SUPREME COURT OF THE UNITED STATES

No. 00–949

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

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

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.

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 post-election 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. 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).
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> "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.

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.