THE FLORIDA VOTE COUNT DECISIONS -

A CANADIAN PERSPECTIVE

Canada followed with interest the dramatic aftermath to what may have been the closest presidential election in the history of its great neighbour to the south. While the constitutions and systems of government in the two nations are substantially different, democracy is the underlying foundation in both. The authors, who profess no expertise in American constitutional law, are therefore able to express opinions in this article that are founded on common basic principles of law and universally accepted tenets of fairness.

At bottom, there was only one issue of substance before the courts, that of course being the equal protection issue on which the U.S. Supreme Court focused. Surprisingly, however, neither the parties nor the courts raised or considered, other than tangentially, the conundrum posed by the conflict between two constitutional provisions: on the one hand, the investment in the State legislatures of exclusive and "plenary" power in regard to the selection and appointment of presidential electors, and on the other, the equal protection clause. The Florida legislature chose to exercise its constitutionally endowed power by enacting a general, non-objective standard for the identification of "legal votes" during recounts, and by delegating to local canvassing boards the implementation of that standard. In leaving the matter to the discretion of local boards, the legislature must have known that different boards might implement that standard differently. The question neither raised nor considered was: Having exclusive and plenary power in the matter of the selection and appointment of presidential electors, was the Florida legislature entitled to enact legislation which might otherwise be constitutionally invalid as being a violation of the equal protection clause? Stated more simply, which of the two constitutional directives should have prevailed?

JUDICIAL INVOLVEMENT IN THE ELECTORAL PROCESS

Jurisdictional issues are always the first to be considered. One of the arguments made by the Bush camp was that the electoral process is political in nature and should not be subject to judicial intervention. The separation of powers doctrine lends an aura of respectability to that argument, which was most strenuously adopted by Wells C.J. in his dissenting opinion in the Florida Supreme Court:

> Otherwise, we run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters—not by judges. We must have the self- discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is "the right thing to do." Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by

> a court of last resort, always has the potential of leading to a crisis with the other branches of government and raises serious separation-of-powers concerns.[1]

That position, while superficially attractive, must yield to other considerations. America is a nation of laws,[2] including laws which govern the electoral process. An election result is meaningless in a democratic society unless, as best can be done, the ballots have been fully, fairly and accurately counted. The Florida legislature enacted laws to seek to ensure the legitimacy of election results in accordance with that principle. Not remarkably, it statutorily directed that an election contest be resolved in a judicial forum.[3] There is no justifiable reason for thinking that elections should be uniquely exempt from supervision by the judicial branch for compliance with the law. "The Framers of our Constitution ... understood that in a republican government, the judiciary would construe the legislature's enactments."[4]

The Florida Supreme Court "did what courts do - it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted."[5] It was for that reason that the majority opinion in the U.S. Supreme Court made the comment that "[I]t becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[6] Furthermore, the concern of Wells C.J. that there is "a great risk that every election will result in judicial testing" fails to take into account the practical consideration that the statutory right to contest an election result requires evidence of the "receipt 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."[7]

Another jurisdictional matter that was forcefully argued by the Bush legal team was that the only judicial body that had jurisdiction to deal with the Gore claims was the Florida circuit court, no jurisdiction having been granted by the relevant Florida statute to any higher Florida

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1 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at pp. 44-45.

2 "We are a nation of laws, and we have survived and prospered as a free nation because we have adhered to the rule of law.": *ibid*, at p. 66, Harding J., dissenting.

3 *Ibid*, at p. 7, referring to Fla. Stat. s. 102.168. Also notable, as pointed out by Stevens and Breyer JJ., both dissenting in Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 2 and 10 respectively, is the fact that 3 U.S.C. s. 5 (the "safe harbour" provision), which was heavily relied upon by the Bush camp, expressly contemplates judicial resolution of any controversy or contest concerning the appointment of presidential electors.

4 Bush v Gore, U.S. Sup. Ct. December 12, 2000, Ginsburg J., dissenting, at p. 7.

5 *Ibid*, Stevens J., dissenting, at p. 6. Also noteworthy is his reproduction, at n. 7, of the statement: "It is emphatically the province and duty of the judicial department to say what the law is."

6 *Ibid*, *per curiam* opinion, at p. 13.

7 Fla. Stat. s. 102.168(3)(c).

court, including the Florida Supreme Court, to entertain any appeal therefrom.[8] It was argued that the Florida constitution, the source of judicial appellate jurisdiction, had no import because the grant of plenary power to the State legislature by Article II of the federal constitution could not be circumvented, not even by the State constitution; only a law enacted by the legislature could have any validity in regard to the matter of appointing the State's presidential electors.[9]

The Gore legal team responded by referring to the fact that the Florida constitution had been drafted and approved by the Florida legislature,[10] and that the Florida election statutes had been enacted against the settled background rule that decisions of circuit courts in election contest actions are subject to appellate review.[11] The U.S. Supreme Court had little difficulty in rejecting this highly technical argument.[12] One of the first questions put to counsel for Bush during oral argument included the comment: "[T]o say that the legislature of the State is unmoored from its own constitution and ... can't use its courts ... [is] a holding which has grave implications for our republican theory of government."[13] Stevens J., dissenting on other grounds, succinctly dealt with this issue as follows:

> The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida constitution, and nothing in Article II of the federal constitution frees the State legislature from the constraints in the State constitution that created it. Moreover, the Florida legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in presidential elections that it has historically played in resolving [other] electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.[14]

POLICY CONSIDERATIONS

All legal disputes are determined in the context of underlying policy considerations, some written and some unwritten. Constitutional enactments such as the Bill of Rights reflect broad

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8 Relying on Fla. Stat. s. 102.168(1) and (8).

9 Brief for petitioners in Bush v Gore, at pp. 28-31.

10 Brief of respondent in Bush v Gore, at pp. 9 and 14-15.

11 *Ibid*, at p. 13.

12 In oral argument, counsel for Bush euphemistically said: "It may not be the most powerful argument we bring to this court.": Transcript of oral argument, at p. 6.

13 Transcript of oral argument in Bush v Gore, at p. 4.

14 Bush v Gore, U.S. Supreme Court December 12, 2000, at p. 2.

policy choices, while statute laws express narrower policy choices. Some policy considerations are so basic and so undisputed that they are not written anywhere.

A number of highly important policy considerations were at play here. Among those, of course, were the right to vote and the right to have one's vote counted.[15] The Bush legal team itself made reference to "the fundamental right to vote"[16] and relied on the following statement: "Undeniably the constitution of the United States protects the right of all qualified citizens to vote."[17] The right to vote was described as "the pre-eminent right contained in the Declaration of Rights in the Florida state constitution"[18] and the Florida Supreme Court referred to the "clear legislative policy of the importance of an elector's right to vote and of having each vote counted",[19] and to the "bedrock principle of democracy: that every vote counts."[20] The *per curiam* decision in the U.S. Supreme Court referred to the "one man, one vote basis of our representative government"[21] and stated that "[T]he right to vote as the legislature has prescribed is fundamental."[22]

A natural corollary of those basic values is reflected in the statement: "We hold that the primary consideration in an election contest is whether the will of the people has been effected."[23] The "essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida legislature."[24] Furthermore, "[T]he real parties in interest here, not in the legal sense but in realistic terms, are

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15 A protest sign said it best: "This is America. Count the votes."

16 Brief for petitioners in Bush v Gore, at p. 47 n. 25.

17 *Ibid*, at p. 40, quoting from Reynolds v Sims (1964) 377 U.S. 533.

18 Taylor v Martin County Canvassing Board, Fla. Cir. Ct. December 8, 2000, at p. 4.

19 Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 33.

20 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 36 n. 20.

21 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 8.

22 *Ibid*, at p. 6.

23 Taylor v Martin County Canvassing Board, Fla. Cir. Ct. December 8, 2000, at pp. 5-6, quoting from Boardman v Esteva (1975) 323 So. 2d 259, Fla. Sup. Ct.

24 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at pp. 16-17. Similar remarks include: "[T]he people's will is what elections are about": Bush v Gore, U.S. Sup. Ct. December 12, 2000, Breyer J., dissenting, at pp. 12-13; references to "a full and fair expression of the will of the people" and the obligation not to "compromise the integrity of the election or the sanctity of the ballot": Taylor v Martin County Canvassing Board, Fla. Cir. Ct. December 8, 2000, at pp. 6 and 4 respectively; "Not surprisingly, we have identified the right of Florida's citizens to vote and to have elections determined by the will of Florida's voters as important policy concerns of the Florida legislature in enacting Florida's election code.": Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 31.

the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration."[25] That view echoes the statement "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."[26] A final relevant comment is: "Public confidence in the election process is essential to our democracy. If the voter cannot be assured of an accurate vote count ... they will not have faith in other parts of the political process."[27]

In accordance with such views,[28] the Florida Supreme Court held that "[T]he clear message from [the] legislative policy [was] that every citizen's vote be counted whenever possible",[29] the "paramount concern" being the intent of the voter, which "should always be given effect *if* the intent can be determined"[30] (original emphasis). In contrast, Wells C.J. made the following comment in his dissenting opinion:

> This case has reached the point where finality must take precedence over continued judicial process. I agree with a quote from John Allen Paulos, a professor of mathematics at Temple University, when he wrote that "the margin of error in this election is far greater than the margin of victory, no matter who wins." Further judicial process will not change this self-evident fact and will only result in confusion and disorder.[31]

Translated into plain English, that statement means:

> Although the legislature has directed that in all close elections an attempt should be made to ascertain the intent of the voter in regard to each contested ballot, so

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[25] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 18, quoting from Boardman v Esteva (1975) 323 So. 2d 259, Fla. Sup. Ct.

[26] Bush v Gore, U.S. Sup. Ct. December 12, 2000, Rehnquist C.J. concurring, at p. 1, quoting from Burroughs v United States (1934) 290 U.S. 534.

[27] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 37, quoting from the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts.

[28] And with the recognized principle that "Legislative intent - as always - is the polestar that guides a court's inquiry into the provisions of the Florida Election Code.": Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 10.

[29] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 19; Bush v Gore, U.S. Sup. Ct. December 12, 2000, Stevens and Ginsburg JJ., both dissenting, at pp. 6 and 6 respectively.

[30] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 24; Bush v Gore, U.S. Sup. Ct. December 12, 2000, Souter J., dissenting, at p. 4.

[31] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 60.

as to ensure the integrity of the election process and the legitimacy of the outcome, why should we bother to make the effort?

A legislature acts through the enactment of laws. Enforcement of those laws is the responsibility of the judicial branch of government. Not only would the unilateral decision that finality is the more important objective, and that it is not worthwhile to implement a statutory directive, be an abrogation of the judiciary's normal duty to enforce the laws, but it would be a violation of the constitutional delegation of "plenary" power to the State legislature, in that it would substitute the view of the judicial branch for that of the legislature. Unfortunately, this erroneous substitution of a judicial preference for finality was repeated in the majority decision in the U.S. Supreme Court.

Interpretive implementation of these underlying policies led the Florida courts to overlook irregularities which did not compromise the integrity of the election or the sanctity of the ballot,[32] on the theory that election laws must be liberally construed to protect the right to vote and to have that vote counted.[33] Other formulations of the rationale were that "[A] common sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated"[34] and "[T]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[35]

In close elections, the practical implementation of those underlying policies requires recounts, which are "an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted."[36] Furthermore, "[T]he manual recount provision is intended to safeguard the integrity and reliability of the electoral process ... While discretionary in its application, the provision is not wholly standardless. ... [It] strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate."[37] The view adopted by Wells C.J., however, would preclude recounts in elections where there is a narrow margin of victory after the initial vote count. Counsel for Gore made the

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[32] Taylor v Martin County Canvassing Board, Fla. Cir. Ct. December 8, 2000, at pp. 4 and 9, aff'd Fla. Sup. Ct. December 12, 2000.

[33] *Ibid*, at p. 4.

[34] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 8.

[35] Bush v Gore, U.S. Sup. Ct. December 12, 2000, Stevens J., dissenting, at p. 4, quoting from Bain Peanut Co. of Tex. v Pinson (1931) 282 U.S. 499.

[36] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 12, quoting from the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts.

[37] Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 17 n. 14, quoting from Siegel v LePore, S.D. Fla. November 13, 2000, aff'd 11th Cir. December 6, 2000.

pointed comment that the Supreme Court has long championed the fundamental right of all who are qualified to cast their votes and to have their votes counted, and that the Bush request that the court intervene in a state electoral process to ensure that votes are *not* counted turns that position on its head.[38]

THE GRANT OF PLENARY POWER TO STATE LEGISLATURES

Article II, section 1, clause 2 of the United States Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct" the presidential electors for that State. Throughout the various court proceedings, reference was made to the earlier U.S. Supreme Court decision in McPherson v Blacker[39] as authority for the exclusive and plenary jurisdiction vested by the federal constitution in the legislature of each State to determine the manner for selecting and appointing the presidential electors for that State.[40] Rehnquist C.J. said in his concurring opinion that the court in McPherson explained that Article II, s. 1, cl. 2 conveyed the broadest power of determination and left it to the legislature exclusively to define the method of appointment.[41] Counsel for Bush submitted that "[T]he [State] legislature *alone* may define the method of appointing electors"[42] (original emphasis).

The McPherson decision also said that "[I]t is, no doubt, competent for the legislature to authorize the Governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors."[43] The legislature may furthermore retake from the citizens of the State the power to select and appoint the presidential electors for the State.[44] Wells C.J. emphasized the term "plenary", referring to the definition of that word as "full, entire, complete, absolute, perfect [and] unqualified".[45]

Having recognized and accepted this sweeping power residing in the Florida legislature, why then did the U.S. Supreme Court fail to accord the constitutional respect due the

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38 Brief of respondent in Bush v Gore, at p. 2.

39 (1892) 146 U.S. 1.

40 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at pp. 54-55; Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at pp. 8-9; Bush v Gore, U.S. Sup. Ct. December 12, 2000, *per curiam* opinion at p. 5; Rehnquist C.J., concurring opinion at p. 2; Brief for petitioners in Bush v Gore, at pp. 1, 16, 19, 29 and 31.

41 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 2.

42 Brief for petitioners in Bush v Gore, at p. 31.

43 Quoted in Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 9.

44 Bush v Gore, U.S. Sup. Ct. December 12, 2000, *per curiam* opinion at pp. 5-6.

45 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at pp. 54-55.

legislature's choice of the method for dealing with one particular aspect of the appointment of Florida's presidential electors - i.e. the standard to be applied in determining on a recount what constituted a "legal vote"? The majority in the Florida Supreme Court had it right when they said:

> We decline to rule more expansively in the present case, for to do so would result in this court substantially rewriting the [Florida election] Code. We leave that matter to the sound discretion of the body best equipped to address it, the legislature.[46]

The U.S. Supreme Court disagreed, saying:

> [W]e are presented with a situation where a state court *with the power to assure uniformity* has ordered a statewide recount with minimal procedural safeguards.[47] (emphasis added)

No explanation was given, however, as to the source of that alleged power, notwithstanding the further statement that "None are more conscious of the vital limits on judicial authority than are the members of this Court."[48] While not explicitly so ordering, the majority apparently imposed a requirement for "the adoption ... of adequate statewide standards for determining what is a legal vote, and practical procedures to implement them".[49]

The court's casual disregard of the exercise by the Florida legislature of its "exclusive and plenary" power is all the more evident in the concurring opinion of Rehnquist C.J., who said that "[T]he Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."[50] This view reflected one of the major submissions of the Bush legal team, which was that the Gore camp was seeking to amend the Florida election statutes and had persuaded the Florida Supreme Court to do so. In reality, however, the Florida court had merely implemented the Florida legislature's choice of a general and non-objective standard for vote recounts.

The only member of the U.S. Supreme Court who made even passing reference to this was Breyer J. when he said in his dissenting opinion:

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46 Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 34.

47 Bush v Gore, U.S. Sup. Ct. December 12, 2000, *per curiam* opinion at p. 11.

48 *Ibid*, at p. 13.

49 *Ibid*, at p. 11.

50 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 4-5.

> [T]he Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II.[51]

Even Breyer J., however, failed to articulate, consider or try to resolve the clear conflict between the exclusive and plenary power conferred by the federal constitution on the Florida legislature, and the concern regarding a contravention of the equal protection clause. Several indirect references to that conflict of constitutional imperatives were made during the course of oral argument,[52] but nothing came of that in the opinions subsequently rendered.

THE EQUAL PROTECTION ISSUE

The local canvassing boards charged with the responsibility of conducting manual recounts in Florida applied different substandards[53] in determining whether the statutory "intent of the voter" standard had been satisfied. Some boards decided that, as a general rule, a dimpled[54] chad was sufficient to demonstrate the voter's intent; others required, as a general rule, the ability to see light through the chad (i.e. penetration of the ballot); still others required that the chad be hanging from one or two corners. Some boards from time to time changed their policy regarding the general rule to be applied, and apparently on some boards different substandards were applied by different members or by different counting teams,[55] although the majority rule governed in regard to the determination made for each ballot.

This discriminatory conduct in the recounting process not unexpectedly led to expressions of serious concern regarding violation of the equal protection clause in the United States constitution. Counsel for Gore conceded, during oral argument, that if different objective standards were applied in different counties, "then you might have an equal protection problem."[56] One of the questions put to him was: "Why shouldn't there be one objective rule for

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51 *Ibid*, at p. 2.

52 Transcript of oral argument in Bush v Gore, at pp. 22, 23, 30 and 43-44, questioning the court's authority to amend the Florida legislation by creating an objective statewide standard. At p. 53, however, one judge said: "I think we would have a responsibility to tell the Florida courts what to do about [the differing applications of the general 'intent of the voter' standard]."

53 This was the term used by the justices of the U.S. Supreme Court during oral argument in Bush v Gore.

54 Or pregnant, indented or protruding.

55 As to all of the above, see Brief for petitioners in Bush v Gore, at pp. 10-11, 37-38 and 42; Bush v Gore, U.S. Sup. Ct. December 12, 2000, *per curiam* opinion at p. 8; Gore v Harris, Fla. Sup Ct. December 8, 2000, at p. 52; Transcript of oral argument in Bush v Gore, at pp. 74-75.

56 Transcript of oral argument in Bush v Gore, at p. 53.

all counties and if there isn't, why isn't it an equal protection violation?"[57] The position of counsel for Bush was that "[S]imilarly situated voters and similarly situated ballots ought to be evaluated by comparable [objective] standards."[58]

The *per curiam* opinion stated that equal weight should be accorded to each vote and equal dignity to each voter,[59] and that "[T]he State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[60] The opinion went on to say that the "intent of the voter" standard "is objectionable as an abstract proposition and a starting principle. The problem adheres in the absence of specific standards to ensure its equal application."[61] Even Stevens J., who, along with Ginsburg J., were the only members of the court prepared to affirm without qualification the Florida Supreme Court decision, was troubled by the equal protection issue.[62]

Accepting the validity of those concerns, other considerations must also be taken into account. Vote tabulation substandards differ not only among counties within a single State, but also among the several States. In assigning jurisdiction exclusively to the States, rather than to the federal government so that a uniform national standard could be created, the framers of the constitution apparently were not perturbed by the possibility, even likelihood, of differing standards being adopted across the nation. If the federal constitution contemplates that voters in different States can be differently treated, then why should the same circumstance within a single State be found unconstitutional? Furthermore, why is there no constitutional impediment to the use of different vote tabulating systems or equipment among different counties within the same State? As noted by Stevens J., dissenting, the error rate in vote tabulation by the punch-card system was 3.92%, while it was 1.43% under the optical-scan system.[63] Breyer J., dissenting on other grounds, then commented: "Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted."[64] Souter J., dissenting as well on other grounds, stated his view that different vote

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57 *Ibid*, at p. 51. Another (at p. 55) included the following: "It was clear that Broward and Palm Beach Counties had applied different criteria to dimpled ballots. One of them was counting all dimpled ballots, the other one plainly was not. ... That's just not rational."

58 *Ibid*, at p. 74.

59 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 6.

60 *Ibid*.

61 *Ibid*, at p. 7.

62 He said (at p. 4 of his opinion): "Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns."

63 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 4 n. 4. Refer also to Brief of respondent in Bush v Gore, at pp. 42 and 43, ns. 23 and 24.

64 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 4.

tabulation systems could be justified "by concerns about cost, the potential value of innovation, and so on."[65] He also said that the issue before the court involved "a different order of disparity",[66] without, however, explaining what that difference was.

Unequal treatment is built into the constitutional framework in another way as well. As indicated above, the McPherson decision confirmed the untrammelled power of state legislatures to select and appoint presidential electors, including the ability to delegate that task to the state Governor, the state Supreme Court, *or any other agent of its will*. In each such instance, the general citizenry would be left out in the cold, while a privileged person or group would be empowered to choose the presidential electors for that State.

A more significant concern was outlined by counsel for Gore and adopted by Stevens J., dissenting: The judicial imposition of "a fixed and mechanical standard (e.g. the 'two-corner chad rule') ... would mean that the Constitution requires the disenfranchisement of many voters whose intent is clearly discernable."[67] The basis for that statement is that it would be literally impossible to formulate fixed objective standards which would accommodate every possible way in which a voter might demonstrate his or her intent on a ballot rejected by the vote-counting machine because of voter or machine error. In a television interview, for example, reference was made to a machine-rejected ballot on which the voter had written something like "I want to vote for Gore."[68] Whether or not that actually happened is not important; the relevant point is that it *could* have happened, as might many other unforeseeable acts from which a voter's intent could be ascertained with reasonable certitude.[69]

As noted by Ginsburg J., dissenting: "Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world."[70] The *per curiam* opinion, on the other hand, made the comment: "The formulation of uniform rules to determine intent based on these recurring circumstances is practicable."[71] The incorrectness of that statement, except in so far as it relates only to specific "recurring circumstances", may be gathered from the

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65 *Ibid*, at p. 6.

66 *Ibid*.

67 Brief of respondent in Bush v Gore, at p. 36. Stevens J. said (at p. 5 of his opinion): "In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent."

68 A question from the bench during oral argument in the U.S. Supreme Court (at p. 64 of the transcript) postulated the same scenario in the context of overvotes.

69 As, for example, described in the evidence given by Judge Burton, summarized in the Transcript of oral argument in Bush v Gore, at pp. 57-58.

70 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 8.

71 *Ibid*, at p. 7.

inability of State legislatures to formulate fixed objective statutory standards while maintaining the policy goal of counting every vote where the intent of the voter is reasonably discernible. The best example of this may be found in the Texas statute[72] which, after listing a number of objective standards, sets out the following two catch-all provisions: "[T]he chad reflects by other means a clearly ascertainable intent of the voter to vote" and "Subsection (d)[73] does not supersede any clearly ascertainable intent of the voter."[74] The fact that those provisions plainly override the list of objective standards is both informative and significant.

The Florida legislature (like 33 other State legislatures)[75] has chosen to adopt the "intent of the voter" standard.[76] If that legislative choice is to be honoured - and here again the courts run up against the constitutional wall of exclusive and plenary power having been conferred on the State legislatures - then fixed objective standards are simply unworkable, as evidenced by legislation such as that enacted in Texas.

Having assumed that there was judicial authority to impose substandards, the majority in the U.S. Supreme Court made no determination regarding what fixed objective substandards should be imposed, saying only that the search for a voter's intent involves consideration of an inanimate object - a ballot - and not a person's mind or behaviour.[77] Counsel for Bush indicated that he did not know what an appropriate standard would be, saying "That is the job for a legislature."[78] He also said that, at a minimum, there would need to be penetration of the ballot,[79] and agreed with the suggestion made by a judge during oral argument that "[T]here is no wrong when a machine does not count those ballots that it's not supposed to count".[80] This suggestion -

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[72] Which is, of course, ironic, seeing that Mr. Bush, whose legal team argued strenuously that the equal protection clause demanded fixed objective standards, was Governor of Texas and signed that bill into law.

[73] In which the fixed objective standards are listed.

[74] Brief of respondent in Bush v Gore, at p. 46.

[75] Transcript of oral argument in Bush v Gore, at p. 29. Stevens J., dissenting, listed the States which employ either the "intent of the voter" standard, or the standard of counting a vote unless it is "impossible to determine the elector's [or voter's] choice": Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 3 n. 2.

[76] Counsel for Gore noted that this standard has been the rule, not the exception, throughout the U.S. for most of its history: Brief of respondent in Bush v Gore, at pp. 44-45.

[77] Bush v Gore, U.S. Sup. Ct. December 12, 2000, *per curiam* opinion at p. 7; Transcript of oral argument, at p. 50.

[78] Transcript of oral argument in Bush v Gore, at p. 21.

[79] *Ibid*, at pp. 18 and 21. Had the Florida legislature chosen to adopt a minimum standard of that nature, the legislation would have so provided. By what authority can a court impose a minimum standard which the legislature has, in effect, rejected? The contrast between the position of counsel for Bush on this matter, and his statement cited at n. 78 *supra*, is stark.

[80] *Ibid*, at p. 24.

i.e. that the correct and appropriate standard is whether the voter followed the printed instructions - was the position advanced by counsel for the Florida Secretary of State.[81] That view was adopted in the concurring opinion of Rehnquist C.J.,[82] and was also the view expressed by one of the judges during oral argument:

> Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?[83]

There is, unfortunately, one major flaw in that approach: it nullifies the statutory policy of counting votes where the intent of the voter can be ascertained. It is another example of the substitution by the judicial branch of its view for that of the legislature. It is, in other words, both another example of judicial amendment of legislation and a violation of Article II, s. 1 of the federal constitution.

Effectiveness and Reliability of the "Intent of the Voter" Standard

It was the position of the Bush legal team that the "intent of the voter" standard was no standard at all. Their written argument referred to the "so-called standard",[84] "that infinitely elastic phrase",[85] and "standardless recounts".[86] In his dissenting opinion in the Florida Supreme Court, Wells C.J. agreed, saying that the legislation "utterly fails to provide any meaningful standard"[87] and that "[M]any times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder."[88] General and non-objective standards are, however, ubiquitous in the law.[89] Reference need only be made to the standard of reasonableness that is central to the law of torts and to parts of the criminal law. Some goals do not lend themselves to testing by objective standards; flexibility can be a necessary and laudable

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81 *Ibid*, at pp. 28-32; Opinions of Breyer and Souter, JJ., both dissenting in Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 7 and 4 respectively.

82 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 8-9.

83 Transcript of oral argument in Bush v Gore, at p. 58.

84 Brief for petitioners in Bush v Gore, at p. 42.

85 *Ibid*, at p. 43.

86 *Ibid*, at p. 44.

87 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 51.

88 *Ibid*, at p. 57.

89 Refer to comments by Stevens J., dissenting, in Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 4, regarding the "beyond a reasonable doubt" standard, and the remarks by counsel for Gore regarding non-objective standards in ascertaining intent in other areas of the law, in Brief of respondent in Bush v Gore, at p. 43 n. 25.

attribute. It is not without good reason that broad and general language is used, for example, in the Bill of Rights. The use of bright line rules would diminish rather than promote and enhance the underlying policy.

Counsel for Gore made the argument that any inconsistency in the application of the statutory general standard could be corrected on appeal to the courts, which would "eliminate any inconsistency by determining itself which ballots meet the statutory standard."[90] Stevens J., dissenting, agreed with that position.[91] Here too, however, lies what appears to be an insurmountable difficulty: were a court on appeal, faced with differing decisions by different local canvassing boards, to choose one over any other, that would constitute the imposition by the court of a substandard, thwarting the will of the legislature to leave such decisions to the discretion of the local canvassing boards. This would be the same kind of jurisdictional error that was ultimately committed by the U.S. Supreme Court. The correct approach would be to allow an appeal not on the basis of any judicially imposed substandard, but rather on the test of whether the decision by the local board was tainted by bad faith or could not be supported on any reasonable ground.[92] While that would not eliminate inconsistency, the bottom line is that the legislature, in adopting a general and non-objective standard, must be taken to have chosen to accept the real and substantial likelihood of inconsistency as the price of accomplishing the goal of ensuring, as best could be done, the counting of all votes where the intent of the voter could be ascertained.

Counsel for Bush argued that there was no basis for believing that the necessarily *ad hoc*

process arising from the use of the general "intent of the voter" standard would produce a result more reliable than that produced by the certified election results that were based on machine recounts.[93] Given, however, that the Florida legislature chose to adopt that standard for manual recounts, the onus rested with Bush to show that it "would yield a result ... less fair or precise than the certification".[94] Furthermore, "[A]t least 21 other states have enacted statutes allowing or even - as in Texas - encouraging the use of manual recounts to back up punch-card tabulation systems." and "[T]he uncontradicted evidence by both respondents' and petitioners' witnesses at trial was that a manual count of punch-card ballots was necessary in close elections."[95]

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90 Brief of respondent in Bush v Gore, at pp. 36-37; Transcript of oral argument in Bush v Gore, at p. 54.

91 Bush v Gore, U.S. Sup Ct. December 12, 2000, at p. 4.

92 This was essentially the test formulated in a question put by one of the justices to counsel for Gore: Transcript of oral argument in Bush v Gore, at p. 49.

93 Brief for petitioners in Bush v Gore, at p. 28.

94 Bush v Gore, U.S. Sup. Ct. December 12, 2000, Ginsburg J., dissenting, at p. 9.

95 Brief of respondent in Bush v Gore, at p. 39 ns. 19 and 20 respectively.

In his concurring opinion, Rehnquist C.J. said that the order for a manual recount "was done in a search for elusive - perhaps delusive - certainty as to the exact count of 6 million votes."[96] This was ironic criticism when taken together with his view that, presumably in the same search for elusive certainty (his being a search for certainty as to equality of treatment),[97] there was a need for fixed objective substandards. It is not, in any event, a case of seeking certainty, but rather an attempt to ensure, to the greatest extent possible, that every "real" vote is counted and that "the will of the people has been effected".[98]

The most eloquent response to the suggestion that a manual recount would provide no additional reliability was made in the majority decision in the Florida Supreme Court:

> Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavours, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots.[99]

THE SUGGESTED CONCERN REGARDING PARTIALITY AND FRAUD

Counsel for Bush argued that, with a subjective standard, "[T]here is a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result."[100] At the same time, however, the Bush camp had no qualms arguing that absentee ballots, which provided a net gain for Bush, should be counted despite irregularities that "offered an opportunity for fraud and created the appearance of partisan favouritism".[101] As indicated in the decision in that case, the presence of an opportunity for fraud is not sufficient; there must be proof that fraud has been committed.[102] Were the Bush position accepted, manual recounts would always be precluded, and the same

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96 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 11.

97 Suppose the fixed objective standard were penetration of the ballot - how much penetration would qualify? Would a pinprick be sufficient? What if the standard were detachment of two corners of the chad - how much detachment would there need to be? Furthermore, can citizens truly be said to have been equally treated when the vote of one of them is not counted merely because he or she neglected to follow instructions or failed to do so because of age or infirmity?

98 Taken from the quote at n. 23 above.

99 Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at pp. 14-15.

100 Brief for petitioners in Bush v Gore, at p. 48.

101 Taylor v Martin County Canvassing Board, Fla. Cir. Ct. December 8, 2000, at p. 4.

102 *Ibid*, at p. 9.

argument[103] could be made as regards any legal proceeding in which subjective determinations are made, including trials and appeals. The manual recounts were "conducted in full public view by counting teams made up of representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary."[104] Furthermore, as stated by Stevens J., dissenting:

> If we assume—as I do - that the members of [the Florida Supreme Court] and the judges who would have carried out its mandate are impartial, its decision does not even raise a colourable federal question.
>
> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit.[105]

TIME CONSIDERATIONS

In the late nineteenth century, federal legislation was enacted to reduce the likelihood of congressional dispute regarding the validity of State-appointed presidential electors, as occurred in the election of 1876.[106] Now cited as 3 U.S.C. s. 5, a notional "safe harbour" was created whereby Congress would be precluded from contesting a State-appointed slate of electors, provided that the slate had been selected under laws enacted prior to the election and any controversy or contest concerning the appointment of all or any of the electors had been finally resolved, by judicial or other means, at least six days prior to the date fixed for the meeting of presidential electors. Here, the latter date was December 18, 2000, so that the relevant date for the purposes of 3 U.S.C. s. 5 - the "safe harbour" date - was December 12, 2000.

Wells C.J. said that failure to resolve the selection of Florida's slate of presidential electors by December 12 "creat[ed] the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day."[107] That statement was based on two faulty assumptions. First, that there was a real likelihood that Congress would ultimately refuse to recognize a slate of presidential electors selected and appointed after every effort had been made to conduct a full, fair and accurate count in accordance with the Florida

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103 Which, in Canada, might be described as an *in terrorem* argument.

104 Brief of respondent in Bush v Gore, at pp. 10-11.

105 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 7.

106 See generally Brief of respondent in Bush v Gore, at pp. 29-31.

107 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 56.

legislature's policy that all votes be counted where the intent of the voter could be ascertained.[108] Secondly, that only those voters whose votes could be machine-counted had "correctly" (in the sense of validly) cast their ballots.

The majority decision in the Florida Supreme Court did not resort to such baseless speculation. They said: "We consider [the Florida election] statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. s. 5",[109] and "In [an earlier decision] we held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election."[110] While saying that the legislature must have been "cognizant" of the "safe harbour" date, the court gave no indication that a recount which extended beyond that date would endanger the counting of Florida's presidential electors.

In the U.S. Supreme Court, the view of Wells C.J. was effectively adopted, although that was accomplished through a disingenuous and incorrect interpretation of the majority decision in the Florida Supreme Court. The *per curiam* opinion contains the following statements:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. s. 5. . . . That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the state Supreme Court's order that comports with minimal constitutional standards.
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> . . .
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> Because the Florida Supreme Court has said that the Florida legislature intended to obtain the safe harbour benefits of 3 U.S.C. s. 5, Justice Breyer's proposed remedy - remanding to the Florida Supreme Court for its ordering of a

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[108] It is inconceivable, even were Congress not to accept the outcome of that legislatively expressed policy, that they would refuse to recognize one or the other of two competing slates of Florida's presidential electors.

[109] Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 5.

[110] *Ibid*, at p. 35. Subsequently, in Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, the majority said (at pp. 33-34): "Hence, based upon our perception of legislative intent, we have ruled that all election returns must be accepted for filing *unless it can clearly be determined* that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential selection. This statutory construction reflects our view that the legislature would not wish to endanger Florida's vote not being counted in a presidential election. This ruling is not only consistent with our prior interpretation of the entire statutory election scheme, but also with our identification of *the important legislative policies underlying that scheme."* (emphasis added)

> constitutionally proper contest until December 18 - contemplates action in violation of the Florida election code...[111]

In his concurring opinion, Rehnquist C.J. referred to the Florida legislative "desire",[112] "wish"[113] and "intent"[114] to take advantage of the safe harbour provided by 3 U.S.C. s. 5. He said:

> Surely when the Florida legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cut-off date of 3 U.S.C. s. 5.[115]

The views expressed in the *per curiam* opinion and in the concurring opinion of Rehnquist C.J. impliedly held that the Florida legislature's desire to come within the safe harbour created by the federal legislation was the all-important consideration, overriding other legislative policy, including the counting of every vote where the intent of the voter is ascertainable and the concomitant desire to achieve, to the extent possible, a full, fair and accurate vote count. The *per curiam* and Rehnquist C.J. opinions did not even make an attempt to determine which of those policies should prevail.

The dissenting opinions in the U.S. Supreme Court correctly rejected the importance assigned by the majority to this issue. Souter J. said it was "not [a] serious" issue.[116] He said:

> [N]o State is required to conform to s. 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of s. 5 is simply loss of what has been called its "safe harbour". And even that determination is to be made, if made anywhere, in the Congress.[117]

Stevens J. said that the federal legislation

> . . . do[es] not prohibit a State from counting what the majority concedes to be legal votes until a *bona fide* winner is determined. Indeed, in 1960, Hawaii

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111 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 12.

112 *Ibid*, at p. 3.

113 *Ibid*, at p. 10.

114 *Ibid*, at p. 12.

115 *Ibid*, at p. 11.

116 *Ibid*, at p. 2.

117 *Ibid*.

> appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines.[118]

Breyer J. said:

> The [Rehnquist C.J.] concurrence's logic turns the presumption that legislatures would wish to take advantage of s. 5's "safe harbour" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.[119] (original emphasis)

Apart from everything else, the assignment of priority to the "safe harbour" date creates an incentive for the candidate who is ahead in the initial vote count to delay proceedings until there is no longer any time left to conduct a recount.[120]

The Florida election code contains no timetable or deadline for the contestation of an election result,[121] but rather provides to the court wide-ranging authority "to ensure that each allegation in the complaint is investigated, examined or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."[122] At a minimum, the recount should have been permitted to proceed, even if that were to be done pursuant to judicially-mandated objective substandards and even if December 18 were taken as a deadline.[123]

THE "INTENT OF THE VOTER" STANDARD

One of the arguments made by the Bush legal team was that the "intent of the voter" standard was found in the part of the Florida election legislation that dealt with spoiled or damaged ballots, and applied only to such ballots. The term "legal vote" was not defined in the statute that governed contested elections and it was their contention that, in the absence of any

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118 *Ibid*, at pp. 5-6. Ginsburg J., dissenting, made similar comments at pp. 9-10 of her opinion.

119 *Ibid*, at pp. 5-6.

120 An op ed article by Todd Gitlin, a professor at New York University, in the Toronto Globe and Mail on December 15, 2000 included the following comment: "Five justices [of the U.S. Supreme Court] declared that time had run out for democratic procedure - after the Bush team did everything they could to run out the clock, appealing to the federal courts, stopping the vote [recount] every time they could, blasting Mr. Gore for availing himself of legal rights to protest and contest the results, whereupon the justices were shocked, shocked to discover that there was no time to count all the votes."

121 Transcript of oral argument in Bush v Gore, at p. 14.

122 Fla. Stat. s. 102.168(8).

123 See the pointed comments in Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 38 n. 21; Bush v Gore, U.S. Sup. Ct. December 12, 2000, dissenting opinions of Breyer, Ginsburg and Souter JJ. at pp. 2-3, 9 and 7-8 respectively.

legislative standard governing ballots other than those that were spoiled or damaged, a "legal vote", in so far as unspoiled and undamaged ballots were concerned, could only be one that was machine-counted. Counsel for the Florida Secretary of State went so far as to say that even a ballot rejected solely because of machine malfunction could not be counted on the basis of the "intent of the voter" standard,[124] and that the court had no jurisdiction to interpret what the statute meant by the term "legal vote"[125] because the statute containing the intent standard was not designed to handle voter error.[126]

Wells C.J., dissenting, apparently agreed with the Bush position,[127] as, apparently, did Rehnquist C.J., although the majority of the court, as reflected in the *per curiam* opinion, apparently did not.[128] The majority decision in the Florida Supreme Court applied an accepted principle of law[129] in sensibly arriving at the decision that all ballots not counted by the machines, whether spoiled, damaged, or otherwise, were subject to the "intent of the voter" standard for the purpose of determining whether they were "legal votes" in the recount.

There are additional bases for that view. One is the principle referred to by counsel for Bush during oral argument: "[O]ne has to read [the "intent of the voter" provision] in the context of the entire statutory framework."[130] Secondly, among the grounds set out in the statute for contesting an election was "any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly ... elected".[131] Thirdly, to borrow a question put in a well-known decision originating in Canada: To those who ask why the term

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124 Transcript of oral argument in Bush v Gore, at p. 33.

125 *Ibid*, at p. 35.

126 *Ibid*, at p. 36.

127 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 51.

128 Rehnquist C.J.'s concurring opinion in Bush v Gore, U.S. Sup. Ct. December 12, 2000, did not expressly deal with the issue, but he said (at p. 8): "[T]he [Florida Supreme] Court's interpretation of 'legal vote' ... plainly departed from the legislative scheme." The *per curiam* opinion also did not expressly deal with the issue, but its focus on the absence of objective substandards suggests that the majority agreed with the view of the majority decision in the Florida Supreme Court. This appears to be confirmed by the statement of Stevens J., dissenting, (at p. 5): "As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes."

129 That a legislative policy not be frustrated; here specifically the policy that the right to vote and to have that vote counted, not be frustrated. Reference was made to the fact that prior decisions of the court had repeatedly held that so long as the voter's intent could be discerned from the ballot, it constituted a "legal vote" that should be counted. *Ibid*, at pp. 19, 23-25 and 40.

130 Transcript of oral argument in Bush v Gore, at p. 13.

131 Fla. Stat. s. 102.168(3)(e).

"legal vote" should include ballots on which the intent of the voter can be ascertained, the obvious answer is, why should they not?[132]

OTHER ISSUES RAISED

A number of other issues were raised by the Bush team, many of which deserve the description "insubstantial". Among those were the following.

It was argued that the Florida contest statute did not extend to presidential elections.[133] The response of the majority in the Florida Supreme Court was that the legislature had chosen to adopt a single election code to control all elections, including presidential elections.[134] Here again Wells C.J., dissenting, was prepared to give credence to the Bush position.[135] The issue[136] was not referred to by the U.S. Supreme Court.

It was also argued that the Florida Secretary of State had been statutorily empowered to "obtain and maintain uniformity in the application, operation and interpretation of the election laws",[137] so that her opinions on issues such as the standards and substandards to be applied in determining what constituted a "legal vote" were binding on the local canvassing boards and on the courts, and in particular her authority to maintain uniformity precluded any ability by local canvassing boards to interpret the "intent of the voter" standard in differing ways.[138] That position was accepted in the concurring opinion of Rehnquist C.J.[139] During oral argument, counsel for Bush was asked what substandard the Secretary of State had set pursuant to this authority. He responded that she had not set one.[140] Breyer J., dissenting, said that "[N]othing in

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132 Edwards v Attorney-General for Canada [1930] A.C. 124, at p. 138. The question there was whether the word "person" as found in a statute should be interpreted to include females.

133 Brief for petitioners in Bush v Gore, at p. 21 n. 9. However, in Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 6 n. 7, that was said to be "a substantial and dramatic change of position [by the Bush legal team]", and in Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 27 n. 20, it was noted that the parties had conceded that the contest provisions apply to presidential elections.

134 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 18 n. 11; Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at pp. 32 and 33.

135 Saying (at p. 59 in Gore v Harris): "[T]here is uncertainty as to whether the Florida legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections."

136 This is an issue closely related to the jurisdictional issue discussed above under the heading Judicial Involvement In The Electoral Process.

137 Fla. Stat. s. 97.012(1).

138 Brief for petitioners in Bush v Gore, at pp. 20-21 and 25-26.

139 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 5-6.

140 Transcript of oral argument in Bush v Gore, at p. 19.

Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter."[141] Another way of putting it is to say that the Secretary of State's authority was administrative in nature. She was given the power to ensure compliance with the statute, but was not given the power to amend the statute, which is effectively what the setting of fixed objective substandards, in place of the statutory general and non-objective standard, would have amounted to.

In another variation of the view that the courts should not get involved in the election process, Wells C.J., dissenting, said that in the absence of any finding of dishonesty, gross negligence, improper influence, coercion or fraud, the Florida contest statute could not be invoked "because of the chill that a hovering judicial involvement can put on elections."[142] In a similar vein, Rehnquist C.J. commented that "No one claims there was any fraud in the election."[143] Souter J., dissenting, defended the majority decision in the Florida Supreme Court, saying that their "reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined."[144] Nowhere in the statute, in any event, was it made a condition that any of those types of misconduct be shown before a recount could take place.

Another issue involved the question whether the Florida statute authorized a manual recount only for the purpose of counting votes rejected because of machine error, as opposed to voter error.[145] In his concurring opinion, Rehnquist C.J. said:

> No reasonable person would call it an "error in the vote tabulation" ... or a "rejection of legal votes" . . . when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.[146]

The *per curiam* opinion, however, commented that "This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a

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141 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 8.

142 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at pp. 43-44.

143 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 11.

144 *Ibid*, at p. 4.

145 Brief for petitioners in Bush v Gore, at p. 37 n. 17.

146 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 9. Saying, in other words, that the correct standard is whether the voter followed the printed instructions, an issue considered earlier in this article.

clean, complete way by the voter."[147] The majority decision in the Florida Supreme Court contained the following remarks:

> The plain language of s. 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots.[148]

They went on to refer, in support of that position, to the express legislative policy to count all votes where the intent of the voter is ascertainable.[149] The comment might also be made that Rehnquist C.J. was employing circular reasoning in saying that the failure by a machine to count votes that are not marked in accordance with instructions cannot be said to be a "rejection of legal votes". In making the assumption that a ballot marked otherwise than in accordance with instructions is not a "legal vote", he guaranteed the conclusion at which he wished to arrive.[150]

Another submission made was that any recount would need to include all ballots, and not merely those that were contested.[151] The statutory provision relied upon, however, related to the initial protest phase, and not to the subsequent phase in which the certified election result was being contested.[152] As stated in the majority decision in the Florida Supreme Court:

> Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under s. 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under s. 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected.[153]

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147 *Ibid*, at p. 5.

148 Palm Beach County Canvassing Board v Harris, Fla. Sup. Ct. December 11, 2000, at p. 13.

149 *Ibid*, at p. 14.

150 "Circular reasoning is [a] logical fallacy, and a mere conclusion is not a reason.": Alberta Provincial Judges' Assn. v Alberta [1999] A.J. No. 863, C.A. at para. 66.

151 Brief for petitioners in Bush v Gore, at pp. 17, 25 and 27.

152 Fla. Stat. s. 102.166.

153 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 16.

To that might be added reference to the very broad power given by the statute to the court to correct any wrong in the election process, referred to by one justice as "about as broad a grant to fashion orders as I can imagine going into a statute."[154]

A related argument was that any recount should include "overvotes" as well as "undervotes".[155] Wells C.J., dissenting, made the following comment:

> It seems patently erroneous to me to assume that the vote-counting machines can err when reading undervotes but not err when reading overvotes. Can the majority say, without having the overvotes looked at, that there are no legal votes among the overvotes?[156]

The *per curiam* opinion in the U.S. Supreme Court indicated that this issue had not been addressed despite attention having been called to it by Wells C.J.,[157] and expanded the area of concern by stating: "Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot."[158] The primary response by counsel for Gore during oral argument was that "[N]obody asked for a contest of the overvotes".[159] This reflected the complaint-driven nature of the statutory contest scheme. Breyer and Souter JJ., both dissenting, pointed to the fact that the Bush team had presented no evidence that a manual recount of overvotes would have identified additional legal votes.[160] This is relevant because, in addition to being complaint-driven, the Florida contest statute requires evidence of the rejection of a number of legal votes sufficient to change or place in doubt the result of the election.[161]

CONCLUSION

Unlike the other arguments advanced by the Bush legal team,[162] the equal protection issue was a matter of genuine concern. When considered in isolation, the discrepancy of

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154 Transcript of oral argument in Bush v Gore, at p. 13. A similar comment was made at p. 23.

155 An "overvote" is a ballot rejected because it shows votes for more than one candidate: Bush v Gore, U.S. Sup. Ct. December 12, 2000, Souter J., dissenting, at p. 7. An "undervote" is a ballot for which no vote is registered by the counting machine: Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 29.

156 Gore v Harris, Fla. Sup. Ct. December 8, 2000, at p. 46 n. 26.

157 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at p. 11.

158 *Ibid*, at p. 9.

159 Transcript of oral argument in Bush v Gore, at p. 62.

160 Bush v Gore, U.S. Sup. Ct. December 12, 2000, at pp. 1 and 7 respectively.

161 Fla. Stat. s. 102.168(3)(c).

162 Given the stakes, it is not surprising that arguments that were flimsy at best were thrown into the pot.

treatment of similarly marked (or unmarked) ballots from one county to another clearly constituted a contravention of that important constitutional safeguard; but no legal issue is ever considered in isolation. The same discrepancy of treatment either occurs, or *can* occur, from one State to another. Furthermore, the use of different vote-counting systems guarantees a higher chance that a citizen's vote will not be counted in one area as compared to another. The fact that a State legislature has the authority to delegate to any particular person or group the right to select and appoint the presidential electors for that State is another example of actual or potential discriminatory treatment which would not be prohibited by the equal protection clause. Finally, and most significantly, any attempt to lay down uniform fixed objective substandards would be incompatible with the policy of seeking to ensure the counting of every vote where the intent of the voter is reasonably ascertainable. Choosing between competing policies or values, or, stated differently, choosing between the lesser of two evils, is a normal legislative task. The choice made by the Florida legislature was, in our view, entirely justifiable on the merits alone.

There is an additional factor for consideration, that being the exclusive and plenary power conferred on State legislatures by the federal constitution to determine the manner for selecting and appointing the presidential electors for that State. The Florida legislature opted to exercise that power in a certain way, a way which might otherwise be said to be invalid as a violation of the equal protection clause. Which of the two constitutional provisions should prevail is a question that deserves close consideration. When combined with the factors that might well be[163] sufficient in themselves to avoid the sanction of the equal protection clause, the grant of exclusive and plenary power to the legislatures of the States should be seen to be conclusive, on the theory that the framers of the constitution left it to those legislatures to balance such competing values as the desire to count every vote and the wish to treat every person equally. The U.S. Supreme Court, however, failed entirely to consider this aspect of the matter, instead acting as if it and the lower courts had the unquestioned authority to effectively amend State legislation by imposing fixed objective substandards in place of the statutory general and non-objective standard.

Hopefully, the introduction of better and more accurate vote-counting systems will avoid this type of problem in the future. The decision to stop the vote recount on this occasion was based on faulty reasoning and had the unfortunate effect of leaving the nation with a "perhaps President". History, in our view, will judge that decision unfavourably.

Hillel David*

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163 And, in our view, are.

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