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Bush v. Gore as an Equal Protection Case

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BUSH V. GORE AS AN EQUAL PROTECTION CASE

Richard Briffault

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I. INTRODUCTION

In *Bush v. Gore*,¹ the United States Supreme Court applied the Equal Protection Clause to the mechanics of state election administration. The Court invalidated the manual recount of the so-called undervote—that is, ballots that vote-counting machinery had found contained no indication of a vote for President—which the Florida Supreme Court had ordered to determine the winner of Florida’s vote for presidential electors in the 2000 presidential election.² The United States Supreme Court reasoned that the principles it had previously articulated in applying the Equal Protection Clause to the vote were violated by the Florida court’s failure to assure consistency between and within Florida’s counties in the determination of whether particular undervote ballots constitute legally valid votes.³

The Court correctly determined that the Equal Protection Clause applies to the state and local procedures affecting the casting and

* Vice Dean & Joseph P. Chamberlain Professor of Litigation, Columbia University School of Law. This paper benefited from the comments of the official commentators—Steve Bickerstaff, Heather Gerken, and Spencer Overton—of an earlier draft presented at the Florida State University College of Law’s symposium on the Law of Presidential Elections: Issues in the Wake of Florida 2000, as well as from the thoughtful criticisms of Mike Dorf, Sam Issacharoff, and Rick Pildes.

1. 531 U.S. 98 (2000).

2. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

3. *Bush v. Gore*, 531 U.S. at 104-07.

counting of ballots but was, for the most part, wrong to find that the Florida Supreme Court's order denied Florida voters equal protection. In particular, the inconsistencies in counting undervotes, which the Florida court's order appeared to tolerate and which so disturbed the United States Supreme Court, did not constitute an equal protection violation.

Equal protection ought to apply to the nitty-gritty of local election practices because those practices can have the effect of disenfranchising voters and discriminating among identifiable groups of voters. Such practices can negate the right to vote and the right to an equally weighted vote—rights long protected by the Equal Protection Clause. However, with virtually every local administrative decision having the potential to burden some voters relative to others, the application of the Equal Protection Clause to election rules and procedures could effectively federalize an area which has long been the domain of state and local government. Decentralization of election administration reflects important political values, including the opportunities for local participation and decisionmaking concerning contestable political issues, as well as protection from centralized political manipulation and abuse. Decentralization necessarily entails variation in election practices across the different local units charged with administering the procedures for casting and counting ballots. Subjecting all interlocal differences in election rules and procedures to close constitutional scrutiny could eliminate meaningful decentralization of election administration.

This is not to say that decentralizing election administration to the local level is an inherently wise policy. State legislative or administrative measures addressed to the selection of voting machinery, ballot design, the process of obtaining absentee ballots, or the standards for conducting manual recounts could certainly improve our system of casting and counting votes. However, given the political values that support decentralization, I would suggest that the mix of state and local decisionmaking in election administration is primarily a matter for political, not judicial determination. To be sure, judicially imposed centralization would be appropriate when certain practices are necessarily required or precluded by constitutional principles. The presumption of universal adult citizen suffrage and the one person, one vote rule for weighting ballots are constitutional principles that ended alternative state or local rules concerning the availability of the franchise and the apportionment of legislative representation. Comparable constitutional principles might prohibit certain state or local election administrative practices that consistently burden the vote or discriminate among voters. But not all questions concerning election administration can be resolved by reference to

constitutional principles, and not all state or local rules that affect the casting and counting of ballots violate constitutional norms.

The political tradition of decentralized election administration and the values that support it, combined with the absence of constitutional rules for answering many questions of election procedure, suggest the need for an equal protection standard that both protects fundamental voting rights and respects local variations in rules and procedures. The Supreme Court apparently agrees. Even as it applied equal protection to the details of election administration, *Bush v. Gore* underscored the need to constrain equal protection review when it “limited” its “consideration . . . to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”⁴

This Article will examine the equal protection issues presented in *Bush v. Gore*. Part II will review the political and legal struggle over counting and recounting the Florida presidential vote. Part III will summarize the equal protection analysis of the recount issues undertaken by the Justices in *Bush v. Gore*. Part IV will then examine the Supreme Court’s treatment of the equal protection issues created by the Florida Supreme Court’s order in the context of a more general effort to determine an appropriate role for federal court equal protection review of state election procedures.

Drawing on a series of lower federal court cases decided prior to *Bush v. Gore* that dealt with constitutional challenges to local election practices, I will suggest that federal constitutional intervention in state election administration should be limited to cases of “patent and fundamental unfairness”⁵ in which the state or local practice undermines the integrity of the election itself. “[O]rdinary dispute[s] over the counting and marking of ballots,”⁶ even those involving administrative errors that result in distinctions among voters, should not be treated as raising equal protection issues justifying federal court action. Applying that standard, the Florida Supreme Court’s manual recount order did not violate the Equal Protection Clause because it would not have caused fundamental unfairness in the Florida election. The Florida court’s manual recount order would not have led to the exclusion of any voters;⁷ it did not unconstitutionally

4. *Id.* at 109.

5. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (arguing that in cases of “patent and fundamental unfairness” due process may be violated).

6. *Id.*; see also *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. Unit B 1981) (stating that no constitutional question is presented by “garden variety challenges to the manner in which ballots are counted”).

7. See *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) (holding that election procedure will likely be held unconstitutional on substantive due process grounds only if “significant disenfranchisement” results from a change in election procedure).

favor any group of voters over any other group of voters;⁸ and it did not unsettle any of the expectations, strategies, or voting plans of any of the participants in Florida's electoral process.⁹

This is not to say that the Florida Supreme Court's order was flawless. The Florida court violated equal protection principles by ordering the tabulation of recount results from some counties that may have included votes obtained from the manual recount of overvote ballots—that is, ballots that the vote-counting machinery rejected because they contained two or more presidential votes per voter—without providing for a manual recount of overvote ballots elsewhere in the state. Although the Florida court could have constitutionally limited the recount to the undervote, it was a mistake to mingle votes retrieved from overvote ballots in some counties with a recount limited to undervote ballots in the other counties.

However, the Florida court's failure to provide specific guidelines for the determination of what constituted a valid ballot—*Bush v. Gore*'s principal concern—was not unconstitutional. The lack of such guidance could have led to uncertainties in assessing ballots and might have resulted in variations among counties and canvassing teams in the standards for counting ballots. But variations in the definition of a valid undervote ballot in a manual recount would not have posed a threat to fundamental fairness. The manual recount would not have led to the exclusion of any ballots that were constitutionally required to be counted. Nor would it have led to a departure from any generally accepted standard for determining which undervote ballots are valid votes. *Bush v. Gore* itself highlighted the minimal constitutional protection accorded to undervote ballots when the Supreme Court effectively excluded all votes that might have been gleaned from a statewide inspection of the undervote ballots from Florida's final tally. Presumably, the failure to count undervote ballots was not a constitutional violation.

Moreover, the intercounty or intracounty variations in standards for determining whether an undervote ballot contained a legally valid vote were not ordered by state law and would not have reflected a state-level decision to prefer certain parts of the state or voters who

8. Cf. *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985) (rejecting challenge to election based on claimed irregularities, errors, and fraud in the distribution of absentee ballots given district court's finding that, although numerous violations of state election laws had occurred, there was no evidence of racially discriminatory intent); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (invalidating an election due to racially discriminatory practices in administration).

9. Cf. *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825, 828 (1st Cir. 1980) (upholding the counting of ballots containing marks outside the spaces and squares designated by law for marking preferences: "no party or person is likely to have acted to their detriment by relying upon the invalidity of ballots with marks outside the ballots' drawn rectangles").

backed particular candidates or voters associated with particular parties over others. Thus, any variations in counting standards would not have amounted to an unconstitutional discrimination among Florida voters.

To be sure, differences in standards for assessing undervote ballots may be troubling. But the Florida Supreme Court's apparent willingness to tolerate variations may have been required by the court's need to abide by the special legal imperatives for resolving disputes concerning presidential elections articulated by the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*.¹⁰ In order to honor the state legislature's constitutional prerogative of writing the rules for the selection of presidential electors and the legislature's presumptive interest in benefitting from the federal "safe harbor" law providing congressional deference to state resolutions of disputes concerning electors, the Florida court may have been unable to spell out more precise standards than those found in existing statutes and case law.

Rather than create a problem of fundamental unfairness, the Florida court's order would have increased the fairness of the Florida vote. Unlike the county-level manual recounts conducted prior to the certification of the Florida results, the court-ordered statewide recount would not have been biased in favor of a particular candidate. Moreover, the manual recount would have provided a partial remedy for the intercounty disparities in the percentage of votes that resulted in undervote ballots—disparities closely associated with the intercounty differences in the quality of Florida's voting machinery. In short, instead of limiting voting rights and discriminating among voters, the Florida Supreme Court's order promoted voting rights and the equal treatment of voters. Indeed, one striking consequence of the United States Supreme Court's decision is that, unlike any other case in which the Equal Protection Clause was used to vindicate the right to vote, *Bush v. Gore* produced a smaller electorate marked by greater intercounty discrepancies than would have been the case had the Court stayed its hand.

In Part V, I will conclude by touching on the relationship between the Court's equal protection analysis and its commitment to federalism. A central premise of our federal system is that many important questions are left to smaller units rather than bigger ones, even though—indeed, perhaps, because—that will create a multiplicity of different approaches. That is the philosophy of federalism which has been so central to the jurisprudence of the Justices who composed the *Bush v. Gore* majority and embraced the application of the Equal Protection Clause to the manual recount order. *Bush v. Gore's* con-

10. 531 U.S. 70 (2000).

cern about interlocal variations in election administration suggests a surprising discomfort about the very values of local decisionmaking and interlocal variation which are at the heart of federalism itself.

II. COUNTING AND RECOUNTING THE FLORIDA BALLOTS IN THE 2000 PRESIDENTIAL ELECTION

On November 7, 2000, the people of the United States went to the polls to vote for the next President and Vice President, or rather, as they were reminded over the next few days, to choose the electors who would vote for President and Vice President of the United States. On November 8, 2000, they awoke to find that although Vice President Al Gore enjoyed a narrow lead in the popular vote—his lead ultimately grew to 540,000 votes or about one-half of one percent of the total vote cast—there was no electoral vote winner. With 270 electoral votes necessary to win, Gore had carried states and the District of Columbia casting a total of 267 electoral votes.¹¹ His Republican opponent, Texas Governor George W. Bush, had carried states that would cast 246 electoral votes for him. Still in the balance, and with 25 electoral votes, the key to the election, was Florida. On the morning after the election, Bush led in Florida by 1,784 votes. Florida law required the ballot counting machines to count the ballots again if the winner's margin over the next-best candidate totaled less than one-half of one percent of the vote.¹² Bush's margin over Gore was about three-hundredths of one percent of the vote. The machine recount, which was completed by Friday, November 10, reduced Bush's lead to a mere 327 votes,¹³ although his lead was likely to grow once the overseas absentee ballots, which historically had favored Republicans, were included. At no point after the machine recount did Bush's margin over Gore ever exceed one thousand out of the nearly six million votes cast.

With the candidates so close, the legal issues over the next five weeks were dominated by Gore's efforts to obtain a recount.¹⁴ For-

11. Ultimately, Vice President Gore received just 266 electoral votes when one District of Columbia elector who was pledged to Gore spoiled her ballot.

12. FLA. STAT. § 102.141(4) (2000), *amended by* 2001 Fla. Laws ch. 40, § 41, at 148-49.

13. THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS 29 (2001) [hereinafter 36 DAYS].

14. Recount-related issues were not the only legal questions growing out of the Florida presidential vote that state and federal courts addressed in November and December 2000. Voters in Palm Beach County unsuccessfully challenged that county's unusual and apparently confusing "butterfly ballot," which, they contended, caused many Gore voters to mistakenly vote for Pat Buchanan. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000). The actions of election officials in Seminole and Martin Counties, which enabled Republican party workers to add voter identification numbers to requests for absentee ballots, led to challenges to the legality of absentee ballots in those counties. *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000); *Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517 (Fla. 2000). Absentee ballot issues may ultimately

mally, this challenge consisted first of a protest phase—that is, challenges to county-level election results—prior to the formal certification of the statewide results; and, then, a contest phase, or a challenge to the certified statewide result. The recount struggle can also be analyzed in terms of the different legal issues that dominated its different stages. Initially, these concerned primarily questions of timing, authority, and discretion. Could Florida's Secretary of State waive the statutory deadline for the submission of county-level election results and include late-filed results from county canvassing boards that had undertaken manual recounts? Was she required to do so? Did the statutory authorization to undertake a manual recount on evidence of an "error in the vote tabulation" apply to instances where the vote-counting machinery had worked as designed but had failed to count imperfectly marked ballots? Did the Florida courts have the authority to require the Secretary of State to accept late-filed returns?

In early December, the legal issues began to shift from the powers and duties of boards and courts to the equal treatment of voters in different counties, the standards for determining whether an imperfectly marked ballot is a legal vote, and the interplay of these two questions. These were the issues that either shaped or came directly before the Supreme Court in *Bush v. Gore*. However, the earlier issues played an important role in the development of the recount struggle and also helped frame the equal protection questions that took center stage in *Bush v. Gore*.

A. *The Protest Phase*

Like most states, Florida uses a highly decentralized procedure for conducting elections, counting votes, and challenging vote counts.¹⁵ Elections are conducted by county supervisors of elections, and the votes are counted by county canvassing boards composed of each county's supervisor of elections, a county court judge, and the chair of the board of county commissioners.¹⁶ The county canvassing board certifies the results and, for elections involving state or federal offices, transmits them to the state. The state Elections Canvassing Commission, composed of the Governor, the Secretary of State, and the Director of the Division of Elections, certifies the returns and de-

have been crucial in resolving the presidential election. David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1.

15. Florida's election laws are codified at FLA. STAT. chs. 101-02 (2000). After the 2000 presidential election, the Florida Legislature made significant amendments to the election code. See 2001 Fla. Laws ch. 40. This Article considers the election statutes as they existed before the 2001 amendments.

16. FLA. STAT. §§ 102.131(1), 102.141(2) (2000) (amended 2001).

clares the winner based on the county results.¹⁷ This process is required by law to be concluded within seven days after the election, or, in 2000, by 5 p.m. on Tuesday, November 14—with the exception of overseas absentee ballots which, as a result of a consent decree, may be received until ten days after the election.¹⁸

Florida law also provides that protests of election returns may be submitted to the county canvassing boards.¹⁹ Any candidate or voter can protest the returns of an election as erroneous,²⁰ any candidate or political party whose candidates' names appeared on the ballot may ask a county board for a manual recount, and the county board is authorized to undertake a manual recount.²¹ If a manual check of at least three precincts involving one percent of the total votes cast in the county “indicates an error in the vote tabulation which could affect the outcome of the election,” the county canvassing board is authorized, but not required, to “manually recount all ballots.”²² To do so, the county canvassing board appoints counting teams composed of voters who are members of at least two political parties, who then inspect the ballots by hand.²³ “If a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.”²⁴

Between November 9 and November 11, the Democratic Party filed protests and requested manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties. Broward, Miami-Dade, and Palm Beach are the three most populous counties in the state. Gore carried Broward and Palm Beach by substantial margins.²⁵ Gore led by much smaller margins in Miami-Dade, the state’s most populous county, and in Volusia, a much smaller county.

In Broward, Miami-Dade, and Palm Beach Counties, the machine counts found a significant number of presidential ballots that contained no presidential preference—nearly 30,000 such ballots in Miami-Dade and Broward each, and another 15,000 in Palm Beach.²⁶ In

17. *Id.* § 102.111(1).

18. *See id.*

19. *Id.* § 102.166.

20. *Id.* § 102.166(1).

21. *Id.* § 102.166(4)(a), (c). The request for a manual recount must be filed prior to the time the county canvassing board certifies the result for the office in question, or within seventy-two hours of election day, whichever is later. *Id.* § 102.166(4)(b).

22. *Id.* § 102.166(5).

23. *Id.* § 102.166(7)(a).

24. *Id.* § 102.166(7)(b).

25. 36 DAYS, *supra* note 13, at 285. Gore received his highest county percentage in Broward, and his third highest percentage of the county vote in Palm Beach. Gore’s number two county, Gadsden, cast well under 20,000 votes, compared with the nearly one million votes cast in Broward and Palm Beach together.

26. *Id.*

terminology that became famous as the recount struggle continued, these no-preference ballots consisted of undervotes—ballots which, according to the vote-counting machinery, contained no vote for any presidential candidate—and overvotes—ballots in which the voter voted for more than one candidate and thus invalidated the ballot. The undervote ballots became the principal focus of the political and legal battle over the recount. Although some undervote ballots may have reflected the decision of voters to skip the presidential election and focus on other races, Gore's forces alleged that in many cases voters had attempted to cast a presidential vote, but due to problems with the voting machinery, their preferences had failed to register.²⁷

Indeed, the percentage of a county's ballots containing undervotes was associated with the type of voting machinery the county used, suggesting that problems with the voting machinery were at least as important a factor as voter preferences in explaining why some ballots that bore voters' markings had not been read by the machines as containing votes.²⁸ Broward, Miami-Dade and Palm Beach Counties were among the two dozen Florida counties that used Votomatic punch card ballots.²⁹ In those counties, a voter casts a ballot by placing a punch card into a holder and then uses a stylus to make a hole in the ballot card corresponding to the voter's preference. A machine "reads" the light coming through the hole in the ballot card and records it as a vote. A ballot can be counted by the machine only if the hole is punched through cleanly, and the "chad"—or the material occupying the space to be punched out to make the hole—is cleanly detached. Counties using Votomatic punch card ballots had five times the undervote rate as counties using optical scan ballots, in which voters mark their choice with a pencil next to the name of their preferred candidate.³⁰ The high undervote rate was apparently attributable to problems characteristic of the punch card mechanism. If the punch card and the cardholder are improperly aligned, the punch tool may fail to punch out the hole fully. The rubber or plastic strips that help hold the card in place may age and become too stiff to allow the paper to be punched out of the hole, that is, the strips prevent the chad from passing through, creating a dented or "dimpled" chad but not a detached one. When these problems occur, the voter's attempt to vote may leave a mark on the ballot which is not read by the vote-counting machinery but is detectable as a vote to a human vote-counter.

27. Compl. to Contest Election at 7-8, *Gore v. Harris*, No. CIV-00-2808 (Fla. 2d Cir. Ct. Nov. 27, 2000), available at <http://election2000.stanford.edu/CV-00-2808a.pdf>.

28. 36 DAYS, *supra* note 13, at 189-91.

29. *Id.*

30. *Id.*

The combination of large voting populations, large margins for Gore, and high undervote rates due to the use of Votomatic punch card ballots made Broward and Palm Beach Counties particularly attractive targets for Democratic efforts to obtain a manual recount. Although Gore's margin in Miami-Dade was smaller, the county's large population and high undervote rate indicated that it, too, might provide Gore with an appreciable net gain relative to Bush. The fourth county in which a manual recount was sought, Volusia, differed from the others. Volusia used optical scan equipment and, thus, had only a small undervote. But the Volusia count had been marked by a malfunction of the electronic ballot tabulating machine in one precinct, making a manual recount appropriate.³¹

Initially, only the Palm Beach and Volusia county canvassing boards voted to undertake manual recounts. Palm Beach County undertook the one percent sample recount and found sufficient new votes to constitute "an error in the vote tabulation which could affect the outcome of the election."³² Broward and Miami-Dade undertook the sample recounts but decided that countywide manual recounts were not warranted.³³ Nor was it clear whether any of the manual recount findings would be included in the certified results. On November 13, Florida Secretary of State Katherine Harris announced that she would adhere to the November 14 statutory deadline for certifying the election results—excluding the overseas absentee ballots—even if manual recounts were still pending. She contended that in the absence of an Act of God, such as a hurricane, she had no authority to count any returns received after the November 14 deadline.³⁴

On November 14, Judge Terry Lewis of Florida's Second Circuit Court in Tallahassee found that Secretary Harris had the discretion to include late-filed manual recount returns in the statewide results, notwithstanding the statutory deadline to certify the election.³⁵ Indeed, Judge Lewis suggested that such authority to waive the deadline was actually necessary to prevent discrimination against the most populous counties.³⁶ Secretary Harris' refusal to accept manually recounted returns submitted in good faith after the seven-day deadline

would mean . . . that only in sparsely populated counties could a Canvassing Board safely exercise what the Legislature has clearly

31. See *Siegel v. LePore*, 120 F. Supp. 2d 1041, 1046 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

32. FLA. STAT. § 102.166(5) (2000) (amended 2001).

33. 36 DAYS, *supra* note 13, at 65 (Broward), 72 (Miami-Dade).

34. *McDermott v. Harris*, 2000 WL 1693713, at *1 (Fla. 2d Cir. Ct. Nov. 14, 2000).

35. *Id.*

36. *Id.* at *2.

intended to be an option where the Board has a real question as to the accuracy of a vote.

. . . It is unlikely that the Legislature would give the right to protest returns, but make it meaningless because it could not be acted upon in time.³⁷

In response to Judge Lewis' ruling, Secretary Harris invited the Broward, Miami-Dade, and Palm Beach canvassing boards—Volusia's had completed its recount by the statutory deadline—to submit statements of “facts and circumstances” that would justify her acceptance of late-filed amended returns. After the boards filed their statements, she rejected their reasons, concluding that only proof of voter fraud, substantial noncompliance with statutory election procedures, an Act of God, or similar “extenuating circumstances” such as “an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system”—none of which had been alleged by the counties—justified waiver of the statutory deadline.³⁸ On November 17, Judge Lewis sustained the Secretary's action as an acceptable exercise of her discretion.³⁹ The Florida Supreme Court, however, agreed to take the case and enjoined the Secretary and the state Elections Canvassing Commission from certifying the results of the presidential election pending the court's decision on the merits. Following the state supreme court's order, the Miami-Dade canvassing board voted to join Broward and Palm Beach Counties in conducting a full manual recount. As the court prepared for a full hearing, the counties canvassed the overseas absentee ballots, with final but unofficial figures boosting Bush's lead to 930 votes.

On November 21, a unanimous Florida Supreme Court reversed Judge Lewis and found that Secretary Harris was required to accept late-filed returns. In *Palm Beach County Canvassing Board v. Harris*, the court rejected the Secretary's argument that the statutory standard of “error in the vote tabulation” referred only to machine failures to include machine-readable results.⁴⁰ The court, thus, confirmed that the manual recount was authorized by statute when the sample recounts detected a discrepancy between the machine totals and the sample manual recount results.⁴¹ Emphasizing the fundamental importance of the right to vote under the Florida Constitution,⁴² the court held that the Secretary could ignore the late-filed re-

37. *Id.*

38. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1226-27 n.5 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

39. *McDermott v. Harris*, 2000 WL 1714590, at *1 (Fla. 2d Cir. Ct. Nov. 17, 2000).

40. 772 So. 2d at 1229-30.

41. *Id.*

42. *Id.* at 1236-37.

sults of a county manual recount only when the results are submitted “so late that their inclusion will compromise the integrity of the electoral process” by precluding the ability of either a candidate or voter to contest the certification of the election results or preventing the State of Florida from completing its count in time to participate fully in the presidential election.⁴³ The court required the Secretary to accept all amended county canvassing board certifications filed by 5 p.m. on Sunday, November 26.⁴⁴

In the five days between the Florida Supreme Court’s order and the deadline it imposed, Broward County completed its recount. The Miami-Dade County canvassing board began a recount focused on the approximately 10,000 ballots that contained no presidential preference; then reversed itself and ordered a recount of all of the county’s nearly 700,000 ballots; then reversed itself again and, besieged by an intense and intermittently violent crowd of Republican demonstrators, voted that since it could not complete the full recount within the time allotted by the Florida Supreme Court it would not undertake a recount at all.⁴⁵ The Florida Supreme Court unanimously refused a request by the Gore campaign to compel Miami-Dade to resume the recount.⁴⁶

Palm Beach County undertook its recount but found itself running out of time as the evening of November 26 approached. Palm Beach County requested an extension until 9 a.m. on November 27—a time that the Florida Supreme Court had indicated was also acceptable.⁴⁷ Secretary Harris rejected the request. Ultimately, Palm Beach completed its recount a little after 7 p.m. on the night of November 26, but Secretary Harris refused to include the returns in the certified results.⁴⁸ With only the Broward County recount results included, George W. Bush, with his lead reduced to 537 votes, was certified as the winner.

Following the Florida Supreme Court’s order to the Secretary to accept late-filed county results but before the expiration of the court’s deadline for completion of the recounts, Bush sought United States

43. *Id.* at 1237.

44. *Id.* at 1240.

45. See 36 DAYS, *supra* note 13, at 133-35.

46. *Id.* at 142.

47. The court specified 5 p.m., Sunday, November 26, as the deadline for the county canvassing boards’ submissions of manual recount results “provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000.” Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d at 1240. Plainly, the Secretary’s acceptance of Palm Beach County’s recount results on the morning of Monday, November 27 would have been consistent with both the spirit and the letter of the Florida Supreme Court’s order.

48. 36 DAYS, *supra* note 13, at 164-66, 171-72.

Supreme Court review of the Florida court's decision. On November 24, while the recounts were underway, the Supreme Court granted certiorari with respect to two of the questions Bush raised⁴⁹—whether the Florida court's order was inconsistent (1) with Article II, Section 1, Clause 2 of the United States Constitution, which provides that presidential electors shall be appointed by each state “in such Manner as the Legislature thereof may direct;” or (2) with 3 U.S.C. § 5, which requires Congress to accept a state's resolution of a dispute concerning the selection of presidential electors provided, *inter alia*, that the state's resolution is pursuant to “laws enacted prior to” election day and is completed not later than six days before the day set for the Electoral College to vote.⁵⁰

On December 4, the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*,⁵¹ vacated the Florida Supreme Court's order. The United States Supreme Court expressed concern that the Florida court's reliance on the state constitution's protection of the right to vote in interpreting the state legislative scheme for election protests was in tension with the federal constitutional provision giving the state legislature exclusive power to direct the appointment of presidential electors.⁵² The Court also noted the relevance of 3 U.S.C. § 5, observing that “a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the [Florida] Election Code that Congress might deem to be a change in the law.”⁵³ Consequently, the United States Supreme Court vacated the Florida Supreme Court's action and remanded the case to the Florida court to clarify whether it had been appropriately mindful of Article II, Section 1 and 3 U.S.C. § 5 in its analysis of the Florida Election Code. On remand, the Florida Supreme Court reiterated its earlier decision, taking care this time to ground its reasoning solely on the text of the relevant Florida statutes and its “perception of legislative intent.”⁵⁴

B. *The Contest Phase*

With Bush certified as the statewide winner, Gore moved under Florida law to contest the certification. Unlike his earlier protests of

49. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004 (2000).

50. 3 U.S.C. § 5 (1994).

51. 531 U.S. 70 (2000).

52. *Id.* at 76-77.

53. *Id.* at 78.

54. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1291 (Fla. 2000). The initial *Palm Beach* decision had been unanimous. The remand was on a 6-1 vote, with Chief Justice Wells dissenting solely based on his opposition to “issuing a new decision while the United States Supreme Court has under consideration *Bush v. Gore* . . .” *Id.* at 1292. *Bush v. Gore* had been argued prior to the Florida Supreme Court's decision on remand; the United States Supreme Court's decision was issued the next day.

the Broward, Miami-Dade, Palm Beach and Volusia returns, which involved requests of individual county canvassing boards to recheck the tabulations within their counties, the contest was a judicial proceeding, brought in circuit court, to challenge the result of the entire election. The statutory grounds on which Gore relied, however, were similar to the grounds for his protests—“[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.”⁵⁵ Gore alleged five instances of the rejection of legal votes or the inclusion of illegal votes which were sufficient to “change or place in doubt the election”:

- (1) Secretary Harris’ failure to include the results of the Palm Beach County recount, completed just hours after the November 26 deadline;
- (2) An additional 3,300 undercount ballots which the Palm Beach County canvassing board had examined but declined to treat as legal votes;
- (3) The results of the partial manual recount undertaken in Miami-Dade County before the Miami-Dade canvassing board had voted to abandon the recount;
- (4) An additional nine to ten thousand Miami ballots which the Miami-Dade County canvassing board had set aside as undervote ballots but had never reviewed; and
- (5) Votes identified in the machine recount of Nassau County’s votes that were not included in the certified Nassau result. With respect to Nassau, the statutory machine recount had reduced the county total by 218 votes and clipped Bush’s lead by 51 votes. Although Nassau County originally certified the machine recount figures as the official result, the county canvassing board subsequently voted to rescind the certification and, instead, certified the election-night count, thereby adding to Bush’s lead. Even though this had occurred after November 14, Secretary Harris accepted the results and included them in Bush’s 537-vote margin of victory.⁵⁶

Following a two-day trial, Judge N. Sanders Sauls of Florida’s Second Circuit ruled on December 3, 2000, that, as a matter of law, in order to prevail in an election contest the challenger must demonstrate a “reasonable probability” that the ballots in question would change the statewide result.⁵⁷ The court determined that Gore had failed to meet the reasonable probability standard. As a result, Gore

55. FLA. STAT. § 102.168(3)(c) (2000).

56. See generally *Gore v. Harris*, 772 So. 2d 1243, 1247-48 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000); Compl. to Contest Election at 3-4, *Gore v. Harris*, No. CIV-00-2808 (Fla. 2d Cir. Ct. Nov. 27, 2000), available at <http://election2000.stanford.edu/CV-00-2808a.pdf>; 36 DAYS, *supra* note 13, at 173-74.

57. *Gore v. Harris*, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000), *rev’d*, *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

could not obtain review of the ballots which he claimed would give him enough votes to prevail. The court also determined that the specific decisions of the Miami-Dade, Nassau, and Palm Beach canvassing boards with respect to the inclusion or exclusion of ballots must be sustained unless they constituted an abuse of discretion. The court found that no such abuse of discretion was shown.

Gore appealed to the Florida Supreme Court, and on December 8 a divided court ruled in his favor. In *Gore v. Harris*,⁵⁸ six of the seven Florida Supreme Court justices ruled that the circuit court had applied erroneous legal standards. They determined that the “abuse of discretion” standard was far too deferential to the county canvassing boards’ decisions,⁵⁹ and they found that, due to amendments to the Election Code enacted in 1999, an election contest plaintiff need prove only a reasonable *possibility*, not probability, of success in order to compel the counting of uncounted ballots.⁶⁰ A four-justice majority then found that an “undisputed showing of the existence of some 9000 ‘undervotes’ [in Miami-Dade County] in an election contest decided by a margin measured in the hundreds [provided] a threshold showing that the result of an election has been placed in doubt, warranting a manual count”⁶¹ The Florida Supreme Court, however, went well beyond Gore’s request for relief and held that, given the statewide nature of the presidential election, “it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State . . . in all Florida counties where there was an undervote and, hence, a concern that not every citizen’s vote was counted.”⁶²

The focus of the contest litigation in Miami-Dade and Palm Beach—and of the earlier protest litigation in those two counties and Broward County—was largely the result of decisions of the Gore campaign to target their efforts on the counties where a recount was likely to generate the most Democratic votes. But, the court reasoned, the “election should be determined by a careful examination of the votes of Florida’s citizens and not by strategies extraneous to the voting process.”⁶³ The court, thus, required a statewide recount of the undervote.⁶⁴ The court remanded the case to the circuit court with di-

58. 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

59. *Id.* at 1252 (per curiam), 1271 (Harding, J., dissenting).

60. *Id.* at 1256 (per curiam), 1271 (Harding, J., dissenting).

61. *Id.* at 1256. Two of the Florida Supreme Court dissenters agreed with the majority in rejecting the abuse of discretion and reasonable probability of success standards. *See id.* 1270-71 (Harding, J., dissenting).

62. *Id.* at 1253.

63. *Id.*

64. *Id.* Justices Harding and Shaw agreed with the majority concerning the legal standards for a contest but determined that Gore had failed to show “by a preponderance of the evidence, that the outcome of the statewide election would likely be changed” by the

rections to order the county supervisors of elections and county canvassing boards to conduct a manual recount of the undervotes in all counties that had not previously done so.⁶⁵

The Florida Supreme Court only briefly addressed a question that had beset the canvassing boards of the three counties that had undertaken manual recounts—“what, under Florida law, may constitute a ‘legal vote?’”⁶⁶ Florida law defined a ballot to be validly cast if the intent of the voter could be discerned. The recounts that the county canvassing boards had conducted during the protest phase were marked by sometimes heated debates over what constituted sufficient evidence of intent to vote for a candidate: Did a ballot have to have some of its chad detached? Was piercing of the chad, so that light could penetrate, sufficient? Was piercing even necessary, or would an indentation or dimpling of the chad next to a candidate’s name be sufficient to indicate intent to cast a vote? Even the dimpled-chad standard was not entirely straightforward, with some observers arguing that dimpled chads could evidence intent only if all the different offices listed on the ballot were marked by dimpled chads. Others contended that a dimpled presidential chad even without a pattern of dimpled voting was enough.⁶⁷

Perhaps mindful of the United States Supreme Court’s warning in *Bush v. Palm Beach County Canvassing Board* against encroaching on the legislature’s federal constitutional prerogative to set the rules for the selection of presidential electors or threatening the federal statutory safe harbor by judicial creation of a postelection law concerning the review of undervote ballots, the Florida court stuck closely to Florida’s statutes and case law, which had defined a “legal vote” as one in which there is a “clear indication of the intent of the voter.”⁶⁸ The court did reject Gore’s claim concerning the 3,300 ballots examined during the Palm Beach County recount but not included in the county vote total. Gore contended that Palm Beach County’s failure to apply the most expansive application of the in-

relief he had sought. *Id.* at 1272 (Harding, J., dissenting). Justices Harding and Shaw agreed with the majority that any recount would have to be statewide, but the dissenters found that Gore had failed to show that it was reasonably likely he would prevail on a statewide recount. *Id.* Moreover, they disagreed with the majority’s decision to limit the recount to the undervote, indicating that all no-vote ballots—overvotes as well as undervotes—would have to be manually counted. *Id.* at 1272-73. They expressed doubt that this could be accomplished by the federal “safe harbor” date of December 12. *Id.*

Only Chief Justice Wells agreed with the circuit court that an abuse of discretion standard applied. He also determined that a fair and accurate statewide recount could not be conducted in the limited time available, and he called for the conclusion of the ballot counting process. *Id.* at 1266-70 (Wells, C.J., dissenting).

65. *Id.* at 1262.

66. *Id.* at 1256.

67. See, e.g., 36 DAYS, *supra* note 13, at 130, 145-46, 152-53, 159.

68. *Gore v. Harris*, 772 So. 2d at 1257.

tent-of-the-voter standard—which would have treated a dimpled presidential chad as a vote without regard to whether other preferences on the ballot were also marked by dimpled chads—was a legal error. The Florida Supreme Court’s rejection of Gore’s Palm Beach claim, however, was not a decision on the merits concerning how to apply the intent of the voter standard but simply a finding that Gore had “failed to introduce any evidence to refute the Canvassing Board’s determination that the 3300 ballots did not constitute ‘legal votes.’”⁶⁹

Completing its disposition of Gore’s specific contest claims, the Florida Supreme Court ruled against Gore with respect to the Nassau County vote when it affirmed the circuit court’s decision upholding Nassau County’s use of the original machine count—rather than the machine recount—in determining that county’s vote.⁷⁰ The court, however, also ruled that the Palm Beach County manual recount—which the county canvassing board had completed but which Secretary Harris had refused to include in her certified count—and the additional votes that had resulted from the partial recount conducted by the Miami-Dade County Canvassing Board had to be immediately included in the statewide total.⁷¹ This cut Bush’s lead to less than 200 votes.⁷²

The effect of the Florida Supreme Court’s order was short-lived. The following day the United States Supreme Court stayed the Florida court’s mandate.⁷³ Three days later, the United States Supreme Court reversed, holding that various aspects of the Florida court’s order violated the Equal Protection Clause.⁷⁴

III. *BUSH V. GORE*: THE OPINIONS

Bush had raised an equal protection argument in his petition for writ of certiorari challenging the Florida Supreme Court’s *Palm Beach County Canvassing Board v. Harris* decision, but the United States Supreme Court had focused only on the Article II and 3 U.S.C. § 5 questions and declined to grant certiorari on the equal protection question.⁷⁵ Bush had also raised equal protection arguments in separate efforts to bar county-level recounts prior to the *Gore v. Harris*

69. *Id.* at 1260.

70. *Id.*

71. *Id.*

72. There was some dispute as to the size of Gore’s net gain in Palm Beach County. Depending on the count, Bush’s lead after the Florida Supreme Court decision was either 154 or 193.

73. *See Bush v. Gore*, 531 U.S. 1046 (2000).

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

75. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004 (2000).

contest order, but two Florida federal district courts and the en banc Eleventh Circuit Court of Appeals had rejected his arguments.⁷⁶

Equal protection, however, dominated the Supreme Court's review of the Florida Supreme Court's manual recount order.⁷⁷ All nine Justices discussed the equal protection question, with six Justices, and possibly seven, finding an equal protection violation. The Court's reliance on equal protection has potentially enormous significance. Article II, Section 1 and 3 U.S.C. § 5 apply only to presidential elections. Equal protection principles, however, apply to all elections—federal, state, and local. Although the Court self-consciously "limited" its "consideration" "to the present circumstances,"⁷⁸ *Bush v. Gore* broke new ground in applying equal protection to state and local election administration and procedure. The case could subject a wide range of state and local election practices to federal constitutional review.

A. *The Per Curiam Opinion*

The *Bush v. Gore* per curiam opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas, found four equal protection problems in the *Gore v. Harris* order. First, and most importantly, the Florida Supreme Court permitted inconsistent treatment, both among counties and, apparently, among counting teams within counties, in the determination of which ballots would count as legal votes.⁷⁹ The per curiam reasoned that by not providing more detailed guidance than the "intent of the voter" standard, the Florida court's manual recount order would lead to the differential treatment of similarly marked ballots in different counties. Indeed, by accepting recount totals from counties that had already conducted their recounts using apparently differing standards, the Florida court had "ratified this uneven treatment."⁸⁰ Second, the Florida court's order also accepted recount results from some counties that had not limited their recounts to undervotes but had also apparently included overvotes.⁸¹ As a result, valid votes found on overvote ballots in those counties would be included in the final tally, but comparably valid votes found on overvote ballots cast elsewhere in the state would not be. Third, *Gore v. Harris* had certified a partial

76. See *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000) (en banc); *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000), *aff'd*, 234 F.3d 1133 (11th Cir. 2000) (en banc).

77. See *Bush v. Gore*, 531 U.S. 98 (2000), *rev'g Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

78. *Id.* at 109.

79. See *id.* at 107.

80. *Id.*

81. *Id.*

manual recount result from Miami-Dade County. “The Florida Supreme Court’s decision thus gives no assurance that the recounts included in the final certification must be complete.”⁸² In other words, some ballots might be accepted and included in the final tabulation, but other comparable ballots might not be counted and thus not included in the final result. Although the failure to complete the recount would be due to a lack of time rather than a desire to exclude any voters, “[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.”⁸³ Finally, the Court criticized “the actual process” in which the manual recount would be undertaken.⁸⁴ The order in *Gore v. Harris*

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.⁸⁵

Although these concerns sound more in due process than in equal protection, the per curiam did not refer to the Due Process Clause and voiced these process concerns in the framework of its equal protection discussion. Presumably, the lack of a proper process would make discrepancies in recount standards more likely to occur and less likely to be corrected.

B. Justice Souter

Justice Souter’s very brief treatment of the equal protection issue focused exclusively on the question that was the primary focus of the per curiam—the use of different standards in the determination of whether a ballot ought to be counted.⁸⁶

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. . . . I can conceive of no le-

82. *Id.* at 108.

83. *Id.*

84. *Id.* at 109.

85. *Id.*

86. *Id.* at 134 (Souter, J., dissenting).

gitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.⁸⁷

Justice Souter's opinion did not address whether the inclusion of some overvotes, the certification of incomplete returns, or the Florida Supreme Court's recount process presented constitutional concerns.

C. Justice Breyer

Although counted by commentators as one of seven Justices who found the *Gore v. Harris* order violated the Equal Protection Clause, Justice Breyer's position was far more equivocal. On the one hand, Justice Breyer joined Justice Souter's opinion, including the portion of Justice Souter's opinion that found Bush's equal protection argument "meritorious."⁸⁸ On the other hand, Justice Breyer also joined Justice Stevens' dissenting opinion, in which Justice Stevens rejected the claim that the Florida Supreme Court's manual recount order violated equal protection principles.⁸⁹

In his own separate opinion, Justice Breyer observed that the inconsistencies in counting undervote ballots "*implicate* principles of fundamental fairness," and that "in these very special circumstances, basic principles of fairness *should have counseled* the adoption of a uniform standard to address the problem."⁹⁰ But many rulings implicate principles of fairness without violating them, and to say that one course of action is better than a second is not to say that the second is unconstitutional. In his own opinion, Justice Breyer never stated that the Florida Supreme Court's action violated equal protection or that the Constitution requires a uniform standard for evaluating undervote ballots.⁹¹

D. Justices Stevens and Ginsburg

Justice Stevens, in an opinion joined by Justices Ginsburg and Breyer, denied that the Florida court's failure to spell out more detailed operational standards for the application of the intent of the voter standard created an equal protection problem. Noting that "we have never before called into question the substantive standard by

87. *Id.* (citations omitted).

88. *Id.* at 133-35 (Souter, J., dissenting). By contrast, Justices Stevens and Ginsburg joined Justice Souter's opinion except for the part of his opinion finding an equal protection violation. *Id.* at 129.

89. *Id.* at 125 (Stevens, J., dissenting).

90. *Id.* at 145-46 (Breyer, J., dissenting) (emphasis added).

91. The portion of Justice Breyer's opinion analyzing the equal protection question was joined by Justice Souter but not by Justices Stevens and Ginsburg, suggesting perhaps that his Supreme Court colleagues thought Justice Breyer was agreeing with Justice Souter even if Justice Breyer's language did not go quite that far.

which a State determines that a vote has been legally cast,”⁹² Justice Stevens concluded there was “no reason to think that the guidance provided [by that 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.”⁹³ He concluded that the concern over different standards in different counties was “alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.”⁹⁴ He also suggested that one implication of the Court’s decision is that “Florida’s decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection.”⁹⁵

In her separate opinion, Justice Ginsburg, joined by Justice Stevens, was even more dismissive of the equal protection claim. Noting that “we live in an imperfect world, one in which thousands of votes have not been counted,” she could not “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.”⁹⁶

IV. EQUAL PROTECTION AND THE FLORIDA SUPREME COURT’S MANUAL RECOUNT ORDER

A. *The Equal Protection Clause and the Vote*

There is no federal constitutional right to vote. The Constitution of its own force enfranchises no one. Article I, Section 2 sets the tone by looking to state law for the determination of who may vote in federal elections when it provides that the electorate for selecting members of the House of Representatives shall consist of “Electors in each State [who] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” The Seventeenth Amendment makes the same provision for the electorate that chooses United States Senators. And, as we were so forcefully reminded by both *Bush v. Palm Beach County Canvassing Board*⁹⁷ and *Bush v. Gore*,⁹⁸ the Constitution gives the people no vote in the presidential

92. *Id.* at 125 (Stevens, J., dissenting).

93. *Id.*

94. *Id.* at 126.

95. *Id.*

96. *Id.* at 143 (Ginsburg, J., dissenting).

97. 531 U.S. 70, 76-77 (2000).

98. 531 U.S. at 104 (“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.”).

election at all. As for the voting rights provisions of the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth Amendments, none of these confer a right to vote in federal, state, or local elections. Rather, each is phrased in the negative, eliminating a qualification that a state or locality might otherwise have utilized to determine who may exercise the franchise but not requiring that anyone actually be enfranchised.

For most of American history, constitutional doctrine joined with constitutional text in denying the existence of a general constitutionally protected right to vote. In 1875, in *Minor v. Happersett*,⁹⁹ the Supreme Court emphatically rejected the argument that the right to vote is a right of citizenship. In that case, Minor, a woman, argued that, by virtue of the Fourteenth Amendment's declaration, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" are citizens of the United States and of the states in which they reside. Minor was a citizen of Missouri and therefore asserted that she was entitled to vote in Missouri federal and state elections, notwithstanding the fact that Missouri law limited the franchise to men. The Supreme Court agreed that she was a citizen and thus a member of the "political community,"¹⁰⁰ but found that citizenship had no relevance to the question of whether she was entitled to vote. Voting was simply not an attribute of citizenship. The scope of the franchise was a matter entirely for state determination, subject only to the Fifteenth Amendment's preclusion of racial discrimination in voting.

Although *Minor's* specific determination that a state could limit the vote to men was overturned by the Nineteenth Amendment, *Minor's* central premise, that the Constitution provides no general protection for the right to vote, was still good law almost eighty-five years later. In 1959, in *Lassiter v. Northampton County Board of Elections*,¹⁰¹ the Court, noting that "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised,"¹⁰² upheld the constitutionality of a state literacy test. To be sure, the Court had become vigorous in detecting and invalidating state suffrage laws that violated the Constitution's specific ban on racial discrimination, and the Court had repeatedly recognized Congress's power to regulate the suffrage in federal elections. But apart from the voting criteria explicitly condemned by specific provisions of the Constitution, there was no federal constitutional protection of the right to vote.

99. 88 U.S. (1 Wall.) 162 (1875).

100. *Id.* at 165.

101. 360 U.S. 45 (1959).

102. *Id.* at 50.

All that changed during the voting rights revolution of the 1960s and early 1970s. Beginning with the legislative apportionment cases,¹⁰³ and then turning to restrictions on the franchise itself, the Supreme Court transformed the constitutional status of the vote. Voting became a fundamental right, with laws infringing that right subject to strict judicial scrutiny. In short order, the Court invalidated such longstanding limitations on suffrage such as the poll tax,¹⁰⁴ property tax payment requirements,¹⁰⁵ and durational residency requirements.¹⁰⁶ The Court also established one person, one vote as the constitutional ground rule for political representation in elected bodies. Although the Court adhered to the traditional federal constitutional formula of invalidating criteria for voting rather than creating an affirmative entitlement to vote, the holdings and reasoning of the Court effectively established such an entitlement. Inclusion and equality are the twin hallmarks of the new jurisprudence of voting rights. Once a state or locality provides that an election is used to fill a public office or to answer a governmental question, then all adult citizens who are residents of the jurisdiction are presumptively entitled to vote in that election, and all voters must have equally weighted votes.

Voting was transformed from a matter of legislative grace into a fundamental aspect of citizenship. A defining characteristic of citizenship is the opportunity to participate in political decisionmaking. "Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of" public officials.¹⁰⁷ The assumption that citizenship means the right to vote was most clearly underscored in the way the Court in *Reynolds v. Sims* nonchalantly equated citizenship with the suffrage in the phrase "[a] citizen, a qualified voter."¹⁰⁸

The extension and protection of the right to vote was a critically important official public statement of the voter's status as a citizen. Disenfranchisement and malapportionment were particularly troubling not simply because they interfered with political participation but because they expressed a state's determination that the excluded and the underrepresented were less than full citizens.

103. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

104. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

105. See *Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix v. Kolodziejwski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

106. See *Dunn v. Blumstein*, 405 U.S. 330 (1972).

107. *Reynolds*, 377 U.S. at 565.

108. *Id.* at 568.

The Court's notion of the right to vote as a signifier of full citizenship may also explain the handful of Court-approved exclusions from the franchise. Residency is the state and local equivalent of citizenship; it determines whether one is a member of a particular state or local political community.¹⁰⁹ As a result, nonresidents have no right to vote where they do not reside.¹¹⁰ Felons may be denied the franchise in part because conviction of a felony has long had the metaphoric status of loss of political citizenship.¹¹¹ Finally, the Court found that certain bodies, such as quasi-proprietary special districts, are not political communities. As such they lacked citizens, and citizen entitlements to suffrage and equally weighted votes do not apply to voting arrangements in such special districts.¹¹²

In addition to tightly linking voting to citizenship, the Court justified its new protection of the franchise instrumentally. The vote is a critical tool that enables citizens to protect their rights and interests. "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."¹¹³ Beyond rights, the franchise is the key means by which those affected by government actions can make their interests known and their voices heard.¹¹⁴ Universal adult citizen suffrage is thus necessary to legitimate government as representative of the people. Only when all adult citizens are free to vote can we assume that elected officials are representative of and accountable to the people as a whole.

Finally, the Court defended its intervention in an area traditionally left to the states in comparative institutional terms. Because the current distribution of the franchise and the current weighting of votes determines who holds political power, the political process could not be counted on to correct laws that result in disenfranchisement and underrepresentation:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic as-

109. "An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny." *Dunn*, 405 U.S. at 343-44.

110. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

111. See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

112. See, e.g., *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). See generally Richard Briffault, *Who Rules at Home? One Person, One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 359-84 (1993).

113. *Reynolds*, 377 U.S. at 562.

114. See *Kramer v. Union Free Sch. Dist. No. 1*, 395 U.S. 621, 630-33 (1969).

sumption, the assumption can no longer serve as the basis for presuming constitutionality.¹¹⁵

Judicial intervention was necessary—and strict judicial scrutiny of restrictions on the franchise was called for—because the self-favoring biases of political insiders, who were elected by a limited electorate or under voting rules that overrepresented some groups, made departures from universal adult resident citizenship and equally weighted votes both inherently suspect and unlikely to be corrected by the political branches without judicial intervention.

The overall thrust of the Court's application of the Equal Protection Clause to the vote was the expansion of the franchise. In theory, the inequality created by laws that unequally enfranchised some and disenfranchised other similarly situated people could have been remedied by disenfranchising the enfranchised. But that result never occurred. In the right to vote cases, the Court's focus was less on inequality per se and more on extending the franchise to groups of adult resident citizens who had previously been excluded from voting.

*B. Equal Protection and the Administration of Elections:
Setting the Standard for Federal Judicial Intervention*

As the Supreme Court noted in *Bush v. Gore*, constitutional protection of the right to vote goes well beyond “the initial allocation of the franchise.”¹¹⁶ Equal protection of the vote applies to the weighting of votes in the election of officials;¹¹⁷ the design of systems of representation, including the drawing of legislative districts and the selection of single- or multi-member districts; and the rules, such as those regulating the ability of candidates and parties to get on the ballot, that determine the range of options available for casting one's vote.¹¹⁸ Equal protection could reasonably be extended to the state and local rules that govern the casting and counting of ballots. Certainly if a state law mandated the use of two different kinds of election machinery, with different error rates, in different parts of the state, the voters in the area required to use the machine with the higher error rate—so that a higher percentage of their votes were legally ignored—could reasonably contend that their votes were unconstitutionally underweighted compared to the votes of residents with better machinery. Similarly, if the state imposed a fee for submitting an absentee ballot, that fee could be challenged by voters unable to get to the polls as a form of wealth tax on voting and would be subjected to strict judicial scrutiny. So too, if county officials provided assis-

115. *Id.* at 628.

116. 531 U.S. 98, 104 (2000).

117. *Gray v. Sanders*, 372 U.S. 368 (1963).

118. *Williams v. Rhodes*, 393 U.S. 23 (1968).

tance to Republican party workers, but denied comparable assistance to Democrats in filling out absentee ballot applications, that would plainly be subject to constitutional challenge as partisan discrimination affecting the vote.¹¹⁹

Election administration practices, however, may present a more complicated problem for equal protection analysis than state laws affecting the formal right to vote or the weighting of representation in a multi-member elected body. Whereas adult citizen suffrage and one person, one vote are well-established constitutional norms, there are no constitutionally mandatory standards or widely accepted requirements for many aspects of the election process. To use just some of the examples that surfaced during the Florida recount struggle, there are multiple types of voting machinery, different types of ballot design, and a variety of requirements and procedures for casting absentee ballots and for protesting and contesting elections. To subject all of these diverse practices and rules to equal protection review could ultimately result in a federal court-ordered, nationwide standardization of the mechanics of elections. In many of these cases, the basis for a judicial determination of one constitutionally mandatory election procedure would be far from clear. Moreover, judicial standardization would undermine, if not end, the longstanding American tradition of decentralized control of elections—a tradition going back at least to the late eighteenth century when, according to Alexis de Tocqueville, Massachusetts local officials prepared the voting lists for state elections and transmitted the results of the local poll to state officials.¹²⁰ Indeed, during much of American history, local governments set their own voting rules for participation in local elections. As a result, a person could be qualified to vote in a colonial or state election but not in a local election or vice versa.¹²¹

Of course, much as “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,”¹²² tradition alone cannot justify a practice inconsistent with current values. Decades of history did not save malapportionment and durational residency requirements when the Supreme Court began to

119. *Cf. Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519, 523 (Fla. 2000) (The court found that the county supervisor of elections provided special assistance to the Republican party in submitting requests for absentee ballots, but that “there was no evidence that such a request was made by the Democratic party” and no evidence of a denial of requested assistance to Democrats. “Thus, there was no adequate showing that there was disparate treatment of Republicans as opposed to any other individuals or groups with regard to the ballot request forms.”).

120. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73 n.14 (J.P. Mayer ed., 1969).

121. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 6, 20-21, 30, 186-87, 200-01 (2000).

122. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

apply an equal protection analysis to voting and representation laws in the 1960s and 1970s.

Local decisionmaking, however, does continue to reflect and reinforce important contemporary political values. Local decisionmaking curbs abuses of power by the upper level government; builds democracy; increases the satisfaction of citizen preferences; and facilitates innovation, experimentation and political learning. De Tocqueville stressed the first two points in *Democracy in America*, when he focused on the political benefits of “Administrative Decentralization in the United States.”¹²³ Given the absence of institutional curbs on state power, de Tocqueville found that the practice of decentralization played an important role in preventing state tyranny.¹²⁴ Moreover, de Tocqueville expressed the concern that the equality and individualism that accompany democracy can make it difficult for people to cooperate and thus make them easy targets for despotism. By giving Americans an interest and an opportunity to participate in self-government—and thus a “habit and taste” for working together concerning public matters—local government strengthened Americans’ commitment to their own freedom. In his view, local government was a sort of “primary school” of democracy.¹²⁵ Decentralized decisionmaking enabled people to become “citizens”; that is, active participants in self-governance who, due to that participation, would become committed to maintaining and defending self-government. Decentralization thus serves the same interests as voting itself.

Decentralized power as a break on centralized tyranny is still an important theme in contemporary arguments for decentralization. It may also be directly relevant to the conduct of manual recounts. As Judge Middlebrooks observed in rejecting a federal court challenge to the Florida 2000 presidential recounts then underway in Broward, Miami-Dade, Palm Beach, and Volusia Counties,

[r]ather than a sign of weakness or constitutional injury, some solace can be taken in the fact that no one centralized body or person can control the tabulation of an entire statewide or national election. For the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corrup-

123. DE TOCQUEVILLE, *supra* note 120, at 87.

124. *See id.* at 89.

125. John Stuart Mill used a similar metaphor, noting that participation in local government “may be called the public education of the citizens.” JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 288 (Prometheus Books 1991). Thomas Jefferson also emphasized democracy’s dependence on the training in citizenship provided by local self-government: “[B]y giving to every citizen, personally, a part in the administration of the public affairs,” “and in the offices nearest and most interesting to him,” local government “will attach him by his strongest feelings to the independence of his country, and its republican constitution.” Thomas Jefferson, *Letter to Samuel Kercheval: July 12, 1816*, in THOMAS JEFFERSON: *WRITINGS* 1395, 1399-1400 (1984).

tion, bias, or error can influence the ultimate result of an election.¹²⁶

Certainly, in the Florida recount fight it was striking how Secretary Harris' decisions consistently favored the interests of her party's candidate—whom she herself had served as state campaign co-chair during the election. In Florida, decentralization served to reduce the ability of one party to make all the administrative decisions affecting the recount.

Administrative decentralization may also be of value in building democracy and increasing the ability of government to satisfy divergent preferences. Justice O'Connor emphasized these benefits of decentralized decisionmaking when she argued that “decentralized government . . . will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; [and] . . . it makes government more responsive”¹²⁷ These concerns seem apposite in the election administration setting. Election administration involves the juggling of multiple values: facilitating voting, promoting innovation, achieving accurate and timely tabulations, assuring fairness to candidates and parties, controlling costs, relying on volunteers to do the nitty-gritty of administration,¹²⁸ and permitting opportunities for challenges while also providing for finality of results. Different states and localities may balance these values differently and their different conclusions can affect the rules they adopt.

Decentralization is particularly valuable where there is no one right answer, reasonable people disagree, and those disagreements correlate with residence in a particular local government. People in rural areas may set the balance in one direction, and people in urban areas may set it differently. People in areas dominated by one ethnic group, social class, age group or first-time voters may have one preference, while other areas with different demographics might feel differently. Where there is considerable intrastate disagreement on what the right rule ought to be—and no particular rule is constitutionally required—a uniform, statewide rule could have the unfortunate effect of forcing a lot of people to live under a rule they oppose. Decentralized decisionmaking, with local rules responsive to local

126. Siegel v. LePore, 120 F. Supp. 2d 1041, 1052 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

127. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

128. See, e.g., Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986) (“[E]lections are generally conducted by volunteers, rather than trained professionals. While this may be a positive aspect of the electoral system it inevitably leads to errors of widely differing degrees of severity.”) (citing Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975)); Duncan v. Poythress, 657 F.2d 691, 701 (5th Cir. Unit B 1981) (“[E]rrors are inevitable in a society which relies upon volunteers to conduct most elections.”).

preferences, increases the number of people likely to be satisfied with the rule under which they are governed.

Decentralization and variation may also promote innovation. It may be easier to try out new forms of voting machinery, new types of ballot design, technological developments like electronic voting, or experiments like mail-in voting, two-day voting, or Sunday voting in one or a handful of jurisdictions rather than in the state or nation as a whole. Equal protection could jeopardize such innovation by requiring the immediate statewide application of innovations in voting before any difficulties in administration or unintended consequences have been studied and resolved. Alternatively, innovation could be discouraged if the constitutionalization of questions of administration result in liability for jurisdictions whose innovations misfire and unintentionally burden voting.

This does not mean that local control of all aspects of election administration is necessarily desirable. The Florida presidential recount revealed to the nation many of the shortcomings of local control—variations in the quality of election machinery that relate to differences in local resources; ill-considered judgments like Palm Beach County's butterfly ballot; the close relationships between election administrators and local party workers that affected applications for absentee ballots; and the lack of consistent standards for resolving questions concerning the validity of disputed ballots. State legislative determination of ballot design and more precise standards for resolving counting disputes, state financing of high-quality machinery for all counties, and vigorous state oversight of local election officials' cooperation with party workers could certainly promote a more equitable, reliable, and effective electoral process. But, given both the tradition of decentralized administration and the values that support it, the determination of whether particular administrative questions are resolved at the state or at the local level is primarily a matter for the state political process, not federal constitutional law.

Certainly, local election administration may be marred by errors, irregularities and minor violations of state election laws that infringe the voters' rights. Election machines can be improperly programmed,¹²⁹ break down,¹³⁰ or be installed too late for some voters to use.¹³¹ Ballots and absentee ballot applications can be mishandled.¹³² The states, however, have rules and procedures for addressing these

129. See, e.g., *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980).

130. See, e.g., *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975).

131. See, e.g., *Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996).

132. See, e.g., *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985); *Pettengill v. Putnam County R-1 Sch. Dist.*, 472 F.2d 121 (8th Cir. 1973).

“garden variety” election disputes.¹³³ In the absence of a showing that these measures are insufficiently attentive to voting rights or that an election dispute raises more serious issues, there is little basis for federal judicial intervention.

Most problems of election administration, including rules—or violations of rules—that burden the vote in individual cases simply do not raise the kinds of concerns that triggered the Supreme Court’s intervention to protect voting rights. Random machine breakdowns, unpatterned mishandling of ballots, and intermittent irregularities in absentee ballots do not undermine the political rights of affected voters, signify that they are second-class citizens, or threaten their ability to advance their rights and interests in the political process. It will often not be known precisely which voters’ ballots were lost due to mechanical problems or election day errors, and voters whose ballots were lost in a particular election or for a particular race are not entirely excluded from the electorate but may be able to vote in other elections or for other races in the same election. State remedies may be able to catch and correct errors or prevent their recurrence in the future. The voters affected by administrative mistakes are as much members of the polity, and able to vindicate their interests over time, as voters whose votes were counted.

Of course, to the extent that maladministration is intentional, recurring, predictable, and targeted at particular groups of voters, with state remedies failing to correct the problem, a constitutional problem is presented. Such administrative practices compromise the integrity of the election. The voters whose ballots are consistently not counted are burdened with a reduced opportunity to participate, are treated disrespectfully by their states, and suffer a reduction in their political power. They may be, for voting purposes, second-class citizens.

In their cases dealing with problems of election administration, the lower federal courts have repeatedly distinguished between ordinary, or “garden variety,” election irregularities and election practices that reach “the point of patent and fundamental unfairness.”¹³⁴ In cases involving such standard problems as “the malfunctioning of voting machines and innocent human errors,”¹³⁵ the federal courts have deferred to state and local control of election administration and have avoided finding that election irregularities—including violations of state election laws and actions interfering with the ability

133. *Duncan*, 657 F.2d at 701.

134. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978).

135. *Duncan*, 657 F.2d at 701. *Accord Gold*, 101 F.3d at 796; *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270 (7th Cir. 1986); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980).

to cast a ballot or have it properly counted¹³⁶—violated the constitutional right to vote. On the other hand, election administrative actions involving racial discrimination,¹³⁷ intentional and widespread disenfranchisement,¹³⁸ or changes in election rules on which voters had reasonably relied to their detriment in deciding whether and how to vote,¹³⁹ have been found to constitute the kind of fundamental unfairness that rises to the level of a constitutional violation.

The lower federal courts' focus on fundamental unfairness not only holds together protection of the vote with respect for state and local control over elections, but it is also consistent with the Supreme Court's approach in other settings for determining whether state laws burden voting rights. In the legislative apportionment context, for example, the Court has extended the right to an equally weighted vote from its original use in invalidating districts of unequal population to partisan gerrymandering, recognizing that such gerrymandering can diminish the effectiveness of the votes of political minorities.¹⁴⁰ But the adoption of a districting plan with the intent—and effect—of giving one party a higher percentage of legislative seats than its percentage of the popular vote (and the concomitant reduction in the percentage of seats relative to votes for the other parties) is not enough to sustain an action for unconstitutional partisan gerrymandering. Rather, the Court has held that in order to violate the Equal Protection Clause the gerrymander has to be so severe that it “will consistently degrade a voter's or a group of voters' influence on the political process as a whole.”¹⁴¹ In other words, intentional gerrymandering alone is not unconstitutional; only an intentional gerrymander that consistently undermines the votes of a partisan group over time is unconstitutional.

Similarly, the Court has recognized that state laws that limit the ability of third parties and independents to win a place on the ballot burden the rights of voters to cast effective votes.¹⁴² But the Court has held constitutional state laws requiring independents to demonstrate some substantial level of support in order to be listed on the ballot;¹⁴³ limiting the ability of primary election losers to run as inde-

136. See, e.g., *Gold*, 101 F.3d at 796; *Bodine*, 788 F.2d at 1270; *Welch*, 765 F.2d at 1311; *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975); *Pettengill*, 472 F.2d at 121.

137. See, e.g., *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

138. See *Duncan*, 657 F.2d at 691.

139. See *Roe v. Alabama*, 43 F.3d 574, 581-82 (11th Cir. 1995); *Griffin*, 507 F.2d at 1065.

140. See *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986).

141. *Id.* at 132.

142. See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

143. See *Jenness v. Fortson*, 403 U.S. 431 (1971).

pendents in the general election;¹⁴⁴ and refusing to count write-in ballots.¹⁴⁵ The right to vote includes a right to have choices, but laws limiting the range of choices do not unconstitutionally burden the right to vote. So long as a state's laws provide minor parties and independents with a reasonable opportunity to get on the ballot, the state can enforce some laws that keep candidates and parties off the ballot even though that has the effect of narrowing the range of choices and, thus, constraining the right to vote. "Election laws will invariably impose some burden upon individual voters."¹⁴⁶ Only unduly burdensome limits on the ability of new parties and candidates to get on the ballot violate the right to vote. Where a state provides "adequate ballot access," laws such as a ban on write-in voting are constitutional even though they impose a "burden on voters' rights to make free choices and to associate politically through the vote."¹⁴⁷

Did the Florida Supreme Court's order, with its tacit approval of varying county-level standards for determining whether an undervote ballot contained a legally valid vote, create a situation of fundamental unfairness for Florida's presidential voters? That determination involves consideration of the constitutional status of the undervote ballots, the cause of the variation in standards, and the justifications for the Florida court's action. The next three sections of this Part take up those issues.

C. *The Uncertain Constitutional Status of Undervote Ballots*

Are undervote ballots votes entitled to the full constitutional protection available to votes? The answer is not clear, but probably "no." Conceivably, there could be three kinds of undervotes. First, there are ballots that show no markings whatsoever with respect to any of the presidential candidates. Such a ballot reflects the voter's choice not to vote for President. The voter might have come to the polls to vote in another race but decided not to vote in the presidential election. There is no dispute that such ballots should be treated as nonvotes. Second, some undervotes might be attributable to machine error. Such a ballot would have been properly marked, with the chad cleanly detached, but for some reason the vote-counting machinery failed to record a vote. There was no question that a voter who cast such a ballot is entitled to have that ballot counted as a vote. The crux of the conflict in *Bush v. Gore* was a third type of undervote: a ballot that reflects some marking of the ballot card next to a presi-

144. See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724, 735-36 (1974). *But cf.* *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating an early filing deadline for presidential candidates).

145. See *Burdick v. Takushi*, 504 U.S. 428 (1992).

146. *Id.* at 433.

147. *Id.* at 438-39.

dential candidate's name but not enough to detach the chad, thereby causing the ballot-counting machinery to treat the ballot as not including a choice of candidate for President.

Under Florida law and the law of many states, such imperfectly marked ballots may be valid where the markings reflect the intent of the voter to cast a ballot. But not all markings on a ballot demonstrate the intent of the voter to cast that ballot. Some markings are just stray marks. Others may be indications of a tentative disposition to cast the ballot followed by a final decision not to. In other words, some but not all imperfectly marked ballots are votes, while some imperfectly marked ballots are not votes.

There is no federal constitutional or statutory standard for determining what counts as a valid ballot, and *Bush v. Gore* declined to establish one. Although some states, by legislative or judicial ruling, have adopted relatively specific standards, there is no consistency across the states. Different state standards include requiring the chad be detached in two corners,¹⁴⁸ requiring only that some light penetrate the ballot,¹⁴⁹ or accepting dimples or indentations without any detachment or penetration at all.¹⁵⁰ Many states have no clearly articulated standard more precise than the intent of the voter.¹⁵¹ In Florida, prior to the 2000 election, neither the legislature, nor the Secretary of State—as the state's chief administrative officer with responsibility for elections—nor the courts had spelled out criteria for the determination of when an undervote ballot demonstrates the intent of the voter to cast a vote.

Constitutional protection of the vote does not require the broadest possible definition of a validly cast undervote ballot. The determina-

148. See, e.g., *In re Issue 27 Election of November 4, 1997*, 693 N.E.2d 1190, 1191 (Ohio Com. Pl. 1998) (holding that a ballot will be counted only if marked by a "hanging chad," that is, a chad "attached by two or less corners"); cf. *Duffy v. Mortenson*, 497 N.W.2d 437, 439-40 (S.D. 1993) (finding that a ballot must be counted where two of the four corners of the chad were detached).

149. See, e.g., IND. CODE ANN. § 3-12-1-9.5(c) (Michie 2000) ("A chad that has been pierced, but not entirely punched out of the card, shall be counted . . ."); *id.* § 3-12-1-9.5(d) ("A chad that has been indented, but not in any way separated from the remainder of the card may not be counted . . .").

150. See, e.g., TEX. ELEC. CODE ANN. § 127.130(d)(3) (Vernon 2000) (A ballot may be counted where "an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote"); *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996) ("[T]he presence of a discernible impression made by a stylus" counts as a clear indication of a voter's intent.).

151. See, e.g., *Pullen v. Mulligan*, 561 N.E.2d 585, 610 (Ill. 1990).

Although the legislature certainly has the power to provide a mandatory standard for marking punch card ballots, as it did for the marking of paper ballots, no such standard has been set out in the Election Code. We would be usurping the power of the legislature if we were to infer such a standard in the Election Code and then conclude that the legislature intended such standard to be given a mandatory construction.

Id.

tion of whether an imperfectly marked ballot contains a vote involves the balancing of a variety of competing concerns. These include assuring that all votes are counted, avoiding the mistaken tabulation of nonvotes, and maintaining the political neutrality of the process. Respecting the intent of the voter entails both counting all ballots intentionally cast and not counting ballots not intended to be cast for a candidate. Moreover, some standards, like the inclusion of dimpled or indented ballots, are less precise than the requirements of detachments or penetration by light. So there is a tension between the benefits of a more inclusive standard in assuring that all intentionally cast ballots are counted and the dangers of giving a greater role to the subjective perceptions of the individual ballot counters.

In the right to vote cases, universal suffrage was a presumption of democratic theory and quickly became a constitutional benchmark. The denial of the right to vote was an unusual deviation from the suffrage norm that had to be justified. Although in the legislative apportionment context, there was no universal practice of equipopulous representation, the one person, one vote principle quickly emerged because of its close correspondence with notions of majority rule and equal voting rights and its relative ease of administration. But there is no comparable baseline in state electoral practices or democratic theory for deciding how to count imperfectly marked ballots. The Constitution does not require a specific test for counting undervotes, nor does it necessarily prefer a more inclusionary approach over a more restrictive one. Presumably, each of the tests employed by the states and by the individual county canvassing teams in Florida—partially detached chad, pierced chad, and dimpled chad—were constitutional. In any event, the Court made no statement that any of the divergent standards, including the most restrictive, was invalid. Thus, it would not have been an unconstitutional infringement on the right to vote if any counting team—or all the counting teams—had adopted a relatively restrictive approach to applying the intent of the voter standard and had excluded most of the imperfectly marked ballots, even if they contained discernable marks.

Indeed, three members of the Court—constituting a majority of those who signed the per curiam opinion—indicated their view that as a matter of Florida law *none* of the imperfectly marked ballots should be counted as valid votes. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, pointing to the directive given to Florida voters to “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,” as well as to the specific provisions of the Florida election contest law, concluded that ballots not counted by properly functioning machinery because the bal-

lots were imperfectly marked should not be counted at all.¹⁵² Florida's Secretary of State had taken the same position, arguing in effect that the only undervotes that should be counted are those that a properly functioning machine would have registered. Implicitly, Chief Justice Rehnquist and Justices Scalia and Thomas must have concluded that failure to count all imperfectly marked ballots was constitutional. The concurring Justices actually used the term "improperly marked," suggesting that the voters were somehow at fault for the failure to register a proper vote. For the concurring group at least, a complete exclusion of imperfectly marked ballots does not deny equal protection of the laws to the voters whose ballots were not counted since those voters had no right to have their ballots counted at all.

The concurring opinion aside, there was nothing in the per curiam opinion that indicated that a voter who casts any particular sort of imperfectly marked ballot had any substantive entitlement to have that ballot treated as a valid vote. Indeed, the per curiam Justices, like their concurring brethren, also appeared to conclude that undervote ballots were of minimal constitutional status. As the per curiam opinion observed in finding that the Florida Supreme Court's certification of Miami-Dade County's partial recount results violated equal protection, "[t]he press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."¹⁵³ If equal protection guarantees applied to imperfectly marked ballots, then presumably even "the press of time" would not have justified the failure to review them. Yet the effect of the per curiam decision was to terminate the recount of Florida's undervote ballots because of the impending federal statutory safe harbor deadline—in other words, "the press of time." If "the press of time" does not excuse ignoring equal protection guarantees but does require the termination of the statewide manual recount of undervote ballots, then, logically, those ballots are not entitled to much protection under the Equal Protection Clause.

Imperfectly marked ballots appear to fall into a constitutional gray area. They might be votes and they might not be votes. That does not mean that such ballots must be ignored. A state or locality may choose to go beyond the constitutionally mandated right to vote

152. *Bush v. Gore*, 531 U.S. 98, 119 (2000). That was also the view of three members of the U.S. Court of Appeals for the Eleventh Circuit who dissented from that court's affirmation of the district court's refusal to preliminarily enjoin, on equal protection grounds, the manual recounts under way before *Gore v. Harris*. See *Touchston v. McDermott*, 234 F.3d 1133, 1141-45 (11th Cir. 2000) (Tjoflat, J., dissenting, joined by Birch and Dubina, JJ.).

153. *Bush v. Gore*, 531 U.S. at 108.

and enfranchise those, such as noncitizens¹⁵⁴ or nonresidents,¹⁵⁵ who do not have a constitutional entitlement to vote but have a sufficient tie to the polity that it is reasonable to include them. Such an extension of the franchise does not unconstitutionally “dilute” the votes of the members of the electorate who are constitutionally entitled to vote.¹⁵⁶ As a result, even if Florida did not have to count the undervote ballots, the state could do so. Any undervote ballots found to reflect an intent to vote for a presidential candidate and added to the tally would not have unconstitutionally diluted the votes recorded by machines.¹⁵⁷

The uncertain constitutional status of the undervote ballot does not mean that the Equal Protection Clause does not apply when some imperfectly marked ballots are reviewed and counted and some are not. Certainly, it would be unconstitutional for a canvassing board to count only those undervote ballots marked for a Democrat while ignoring those marked for a Republican. But the status of the undervote ballots—the fact that they could be ignored and that no particular criterion for counting such a ballot is either constitutionally mandated or clearly implicated by constitutional protection of the vote—affects the sense of whether variations in the standards for assessing undervote ballots creates an equal protection violation.

The only voters in Florida’s 2000 presidential election who were arguably denied equal protection by the manual recount order were those who cast imperfectly marked ballots that might have been treated as valid in a county applying a liberal “intent of the voter” standard but whose ballots would not have been found valid in the voter’s own county. Such a voter has no constitutional entitlement to have her ballot reviewed at all and certainly has no entitlement to have her ballot reviewed under a liberal intent standard. The state could have adopted a restrictive, detached chad standard that would

154. See, e.g., Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1460-67 (1993).

155. See, e.g., *May v. Town of Mountain Vill.*, 132 F.2d 576, 582 (10th Cir. 1997).

156. See Briffault, *supra* note 112, at 398-99.

157. Plaintiffs in *Siegel v. LePore* and *Touchston v. McDermott* who challenged the manual recounts ordered by the local canvassing boards in Broward, Miami-Dade, Palm Beach, and Volusia Counties were voters in other parts of the state who claimed that the inclusion of manually recounted ballots would “dilute” their votes. Those claims were consistently rejected by the federal courts that heard them. See *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000), *aff’d*, 234 F.3d 1133 (11th Cir. 2000) (en banc); *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff’d*, 234 F.3d 1163 (11th Cir. 2000) (en banc). Judge Middlebrooks, the trial judge in *Siegel*, was particularly critical of the vote dilution theory, noting that a recount “strives to strengthen rather than dilute the right to vote by securing, as near as humanly possible, an accurate and true reflection of the will of the electorate.” *Siegel*, 120 F. Supp. 2d at 1050. The Supreme Court denied the petitions for writ of certiorari in both cases. See *Touchston v. McDermott*, 531 U.S. 1061 (2001); *Siegel v. LePore*, 531 U.S. 1005 (2000).

have treated all dented, dimpled, or pierced chads as no-votes. It is difficult to see the constitutional harm to those voters whose ballots may constitutionally be treated as no-votes and might still be treated as no-votes under a consistent statewide standard if similar ballots are tabulated in other parts of the state. In the absence of the adoption of a standard intentionally discriminating against a group or groups of voters, a variation in the standards for counting undervote ballots does not create an equal protection problem.

Indeed, in other cases the Supreme Court has suggested that when a state's voting rules go beyond what the Constitution requires in vindicating the right to vote, the distinctions the state draws in providing more generous rules are subject to rational basis review rather than the strict scrutiny ordinarily applied to discriminations affecting the vote. This is true even if the result is that some voters are benefited while others are not. Thus, in *McDonald v. Board of Election Commissioners*,¹⁵⁸ the Court applied only rational basis review and upheld an Illinois law that made absentee ballots available to voters who could not go to the polls for medical reasons as well as to voters who were away from their home county, but not to voters unable to go to the polls because they were jailed in their home counties. Noting that Illinois had no obligation to provide absentee ballots at all, the Court treated the absentee ballot law as an instance of the legislature's traditional authority

to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." . . . [A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.¹⁵⁹

The Court then sustained the limited availability of absentee ballots.¹⁶⁰

In short, in the absence of a showing that the variations in standards for evaluating undervote ballots were intended to benefit the voters in some counties or burden those in others—or that the inconsistencies were intended to benefit or burden other identifiable

158. 394 U.S. 802 (1969).

159. *Id.* at 809 (citation omitted).

160. *Id.* at 809-11. *McDonald's* specific ruling—upholding the constitutionality of the denial of absentee ballots to pretrial detainees incarcerated in their home counties—was overruled five years later in *O'Brien v. Skinner*, 414 U.S. 524 (1974). *McDonald* had focused on the fact that the detainees had failed to demonstrate that, without absentee ballots, they were unable to vote. In *O'Brien*, the plaintiffs made such a showing and the Court found that their inability to get to the polls was due entirely to their detention by the state. Thus, denial of absentee ballots was tantamount to denial of the vote. Of course, in *Gore v. Harris*, there was no claim that the state had prevented the voters who cast imperfectly marked ballots from casting proper ballots.

groups of voters or particular candidates—variations in the standards for reviewing undervote ballots would not create an equal protection claim. Of course, a finding of geographic discrimination was central to *Bush v. Gore*'s holding. Yet, as I will indicate in the next section, any geographical variations in counting standards that might have occurred were not unconstitutional discriminations.

D. Geographic Discrimination and the Undervote

The *Bush v. Gore* per curiam sought to tie its reversal of the Florida court's manual recount order to an important theme in the Supreme Court's voting rights jurisprudence—the prohibition of geographic discrimination. Indeed, the revolution in voting rights jurisprudence of the 1960s began with the problem of state laws favoring voters in some areas over voters in other areas, rather than with the right to vote per se. As the per curiam explained:

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.¹⁶¹

*Gray v. Sanders*¹⁶² involved Georgia's use of the county unit rule in primary elections that selected the Democratic nominees for statewide office. Under the unit rule, votes were counted within counties; the candidate who got a plurality of votes within that county won the "county unit" votes allocated to that county. The county unit votes were then tabulated to determine the primary winner. The allocation of the county unit votes overrepresented the least populous counties. The Supreme Court held that such a weighting of the primary vote to favor the least populated counties—in practice, the rural counties—was unconstitutional.¹⁶³ Moreover, the Court indicated that even if the malapportionment had been cured and each county had received its fair share of the unit votes, the winner-take-all aspect of unit voting, which in effect disregarded the votes of all but the winning candidate in each county, would have rendered the system unconstitutional.¹⁶⁴

161. *Bush v. Gore*, 531 U.S. 98, 107 (2000).

162. 372 U.S. 368 (1962).

163. *Id.* at 379.

164. *Id.* at 381 n.12.

*Moore v. Ogilvie*¹⁶⁵ also involved a state law that formally favored less populous counties. Illinois law provided that in order to be placed on the ballot, independent candidates for President had to secure, inter alia, petition signatures from 200 voters from each of fifty counties. Given the enormous variation in county populations in the state, “[t]his law . . . discriminates against the residents of the populous counties of the State in favor of rural sections.”¹⁶⁶

The intercounty variations in the Florida Supreme Court’s manual recount order differed from the geographic discriminations in *Gray* and *Moore* in three important ways. First, unlike the county unit rule and the county signature requirements, the intercounty differences in assessing imperfectly marked ballots were not commanded by the state. They were the results of local decisionmaking. The state supreme court had not required a more inclusive rule in some counties and a more restrictive rule in others. If voters in some counties were disfavored relative to voters in other counties, that was the result of the actions of decisionmakers in the voters’ own counties, not the state supreme court. This is very significant. Whereas in *Gray* and *Moore* the voters in the disfavored counties would have had to persuade a legislature composed of representatives of both favored and disfavored counties to change the rules—which was not likely to succeed and was likely, instead, to result in the perpetuation of the discrimination against populous areas—in Florida any county utilizing a more restrictive undervote assessment rule could, on its own, change that rule to a more inclusive one.

Second, the variations in Florida were unpatterned whereas in *Gray* and *Moore* the state laws favored a specific interest group, rural voters, over another group, the residents of populous urban areas. In *Gore v. Harris*, not only did the state supreme court not determine which county must use a restrictive rule and which must use an inclusive rule, but there was also no claim or evidence that the differences in ballot assessment standards mapped on to any “independently identifiable group or category”¹⁶⁷ As a result, the variation in counting standards would have been comparable to the West Virginia constitutional provision requiring bond issue ballot propositions to receive 60 percent of the vote in order to pass. Although that provision gave greater weight to the votes of voters in a 40.1 percent to 49.9 percent minority than to voters in a 50.1 percent to 59.9 percent majority, the Supreme Court in *Gordon v. Lance* upheld the supermajority voting rule, finding that “[u]nlike the restrictions in our

165. 394 U.S. 814 (1969).

166. *Id.* at 819.

167. *Gordon v. Lance*, 403 U.S. 1, 5 (1971).

previous cases, the West Virginia Constitution singles out no 'discrete and insular minority' for special treatment."¹⁶⁸

Indeed, the variations in Florida's manual recount standards may have actually been less troubling than the variations in undervote rates attributable to the use of different kinds of election machinery. To the extent that Florida's counties chose between punch card and optical scan technologies based on cost, and to the extent that those choices correlated with each county's per capita tax base, then the differences in the ability to cast an effective vote would begin to correlate with local wealth. Although not exactly a poll tax, such a relationship between wealth and voting ability, if proven, would surely raise a constitutional question. By contrast, there was no apparent connection between local wealth and the choice of manual recount standard.

Finally, unlike the county unit rule in *Gray*, the Florida Supreme Court's order would not have resulted in the disregarding of any counted ballots. In *Gray*, votes cast for a candidate who failed to carry the voters' county were effectively ignored in the final decision (much as the votes for a presidential candidate who fails to carry a state are effectively ignored in the selection of presidential electors). Under the Florida court's order, all ballots that had been counted would have been tabulated in the final total.

To be sure, the order in *Gore v. Harris* would have resulted in the differential treatment of comparable undervote ballots depending on where they had been cast. But unlike the two cases cited by the per curiam, *Gray* and *Moore*, there was no state-mandated discrimination, and indeed, no discrimination with respect to a constitutionally protected vote. Nor did the recount order expressly or impliedly favor one candidate or one set of voters over another candidate or set of voters.

The lack of any partisan bias in the recount order can be favorably contrasted with the county-level recounts undertaken during the protest phase of the Florida election battle and the Florida court's order to include the results of the Miami-Dade and Palm Beach county recount results in the candidates' vote tallies. The county-level recounts potentially injected political bias in the Florida statewide tally. Those recounts resulted from the decisions of the Gore campaign to target counties which had given Gore majorities. That action was not unreasonable. Under Florida law, protests are filed and decisions whether or not to undertake a recount are made at the county level.¹⁶⁹ In the absence of any legislative provision for a statewide protest, it would have been logistically difficult for a candidate to

168. *Id.*

169. FLA. STAT. § 102.166 (2000) (amended 2001).

seek a statewide precertification recount. Gore would have had to file in sixty-seven separate counties, and even if he had done so there was no guarantee that a statewide recount would have resulted because each county had the discretion to decline to undertake a recount. Indeed, if the preliminary sampling recount had failed to detect an appreciable discrepancy between machine and manually counted ballots in a particular county,¹⁷⁰ that county canvassing board probably could not have ordered a recount even if there were some undervote ballots in the county that might generate legally valid votes.

Thus, Gore reasonably targeted his recount efforts on the counties that he thought would generate the most additional votes for him. But this meant that the protest period recount was tilted in favor of the Democratic candidate and Democratic voters. To be sure, the fact that Gore asked for a recount did not mean that a county canvassing board was required to grant his request. Indeed, Miami-Dade County, after initially granting the request, rescinded its vote and terminated its recount.¹⁷¹ But the impetus for the recounts came from the Democrats, thus skewing the recount's focus in the Democrats' direction. A selective manual recount focused on particular counties or territorial subdivisions of the state is not necessarily unconstitutional. A selective recount could be justified by a combination of factors, including time constraints precluding a complete statewide recount and the utilitarian benefits of focusing the limited recount opportunity on those areas which, due to large populations and high percentages of undervotes linked to the use of particular voting machinery, potentially provide the most undervotes. But in the 2000 Florida election's protest phase, the selective recounts were driven in large measure by partisan strategies and certainly had predictable partisan consequences.¹⁷² Indeed, one of the appealing features of the

170. *Id.* § 102.166(4) (amended 2001).

171. 36 DAYS, *supra* note 13, at 133-35. The Florida Supreme Court unanimously rejected Gore's request that Miami-Dade be compelled to resume the recount. *Gore v. Miami-Dade County Canvassing Bd.*, 780 So. 2d 913 (Fla. 2000); *see also* 36 DAYS, *supra* note 13, at 142.

172. The Bush campaign advanced this argument in its unsuccessful effort to obtain a preliminary injunction against county level recounts. The Eleventh Circuit's per curiam opinion did not expressly consider the argument that the selective county recounts were unconstitutional. Rather, the court found that Bush had failed to establish one of the requisites for a preliminary injunction—substantial likelihood of irreparable injury. The court reasoned that, at the time of the court's decision, Bush was "suffering no serious harm, let alone irreparable harm," since he had been certified the winner of Florida's electoral votes notwithstanding the inclusion of some manually recounted ballots. *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc). Chief Judge Anderson, concurring specially, reached the merits of the question of whether the recounts were unconstitutional. He determined that due to the facts that both candidates had the opportunity to *seek* recounts, the county canvassing boards had complete discretion to reject a recount request, and the recounts themselves were "untainted by partisan manipulation," the selective manual re-

Florida Supreme Court's decision in *Gore v. Harris* is its correction of the partisan skew that resulted from the selective recounts undertaken in the protest phase.

The role of partisan strategy in the selection of ballots for a partial manual recount explains why the portion of the Florida Supreme Court's order directing the inclusion of the Palm Beach and partial Miami-Dade recount results in the candidates' vote totals violated equal protection principles, as *Bush v. Gore* held. According to the United States Supreme Court, the Palm Beach and Miami-Dade recounts were not limited to the review of undervote ballots but also included valid votes found through the review of overvotes—that is, ballots treated as void because they reflected votes for more than two candidates. Overvotes that turned out to be valid votes involved ballots in which a voter punched out a candidate's chad and also wrote in the same candidate's name. Although such ballots would be rejected by a machine as votes for two different candidates, they plainly indicated the intent of the voter to vote for just one candidate.

It would be constitutional to focus a manual recount on undervotes and exclude overvotes—as the Florida Supreme Court did. As strict scrutiny ought not apply to distinctions in no-vote ballots which constitutionally could be completely ignored, the decision of a court or election administration panel to focus a recount on undervotes and to exclude overvotes should be subject to the rational basis test, not strict scrutiny. Given the data indicating considerable positive correlation between a county's use of punch card machinery and its undervote rate¹⁷³—and the lack of a similar correlation with respect to overvotes—it would be reasonable to infer that, at least in punch card counties, some significant fraction of undervotes consisted of failed efforts to register a preference. On the contrary, overvotes were more likely to involve either voter mistakes or efforts to register two preferences. As a result, it would be reasonable to conclude that undervote ballots are more likely than overvote ballots to include legal votes.¹⁷⁴ With the presidential recount subject to severe time constraints, a state could reasonably seek to reconcile its legiti-

counts were not unconstitutional. *Id.* at 1182-86 (Anderson, C.J., concurring specially). Three members of the court dissented, finding, *inter alia*, that the selective recounts amounted to partisan discrimination. *Id.* at 1202-09. (Birch, J., dissenting, joined by Tjoflat and Dubina, JJ.)

173. 36 DAYS, *supra* note 13, at 191.

174. The discovery that some overvote ballots consisted of punched-out and written-in votes for the same candidate suggests that there may have been more valid votes on overvote ballots than was generally assumed. Nevertheless, given the differences between undervote and overvote ballots and the problems with the punch card machinery associated with some of the undervote ballots, it would have been reasonable, even if mistaken, to assume that undervote ballots would be a greater source of valid votes—and, thus, the principal target for a time-constrained manual recount—than overvote ballots.

mate goals of counting as many valid ballots as possible and meeting the statutory deadlines for participating in the presidential selection process by focusing on the undervote. So, too, it would not necessarily be unconstitutional to combine a statewide recount of the undervote with a partial recount of the overvote. Again, the combination of tight time constraints, the effort to maximize the vote count, and the use of nondiscriminatory criteria for selecting those counties in which to undertake the overvote partial recount would mean that a recount consisting of a statewide count of the undervote and a partial count of the overvote could be reasonable.

But if the counties in which the manual recount of the overvote took place were selected to advance partisan interests, then the fairness of the resulting vote count would be tainted. That is apparently what happened in Florida. Palm Beach and Miami-Dade Counties were selected for recounts by the Democrats because they were carried by the Democratic candidate. If, as a result of the Florida Supreme Court's order, votes were obtained from the recount of overvotes in those two counties but from no other counties in the state, that would have biased the result in favor of Gore. Thus, the United States Supreme Court was right to determine that the Florida court's inclusion of votes obtained from the recount of the overvote ballots in those counties was unconstitutional.¹⁷⁵

The selective protest phase recounts and the inclusion of the overvote recount results from the counties selected by the Democrats thus present serious issues of partisan bias. But the Florida Supreme Court's order directing a statewide manual recount of undervote ballots did not have a similar partisan tilt. There was no reason to assume that the lack of consistent statewide standards was intended to favor one candidate and that candidate's voters over the other candidate and his voters, or that it would have had the effect of doing so. There was no evidence that geographic variation was a disguised form of partisan manipulation.¹⁷⁶

175. Presumably, had Gore prevailed on the recount, Bush could have raised a similar argument with respect to the inclusion in the statewide result certified by Secretary Harris of votes obtained from recounting the overvote in heavily Democratic Broward County.

176. The *Bush v. Gore* per curiam also expressed concern that the Florida Supreme Court's certification of a partial total from Miami-Dade gave "no assurance that the recounts included in a final certification must be complete." 531 U.S. 98, 108 (2000). The implication is that it would be unconstitutional to certify a partial recount result. That seems mistaken. Given that the Court was willing to permit the certification of a partial tally—Secretary Harris' certification included valid votes found by manual recounts undertaken in Broward and Volusia Counties but ignored any valid votes that a manual recount might have found in Florida's other counties—a partial count, particularly a partial count that picks up some but not all of the votes missed by the vote-counting machinery, does not deny equal protection. The voters whose ballots are not counted in the recount are not made worse off by the fact that a partial recount picked up valid votes cast by other voters. A constitutional objection would arise only if the partial count is skewed to benefit particu-

E. Fundamental Fairness and the Recount Order

Apart from the inclusion of the Palm Beach and Miami-Dade recount results, the Florida recount order did not create a problem of fundamental unfairness. The recount order did not violate the right to vote or the right to an equally weighted vote. To the limited extent that the variations in counting standards created equal protection problems, those variations were justified by the Florida court's effort to maximize the ability of Florida voters to have their ballots counted while avoiding the constraints on judicial innovation in the presidential election context imposed by the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*.¹⁷⁷

The hallmarks of electoral unfairness have been the disenfranchisement of voters and intentional discrimination against voters. The leading lower court cases involving the invalidation of election practices on federal constitutional grounds have involved state or local rescission of rules on which voters had reasonably relied in deciding how to vote. In *Griffin v. Burns*,¹⁷⁸ for example, state election officials told Rhode Island voters that they could vote by absentee or shut-in ballots in party primaries. After an election in which nearly ten percent of the total vote recorded was cast by absentee or shut-in ballots, the Rhode Island Supreme Court held that the use of absentee or shut-in ballots in primaries was unauthorized by state law and invalidated those ballots. The First Circuit held that the state court's action "severely impugned" the integrity of the election and amounted to "patent and fundamental unfairness" since the voters had reasonably relied on well-established practice, and the state court's order thus unfairly disenfranchised them.¹⁷⁹

In *Roe v. State of Alabama*,¹⁸⁰ a case heavily relied on by Bush in his effort to block the Florida recounts, the Eleventh Circuit found that an Alabama court's postelection order, which departed from past practice and required election officials to count absentee ballots that did not include notarization and the signatures of two qualified wit-

lar voters. Miami-Dade had been selected for a recount because of its Democratic majority, and the precincts in Miami-Dade that had already been counted might have been selected for partisan reasons. As a result, the Florida court's inclusion of the partial Miami-Dade results before the general statewide recount was undertaken was an error. But it should have been constitutionally permissible to include partial recount results when a full recount is impossible due to the federal timetable for the selection of presidential electors, provided that the counties and precincts that were counted were not selected on a partisan basis.

177. 531 U.S. 70 (2000).

178. 570 F.2d 1065 (1st Cir. 1978).

179. *Id.* at 1078; *see also* Partido Nuevo Progresista v. Barreto Perez, 639 F.2d 825, 827 (1st Cir. 1980) (finding that disenfranchisement was crucial to *Griffin's* holding).

180. 43 F.3d 574 (11th Cir. 1995).

nesses required by law, “implicate[d] fundamental fairness.”¹⁸¹ The Eleventh Circuit rejected the argument that the state court’s acceptance of otherwise invalid absentee ballots was constitutional because it enfranchised those who had cast the contested absentee ballots. Instead the federal court emphasized the disenfranchising effect of the Alabama court’s order:

[T]he change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement. . . . We believe that, had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and supporters [of the candidates disadvantaged by the rule change] who did not vote would have voted absentee.¹⁸²

Unlike the Rhode Island court’s order in *Griffin* and the Alabama court’s order in *Roe*, the Florida court’s order in *Gore v. Harris* was enfranchising. It would have provided for the review of tens of thousands of uncounted undervote ballots and potentially would have led to the counting of whatever valid votes were found among those ballots. The *Gore* order would not have unfairly burdened other voters or potential voters. Both the availability of the manual recount and the use of the “intent of the voter” standard were consistent with preexisting law. Even if the Florida order could somehow be characterized as a change in the law, it is hard to see how such a change disenfranchised anyone. Unlike the situation in *Roe*, it is simply impossible to believe that some Floridians assumed they would be unable to fully detach their chad and did not bother to vote but that they would have voted if they had known that a manual count, using a liberal standard, would have been required for all undervotes, and thus they were disenfranchised by the Florida order.

The Florida case is much closer to *Partido Nuevo Progresista v. Barreto Perez*¹⁸³ than it is to *Roe*. In *Partido Nuevo Progresista*, the First Circuit reversed the district court and rejected federal intervention in a Puerto Rico election dispute where the election administrator counted as votes ballots with marks above the list of a party’s candidates rather than in the places on the ballot designated for indicating preferences. The court emphasized that the administrator’s order was enfranchising and that “no party or person is likely to have

181. *Id.* at 581.

182. *Id.* at 581-82.

183. 639 F.2d 825 (1st Cir. 1980).

acted to their detriment by relying upon the invalidity of ballots with marks outside the ballots' drawn rectangles."¹⁸⁴

The Florida court's order did not intentionally discriminate among voters. As already noted, the Florida court did not itself require the use of a more inclusionary standard for determining legal votes in some counties and a less inclusionary one in others. Any differences in counting standards would have been the result of local action, not state mandate. If anything, the Florida court's order would have ameliorated the intercounty differences in effective voting rates attributable to the differences in the quality of voting machinery. Voters in counties using punch card ballots had an appreciably lower chance of casting effective votes than voters in counties using optical scan machinery.¹⁸⁵ The recount order would have reduced the disparity in effective voting rates between punch card and optical scan counties, although, to be sure, it could have led to the creation of smaller disparities within the punch card counties if the counties in fact used different counting standards.

Even then, by directing that the recount be undertaken under the auspices of a circuit court judge who had the authority to hear challenges to counting team decisions and resolve disputed cases, the Florida court's order provided an opportunity for reducing intercounty differences. Oddly, the *Bush v. Gore* per curiam cabined the application of equal protection in the election administration context to "the special instance of a statewide recount under the authority of a single state judicial officer."¹⁸⁶ Yet, by placing the recount under the authority of a single state judicial officer, the Florida Supreme Court actually created the possibility of reconciling intercounty differences and harmonizing standards. Certainly, the order created a greater possibility for statewide consistency in ballot evaluating standards than was the case with the protest phase recounts, when no state officer reconciled intercounty variations in counting standards.

Even if intercounty variations in the determination of whether a ballot contained a valid vote had resulted, and even if those variations could be attributed to the state supreme court's failure to spell out ballot assessment standards, the Florida court's action did not threaten the integrity of the election under the circumstances of the Florida presidential recount dispute. Rather, the Florida court's fail-

184. *Id.* at 828; see also *Roe v. Alabama*, 43 F.3d at 581-82 (citing *Partido Nuevo Progresista* with approval).

185. 36 DAYS, *supra* note 13, at 191. In the counties that used optical scan ballots, just 0.30 percent of ballots had no selection for President whereas in the counties that used Votomatic punch card ballots, 1.53 percent of the votes had no selection for President. Indeed, in every single one of those counties, the undervote fraction was greater than one percent, and in five counties (including Palm Beach county) the undervote fraction was greater than two percent. *Id.*

186. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

ure to spell out more precise rules for the evaluation of undervote ballots may have been required by the constitutional and statutory rules governing presidential elections.

Just four days before *Gore v. Harris* was decided, the United States Supreme Court had sharply reminded the Florida court of the Florida Legislature's exclusive constitutional prerogative to determine the rules for selecting presidential electors. The Supreme Court had also hinted broadly that the Florida Legislature would probably have wanted to secure the safe harbor provided by 3 U.S.C. § 5 by avoiding the creation of any rules for the presidential election that could be characterized as postelection day new law. The Florida Legislature had never adopted a standard for evaluating ballots more specific than "the intent of the voter." Similarly, Florida case law concerning the determination of legal votes prior to November 2000 had been phrased exclusively in terms of the "intent of the voter." Given *Bush v. Palm Beach County Canvassing Board*, if the Florida Supreme Court had adopted a more specific standard, such action could have been challenged as a violation of Article II, Section 1 and a threat to the federal statutory safe harbor. In effect, *Bush v. Palm Beach County Canvassing Board* chastised the Florida Supreme Court for doing what *Bush v. Gore* subsequently condemned the Florida court for not doing—making new law with respect to the resolution of a dispute in the selection of presidential electors.

Under these circumstances, the Florida court's order did not threaten the integrity of the presidential election. After *Bush v. Palm Beach County Canvassing Board*, judicial deference to the legislature and avoidance of making new law for the resolution of election disputes are part of the very definition of electoral fairness and integrity in the presidential election setting. If it had spelled out a standard more specific than the "intent of the voter" for the evaluation of undervote ballots, the Florida Supreme Court would surely have been creating new law. The Florida court's order may have permitted intercounty and intracounty inconsistencies in the evaluation of undervote ballots. But the court's failure to adopt a standard that would have precluded those inconsistencies was apparently required by the federal policy of avoiding the state judicial creation of new law in the context of a presidential election.

In effect, the Florida Supreme Court had two choices. It could have declined to order a recount, thus excluding whatever valid votes might have been found in the undervote ballots and leaving unremedied the effects of the different election machinery in creating different undervote rates in different Florida counties. Or it could have done what it did—order a statewide recount of the undervote, recognizing that the lack of a precise statewide standard for evaluating undervote ballots might lead to certain ballots being counted in some

counties while comparable ballots were ignored in other counties. The third option implicated by *Bush v. Gore*—the inclusion of a ballot assessment standard in the recount order—was effectively precluded by *Bush v. Palm Beach County Canvassing Board*.¹⁸⁷

Both of the options available to the Florida court were flawed. Each would have entailed some disparities in the treatment of some Florida voters. But the second option—the manual recount—at least had the benefits of increasing the number of Floridians whose votes were counted and of reducing the disparities in voting rates attributable to differences in the quality of county voting machinery. Moreover, whatever disparity of treatment might have occurred due to the uncorrected differences in vote assessment standards, it would have been the result not of an intent to discriminate among counties or among partisan interests but of a constitutional constraint on the Florida court's authority to take the action necessary to avoid that disparity.

Each option posed issues of fairness but, given the circumstances, neither option would have caused a fundamental unfairness or threatened the integrity of the election. Certainly it is hard to see how the option the Florida court did choose—the manual recount without specific standards—was more unfair than no recount, and therefore the failure to review tens of thousands of undervote ballots at all. The Florida court's recount order may have been debatable as a matter of Florida election law—an issue beyond the scope of this Article—but it did not create the kind of fundamental unfairness that ought to be necessary to support a finding that it violated the Equal Protection Clause. Indeed, in seeking to expand the number of voters counted while reducing the differences in effective voting rights among counties, the Florida court's order was far more consistent with the United States Supreme Court's use of the Equal Protection Clause in its modern voting rights cases than was the Supreme Court majority in *Bush v. Gore*.

V. CONCLUSION: FEDERALISM AND EQUAL PROTECTION IN *BUSH V. GORE*

Many observers were struck by the obvious fact that the five Justices who led the Court's unprecedented intervention into a state's vote counting process, and who injected federal equal protection concerns into an area hitherto seen as a matter largely committed to the

187. A fourth option, of course, was to grant Gore's request and order a manual recount limited to the uncounted Miami-Dade undervote ballots. For the reason given in the text—that Miami-Dade was selected for the protest phase recount because of its Democratic majority and thus a recount limited to Miami-Dade would have been unfairly pro-Democratic—this option would have created a fundamental unfairness.

states,¹⁸⁸ were also the five Justices who have mounted the Court's recent aggressive defense of states rights against federal power. These are the Justices who read the "anti-commandeering" doctrine into the Tenth Amendment,¹⁸⁹ reinvigorated the Eleventh Amendment,¹⁹⁰ and imposed new limits on Congress's power to act under the Commerce Clause¹⁹¹ and under Section 5 of the Fourteenth Amendment.¹⁹²

The tension between *Bush v. Gore* and federalism is not simply a matter of the Court's application of equal protection principles to state election administration. Federalism has always included federal judicial protection of federal constitutional rights. As I have suggested earlier, equal protection principles have been applied to voting in state and local elections, and it is no great stretch of the Constitution's vindication of the right to vote and the right to an equally weighted vote to subject state voting mechanisms that operate to disenfranchise voters or to discriminate among voters to equal protection principles. The evidence from Florida concerning the disparate voter error rates resulting from different types of voting machines and different ballot designs suggests that equal protection could play a legitimate and useful role in curbing the structural inequalities in voting that currently plague our system.

The real tension between *Bush v. Gore* and federalism is that the gravamen of the particular equal protection violation at the heart of *Bush v. Gore* is the value at the heart of federalism itself—decentralized decisionmaking and the resulting variations in government action. *Bush v. Gore*'s greatest concern was with the poten-

188. The lower federal courts have repeatedly refused to get involved in disputes involving "garden variety" irregularities of state and local election administration, even when such irregularities have resulted in the rejection of some valid votes or undermined the validity of an election. *See, e.g.*, *Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996); *Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270 (7th Cir. 1986); *Partido Nuevo Progresista*, 639 F.2d 825; *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980). Rare exceptions are *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (finding that a change in law concerning absentee ballots unfairly surprised those who had relied on restrictive law by not voting absentee); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Unit B 1981) (failing to hold an election altogether was held to be a denial of voting rights); and *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (holding that a postelection ruling by a state court that absentee ballots should not have been allowed and thus that nearly ten percent of the ballots cast should not be counted; such a surprise massive disfranchisement after the election was unconstitutional).

189. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997).

190. *See, e.g.*, *Board of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (2000); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

191. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

192. *See, e.g.*, *Morrison*, 529 U.S. 598; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

tial for varying local standards when determining whether an under-vote ballot contained a valid vote. These variations occurred because state institutions—the legislature, the Secretary of State as chief administrative officer of the elections system, and the state supreme court—had not adopted rules guiding the actions of county canvassing boards and their counting teams. Although there is no evidence that Florida intentionally chose to devolve this difficult question to the county canvassing boards, that would not have been an unreasonable thing to do. Given the absence of one right answer for balancing the competing factors of voter inclusion, objectivity, and ease of administration, the state could have chosen to let the counties decide this, with different counties balancing these factors differently. Those that valued inclusion could have adopted a more liberal rule, while those that believed that the voters should be required to make a greater effort to confirm that their chads had detached or those more concerned about the objectivity of local election administrators could have adopted a more restrictive rule.

A longstanding principle of federalism has been that state-local relationships and the nature and scope of a state's delegation of power to its local units is, as a matter of federalism, largely for the states.¹⁹³ To be sure, state delegations or, more commonly, state modifications of traditionally delegated powers that target particular groups or burden fundamental rights, are subject to federal constitutional review.¹⁹⁴ But even when decentralization imposes some constraints on the ability to vindicate fundamental rights or protect important interests, the Court has generally treated the state-local relationship as primarily a state matter while expressing support for the state's decision to favor local autonomy over other concerns.¹⁹⁵ So long as any of the standards open to the local canvassing boards—hanging chad, pierced chad, or indented chad—is constitutional, then, as a matter of federalism, the states should be free to leave the matter to the local units. *Bush v. Gore* does not expressly preclude such decentralization. By limiting its opinion to “the special instance of a statewide recount under the authority of a single state judicial officer,” the Court does not even reach recounts that might be con-

193. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

194. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Bd. of Educ. v. Kiryas Joel Vill. Sch. Dist.*, 512 U.S. 687 (1994); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1983); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

195. *See Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that the protection of a system of decentralized education administration justifies reversal of lower court order requiring inclusion of suburban school districts in a metropolitan area desegregation plan); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (finding that decentralization of education administration justifies the interdistrict inequalities in revenues and expenditures resulting from differences in local wealth and reliance on local wealth in funding schools).

ducted under the auspices of a state administrative body.¹⁹⁶ But the implication is clearly that the decentralization of the determination of counting standards is unconstitutional.

Bush v. Gore does not simply challenge the state's power to decentralize some aspects of election law decisionmaking. It raises questions about the variations that result from such decentralization. The central principle of federalism is diversity. Federalism necessarily results in differences—differences that grow from variations in needs, circumstances, preferences, and decisionmaking processes. These differences reflect the local political participation that federalism promotes and the local innovation that federalism protects. Yet, where federalism ordinarily celebrates diversity, local participation, and local experimentation, the *Bush v. Gore* per curiam saw arbitrary and disparate treatment in different counties.

Certainly federalism produces “disparate” rules for different places. But the theory of federalism suggests that such differences, although perhaps arbitrary in the sense that there is no justification that links a particular local rule to specific local circumstances, are also an inevitable outgrowth of decentralized decisionmaking. Different groups of people look at the same problem differently and reach different conclusions about that problem. As a result, they adopt different responses to the same problems. There may be no objective explanation for the different preferences and different results, but they exist nonetheless. Federalism means those differences may be translated into different legal rules in different places.

The tension between the per curiam's federalism jurisprudence and its *Bush v. Gore* opinion is thus not that the Court has invaded an area that has hitherto been a province of the states. Rather, it is the Court's apparent discomfort with the varying local standards that are the inevitable accompaniment of decentralized decisionmaking—the very decentralized decisionmaking that is the heart and soul of federalism.

Decentralization and the resulting variations in local standards and practices are not always desirable. Election administration could very well benefit from state legislative decisions that provide for voting machinery that is of uniform quality statewide, that standardize ballot design, or that specify consistent statewide procedures for resolving questions concerning improperly marked ballots. But where, as in *Bush v. Gore*, the intrastate variations do not exclude otherwise valid ballots, involve state-ordered geographic discrimination, upset voters' expectations, or otherwise undermine fundamental fairness, a commitment to the spirit of federalism would appear to counsel in fa-

196. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

vor of accepting local decisionmaking rather than undertaking federal judicial intervention. Certainly, *Bush v. Gore* was far from compelled by the Court's voting rights cases. Decentralized decisionmaking has most typically fallen to a constitutional challenge when some state or local decisionmakers fail to abide by federally required standards, or when decentralization is a guise for discrimination against locally vulnerable groups. In *Bush v. Gore*, the intercounty and intra-county variations were just that—variations. None of them fell below federal standards concerning the undervote (since no such standards exist). And there was no evidence that the variation in standards would have discriminated against geographic interests or partisan groups. The variations in counting standards were troublesome to the Justices and, ultimately, held unconstitutional, simply because they were variations.

Bush v. Gore is an unusual equal protection case. The Florida Supreme Court's order did not exclude voters; rather, it would have expanded the ability of Florida voters to cast effective votes. Nor did the Florida order discriminate against any class of voters or ratify the discriminatory actions of other institutions. But what is perhaps more striking is the U.S. Supreme Court majority's failure even to consider the federalism implications of the case. The Court did not appear to recognize that it was federalizing a state-local relationship. Nor did it even attempt to reconcile its usually strong commitment to federalism with its apparent discomfort with decentralization and, especially, its hostility to the variation in local standards that inevitably follows from decentralized governance.