part I—A—1, and with whom Justice Souter joins as to Part I, dissenting.

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

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I

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

A

1

The majority raises three Equal Protection problems with the Florida Supreme Court's recount order: first, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority's reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority's third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). The opinion points out that the Florida Supreme Court ordered the inclusion of Broward County's undercounted "legal votes" even though those votes included ballots that were not perforated but simply "dimpled," while newly recounted ballots from other counties will likely include only votes determined to be "legal" on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

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

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of *3 U.S.C. §5*. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. See *ante*, at 13 (*per curiam*).

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As Justice Stevens points out, see *ante*,

at 4 and n. 4 (Stevens, J., dissenting opinion), the ballots of voters in counties that use punch-card systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No-Vote Rates Higher in Punch Card Count, N. Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punch-card ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of petitioners' claims, which are the focus of the Chief Justice's concurrence, raise no significant federal questions. I cannot agree that the Chief Justice's unusual review of state law in this case, see *ante*, at 5–8 (Ginsburg, J., dissenting opinion), is justified by reference either to Art. II, §1, or to *3 U.S.C. §5*. Moreover, even were such review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, §1, and *3 U.S.C. §5* to justify the majority's conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante*, at 2 (Opinion of Rehnquist, C. J. The concurrence's primary foundation for this conclusion rests on an appeal to plain text: Art. II, §1's grant of the power to appoint Presidential electors to the State "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker, 146 U.S. 1* (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See *id.*, at 41 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as Justice Stevens points out, have we interpreted the Federal constitutional provision most analogous to Art. II, §1—Art. I, §4—in the strained manner put forth in the concurrence. *Ante*, at 1–2 and n. 1 (dissenting opinion).

The concurrence's treatment of §5 as "inform[ing]" its interpretation of Article II, §1, cl. 2, *ante*, at 3 (Rehnquist, C. J., concurring), is no more convincing. The Chief Justice contends that our opinion in *Bush v. Palm Beach County Canvassing Bd., ante*, p. ____, (*per curiam*) (*Bush I*), in which we stated that "a legislative wish to take advantage of [§5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, *id.*, (slip op. at 6), now means that *this Court* "must ensure that postelection state court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by §5." *Ante*, at 3. However, §5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in *Bush I* did we establish that *this Court* had the authority to enforce §5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state court decision that threatens the safe harbor provision of §5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of §5's "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

But, in any event, the concurrence, having conducted its review, now reaches the wrong conclusion. It says that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Ante*, at 4–5 (Rehnquist, C. J, concurring). But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes.

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Compare Fla. Stat. §102.166 (2001) (foreseeing manual recounts during the protest period) with §102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare §102.112(1) (stating that the Secretary "may" ignore late returns) with §102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has any practical importance and cannot justify the reversal of the different Florida court decision before us now.

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

Nor can one characterize the third element as "impermissibl[e] distort[ing]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminated the Secretary's discretion." *Ante*, at 9 (Rehnquist, C. J, concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to . . . place in doubt the result of the election." Fla. Stat. §§102.168(3), (3)(c) (2000). And the parties have argued about the proper meaning of the statute's term "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.*, at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. §101.5614(5) (2000). Given this statutory language, certain roughly analogous judicial precedent, *e.g., Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917) (*per curiam*), and somewhat similar determinations by courts throughout the nation, see cases cited *infra,* at 9, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. *Gore v. Harris*, ___ So. 2d ___, ___ (2000) (slip op., at 19). That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the Court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines contained enough "legal votes" to place "the results" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable—however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." *Id.*, at *13. Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation . . . is *investigated, examined, or checked*, . . . and to provide any relief appropriate." Fla. Stat. §102.168(8) (2000) (emphasis added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g.*, *In re Election of U.S. Representative for Second Congressional Dist.*, 231 Conn. 602, 621, 653 A. 2d 79, 90–91 (1994) ("Whatever the process

used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters"); *Brown v. Carr*, 130 W. Va. 401, 460, 43 S. E.2d 401, 404–405 (1947) ("[W]hether a ballot shall be counted . . . depends on the intent of the voter . . . Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante*, at 1 (Rehnquist, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional provision designed to protect a basic human right. See, *e.g., Brown v. Board of Education, 347 U.S. 483* (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Respondents invoke a competing fundamental consideration—the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by *state* courts. See *3 U.S.C. §5* (providing that, where a "State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . electors . . . by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

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

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

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

The Member of Congress who introduced the Act added:

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

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The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a state submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been . . . regularly given." *3 U.S.C. §15*. If, as occurred in 1876, one or more states submits two sets of electors, then Congress must determine whether a slate has entered the safe harbor of §5, in which case its votes will have "conclusive" effect. *Ibid.* If, as also occurred in 1876, there is controversy about "which of two or more of such State authorities . . . is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." *Ibid.* If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." *Ibid.*

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

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

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

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

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

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

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its

"sheer momentousness, . . . which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, *supra*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." *United States* v. *Butler, 297 U.S. 1*, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra*, at 71. What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

Williams v. State of Mississippi, 170 U.S. 213 (1898)

At June term, 1896, of the circuit court of Washington county, Miss., the plaintiff in error was indicted by a grand jury composed entirely of white men for the crime of murder. On the 15th day of June he made a motion to quash the indictment, which was in substance as follows, omitting repetitions, and retaining the language of the motion as nearly as possible:

Now comes the defendant in this cause, Henry Williams by name, and moves the circuit court of Washington county, Miss., to quash the indictment herein filed, and upon [170 U.S. 213, 214] which it is proposed to try him for the alleged offense of murder[16]: Because the laws by which the grand jury was selected, organized, summoned, and charged, which presented the said indictment, are unconstitutional and repugnant to the spirit and letter of the constitution of the United States of America, fourteenth amendment thereof, in this: that the constitution prescribes the qualifications of electors, and that, to be a juror, one must be an elector; that the constitution also requires that those offering to vote shall produce to the election officers satisfactory evidence that they have paid their taxes; that the legislature is to provide means for enforcing the constitution, and, in the exercise of this authority, enacted section 3643, also section 3644 of 1892, which respectively provide that the election commissioners shall appoint three election managers, and that the latter shall be judges of the qualifications of electors, and are required 'to examine on oath any person duly registered and offering to vote touching his qualifications as an elector.' And then the motion states that 'the registration roll is not *prima facie* evidence of an elector's right to vote, but the list of those persons having been passed upon by the various district election managers of the county to compose the registration book of voters as named in section 2358 of said Code of 1892, and that there was no registration books of voters prepared for the guidance of said officers of said county at the time said grand jury was drawn.' It is further alleged that there is no statute of the state providing for the procurement of any registration books of voters of said county, and (it is alleged in detail) the terms of the constitution and the section of the Code mentioned, and the discretion given to the officers, 'is but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the state of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the constitution of the state and

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the statute of the state adopted under the said constitution. The use of said discretion can be and has been used in the said Washington county to the end complained of.' After some detail to the [170 U.S. 213, 215] same effect, it is further alleged: 'That the constitutional convention was composed of 134 members, only one of whom was a negro. That under prior laws there were 190,000 colored voters and 69,000 white voters. The makers of the new constitution arbitrarily refused to submit it to the voters of the state for approval, but ordered it adopted, and an election to be held immediately under it, which election was held under the election ordinances of the said Constitution in November, 1891, and the legislature assembled in 1892, and enacted the statutes complained of, for the purpose to discriminate aforesaid, and but for that the 'defendant's race would have been represented impartially on the grand jury which presented this indictment,' and hence he is deprived of the equal protection of the laws of the state. It is further alleged that the state has not reduced its representation in congress, and generally for the reasons aforesaid, and because the indictment should have been returned under the constitution of 1869 and statute of 1889, it is null and void. The motion concludes as follows: 'Further, the defendant is a citizen of the United States, and, for the many reasons herein named, asks that the indictment be quashed, and he be recognized to appear at the next term of the court.'

This motion was accompanied by four affidavits, subscribed and sworn to before the clerk of the court, on June 15, 1896, to wit:

1. An affidavit of the defendant, 'who, being duly sworn, deposes and says that the facts set forth in the foregoing motion are true to the best of his knowledge, of the language of the constitution and the statute of the state mentioned in said motion, and upon information and belief as to the other facts, and that the affiant verily believes the information to be reliable and true.'
2. Another affidavit of the defendant, 'who, being first duly sworn, deposes and says that he has heard the motion to quash the indictment herein read, and that he thoroughly understands the same, and that the facts therein stated are true, to the best of his knowledge and belief. As to the existence of the several sections of the state constitution, and the [170 U.S. 213, 216] several sections of the state statute, mentioned in said motion to quash, further affiant states that the facts stated in said motion, touching the manner and method peculiar of the said election, by which the delegates to said constitutional convention were elected, and the purpose for which said objectionable provisions were enacted, and the fact that the said discretion complained of as aforesaid has abridged the suffrage of the number mentioned therein, for the purpose named therein, all such material allegations are true, to the best of affiant's knowledge and belief, and the fact of the race and color of the prisoner in this cause, and that race and color of the voters of the state whose elective franchise is abridged as alleged therein, and the fact that they who are discriminated against, as aforesaid, are citizens of the United States, and that prior to the adoption of the said constitution and said statute the said state was represented in congress by seven representatives in the lower house, and two senators, and that since the adoption of the said objectionable laws there has been no reduction of said representation in congress. All allegations herein, as stated in said motion aforesaid, are true, to the best of affiant's knowledge and belief.'
3. An affidavit of John H. Dixon, 'who, being duly sworn, deposes and says that he had heard the motion to quash the indictment filed in the Henry Williams Case, and thoroughly understands the same, and that he has also heard the affidavit sworn to by said Henry Williams carefully read to him, and thoroughly understands the same. And in the same manner the facts are sworn to in the said affidavit, and the same facts alleged therein upon information and belief are hereby adopted as in all things the sworn allegations of affiant, and the facts alleged therein, as upon knowledge and belief, are made hereby the allegations of affiant upon his knowledge and belief.'
4. An affidavit of C. J. Jones, 'who, being duly sworn, deposes and says that he has read carefully the affidavit filed in the John Dixon Case sworn to by him (said C. J. Jones), and that he, said affiant, thoroughly understands the same, and adopts the said allegations therein as his deposition in [170 U.S. 213, 217] this case upon hearing this motion to quash the indictment herein, and that said allegations are in all things correct and true as therein alleged.'

The motion was denied, and the defendant excepted. A motion was then made to remove the cause to the United States circuit court, based substantially on the same grounds as the motion to quash the indictment. This was also denied, and an exception reserved.

The accused was tried by a jury composed entirely of white men, and convicted. A motion for a new trial was denied, and the accused sentenced to be hanged. An appeal to the Supreme Court was taken, and the judgment of the court below was affirmed.

The following are the assignments of error:

1. The trial court erred in denying motion to quash the indictment, and petitioned for removal.
2. The trial court erred in denying motion for new trial, and pronouncing death penalty under the verdict.
3. The supreme court erred in affirming the judgment of the trial court.

The sections of the constitution of Mississippi and the laws referred to in the motion of the plaintiff in error are printed in the margin. 1 [170 U.S. 213, 218] Cornelius J. Jones, for plaintiff in error.

C. B. Mitchell, for defendant in error. [170 U.S. 213, 219].

Mr. Justice McKENNA, after stating the case, delivered the opinion of the court.

The question presented is, are the provisions of the constitution of the state of Mississippi and the laws enacted to enforce the same repugnant to the fourteenth amendment of the constitution of the United States? That amendment and its effect upon the rights of the colored race have been considered by this court in a number of cases, and it has been uniformly held that the constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discriminations by the general government or by the states against any citizen because of his race; but it has also been held, in a very recent case, to justify a removal from a state court to a federal court of a cause in which such rights are alleged to be denied, that such denial must be the result of the constitution or laws of the state, not of the administration of them. Nor can the conduct of a criminal trial in a state court be reviewed by this court unless the trial is had under some statute repugnant to the constitution of the United [170 U.S. 213, 220] States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Upon this general subject, this court, in Gibson v. Mississippi, 162 U.S. 566, 581, 16 S. Sup. Ct. 906, after referring to previous cases, said: 'But those cases were held to have also decided that the fourteenth amendment was broader than the provisions of section 641 of the Revised Statutes; that, since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode o executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges, or immunities claimed under the constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them resulting from the constitution or laws of the state, rather than a denial first made manifest at or during the trial of the case.'

It is not asserted by plaintiff in error that either the constitution of the state or its laws discriminate in terms against the negro race, either as to the elective franchise or the privilege or duty of sitting on juries. These results, if we understand plaintiff in error, are alleged to be effected by the powers vested in certain administrative officers.

Plaintiff in error says:

'Section 241 of the constitution of 1890 prescribes the qualifications for electors; that residence in the state for two years, one year in the precinct of the applicant, must be effected; that he is twenty-one years or over of age, having paid all taxes legally due of him for two years prior to 1st day of February of the year he offers to vote, not having [170 U.S. 213, 221] been convicted of theft, arson, rape, receiving money or goods under false pretenses, bigamy, embezzlement.

'Section 242 of the constitution provides the mode of registration; that the legislature shall provide by law for registration of all persons entitled to vote at any election, and that all persons offering to register shall take the oath; that they are not disqualified for voting by reason of any of the crimes named in the constitution of this state; that they will truly answer all questions propounded to them concerning their antecedents so far as they relate to the applicant's right to vote, and also as to their residence before their citizenship in the district in which such application for registration is made. The court readily sees the scheme. If the applicant swears, as he must do, that he is not disqualified by reason of the crimes specified, and that he has effected the required residence, what right has he to answer all questions as to his former residence? Section 244 of the constitution requires that the applicant for registration, after January, 1892, shall be able to read any section of the constitution, or he shall be able to understand the same (being any section of the organic law), or give a reasonable

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interpretation thereof. Now, we submit that these provisions vest in the administrative officers the full power, under section 242, to ask all sorts of vain, impertinent questions; and it is with that officer to say whether the questions relate to the applicant's right to vote. This officer can reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the constitution with that power. Under section 244 it is left with the administrative officer to determine whether the applicant reads, understands, or interprets the section of the constitution designated. The officer is the sole judge of the examination of the applicant, and, even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration.'

To make the possible dereliction of the officers the dereliction of the constitution and laws, the remarks of the supreme court of the state are quoted by plaintiff in error as to their intent. The constitution provides for the payment of a poll [170 U.S. 213, 222] tax, and by a section of the Code its payment cannot be compelled by a seizure and sale of property. We gather from the brief of counsel that its payment is a condition of the right to vote, and, in a case to test whether its payment was or was not optional (*Ratcliff v. Beal*, 20 South. 865), the supreme court of the state said: 'Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race.' And further the court said, speaking of the negro race: 'By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.' But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the federal constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the state. Besides, the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.

It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them. The only allegation is '. . . by granting a discretion to the said officers, as mentioned in the several sections of the constitution [170 U.S. 213, 223] of the state, and the statute of the state adopted under the said constitution, the use of which discretion can be and has been used by said officers in the said Washington county to the end here complained of, to wit, the abridgment of the elective franchise of the colored voters of Washington county; that such citizens are denied the right to be selected as jurors to serve in the circuit court of the county; and that this denial to them of the right to equal protection and benefits of the laws of the state of Mississippi on account of their color and race, resulting from the exercise of the discretion partial to the white citizens, is in accordance with the purpose and intent of the framers of the present constitution of said state. . . .'

It will be observed that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race; but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them. If it is done in the latter way, how or by what means should be shown. We gather from the statements of the motion that certain officers are invested with discretion in making up lists of electors, and that this discretion can be and has been exercised against the colored race, and from these lists jurors are selected. The supreme court of Mississippi, however, decided, in a case presenting the same questions as the one at bar, 'that jurors are not selected from or with reference to any lists furnished by such election officers.' *Dixo v. Mississippi* (Nov. 9, 1896) 20 South. 839.

We do not think that this case is brought within the ruling in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 Sup. Ct. 1064. In that case the ordinances passed on discriminated against laundries conducted in wooden buildings. For the conduct of these the consent of the board of supervisors was required, and not for the conduct of laundries in brick or stone buildings. It was [170 U.S. 213, 224] admitted that

there were about 320 laundries in the city and county of San Francisco, of which 240 were owned and conducted by subjects of China, and, of the whole number, 310 were constructed of wood, the same material that constitutes nine-tenths of the houses of the city, and that the capital invested was not less than $200,000.

It was alleged that 150 Chinamen were arrested, and not one of the persons who were conducting the other 80 laundries, and who were not Chinamen. It was also admitted 'that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted.'

The ordinances were attacked as being void on their face, and as being within the prohibition of the fourteenth amendment, but, even if not so, that they were void by reason of their administration. Both contentions were sustained.

Mr. Justice Matthews said that the ordinance drawn in question 'does not describe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone, but as to wooden buildings, constituting all those in previous use, divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.' The ordinances, therefore, were on their face repugnant to the fourteenth amendment. The court, however, went further, and said: 'This conclusion and the reasoning on which it is based are deductions from the face of the ordinance, as to its [170 U.S. 213, 225] necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration. For the cases present, the ordinances in actual operation, and the facts shown, establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned in *Henderson v. Mayor of New York*, 92 U.S. 259; *Chy Lung v. Freeman*, *Id.* 275; Ex parte Virginia, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370; and *Soon Hing v. Crowley*, 113 U.S. 703, 5 Sup. Ct. 730.'

This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them.

If follows, therefore, that the judgment must be affirmed.

Note

16. The three sections of article 12 of the constitution of the state of Mississippi above referred to read as follows:

> 'Sec. 241. Every male inhabitant of this state except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this state two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the 1st day of February of the year in which he shall offer to vote all taxes which may have been legally required of him,

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> and which he has had an opportunity of paying according to law for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified.'
>
> 'Sec. 242. The legislature shall provide by law for the registration of all persons entitled to vote at any election, and all persons offering to register shall take the following oath or affirmation: 'I, _____, do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this county) and that I will have resided in this state two years and _____ election district of _____ county one year next preceding the ensuing election (or if it be stated in the oath that the person proposing to register is a minister of the gospel in charge of an organized church, then it will be sufficient to aver therein two years' residence in the state and six months in said election district) and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this state as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this district; that I will faithfully support the constitution of the United States and of the state of Mississippi, and will bear true faith and allegiance to the same. So held me God.' In registering voters in cities and towns not wholly in one election district the name of such city or town may be substituted in the oath for the election district. Any willful and corrupt false statement in said affidavit, or in answer to any material question propounded as herein authorized shall be perjury.
>
> 'Sec. 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892.'

Section 264 of article 14 of the constitution of the state of Mississippi, above referred to, reads as follows:

> 'Sec. 264. No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court.'

The three sections of the Code of 1892 of the State of Mississippi above referred to read as follows:

> 'Sec. 2358. How List of Jurors Procured. The board of supervisors at the first meeting in each year, or a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration books of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them as nearly as it conveniently can from the several election districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors.'
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> 'Sec. 3643. Managers of Election Appointed. Prior to every election the commissioners of election shall appoint three persons for each election district to be managers of the election, who shall not all be of the same political party, if suitable persons of different political parties can be had in the district, and if any person appointed shall fail to attend and serve, the managers present, if any, may designate one to fill his place, and if the commissioners of election fail to make the appointments, or in case of the failure of all those appointed to attend and serve, any three qualified electors present when the polls should be opened may act as managers.'
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> 'Sec. 3644. Duties and Powers of Managers. The managers shall take care that the election is conducted fairly and agreeably to law, and they shall be judges of the qualifications of electors and may examine on oath any person duly registered and offering to vote touching his qualifications as an elector, which oath any of the managers may administer.'