SUPREME COURT OF THE UNITED STATES

No. 00–949

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

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG AND JUSTICE BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, §1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come— as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson* v. *Blacker*, 146 U. S. 1, 25 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the

constitution of the State." *Ibid.*; cf. *Smiley* v. *Holm*, 285 U. S. 355, 367 (1932).[1] The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

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

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

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. §101.5614(5) (Supp. 2001), is to be determined rises to the level of a constitutional violation.[2] We found such a viola-

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

tion when individual votes within the same State were weighted unequally, see, *e.g., Reynolds* v. *Sims*, 377 U. S. 533, 568 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the fact-finders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient— or will lead to results any less uniform— than, for example, the "beyond a reasonable doubt" standard employed everyday by ordinary citizens in courtrooms across this country.[3]

Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated— if not eliminated— by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex.* v. *Pinson*, 282 U. S. 499, 501 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ— despite enormous differences in accuracy[4]— might run afoul of equal protection. So, too, might

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Laws §12–20–7 (1995); Tenn. Code Ann. §2–7–133(b) (1994); W. Va. Code §3–6–5(g) (1999).

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

[4] The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. *Siegel* v. *LePore*, No. 00–15981, 2000 WL 1781946, *31, *32, *43 (charts C and F) (CA11,

the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

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

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent– and are therefore legal votes under state law– but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante*, at 11. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra*, at 2. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to

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Dec. 6, 2000). Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punch-card systems, and 2,353,811 votes were cast under optical-scan systems. *Ibid.*

count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996).[5] Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 10.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd.* v. *Harris,* 2000 WL 1725434 (Fla., Nov. 21, 2000), did the Florida Supreme Court make any substantive change in Florida electoral law.[6] Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do[7]— it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it

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

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

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

relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume– as I do– that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

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

I respectfully dissent.

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ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE SOUTER, with whom JUSTICE BREYER joins and with whom JUSTICE STEVENS and JUSTICE GINSBURG join with regard to all but Part C, dissenting.

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

As will be clear, I am in substantial agreement with the dissenting opinions of JUSTICE STEVENS, JUSTICE GINSBURG and JUSTICE BREYER. I write separately only to say how straightforward the issues before us really are.

There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U. S. C. §5; whether that court's construction of the state statutory provisions governing contests impermissibly

changes a state law from what the State's legislature has provided, in violation of Article II, §1, cl. 2, of the national Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

A

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

B

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. §102.168 (2000); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, §102.166, which was involved in the previous case, *Bush* v. *Palm Beach County Canvassing Board*. The issue is whether the judgment of the state supreme court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from

the provisions made by the legislature, to which the national Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U. S. Const., Art. II, §1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character of a statute within the meaning of the Constitution. Brief for Petitioners 48, n. 22, in *Bush* v. *Palm Beach County Canvassing Bd., et al.*, 531 U. S. ___ (2000). What Bush does argue, as I understand the contention, is that the interpretation of §102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative act in question.

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

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing

that the court looked to another election statute, §101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by a canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. *Gore* v. *Harris*, __ So. 2d __ (slip op., at 23–25) (Dec. 8, 2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. ____ So. 2d, at___ (slip op., at 26–27). That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection" should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. *id.*, at ____ (slip op., at 48) (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place

in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute.[1] While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. §102.168(8) (2000), to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." As JUSTICE GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of

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

the Florida court's determinations in this case.

C

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

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.,* Tr., at 238–242 (Dec. 2–3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); *id.,* at 497–500 (similarly describing varying standards applied in Miami-Dade County); Tr.

of Hearing 8–10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

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

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes, *Gore* v. *Harris*, *supra*, ___ So. 2d, at ___ (slip op., at 66), the number at issue is significantly smaller. The 170,000 figure apparently represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61–62. But as JUSTICE BREYER has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the oppor-

tunity to try to count all disputed ballots now.

I respectfully dissent.

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JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join except as to Part I–A–1, and with whom JUSTICE SOUTER joins as to Part I, dissenting.

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

I

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

A

1

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

seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

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

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would

be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single-uniform substandard.

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

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As JUSTICE STEVENS points out, see *ante*, at 4 and n. 4 (STEVENS, J., dissenting opinion), the ballots of voters in counties that use punch-card systems are more likely to be disqualified than those in counties

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

B

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

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, §1, and 3 U. S. C. §5 to justify the majority's conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante*, at 2 (Opinion of REHNQUIST, C. J. The concurrence's primary foundation for this conclusion rests on an appeal

to plain text: Art. II, §1's grant of the power to appoint Presidential electors to the State "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson* v. *Blacker*, 146 U. S. 1 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See *id.*, at 41 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as JUSTICE STEVENS points out, have we interpreted the Federal constitutional provision most analogous to Art. II, §1– Art. I, §4– in the strained manner put forth in the concurrence. *Ante*, at 1–2 and n. 1 (dissenting opinion).

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

mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

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

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. §102.166 (2001) (foreseeing manual recounts during the protest period) with §102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare §102.112(1) (stating that the Secretary "may" ignore late returns) with §102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the

Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ing]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminated the Secretary's discretion." *Ante,* at 9 (REHNQUIST, C. J, concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to . . . place in doubt the result of the election." Fla. Stat. §§102.168(3), (3)(c) (2000). And the parties have argued about the proper meaning of the statute's term "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.*, at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. §101.5614(5) (2000). Given this statutory language, certain roughly analogous judicial precedent, *e.g., Darby* v. *State ex rel. McCollough,* 75 So. 411 (Fla. 1917) *(per curiam),* and somewhat similar determinations by courts throughout the Nation, see cases cited *infra,* at 9, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. *Gore* v. *Harris,*

___ So. 2d ___, ___ (2000) (slip op., at 19). That conclusion differs from the conclusion of the Secretary. But nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the Court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

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

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation . . . is *investigated, examined, or checked*, . . . and to provide any relief appropriate." Fla. Stat. §102.168(8) (2000) (emphasis

added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the State legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g.*, *In re Election of U. S. Representative for Second Congressional Dist.*, 231 Conn. 602, 621, 653 A. 2d 79, 90–91 (1994) ("Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the voters"); *Brown* v. *Carr*, 130 W. Va. 401, 460, 43 S. E.2d 401, 404–405 (1947) ("[W]hether a ballot shall be counted . . . depends on the intent of the voter . . . . Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante*, at 1 (REHNQUIST, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional provision designed to protect a basic human right. See, e.g., *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon

the constitutional allocation of power. Respondents invoke a competing fundamental consideration— the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

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

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

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is

the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U. S. C. §§5, 6, and 15.

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

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

The Member of Congress who introduced the Act added:

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

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

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

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

is what elections are about.

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

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

Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159–160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that "'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch

185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." *Ibid.*

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

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, . . . which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, *supra*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were

marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound — a wound that may harm not just the Court, but the Nation.

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

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 00–949

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

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

[December 12, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE BREYER join as to Part I, dissenting.

I

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

members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner* v. *Mata*, 449 U. S. 539, 549 (1981), and no cause to upset their reasoned interpretation of Florida law.

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

L. Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp.* v. *Romein*, 503 U. S. 181 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord[s] respectful consideration and great weight to the views of the State's highest court." *Id.*, at 187 (citation omitted). And in *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.*, at 195.[1]

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[1] See also *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1032, n. 18 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude . . . beneficial uses in the circumstances in which the land is presently found"); *Bishop* v. *Wood*, 426 U. S. 341, 344–345 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley* v. *Rhoden*, 421 U. S. 200 (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the

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

Just last Term, in *Fiore* v. *White*, 528 U. S. 23 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.*, at 25–26. Instead of resolving the state-law question on which the federal claim de-

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grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of the meaning of state statutes," we said that "[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.*, at 208.

pended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.*, at 29; *id.*, at 28 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans*, 520 U. S., at 77, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers*, 416 U. S., at 391, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603 (1813), *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), and *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), cited by THE CHIEF JUSTICE, are three such rare instances. See *ante*, at 4, 5, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee*, which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61–62 (13th ed. 1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). *Patterson*, a case decided three months after *Cooper* v. *Aaron*,

358 U. S. 1 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is not defeated if the nonfederal ground relied on by the state court is without any fair or substantial support." 357 U. S., at 455. *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws– criminalizing conduct not covered by the text of an otherwise clear statute– was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U. S., at 350, 354.

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

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state court interpretations of state law. *Ante*, at 5 ("To

attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U. S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U. S. Const., Art. IV, §4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").[2] Article II does not call for the scrutiny undertaken by this Court.

The extraordinary setting of this case has obscured the

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

ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz* v. *Roe*, 526 U. S. 489, 504, n. 17 (1999) (citing *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U. S. Const., Art. II, §1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President) (emphasis added); *ante*, at 1–2 (STEVENS, J., dissenting).[3] Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

I agree with JUSTICE STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in

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

which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (even in the context of the right to vote, the state is permitted to reform "'one step at a time'") (quoting *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

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

Equally important, as JUSTICE BREYER explains, *post*, at 12 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U. S. C. §5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha[d] not been . . . regularly given." 3 U. S. C. §15. The statute identifies other significant dates. See, *e.g.*, §7 (specifying December 18 as the date electors "shall meet and give their votes"); §12 (specifying "the fourth Wednesday in December"— this year, December 27— as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of

state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. §15.

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

I dissent.