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 factfinders, 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.