

David Versus Goliath: A Law School Debate About *Bush v. Gore**

HONORABLE H. LEE SAROKIN, MODERATOR**

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For the first time in America's history, the Supreme Court has, in effect, selected the President of the United States. The case was analogous to a claim that a jury verdict was tainted. The Court, in this instance, knew who would win if the verdict was permitted to stand, and who was likely to win if the jury was permitted to continue its deliberations. It was this knowledge that made the decision so sensitive and challenged the integrity and the role of the Court so profoundly.

The Court, as you all know, determined to permit the verdict to stand, despite the claims of taint. The panel will discuss the merits. What I thought I would do in this very brief introduction was demonstrate how difficult it is to predict what the Supreme Court will do in any given case.

Many in the legal community predicted that the Supreme Court would not take jurisdiction in this matter, a matter that was so clearly delegated to the state and to the state supreme court. It took jurisdiction.

Many predicted that the Supreme Court would not enjoin the manual recount. If George Bush continued in his lead, the matter would become moot. It was inconceivable to many that continuing the count could constitute irreparable injury, which would be required for injunctive relief. Nonetheless, the Court granted the injunction.

* The debate entitled "Crossfire: The Supreme Court Decision in *Bush v. Gore*: Principled or Partisan?" was held at the University of San Diego School of Law on February 21, 2001.

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Many predicted that the Supreme Court would defer to the state supreme court, consistent with the Supreme Court's precedents, and with its view that the supremacy of state's rights was paramount in such matters. They did not defer.

Many predicted that the Court must and would render a unanimous decision to maintain the dignity and integrity of the Court and, as you all know, the decision was a sharply divided one.

Many scoffed at the equal protection arguments, suggesting that requiring uniformity in tabulating votes would render every election invalid. They argued that no election, past or present, could possibly pass the scrutiny that the Supreme Court had enunciated in this case. The Court based its decision on equal protection grounds.

Many predicted that the Court would not rely upon time constraints in reaching its decision, since to a large degree the delay had been caused by its own injunction. But it did so in any event.

The decision of the Court has been widely criticized, and in the words of the dissent, the decision risks a self-inflicted wound, a wound that may not harm just the Court, but the nation. Justice Stevens stated in his opinion: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."¹

As recently as yesterday, the Supreme Court decision was reviewed extensively in the *New York Times*, and the article pointed out the efforts of the Court, even those of the dissent, to convince the public that politics played absolutely no role in this decision and that the decision was made upon principle and merits.²

It is for this reason that we decided to have this forum. Our own distinguished Professor Michael Ramsey believes strongly in the correctness of the decision, and has already written on the subject.³ So respected is he by his colleagues that we could not get a single professor to come in here and argue the opposite side. Two of your classmates, two brave souls, stepped forward to take on this Goliath, this expert in the field: Erin Alexander and Brian Fogarty. Professor Ramsey decided to enlist Joshua Jessen to participate with him.

We will hear first from those who are in favor of the decision, Joshua Jessen and Professor Ramsey. Erin Alexander and Brian Fogarty will then speak in opposition.

1. *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

2. Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

3. Michael D. Ramsey, *Blame Gore's Lawyers for His Defeat*, SAN DIEGO UNION-TRIB., Dec. 15, 2000, at B9.

I. ARGUMENTS IN FAVOR OF THE DECISION

PROFESSOR MICHAEL RAMSEY:⁴

It is actually not my intent here to talk about legal doctrine. The focus of my remarks here will be on the legal strategy and perhaps the reasonableness, shall we say, of the decision. The proposition I want to advance is that Al Gore's lawyers chose an ultimately self-defeating legal strategy. They overreached in search of a tactical advantage, which ultimately left them in the U.S. Supreme Court arguing the less reasonable position.

It is my observation that the Supreme Court, like courts in general, tends to find a way to let the most reasonable party win. And in *Bush v. Gore*,⁵ Bush had the more reasonable position, not necessarily because Bush was right on the law, but because Gore's tactical overreaching put him in a bad strategic position.

Now let me explain what I mean by all of this. First, I will address the Gore tactical overreach. Gore obviously needed a hand recount to overturn the machine count that favored Bush. The question was what kind of a hand recount he would seek.

Gore's lawyers chose to pursue a selective recount—that is, a recount only for heavily Democratic counties. This was their tactic for the simple reason that a hand recount tends to increase the total number of votes that are counted. Now, we assume, or at least I assume, that Democratic and Republican voters err in casting their votes at roughly the same rate. So a hand recount will generally enhance the votes of each candidate roughly in proportion to the total number of votes that they received. This is why hand recounts rarely overturn the results of the machine count.

But if you count only in Democratic areas, you would expect net Democratic gains. Because there are more Democratic votes counted total, there are going to be more Democratic mistakes in those particular areas. This is not because Democrats are making more mistakes, but because there are just more Democrats in those counties. So selective

4. Professor of Law, University of San Diego School of Law. Professor Ramsey served as a judicial clerk to Associate Justice Antonin Scalia from 1990 to 1991.

5. 531 U.S. 98.

recounts seemed like a smart move by Gore. With a selective recount, he seemed headed for a win. Indeed, that is what seemed to be happening in the counties as they counted.

The problem is that a selective recount is very hard to justify as a matter of reasonableness. It may be justifiable as a matter of law, because there are some technical legal justifications for what Gore was asking for. But even if it is legal, it is unreasonable to do a selective recount because, when you think about it, it plainly conveys the tactical advantage to which I just referred. Moreover, there is really no decent argument for why, in a statewide election, you should only recount the heavily Democratic counties.

Gore's strategists tried to make some arguments to deal with this problem. They pointed, for example, to the confusing ballot in Palm Beach County. At one point that was said to be the reason for the recount, but actually it turned out that it was not the real reason because Gore wanted recounts in other counties that did not have confusing ballots as long as they were Democratic.

What Gore was looking for was an enhanced Democratic vote by recounting only the Democratic areas. And in the end, the Florida Supreme Court, which in popular lore is the unjustifiably pro-Gore court, could not accept the idea of a selective recount, held it illegal, and directed a statewide recount.⁶ The problem was, they did this very late in the process, and did it without, in my judgment, thinking it through completely. In particular, they did not specify any sort of standards to be used, and ultimately it was on the point of standards that the U.S. Supreme Court overturned the Florida Supreme Court.⁷ But I want to make it clear that the two courts agreed that Gore's five-week strategy of pursuing the selective recount was something that could not stand.

The question was where to go from there. This is where I think Gore's attempt to gain a tactical advantage ultimately backfired on him. At that point—that is, at the time the U.S. Supreme Court was deciding what to do—it was five weeks into the process and only a few days before the meeting of the Electoral College. It seemed pretty clear that continuing the process would lead to a constitutional nightmare.

First of all, the recount would take time. Second of all, the Republican-controlled Florida legislature was set to confirm a slate of Florida electors voting for the Bush-Cheney ticket. Florida's governor was going to go along with that. If any recount held after that point showed Gore the winner, the Florida Supreme Court might order a new set of electors. But it was not clear whether the governor and the

6. *Gore v. Harris*, 772 So. 2d 1243, 1261–62 (Fla. 2000).

7. *Bush*, 531 U.S. at 106, 109.

legislature would go along with the court.

Moreover, given the tone of the dispute at this point, it is pretty clear that the recount would have been challenged in court again by whomever lost. So it seemed very unlikely that the process could ever be completed. Not only would it not be completed by the time the electoral college met, it did not look like it would be completed even by the time Congress met in January of the following year. And, moreover, Congress itself, which would probably end up deciding this question, was divided. At that point there would have been a Republican House and a Democratic Senate, based on the tie-breaking vote in the Senate being cast by the Vice President, Al Gore.

On the whole, things did not look good. It seemed likely that this matter would be coming back to the Supreme Court a number of times, and we would be in for a very protracted and difficult process. I think it was reasonable for the Supreme Court to say: “Well, we ought to consider just shutting this whole process down.” At that point the Court is going to look and say: “Who is responsible for this mess?” And the answer is Al Gore.

Why? Because he and his lawyers had spent the previous five weeks pursuing the selective recount, which was of course designed to give him a tactical advantage, but without any reasonable justification, other than it would cause him to win. And, of course, every court that considered the matter decided that this selective recount was illegal under both Florida and U.S. law.

Having wasted five weeks in an attempt to bend the rules in his favor, Gore was in a pretty unsympathetic position. He was in something like the position of somebody who, having attempted to cheat and having been caught, then says: “Well, okay, let us do it over and we will do it right this time.” Whatever you think of Al Gore, and I do not mean to be overly critical of Gore (it is simply a question of the tactics he selected), the tactics made him look bad. And for that reason the Supreme Court did not lose a lot of sleep over saying: “We’re going to shut this process down at Gore’s expense.”

In my view, this was not a foreordained result—that the Supreme Court would come out this way. If Gore’s lawyers had asked for a statewide recount with uniform standards from the beginning, they, and not Bush, would have had the more reasonable argument. The Gore side would not have appeared to be unfairly pursuing a tactical advantage, and they would not have wasted five weeks going after something that

ultimately the courts could not uphold.

If the *Bush v. Gore* case had arisen, let us say, three or four weeks earlier, in the context of a Gore request for a statewide recount with uniform standards, and Bush claimed that this manifestly reasonable request by Gore was somehow illegal as a technical matter based on a close reading of Article II of the Constitution and some federal statutes, I think we would have seen a completely different result. Therefore, I am inclined to conclude that this decision was as much driven by legal strategy of the parties as anything else.

Of course, Gore might have lost the statewide recount based on uniform standards, and that is why he did not pursue it initially. But he at least would have had a chance, had he reached that result with the Supreme Court. So, my lesson in legal strategy here is that by trying for a certain win, Gore's lawyers ultimately assured their defeat. In sum, I say to lawyers: "Do not overreach, because the legal system will find a way to punish overreachers."

I am not sure in the context of this discussion whether that means I think that the *Bush v. Gore* decision was "principled" or "partisan." But what I do think about it is that it was driven by which side appeared the most sympathetic—which side appeared to be the most reasonable. And I think that Gore and his legal team backed themselves into a corner, in which they ultimately appeared in front of the Supreme Court to be less reasonable in asking for an indefinite extension of a confusing and messy process, well beyond the deadlines that seemed to matter, because they spent the previous five weeks trying to get an unfair and unjustifiable tactical advantage.

I leave it to my colleague to talk a little more about the legal justification of the case. But let me say in conclusion that, when the Court finds one side reasonable and one side unreasonable as a practical matter, and each side has technical arguments which seem legally justified, the Court is likely to come out on the reasonable side.

JOSHUA JESSEN:⁸

There is no question that the Gore strategy was to manipulate the process, and ultimately that strategy played a role in his downfall. My assignment, however, is to present a legal defense of the Court's decision. Toward that end, I will attempt to explain the per curiam opinion, and to a lesser extent Chief Justice Rehnquist's concurring opinion.

8. J.D. Candidate 2002, University of San Diego School of Law; B.A. 1996, University of Pennsylvania.

The first thing I would like to note is that there were seven Justices in this case who found equal protection difficulties with the recount ordered by the Florida Supreme Court, and that is the ground on which the Court ultimately reversed the Florida Supreme Court. It is not, of course, the case that seven Justices voted to reverse, but it is important to bear in mind that, in addition to the majority, Justices Souter and Breyer found equal protection problems.⁹ Their disagreement was with respect to the remedy.¹⁰

The Court in its *per curiam* opinion stated that (probably unbeknownst to most citizens) individual voters do not have a constitutional right to elect the President. That right, rather, is constitutionally delegated to state legislatures. It is only through a state legislature's provision for an election that we as voters are able to vote for electors for the President.

However, the Court noted that once this right to vote is given to the individual voter, it rises to the level of a fundamental right.¹¹ And certainly there have been prior cases in which the Court has held that the requirements of equal protection apply to the right to vote.¹² In fact, the Supreme Court has made clear that potential infringements on the right to vote must be closely scrutinized.¹³ However, even if we view the Florida Supreme Court's opinion through the lens of minimum scrutiny, the Florida court's decision does not pass equal protection muster.

What exactly did the Florida Supreme Court do? The court reversed the circuit court during the contest period, ordering a recount of the undervotes. In so doing, the only standard the Florida court set forth for judging a vote was the "intent of the voter."¹⁴ This was, in fact, the standard the legislature had promulgated.¹⁵

The problem, as the U.S. Supreme Court found, is that while the "intent of the voter" standard is a good principle in general, significant

9. *See id.* at 134 (Souter, J., dissenting), 145–46 (Breyer, J., dissenting).

10. *See id.* at 134–35 (Souter, J., dissenting), 146–47 (Breyer, J., dissenting).

11. *Id.* at 104.

12. *See, e.g.,* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”), *cited in* Bush, 531 U.S. at 105.

13. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (“Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

14. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000).

15. *See* FLA. STAT. ANN. § 101.5614(5) (West 1982 & Supp. 2001).

problems arise when one tries to implement it.¹⁶ Indeed, observers of the initial manual recounts witnessed the chaos that flowed from the attempt to implement ambiguous standards. Standards varied from county to county, and as David Boies admitted at oral argument, from table to table and from counting team to counting team within the same county.¹⁷ This was a problem.

Some in the dissent noted that there are certain circumstances in which local communities are allowed to use different standards without such use rising to the level of an equal protection violation.¹⁸ For example, different juries in different counties may attempt to determine the criminal intent of defendants without the help of a concrete standard to ensure uniformity. Therefore, at least Justices Stevens and Ginsburg did not think that the Florida scheme posed an equal protection problem.¹⁹

But as Professor Larry Alexander has noted, discerning a defendant's intent in a criminal trial is significantly different from discerning a voter's intent by reviewing a ballot.²⁰ In a criminal trial, numerous factors are at play, and a jury is attempting to determine the subjective intent of the defendant. However, a ballot is an inanimate object. Thus, it is entirely practical to develop uniform standards for discerning intent that can be applied to various ballots across the state. Florida failed to enforce any uniform standards.

Some would argue—indeed, some in the dissent pointed this out—that if such a failure constitutes a violation of equal protection, then the mere existence of different types of voting machines in different counties is also a violation of equal protection.²¹ However, Justice Souter noted that a legitimate governmental objective exists in allowing counties to have local control over the types of machines they use.²² He focused on issues such as cost and innovation.²³ However, in the present case, there was simply no legitimate state interest in having counties apply different

16. *Bush*, 531 U.S. at 106–07.

17. United States Supreme Court Official Transcript at *50, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 1804429 [hereinafter Transcript of *Bush v. Gore* Oral Argument].

18. *See, e.g., Bush*, 531 U.S. at 134 (Souter, J., dissenting) (stating 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”).

19. *See Bush*, 531 U.S. at 126 (Stevens, J., dissenting); *id.* at 143 (Ginsburg, J., dissenting).

20. *See* Larry Alexander, *The Supreme Court, the Florida Vote, and Equal Protection*, 38 SAN DIEGO L. REV. 1077, 1079 (2001).

21. *See, e.g., Bush*, 531 U.S. at 126 (Stevens, J., dissenting).

22. *See id.* at 134 (Souter, J., dissenting).

23. *Id.*

standards. And I think the position that the Court, in fact seven Justices, took on that point was entirely legitimate. As Justice Souter said: “I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights. The differences appear wholly arbitrary.”²⁴

Of course, Chief Justice Rehnquist, and Justices Scalia and Thomas found that additional grounds existed on which to overturn the opinion of the Florida Supreme Court.²⁵ The Chief Justice noted that traditionally the Supreme Court defers to state court interpretations of state law.²⁶ However, Rehnquist relied upon Article II, Section 1 of the U.S. Constitution, which is one area of the Constitution in which power is not delegated to a state as a whole but is delegated to a specific body within a state—in this case, the legislature.²⁷ The Chief Justice read that provision as meaning that the Florida Supreme Court owed an additional degree of deference to the legislature in “interpreting” its law.²⁸

Informing Rehnquist’s understanding of Article II, Section 1, was Title 3, Section 5 of the U.S. Code, the so-called Safe Harbor provision. Essentially, the Safe Harbor provision is a federal law which states that presidential electors from a given state cannot be challenged by members of Congress as long as the state has complied with certain requirements. First, a state must have a standard way of selecting its electors before election day. Second, the electors must be certified no later than six days before the Electoral College meets.²⁹

Chief Justice Rehnquist determined that it was the intent of the Florida legislature to take advantage of the safe harbor provision.³⁰ A failure to do so would mean that Florida’s slate of electors could be challenged in Congress. Placing the state’s electors in jeopardy was clearly not the intent of the Florida legislature. In fact, as the per curiam opinion noted: “The Supreme Court of Florida [had] said that the legislature intended the State’s electors to ‘participat[e] fully in the federal electoral process,’ as provided in 3 U.S.C. §5.”³¹

24. *Id.*

25. *Id.* at 111–22 (Rehnquist, C.J., concurring).

26. *Id.* at 112, 114.

27. *Id.* at 112–13.

28. *Id.* at 114.

29. 3 U.S.C. § 5 (1994).

30. *Bush*, 531 U.S. at 113, 120–21.

31. *Id.* at 110 (quoting *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000)) (second alteration in original).

However, the first decision of the Florida Supreme Court extended by several days the deadline for requesting manual recounts and completing such recounts.³² The concurrence noted that this and other changes the Florida Supreme Court had enacted under the guise of interpretation exceeded what the court was allowed to do.³³ That is to say, these were not judicial acts in which the Florida Supreme Court was engaging. The court was going beyond the scope of interpreting law. Consequently, the concurrence essentially said: “Look, although it is rare, there have been cases in which the U.S. Supreme Court has stepped in and disregarded a state court’s interpretation of its own law.”³⁴

This raises important questions about what a court, in this case a state court, may do under the guise of interpretation. Certainly, there are limits to a court’s interpretive abilities. This becomes evident by asking the question: “What may the Florida Supreme Court *not* do?” What is the Florida Supreme Court constrained from doing? Is the court allowed to employ a standard where, if the intent of the voter is questionable, the vote is for Gore, and then say, “We’re just interpreting the statute”? There are limits on what the court can do, and it is perfectly proper for the United States Supreme Court, especially in light of Article II which gives this power to the legislature, to take a look at the state court’s interpretations. Rehnquist’s concurrence, however, is not binding.

Finally, I would like to focus on the remedy in this case. Because even though seven Justices found equal protection difficulties, only five of them voted to enjoin the recount. The legal rationale was that the Florida legislature intended to take advantage of the Safe Harbor provision. Based upon that intent, the Supreme Court decided to shut down the process.³⁵

This is perhaps the hardest part of the opinion to justify. In my view, however, the Court was acting pragmatically. The situation in Florida was an absolute mess, and the notion that any concrete standards would emerge from the Florida Supreme Court’s command to discern the “intent of the voter” was wishful thinking. Additional (and likely protracted) litigation would have inevitably arisen over what the standards should be. Justice Stevens believed this would not have posed a problem since a magistrate would apparently have settled any disputes involving individual ballots.³⁶

However, this notion—the idea of a magistrate sorting through thousands and thousands of disputed ballots, and getting this done by

32. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000).

33. *Bush*, 531 U.S. at 116–20 (Rehnquist, C.J., concurring).

34. *See id.* at 114–15.

35. *Id.* at 110–11.

36. *Id.* at 126 (Stevens, J., dissenting).

December 18th, when the Electoral College was scheduled to meet, or even January 6th or 7th, when the electoral votes were to be counted—was completely impractical. This was not going to happen.

The Court, through its remedy, arguably saved us from a constitutional crisis. As Professor Ramsey noted, even if the votes were recounted and Florida was able to comply with the minimum requirements of equal protection, the Florida legislature was going through the process of selecting its own slate of electors. Thus, even if Gore had somehow managed to win the recount, it was likely that there would have been competing slates of electors from Florida. Congress was divided between Democrats and Republicans, and the threat of a constitutional crisis loomed large. Consequently, the Court, very pragmatically, very practically—in contrast to the dissenters who said, “Well, let’s just let them go at it and see what happens”—reversed the Florida Supreme Court’s decision and ended the process. I think the remedy is defensible on these grounds.

II. ARGUMENTS IN OPPOSITION TO THE DECISION

ERIN ALEXANDER:³⁷

Brian Fogarty and I have a slightly different take on this opinion than Joshua Jessen and Professor Ramsey. We believe that the argument is flawed for several reasons; primarily, the majority’s failure to allow the Florida Court to determine a matter of Florida law, and its reliance on equal protection as a means of overturning the decision. I will be discussing some of the separation of powers issues embodied in this opinion, and Brian will be tackling the equal protection grounds.

First of all, there is one thing that I have to clear up right away. Joshua, and most of the media, characterized this decision as a seven-two split. However, this is simply not the case. In fact, the court was sharply divided five to four, with four separate dissenting opinions.³⁸ The issue that was before the Court was: will the manual recount continue or will it stop?³⁹ Although Justice Stevens and Justice Souter

37. J.D. 2001, University of San Diego School of Law; B.S. 1997, University of California, Santa Barbara.

38. *Id.* at 123, 129, 135, 144.

39. Videotape: Tale of the Two Chads (Ronald Reagan Foundation-sponsored debate between Erwin Chemerinsky and Douglas Kmiec, Jan. 30, 2001) (on file with Ronald Reagan Foundation) [hereinafter Videotape: Tale of the Two Chads].

did see a potential equal protection problem, their remedy was different from that of the five Justice majority; instead of stopping the recount, they believed that the Florida Supreme Court should have resolved this issue. I know this because Stevens and Souter could have concurred in part and dissented in part, and they chose not to. Instead they wrote dissenting opinions making this case a five-four decision.⁴⁰

This case is more about Florida law than about the United States constitutional law.⁴¹ In its decision, the first thing that the Supreme Court stated was that the right to vote is fundamental.⁴² Florida law is clear on this point; every effort must be made to count every vote.⁴³ The Bush camp continuously stated: “don’t change the rules after the vote.” That was their mantra throughout this entire debate.⁴⁴ However, the Supreme Court’s decision did change the rules. Instead of deferring to Florida law, the Court took matters into its own hands and changed the rules by stopping the recount.

Florida law states that a losing candidate can ask for a contest if the candidate can show enough votes to call the election into question. That occurred here. Florida law also states that a court can create an appropriate remedy, which is what the Florida Supreme Court did.⁴⁵ That was the law before December 11th.⁴⁶ And in fact, no new rules were made after the vote until the United States Supreme Court issued their opinion on December 12th. Professor Ramsey noted that it was important for the United States Supreme Court to get this counting done by the December 12th deadline.⁴⁷ That deadline is embodied in title 3, section 5 of the United States Code. In fact, title 3 is actually a safe harbor. If states turn in their votes by the safe harbor deadline they will be insulated from challenges in Congress.⁴⁸ This is a permissive provision and is not mandatory.⁴⁹

The United States Supreme Court relied on title 3 to bar any further recounts in Florida.⁵⁰ Any recount seeking to meet the December 12th deadline would be constitutionally contested. The Court did not say that federal law requires the counting to be done by December 12th because

40. *Id.*; *Bush*, 531 U.S. at 123 (Stevens, J., dissenting), 129 (Souter, J., dissenting).

41. Videotape: Tale of the Two Chads, *supra* note 39.

42. *Bush*, 531 U.S. at 104.

43. Videotape: Tale of the Two Chads, *supra* note 39.

44. *Id.*

45. *Id.*

46. *Bush*, 531 U.S. at 101

47. Ramsey, *supra* note 3, at B9.

48. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring); *The Supreme Court’s Ruling: Opening a Gavel of Worms*, ECONOMIST, Dec. 16, 2000, at 30, 33 [hereinafter *Opening a Gavel of Worms*]; Videotape: Tale of the Two Chads, *supra* note 39.

49. Videotape: Tale of the Two Chads, *supra* note 39.

50. *Bush*, 531 U.S. at 110–11.

federal law does not say this. The Electoral College does not vote until December 18th and these votes are not counted until January 6th. In fact, in 1960, Hawaii turned in its votes later than the rest of the states. These votes were counted.⁵¹

What the Court did say was that under its interpretation of Florida law, Florida law requires that votes must be turned in by the December 12th deadline.⁵² This is an important distinction, because in making it, the Court based its holding on Florida law.⁵³ It decided a matter that the Court admits is based on state law. The Court violated one of the most fundamental principles of American jurisprudence: state courts get the last word on state law.⁵⁴

The Florida Supreme Court was aware of title 3 in making its opinion. However, the Florida Supreme Court was not aware that the United States Supreme Court would issue a stay, thereby making the recount impractical and impossible to do. The right thing for the Supreme Court to do, if it believed that Florida law stated that the counting must be done by December 12th, would have been to remand this issue back to the Florida Supreme Court, because there is some conflict in Florida law.⁵⁵ On the one hand, you have Florida law, which states that every vote must be counted. On the other hand you have the December 12th deadline. If the United States Supreme Court was really so concerned with this December 12th deadline and the Florida court's interpretation of Florida law, it should have remanded the issue back to the Florida Supreme Court. It did not do so.

Chief Justice Rehnquist, in his concurrence, relied on Article II to warrant a departure from the usual deference given to state courts.⁵⁶ Chief Justice Rehnquist, Justice Scalia, and Justice Thomas argued that the Florida court's application of Florida law presented a federal question.⁵⁷ They did so because Article II authorizes states to appoint electors only in such a manner as the legislature may direct. Based on this provision, the concurrence felt that the normal deference given to the state courts was not appropriate in this situation. The concurrence felt that the United

51. Videotape: Tale of the Two Chads, *supra* note 39.

52. *Bush*, 531 U.S. at 110.

53. *Opening a Gavel of Worms*, *supra* note 48, at 33.

54. *Id.*; Videotape: Tale of the Two Chads, *supra* note 39.

55. Videotape: Tale of the Two Chads, *supra* note 39.

56. *Bush*, 531 U.S. at 112.

57. *Id.* at 112–13.

States Constitution operated as a limitation on the Supreme Court.⁵⁸

However, as Justice Ginsburg's dissent noticed, this argument is flawed for several reasons.⁵⁹ First of all, the framers of the Constitution knew that the judiciary would construe the legislature's enactments. In light of the constitutional guarantee to states of a Republican form of government,⁶⁰ Article II can hardly be read as an invite to this Court to disrupt a state's republican regime. In fact the United States Supreme Court has previously stated that the Supreme Court acts as an outsider lacking the common exposure to local laws. The United States Supreme Court was not in a position to be as familiar with Florida law and Florida principles as the Florida State Supreme Court was. The United States Supreme Court majority should have respected the state court's interpretation of state law. And as Justice Ginsburg further noticed, the Supreme Court frequently upholds state law decisions which are contrary to what the United States Supreme Court feels is appropriate or even correct.⁶¹

However, the majority took off its federalist cap and decided this matter. It decided that the usual deference given to state courts was simply not appropriate in this case because they did not agree with the outcome. The irony here is that the five Justices who continuously champion state rights are the very Justices who did not do so here. In fact, only one other time in history, not since 1816, has the United States Supreme Court overturned a state court's interpretation of state law. That happened in *Martin v. Hunter's Lessee*.⁶² Admittedly, this is a drastic shift from precedent.

Did the Florida State Supreme Court and the United States Supreme Court vote based on law, or the Justices' own political ideology? The reality is that people are influenced by their personal persuasions.⁶³ And this case is no different. It is not shocking that a predominately Democratic Florida court voted for Al Gore, the Democratic candidate. It is also not surprising that the predominately Republican bench voted for the Republican candidate George Bush.⁶⁴

The proof of the political nature of this decision, and evidence of the hypocrisy in this decision, is that the majority, the same five Justices who continuously champion states' rights, who continuously defer to states courts' interpretation of state law, did not do so here. These

58. *Id.*

59. *Id.* at 135-43 (Ginsburg, J., dissenting).

60. U.S. CONST. art. IV, § 4.

61. *Id.* at 136.

62. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

63. Videotape: Tale of the Two Chads, *supra* note 39.

64. *Id.*

Justices changed their minds based on their own political persuasion.⁶⁵ As Justice Breyer noted in his dissent: “[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. . . . What it does today, the court should have left undone.”⁶⁶

Even if you personally are not persuaded that the Supreme Court voted based on their own political persuasions, the forty-nine million people who voted for Gore, the most people ever to vote for a single candidate in all of history, do feel that this decision is biased. And that is a problem.

BRIAN FOGARTY:⁶⁷

As Professor Ramsey said, Bush had a better strategy in this case, the more reasonable one. So perhaps Will Ferrell of *Saturday Night Live* was far more enlightened than any of us thought when in a mock debate while playing George W. Bush, he boiled George W.’s campaign down to one word: “Strategery.”⁶⁸

The Equal Protection Clause is what this Court bases its opinion on.⁶⁹ The guarantee of equal protection dates back to the Civil War.⁷⁰ It was added to the Constitution after the Civil War to protect African Americans from discrimination, especially in the South.⁷¹ During the late nineteenth century, the Supreme Court practically eradicated this doctrine from the Constitution with the “separate but equal” doctrine that permitted rigidly racist practices.⁷² However, the Court valiantly rescued the equal protection guarantee with the landmark 1954 *Brown v. Board of Education*⁷³ decision that struck down official segregation.⁷⁴

“Over the last fifteen years, the Supreme Court under Chief Justice William H. Rehnquist has made it [difficult] to win constitutional claims

65. *Id.*

66. *Bush*, 531 U.S. at 157–58.

67. J.D. 2001, University of San Diego School of Law; B.A. 1998, Boston College.

68. *Saturday Night Live* (NBC television broadcast, Oct. 7, 2000).

69. *Bush*, 531 U.S. at 109.

70. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 84–95 (1976).

71. *Id.*

72. David G. Savage & Henry Weinstein, *High Court in Tight Spot over Ruling*, L.A. TIMES, Dec. 16, 2000, at A1.

73. 347 U.S. 483 (1954).

74. *Id.* at 487–91; *see also* Savage & Weinstein, *supra* note 72, at A4.

of unequal treatment.”⁷⁵ “To succeed, the court has ruled, claimants must prove that government officials were biased and engaged in blatant discrimination. This high threshold is rarely crossed.”⁷⁶ In this case, no party alleged to the Court that the judges who supervised the recounts were motivated by discriminatory bias.⁷⁷ Nonetheless, it was this argument that proved to be a winner for Bush.⁷⁸

Equal protection: when does it apply? It applies when certain classes of people are treated unequally or when a fundamental right is violated, in this case the right to vote.⁷⁹ But, there were many inequalities in Florida.⁸⁰ For example, there were different machines.⁸¹ Most counties in Florida use optical scanners, which fail to read four in every one thousand votes.⁸² A number of other counties use punch card systems with a failure rate of fifteen in one thousand.⁸³ Additionally, there are inequalities in how polling places are run.⁸⁴ Different local officials are appointed to run various sites.⁸⁵ No two sites are run in exactly the same manner. This also results in some degree of inequality.

There are also inequalities in ballot construction.⁸⁶ We are all familiar with the butterfly ballot, perhaps inspired by Cook County, Illinois officials.⁸⁷ The butterfly ballots used in Palm Beach County were difficult to read, as the voters there will tell you. The voters went in intending to cast their vote for Al Gore and walked out having voted for essentially the polar opposite, Pat Buchanan. There were and there still are tremendous inequalities throughout the Florida election process.⁸⁸ This case did not help to resolve these disparities. It offered no solution to the disparities, other than finality in this particular case.

What makes this inequality so important that the Court decided the case on it? If the court held that the lack of consistency in counting ballots is a violation of equal protection, is not the lack of consistency

75. Savage & Weinstein, *supra* note 72, at A1.

76. *Id.*

77. See Petitioner’s Opening Brief, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 1810102; Respondent’s Opening Brief, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), 2000 WL 1809151; Transcript of *Bush v. Gore* Oral Argument, *supra* note 17; see also Savage & Weinstein, *supra* note 72, at A1.

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

79. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 495–784 (3d ed. 1996).

80. Erwin Chemerinsky, *Court Responds to Values Rather than Partisanship*, *L.A. TIMES*, Dec. 15, 2000, at B9.

81. *Id.*

82. Videotape: *Tale of the Two Chads*, *supra* note 39.

83. *Id.*

84. Chemerinsky, *supra* note 80, at B9.

85. *Id.*

86. *Id.*

87. Videotape: *Tale of the Two Chads*, *supra* note 39.

88. *Id.*

that results from different machines or different ballots also a violation of equal protection?⁸⁹ Accepting the reasoning in *Bush v. Gore* leads to the conclusion that the entire Florida election (and maybe all elections) is unconstitutional on equal protection grounds.⁹⁰

Ironically, the decision by this Court and the arguments advanced by Bush's legal team could quickly become the basis for a number of Democratic and civil rights suits against punch card balloting systems.⁹¹ If such county-by-county differences violate the Equal Protection Clause of the Constitution, then as of today, thirty-three of fifty states conduct their elections in an unconstitutional manner.⁹² A rational reading of the Constitution is that it allows a state to establish its own election process and it allows variations among the states.⁹³ Within states themselves, the legislatures also allow variations from county to county.⁹⁴ It seems to me this is reasonable, and this is rational.

The Supreme Court raised the concern that different counties would be applying different standards.⁹⁵ In an equal protection challenge, the Court should identify the class of individuals who are not being treated fairly. In this case, the Court basically said that Bush is being treated unfairly. This is a quote from Justice Scalia's concurring opinion in the stay portion of the case: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner [George Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of *his* election."⁹⁶

In fact, Bush did not even have standing to assert equal protection rights of voters because Bush was not discriminated against.⁹⁷ If one argues that he would have been discriminated against, then perhaps Bush still did not have standing because the case was not yet ripe.⁹⁸ The counting was not concluded. A better view is that because both Bush and Gore were held to the same standard, neither was being treated

89. Ronald Brownstein, *GOP Argument Could Benefit Democrats*, L.A. TIMES, Dec. 12, 2000, at A22.

90. Videotape: Tale of the Two Chads, *supra* note 39.

91. Brownstein, *supra* note 89, at A22.

92. Videotape: Tale of the Two Chads, *supra* note 39.

93. *Id.*

94. *Id.*

95. *Bush v. Gore*, 531 U.S. 98, 106–07 (2000).

96. *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring) (emphasis added).

97. Videotape: Tale of the Two Chads, *supra* note 39.

98. *Id.*

differently.⁹⁹ Since Bush and Gore were being treated equally, who is the class of persons being treated unequally? It is not clear.

All registered Florida voters were entitled to one vote. Ninety-seven percent had their vote counted, because the machine could decipher their ballots.¹⁰⁰ These voters followed the directions on the ballot and the directions provided at each voting center.¹⁰¹ Only the voters whose votes could not be deciphered were not given the right to have their vote counted. Prior to the manual recount, the class of individuals which was not being treated equally was the class whose votes were not counted.¹⁰² By allowing the manual recount to continue, the number of disenfranchised voters would have been reduced considerably. But, in the interest of finality, the majority disenfranchised an unknown number of voters whose ballots do reveal their intent.¹⁰³

Another problem with the Court deciding its opinion on equal protection grounds is that Florida law already contemplated a resolution to any potential inequalities. The Florida Supreme Court remanded this, and any disputes among the voting ballots, to Judge Lewis.¹⁰⁴ Any disagreements were to go to the circuit court where Judge Lewis, an impartial judge, would adjudicate all objections and concerns. By taking this out of Florida's judges' hands, the Supreme Court shows that it did not trust Florida's judges to objectively make these types of decisions.¹⁰⁵ Judge Lewis could have resolved any problems, but he never got the chance. The Supreme Court stepped in and took this away.

The hypocrisy of this judgment is again evidenced by the application of equal protection. Until this decision, this Court had repeatedly and consistently turned away equal protection claims, even when confronted with strong allegations of racial bias. Such was the challenge to Georgia's death penalty system in 1987 when, by a five-to-four vote, the majority turned away the challenge.¹⁰⁶

The Justices who make up the majority show "remarkable indifference" to equal protection claims in other areas also.¹⁰⁷ This Court routinely rejects equal protection cases.¹⁰⁸ For example, the Justices refuse to hear cases regarding federal punishments for crack-cocaine possession.¹⁰⁹

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Savage & Weinstein, *supra* note 72, at A4.

107. *Id.*; Videotape: Tale of the Two Chads, *supra* note 39.

108. Savage & Weinstein, *supra* note 72, at A1, A4.

109. *Id.* at A4.

The Court still refuses to hear these challenges despite the fact that the punishment for crack-cocaine is one hundred times greater than that for powder cocaine.¹¹⁰ The Rehnquist court has also turned away equal protection claims from gays and lesbians who have been discharged from the military because of their sexual orientation.¹¹¹ Apparently, the significant discretion that a state has in setting its own rules (tax rules, for example), does not apply to elections conducted in state.¹¹² Or perhaps it does not apply when George Bush is on the ballot.

Before this year, Justice Scalia has vehemently insisted that the Court not use the Equal Protection Clause to second-guess the states.¹¹³ Perhaps the Scalia dissent that stands out most is from the 1996 case, *Romer v. Evans*,¹¹⁴ where Scalia ironically labeled the decision by the majority “an act, not of judicial judgment, but of political will.”¹¹⁵ Oh, by the way, Chief Justice Rehnquist and Justice Thomas joined this dissenting opinion.¹¹⁶

Specifically, Justices Scalia and Thomas, two members of the majority, have never before found a violation of equal protection except to shut down affirmative action.¹¹⁷ In a series of cases brought by whites challenging affirmative action, this Court has intervened to strike down state laws that benefit minorities.¹¹⁸ This holding for Bush is directly opposed to most of the majority’s jurisprudence in the equal protection arena.

In fact, just today,¹¹⁹ another decision came down, five-four. The Court ruled that state workers cannot use an important federal disability rights law to win money damages for on-the-job discrimination.¹²⁰ This again strengthens state rights in the area of equal protection. Interestingly, the majority opinion again was made up of five Justices:¹²¹ Chief Justice Rehnquist, Justice Thomas, Justice Scalia, Justice

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

115. *Id.* at 653.

116. *Id.* at 636.

117. Savage & Weinstein, *supra* note 72, at A4.

118. *Id.*

119. Wednesday, Feb. 21, 2001.

120. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); *see also* Laurie Asseo, *Supreme Court Limits State Workers*, FEW Notes, March 15, 2001, at 6, 7, available at <http://www.gokcfew.org/PDFs/FEWNews 02.pdf>.

121. *Garrett*, 531 U.S. at 360 (holding that such suits violate the Eleventh Amendment).

O'Connor, and Justice Kennedy—the same Justices who comprise the majority in the *Bush v. Gore* ruling.

Furthermore, the equal protection analysis in this case is extremely underdeveloped, especially when compared with most other equal protection cases decided by this court.¹²² It appears the Court was trying to say as little as it could to justify the opinion. It also appears that the Court did this in order to limit this reverse-engineered decision to the facts of this case.

Even if you do buy the Court's application of equal protection in this context, the Court's remedy avoids the issue. What the Court did upon finding this equal protection violation was first, to express concern about protecting the class of voters whose ballots were not read by the machine, and then, the majority invoked federal constitutional principles to ensure that all those ballots would be ignored.¹²³ This is contrary to the Court's usual resolution in equal protection cases. Normally the Court will purge the inequality. Instead, the Court threw up its hands and said: "This is just too hard. We just do not have the time. We just do not have the time to correctly determine the winner of the presidential election." What kind of a solution is that?

The application of the Equal Protection Clause, without providing a remedy, simply is an inadequate justification to overrule a state supreme court's interpretation of its own law. Equality legitimately could have been achieved by allowing Florida to continue the recounting until December 18th, along with the establishment of uniform standards.¹²⁴ Or, at the very least, the Court could have sent the case back to the Florida Supreme Court and let it establish uniform standards for Florida.¹²⁵ The majority—the champions and defenders of state sovereignty—traded in their federalist principles when it was convenient.¹²⁶ This is troubling.

Bush v. Gore could turn out to be a one-time-only excursion, which will result in great criticism of this Court. Or, it could also affect a range of future cases, especially in the area of federalism. However, as is indicated by today's ruling, this is unlikely. Justice Rehnquist's concurrence briefly addresses this, but it remains to be seen whether this will be enough of an explanation for critics.

Nevertheless, it is precedent and this Court has likely not seen the last of this decision.¹²⁷ The principle of this case is so large that it could

122. Savage & Weinstein, *supra* note 72, at A4.

123. Videotape: Tale of the Two Chads, *supra* note 39.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

involve and prompt legal challenges to all elections, even those with a much larger margin of victory than the very narrow margin in Florida.¹²⁸ In the inevitable future election cases, and in the future equal protection cases, it will be difficult for this Court to distinguish this case in a principled manner.¹²⁹

In reality, the Supreme Court probably believed it was sparing the country further division, and it was willing to take the hit.¹³⁰ The majority's theory was not the most rational, not the most well developed, nor the most well thought. But it was expedient and it put an end to our potential constitutional crisis.¹³¹ However, the next time the Court ignores an equal protection argument, or fails to find a violation, then we will understand just how profound this decision is. Thank you.

III. OPEN FLOOR DISCUSSION

HONORABLE H. LEE SAROKIN:

I would like to exercise the moderator's prerogative by asking the first question, and it goes back to the procedural context. I served on the federal court for almost twenty years. In granting an injunction, we were required to make a finding of irreparable injury. Irreparable injury requires a conclusion that something had to be done before the final hearing. And the first question that I would have is: What was the irreparable injury that required the Supreme Court to enjoin the manual counting?

PROFESSOR MICHAEL RAMSEY:

First, let me make it clear that the stay was issued against a manual recount that was not in accord with constitutional requirements per seven Justices of the Court. So whatever would have had to happen, you would have had to start over from point one on the recount even if the U.S. Supreme Court had remanded to the Florida Supreme Court to direct a recount using uniform standards.

And let me parenthetically note that it seems like the only difference that there is between our side and the other side is whether the U.S.

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

Supreme Court should have remanded to start over with a new recount. I did not hear anybody on the other side defend either the recount as it was progressing under the direction of the Florida Supreme Court, or the selective recount as pressed for by Gore's lawyers. So the only thing we are debating is whether they should have remanded it to start over.

Now, the question that you ask is: "What is the harm of having a constitutionally defective recount going forward in parallel with a Supreme Court hearing that will ultimately conclude that it is defective and direct that it start over?" (Because the Court had to conclude that there was irreparable injury, in addition to a substantial likelihood of success on the merits.)

I do not think this is a real clear cut case, but if you had a recount, even an admittedly constitutionally defective recount, that showed Gore the winner and purported to be conclusive, I do think that would further undermine the legitimacy of Bush's ultimate election. If I were in a race and I thought that there was a count going forward that was unconstitutional, and even if I was confident that it would ultimately be overturned, I think I would prefer to have it stopped in the middle rather than have it actually produce a result. So I guess the harm is the fact of a result which is unconstitutional, but is nonetheless there.

HONORABLE H. LEE SAROKIN:

The U.S. Supreme Court took the position that the Florida Supreme Court should have ordered the recounts to continue with standards. Wasn't that what they were concerned about—the lack of standards in determining the intent?

PROFESSOR MICHAEL RAMSEY:

Right, that was the seven to two piece.

HONORABLE H. LEE SAROKIN:

Well, wouldn't the Supreme Court then have said that if the Florida court ordered the recount with standards that the Florida court was making new law?

PROFESSOR MICHAEL RAMSEY:

Yes, I think that is somewhat problematic. I think that is what is wrapped up in this whole case. To have a recount that is not in accordance with what the legislature has directed runs afoul of not only the time—the December 12th safe harbor—but also of the other safe

harbor which is that you cannot make new rules after the fact. So yes, I think that would have been problematic on that ground as well.

HONORABLE H. LEE SAROKIN:

Any view from the opposing side about irreparable injury?

ERIN ALEXANDER:

Brian Fogarty noted in his discussion that the class of person harmed and the irreparable injury on both counts, is for George Bush's harm and injury. So we see irony in that irreparable injury caused to three percent of Florida votes not counted is weighed much less by the Supreme Court than the irreparable injury that might have been caused to Bush.

BRIAN FOGARTY:

I think that the class of voters—the class of people protected—is still Bush. And I think that is problematic when you decide the case on equal protection grounds.

HONORABLE H. LEE SAROKIN:

And what about the argument that no election in the past or future can possibly survive this standard that has been enunciated by the Supreme Court in this decision on equal protection grounds?

JOSHUA JESSEN:

I think, as a practical matter, that the Court limited its holding to the facts of this case. I do think that if, in the future, a state attempts to have a statewide recount and does not use something closer to a concrete standard, the recount might encounter equal protection problems. I do not think that is a bad thing. Henceforth, the thirty-three states that have the “intent of the voter” standard must realize that it may not pass constitutional muster in these types of situations.

PROFESSOR MICHAEL RAMSEY:

If I could quickly speak to the scope of this thing. The way I read this opinion, all they are saying is that if you are going to treat ballots

differently you have to have a decent reason for doing it that way. I think that most differential treatments will probably survive that standard. The problem in this case was that there just was not any explanation for why you would count an identically marked ballot as a vote in Broward County and as a nonvote in Palm Beach County. The response to the question, “Why are you treating me differently?”—to the extent there was a response—was simply incoherent. It was, “Well, they decided to do it differently.” That is not a sufficient reason.

HONORABLE H. LEE SAROKIN:

Was the standard on its face unconstitutional as opposed to how it was actually applied?

PROFESSOR MICHAEL RAMSEY:

No, I do not think the standard on its face is unconstitutional. But the problem is when you have different ways of doing it that do not make any sense. Suppose you had a rule that said in Broward County if there are any blue pen marks, we will call it a Bush vote, but in Palm Beach County their rule was if there are blue marks on it, we will call that a Gore vote. What was going on was just made up arbitrarily. I think that was the problem.

When you talk about other things like optical scanners versus the punch cards, optical scanners are a lot more expensive. Some counties do not have the resources to buy them. I think that is a reasonable reason for having optical scanners in one place and punch cards in another. There may be some other tradeoffs. I am not an expert in the field of voting machines. There may be other relative advantages that can be explained in this fashion. This is basic equal protection law. The state needs to come forward with some explanation for why it is treating identically situated things differently. That is fundamental. And here there simply was no explanation. I think when you have an explanation, it is going to go the other way.

AUDIENCE QUESTION:

I do not understand the difference between interpreting the law and making new law. I mean, the Supreme Court said in 1966 that there have to be certain standards before you can get a confession into evidence.¹³²

132. The audience member is referring to *Miranda v. Arizona*, 384 U.S. 436 (1966).

PROFESSOR MICHAEL RAMSEY:

That is an example of making law.

AUDIENCE QUESTION:

Why is it not *interpreting* the Fifth Amendment? It seems to me that every time your side loses, you complain that the Supreme Court made new law. What is the difference between new law and interpretation that you do not like?

PROFESSOR MICHAEL RAMSEY:

I think that is actually quite a fair point. I will take the comment to mean not every time *my* side loses, but every time *one* side loses. The “making new law” argument was not, of course, the basis of the opinion. That is simply the basis of the concurrence. They only got three votes for that. So to the extent that you are persuaded by the equal protection violation, which is what the majority of the Court found, there is no need to worry about the “making new law” claim. The equal protection violation has nothing to do with interpreting the Florida law. It is entirely a federal question.

On the “making new law” argument, I think that it is very difficult to say when a court has gone so far beyond the boundaries of the statutory text it is supposed to be reading that its interpretation has become illegitimate. I think there are times when that is the case, and it is just a question whether this was one of those or not. One thing the concurrence pointed out was that, in light of the Constitution’s special direction, this was supposed to be a legislative determination; the Florida Supreme Court should have proceeded with special deference to the commands of the Florida legislature. And the concurrence found the Florida court had not done that.

To directly answer your question, I think that in some cases a court is clearly outside the bounds of the statute and in other cases a court is working within the bounds of the statute but stretching them a little bit. It is a close question in this case on which side the Florida court fell.

AUDIENCE QUESTION:

I was hoping that we would get a response to the assertion that this in fact was a partisan decision. Professor Ramsey sort of somewhat skirted

that earlier. But what is the position on this side about what appears to be on its face a rather remarkable foray into the area of what would be states' rights in previous renderings of this Court? Are you saying it is not a partisan decision?

PROFESSOR MICHAEL RAMSEY:

Yes, I am saying that it is not a partisan decision in the sense that it is Republicans versus Democrats. I say that if this had come up in a different context four weeks earlier with Gore asking for a statewide recount based on uniform standards, then Gore wins. I think he might win nine to zero. I do not think it was partisan in that sense. I think what happened was that Gore ended up in an unsympathetic position. And as a result, the people who were least likely to be sympathetic to him anyway ended up on the other side.

So again, as I said in the opening presentation, I am not sure whether that means that I think it is political or not, but I think that what it means is that you do not want to come before judges that may be a little bit hostile to you to begin with, with a case that is frankly unsympathetic. So that is the substance of my view of it. I will let my colleague speak to the merits of the legal arguments. I think the legal arguments are strong on both sides. I do not think either side has a slam-dunk.

BRIAN FOGARTY:

I think you cannot underestimate the fact that even if this was not a purely political opinion, and I am not asserting that it was a purely political opinion, the majority of people who look at this are going to say these are five people, five Justices, who constantly defend states' rights. And they switched gears here. They said no, *we* are going to tell the state how to run its own election. That is how the majority proceeded, and that is where the political part of it comes in, because it looks like not just five people who were less sympathetic to the less reasonable side, but five Justices who went from drive to reverse on states' rights in one case. And now we have the first evidence that it will not be the trend. I think that is why this decision will lead to increasing political debate about whether this was a political decision.

Do I personally believe it was? No. A few days after the opinion, Justice Thomas made a public appearance to answer high school students' questions about the Supreme Court.¹³³ One student asked him if he

133. Jonathan Ringel, *Divided Supreme Court Ruling on Election May Mean Future Voting Cases*, AM. LAW. MEDIA, Dec. 14, 2000.

thought he would have to answer a lot of questions about whether irreparably deep divisions would be one result of this opinion. He responded that he does not believe this will be a problem: “In nine-plus years here . . . I have never heard the first unkind word.”¹³⁴ But in writing the opinion, they constantly felt as if they were looking over their shoulders saying, how is this going to look?¹³⁵ I think that was ultimately what came out of it. A lot of people questioned, how does this look, along with the Justices. Yes, the Justices make up the Supreme Court, but they too are human.

ERIN ALEXANDER:

It is not only on the issue of states’ rights, but also on the equal protection grounds, which as Joshua Jessen pointed out is the majority’s argument. These are the same five Justices, most notably Justices Rehnquist, Scalia, and Thomas, who almost always and consistently have turned away equal protection arguments. Yet, in this case, they did not do so.

PROFESSOR MICHAEL RAMSEY:

Can I make a couple of points regarding the alleged inconsistency between past decisions and this one? I think there is an element of *ad hominem* attacks on the Justices going on here. I am not sure it is entirely legitimate. Let me make two points.

First, on the states’ rights point, it is not clear to me that it is states’ rights on one side versus no states’ rights on the other. The question is, what is the state? What part of the state is being defended? As Chief Justice Rehnquist pointed out in his concurrence, the state was not of a single mind here. In fact, the legislative branch and executive branch of the State of Florida felt (and you may draw your own conclusion as to why they felt this way) that the initial count of votes was the correct one. The judicial branch of the state of Florida was on the other side. What was going on here was you had an internal debate within the state as to what was the appropriate interpretation of state law. So to say that the U.S. Supreme Court overturned *the state’s* view of what its law was, is to attribute a monolithicity to the state that simply does not exist. I think

134. *Id.*

135. *Id.*

it is just wrong to see this as an opposition to states' rights. That just does not follow.

On the equal protection point, it is *somewhat* true that *some* of these Justices have been hostile to *some* equal protection claims in the past. But it is not the case that *all* of these Justices have generally opposed equal protection claims and it is not true that *any* of these Justices have *always* opposed equal protection claims. And, indeed, Brian Fogarty slipped in there the fact that, for example, these Justices have been very strong on defending equal protection rights in affirmative action cases. Now you may think those cases are wrong, but that does not mean that these Justices are not defending equal protection rights. It just means that they are defending the equal protection rights of people you do not happen to sympathize with. That does not mean they are hypocritical. It just means they have a different conception of the Equal Protection Clause than you do.

AUDIENCE QUESTION:

I thought the basis of the argument was that the strategy was wrong on Gore's side because, out of the gates, they were pushing for a selective recount with regard to the Democratic counties. However, it is my understanding that the initial request of Gore's side was to have a recount of all the state's Republican and Democratic-controlled counties. That initial request was denied by the powers-that-be in the Florida government. Only after that denial did they say that, at a minimum, they wanted the other votes counted in those heavily Democratic counties. If that is true, that is kind of a Catch-22 position because you are saying that you cannot have the whole state but you are wrong because you only want these counties. It seems like there is no circumstance under those facts where they could make a request that would be reasonable in the eyes of the Republican-controlled Florida government.

PROFESSOR MICHAEL RAMSEY:

I think that is a fair point if true. I am not aware of whether that is true or not.

BRIAN FOGARTY:

Speaking for Gore's side, that is not true. Gore asked for the four counties to be recounted and then tossed it over to Bush¹³⁶ publicly and

136. See *Editorial Roundup*, AP ONLINE, Nov. 14, 2001, at 2001 WL 30245043 (stating that "Mr. Gore's attorneys at first sought selective counting; not until a week

said: “If you want a state recount, go ahead and request it.”

PROFESSOR MICHAEL RAMSEY:

I think what Gore did do as a political matter was he said that he would drop his lawsuits and his requests for recounts if Bush would agree to a statewide recount. But that was a proposal made in a political forum, and it is unclear whether, as a legal matter, he was really prepared to follow through on it. My focus in my remarks was very much on the legal strategy, and my impression of the legal strategy was that it was always focused on getting the selected recount.

I guess I would add that even if it is true that the statewide recount was initially denied by the State of Florida, it seems Gore certainly could have appealed that through the Florida court system, which he certainly did not do. Ultimately, the Florida Supreme Court did decide the statewide recount was the right answer. If Gore had somehow managed to get that rule out of the Florida Supreme Court four weeks earlier than he did, I think he would have won.

HONORABLE H. LEE SAROKIN:

Professor, they certainly had the right to select the counties with which they wished to make a contest, did they not?

PROFESSOR MICHAEL RAMSEY:

Ultimately, the Florida Supreme Court said no, although there were technical arguments why they should have. The Florida Supreme Court ultimately said that it had to be a statewide recount for equal protection reasons. But my point really is not so much the legalities of it because I think that confuses your technical legal rights with your reasonableness. My emphasis really is that you need to have an eye to your reasonableness, not just to what is arguable legally.

AUDIENCE QUESTION:

One problem I have had with all of this, from what I understand of the argument is that the holding is based on equal protection. There is a lot of talk of constitutional crisis and constitutional nightmare, but it seems

after the election did the former vice president propose a statewide recount.”).

like what you are really talking about is, if it had gone to Congress, it is really a constitutional process. My question is: by inserting themselves into this, did the Supreme Court really short circuit the process?

ERIN ALEXANDER:

We would agree with that. There was a mechanism set up in Florida law to deal with any equal protection type problems. In fact, Florida election law stated that once the manual recount was to go forward, protests should go to the circuit judge, in this case Judge Lewis, to resolve any controversies. And that process was not allowed to take place because the Supreme Court stepped in.

AUDIENCE QUESTION:

I think more specifically of the U.S. Constitution and the provisions in it for disputes of electors to go into the U.S. Congress.¹³⁷ By forestalling that process, they really insert themselves where they do not belong.

BRIAN FOGARTY:

I agree with you. The Court did insert itself where it did not belong, but I think that most observers would agree that if this election dispute had to go through its entire process, even though it is probably not fair to call it a constitutional crisis (more of a constitutional process as you would like to label it), it would still be viewed by most observers as a constitutional crisis. We are testing waters that we have never tested before. I think that is where the label came from. I think the label was also very media driven. I think that most constitutional law professors would have a good time teaching the process if it had gone through and run the whole process.

PROFESSOR MICHAEL RAMSEY:

I was just going to say that it is not entirely clear to me what the process is. It is not in the Constitution. It is a matter of federal statute how this is all resolved. It is the federal statute that was passed after the Hayes-Tilden debacle in 1876.¹³⁸ They ultimately had to appoint a commission to decide the Hayes-Tilden matter, and then tried to pass a

137. The student seems to be referring to the state power to appoint delegates to the electoral college granted under Article II, Section 1. See Georgene M. Vairo, *Forum Selection*: Bush v. Gore, 23 NAT. L.J., Feb. 12, 2001, at A16.

138. See 3 U.S.C. §§ 5, 6, 15 (1994 & Supp. V 1999); Act of 1887, ch. 90, 24 Stat. 373 (1887).

statute that would take care of similar things in the future. But, I must say that I have read that statute and it is very opaque. In particular, it is difficult to figure out what would happen if two sets of electors are presented, and the houses of Congress are divided as to which slate of electors is the appropriate one. There is a default provision, but I am not sure if the default provision actually would have answered the question in this particular case. I think it is a little bit too easy to say that Congress would have just figured it out. But it is also a fair point to say, “Maybe we should have let this work out and see where it went.”

JOSHUA JESSEN:

The biggest problem is how long it would have taken Congress to sort this out. As an aside, it is somewhat interesting how Americans look to the Supreme Court for the final word. Americans look to the Court on issues like abortion and civil rights. It would have been interesting to see how Americans would have reacted to the idea that Congress could actually sort this out on its own.

AUDIENCE QUESTION:

There seems to be a concern that there are different standards in the recount of hanging chads and things of that sort, but there are different standards in that there are different ballots, choice of ballots, punch cards or whatever the case may be, and there are different standards across the board and across states. Why would that not be an equal protection violation?

JOSHUA JESSEN:

With respect to equal protection, you are not going to have a problem *interstate* because equal protection is dealing with *intrastate* matters—the state treating its citizens differently within the state. That said, I think the bottom line is, as Professor Ramsey pointed out, in order to avoid an equal protection violation, the one thing you must have (and there are various levels of scrutiny) is, at a minimum, a legitimate state interest. In this case, as Justice Souter said, there is no conceivable legitimate interest for the state to allow the counties to count these ballots differently. I think the argument for why this is not going to open a Pandora’s box with respect to all elections violating equal

protection (due to, for example, different types of voting machines) is, as Professor Ramsey noted, the fact that legitimate governmental interests, such as cost, may justify differences.

As a political matter, I think these differences are something we should try to remedy. I think we should, in the interest of having the fairest elections, try to make those uniform. There is no question that, in reality, if you are in a lower socioeconomic area, there is a greater chance your vote is not going to be counted. I think that is a problem. It is not necessarily an equal protection violation, but it is something the political process should address.

HONORABLE H. LEE SAROKIN:

I want to thank Professor Ramsey and the student participants for enlightening us all.