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Comment

Judicial Jabberwocky in the Presidential Election 2000: When Law and Facts Collide with Politics

I. INTRODUCTION

Long before the United States Constitution was ratified, Americans displayed a deep skepticism of the judiciary.¹ Codification of extremely detailed and complex laws was the palliate to judicial activism.² People believed that if the laws were all published and readily accessible, judges would have less ability to substitute their own personal values and predilections for the will of the people, established through the legislation promulgated by their chosen representatives. Hamilton's first essay on the judiciary assured New Yorkers that "the judiciary is beyond comparison the weakest of the three departments of power" and that

1. *See generally* GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, 298-303 (1969) (noting the colonists' distrust of judges, who were members of the elite class, and insistence upon a written constitution and written laws).

2. "What people in their senses would make the judges, who are fallible men, depositaries [sic] of the law; when the easy, reasonable method of printing, at once secures its perpetuity, and divulges it to those who ought in justice to be made acquainted with it." *Id.* at 302-03 (quoting ROBERT ROSS, RUDIMENTS OF LAW AND GOVERNMENT, DEDUCED FROM THE LAW OF NATURE 35-37 (Charleston 1783)).

"the liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the legislative and executive."³ But history has revealed that the judiciary wields great power in its ability to engineer social change under the guise of "interpreting" the Constitution or statutes.⁴ Judicial activism is not only quite often expected, it is also praised—by those who support the result.⁵

A significant distinction must be made, however, between a good decision and a desirable result. A good decision is a principled one: a decision reached by using accepted tools of construction and recognizing both the appropriate role of the judiciary as the nonpolitical branch and the limited role of the judiciary in deciding social policy, regardless of whether the decision-maker necessarily agrees with the outcome. This distinction is too often glossed over by those who find that the end, which is necessarily value-laden, is justified by the means, usually judicial overreaching. However, the integrity of our tripartite governmental structure simply must be elevated over the expediency of a desired result. A contrary approach leads to judicial legislating such as that of *Roe v. Wade*,⁶ which robs the people of their ability to discuss and decide controversial issues for themselves, and to "truisms" such as that offered by one lawyer: "I don't want to know what the law is, [sic] I want to know who the judge is."⁷

The presidential election debacle in Florida epitomizes judicial overreaching in order to obtain a particular result.⁸ While most

3. THE FEDERALIST No. 78, at 394 (Alexander Hamilton) (Bantam Classic ed., 1982).

4. Consider that *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny changed the public school system, housing patterns, and, to a degree, family life based on the amount of time children spend riding buses past their neighborhood schools to a school miles away. Likewise, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), rewrote the language of Title VII to approve of voluntary affirmative action plans by employers using race, gender, religion, or national origin as the basis for employment decisions. Each of these cases has shaped racial relations in American society.

5. See, e.g., Anna Quindlen, *The Best of the Supremes*, NEWSWEEK, Nov. 6, 2000, at 92 (referring to decisions of the Warren Court when stating, "Its proudest history is a history of daring the unpopular to benefit the unrepresented").

6. 410 U.S. 113 (1973). It is worth noting that this decision by the high Court has hardly had a decisive effect; nearly thirty years later, the Court is still struggling with the results of its activism: "The issue of abortion is one of the most contentious and controversial in contemporary American Society. It presents extraordinarily difficult questions that, as the Court recognizes, involve 'virtually irreconcilable points of view.'" *Stenberg v. Carhart*, 530 U.S. 914, ___ (2000) (O'Connor, J., concurring).

7. ROY M. COHN, *LAWYER'S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION*, IN BRIEF 75 (Bruce Nash & Allan Zullo eds. 1995).

8. The integrity of the Florida court's decisions must be scrutinized independently of one's personal political affinity. The fact that some would embrace or reject the decisions

Americans watched the goings-on as a fascinating, or frightening, political battle, those in the legal profession understood the serious implications of the court's being drawn into that battle. The opinions of the Supreme Court of Florida—once stripped of their ramifications for the presidential candidates—were simply unjustifiable as good legal decisions. The court issued two significant opinions during the thirty-six day election: *Palm Beach County Canvassing Board v. Harris*, (“*Palm Beach*”)⁹ in which the court suspended a statutory deadline as an exercise of its “equitable” power, and *Gore v. Harris*,¹⁰ in which the court ordered a statewide manual recount of undervotes for presidential candidates.¹¹ Neither opinion bears close scrutiny.¹² In their apparent haste to reach a desired result, the justices departed from traditional standards of review, gave mere lip service to canons of statutory construction, clearly departed from legal precedents, and reached a conclusion antithetical to their purported purpose of ensuring the integrity of the rights of Florida voters. In so doing, the court abdicated its limited role in the operation of our government—a role that does not include choosing a President.¹³

II. BACKGROUND OF THE PRESIDENTIAL ELECTION IN FLORIDA

Elections are, by definition, political events and can become ugly, particularly national elections in which the sum expended by the

based solely on whether they favor or disfavor one's political candidate merely illustrates my point about the ends justifying the means as a rationale for judicial activism.

9. 772 So. 2d 1220 (Fla. 2000). The revised version of this opinion in response to the United States Supreme Court's order vacating the original was issued December 11, 2000, three days after the court ordered a statewide manual recount of undervotes.

10. 772 So. 2d 1243 (Fla. 2000). This decision clearly ignored the fact that the Supreme Court had vacated its first opinion.

11. Undervotes refer to ballots on which no vote is registered either because the voter chose not to vote for any candidate or because the voter erred, making his or her choice indiscernible. In Florida the rate of presidential undervotes is about two percent. See Jeff Kurerth et al., *Vote Never Had Chance: Ballots and Laws Were Confusing, Poll Workers Weren't Well-Trained, and Voters Were Careless*, ORLANDO SENTINEL, Dec. 17, 2000, at A1.

12. Because the court's decision in *Gore* was merely an extension of its unsound reasoning and contortion of statutory language in *Palm Beach*, this Comment focuses on the latter case.

13. The decision of the United States Supreme Court in *Bush v. Gore*, 531 U.S. ___, 121 S. Ct. 525 (2000), has rendered ineffectual the decisions of the Supreme Court of Florida regarding the outcome of the election. However, this decision merely refocused the issue of judicial activism from the state court to the federal court. See, e.g., Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000/Jan. 1, 2001, at 46.

candidates is astronomical and the stakes are very high.¹⁴ As in every other state in the nation, Florida voters went to the polls on November 7, 2000, to cast their votes for their preferred candidates for various political offices, including that of President of the United States.¹⁵ Because the result of the presidential race was so close in Florida,¹⁶ a statewide automatic recount was conducted according to statute,¹⁷ yielding the same ultimate result: George W. Bush received more votes for President than did Al Gore.¹⁸ Worth noting is that the "automatic" recount can be waived by the defeated candidate who requests in writing that the recount not be conducted.¹⁹

On November 9, 2000, the Florida Democratic Executive Committee, pursuant to state law,²⁰ protested the election results and requested a manual recount in Palm Beach, Miami-Dade, Broward, and Volusia Counties,²¹ all of which are heavily populated and heavily Democratic

14. An estimated \$3 billion was spent on both the presidential and congressional races in this past election. See *Election Spending Makes Quantum Leap*, THE WASHINGTON POST, reprinted in AUGUSTA CHRON., Nov. 6, 2000, at A3.

15. The number of Floridians who went to the polls but did not vote for a presidential candidate is 180,127, slightly higher than the national average of 2%. See Kunerth, *supra* note 11. However, in the 1996 presidential election, 142,678 ballots registered no vote for president, and voter turnout was much lower in 1996 than in 2000. In 1992, the total was 127,367. See Opposition Brief, *Gore v. Harris*, 2000 WL 1773459, at *2 (Fla. 2d Cir. Ct. Nov. 30, 2000).

16. George W. Bush received 2,909,135 votes and Al Gore received 2,907,351, a difference of 1,784 votes. See *Palm Beach*, 772 So. 2d at 1225.

17. FLA. STAT. ch. 102, § 141(4) (2000). It reads in part:

If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

18. The result of the statutorily mandated recount showed that George W. Bush received 327 more votes than did Al Gore. This number does not reflect the addition of overseas votes in favor of either candidate.

19. FLA. STAT. ch. 102, § 141(4) (2000). It reads in part, "A recount need not be ordered . . . if the candidate . . . defeated . . . request[s] in writing that a recount not be made."

20. FLA. STAT. ch. 102, § 166(4)(a) (2000). It reads in part, "Any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested."

21. See Amended Brief of Intervenors, *Palm Beach*, 2000 WL 1724509, at *2 (Fla. Nov. 16, 2000).

and which Gore won by a sizable margin.²² The selection of these four counties was clearly a political maneuver, as could be expected in a political battle of this magnitude, because the fact that former Vice President Gore won those precincts and counties was undisputed. Instead, the reason for the protest was the closeness of the election outcome.²³ This was not the first close election America has ever had; it was not even the closest.²⁴ However, it was the first time in American history that a presidential candidate requested a recount of votes.²⁵ What is more, it was the first time in Florida history that a request for a recount was granted merely because the election was close and the machine recounts reflected different outcomes.²⁶ Further, neither undervoting nor overvoting is a new occurrence, as the various Supervisors of Elections acknowledged.²⁷ Yet, each of the four county canvassing boards decided to exercise its discretion and grant the Democratic Party's request for an initial manual recount.²⁸

22. In Broward County, Gore received 209,239 more votes than did Bush. In Miami-Dade, the difference was 39,246 votes. Palm Beach County resulted in 116,099 more votes for Gore than for Bush, and in Volusia County, Gore received 14,849 more votes than Bush received. See Complaint, *Rogers v. Elections Canvassing Comm'n*, 2000 WL 1694382, at *4 (Fla. 15th Cir. Ct. Nov. 9, 2000).

23. See Amended Brief of Intervenors, *Palm Beach*, 2000 WL 1724509, at *2.

24. Other close presidential elections occurred in 1824, 1876, 1880, and 1960. Herbert L. Levine, *The Closest Elections of the Past*, ELECTION 2000—WHO REALLY WON? I:21 (2000). During the latter year, despite serious allegations of voter fraud in Illinois and much urging to contest the results, Richard Nixon conceded the election to John F. Kennedy. See Richard Reeves, Op. Ed., N.Y. TIMES, Nov. 10, 2000, at A33. The closest election occurred in 1800 and resulted in a tie between Thomas Jefferson and Aaron Burr with each man receiving 73 electoral votes (three other candidates received between 65 and 1 electoral votes). Levine, *supra*.

25. See Levine, *supra* note 24.

26. Attorney General Bob Butterworth admitted in oral argument that no manual recount had ever been conducted in Florida because of voter error resulting in undervotes that had to be counted. Transcript of Oral Argument, *Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1763817, at *15 (U.S. Dec. 1, 2000). See, e.g., *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508 (Fla. 4th Dist. Ct. App. 1992); *Adams v. Canvassing Bd. of Broward County*, 421 So. 2d 34 (Fla. 4th Dist. Ct. App. 1982) (rejecting the argument that a difference in totals of two counts demonstrates unreliability and noting that “[p]art of the purpose of the protest and contest provisions of the election code is to effect a speedy resolution of such conflicts with minimal disruption of the electoral process”). Justice Anstead, now of the Florida Supreme Court, was a sitting justice in the fourth judicial circuit and concurred in that case.

27. See, e.g., Kevin Valine, *Think Every Vote Counts? You'd Better Think Again*, SARASOTA HERALD-TRIB., Nov. 16, 2000, at A1; Kunerth, *supra* note 11.

28. The decisions of two canvassing boards are rather suspect. Volusia County's machine recount inexplicably resulted in 320 previously undiscovered ballots. A telephone call from Attorney General Butterworth, Gore's campaign chairman in Florida, resulted in

The Democratic Party selected the three precincts in each county whose ballots would be hand counted,²⁹ and all were heavily Democratic.³⁰ Following this initial manual recount, each of the four counties³¹ voted to conduct full manual recounts under Section 102.166(5)(c),³² although the methods by which they concluded that the outcome of the election could be affected were not at all clear. Rather, the number of net votes that Gore gained from the most heavily Democratic voting precincts in the most heavily Democratic counties could be considered negligible.³³ Whether the net gains for each county were accurately

a manual recount, which in turn somehow resulted in the omission of 264 previously counted absentee ballots. See David Tell, *The Gore Coup*, THE WEEKLY STANDARD, Nov. 27, 2000. See also Appellants' Statement of Status of State Court Actions Related to Electors, *Gore v. Harris*, 2000 WL 1720090, at *2 (11th Cir. Nov. 16, 2000) (suggesting that the difference between Volusia County's November 14 certified totals and its initial certified totals was not entirely attributable to the manual recount) [hereinafter "Appellants' Statement of Status"]. Palm Beach County's machine recount resulted in 45% of Gore's total statewide gain in the results of the automatic recount. See Tell, *supra*.

29. FLA. STAT. ch. 102, § 166(4)(d) (2000). It provides in part: "The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue The person who requested the recount shall choose three precincts to be recounted."

30. See Opposition Brief, *Gore*, 2000 WL 1773459, at *2, *10, *12 (Fla. 2d Cir. Ct. Nov. 30, 2000) (noting that handpicking certain precincts that voted for Gore ten to one over Bush could not be extrapolated over Miami-Dade county because, countywide, Gore received 52% of the votes and Bush received 46%).

31. The Miami-Dade County Canvassing Board voted on November 14 to conduct a limited manual recount of three precincts (rejecting the Democrat's request for a manual recount of only the undervoted ballots) and concluded that a full manual recount was not warranted. However, on November 17, the Board reversed its decision and began a full recount on November 20. After determining it could not possibly count all of the ballots by the Florida court's new deadline, the Board voted on November 22 to count only the undervotes and to count them in the tabulation room, which did not allow for observers. A group of media representatives filed a written protest, and the Board voted that afternoon to suspend the recounts and rely on its November 14 returns. See Opposition Brief, *Gore*, 2000 WL 1773459, at *2-4.

32. Section 102.166(5) reads:

If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) [c]orrect the error and recount the remaining precincts with the vote tabulation system; (b) [r]equest the Department of State to verify the tabulation software; or (c) [m]anually recount all ballots.

Id. (emphasis added). The Miami-Dade County Canvassing Board selected the first option and timely notified the Secretary of State on November 9 of its amended results of the automatic recount. See Nov. 22, 2000, Hearing Transcript at 24-30, cited in Opposition Brief, *Gore*, 2000 WL 1773459, at *3, *11 n.2.

33. Gore gained 4 votes in Broward County, 6 in Miami-Dade, and 19 in Palm Beach. See *Palm Beach*, 2000 WL 1725343, at *2; Appellants' Statement of Status, *Touchston*, 2000 WL 1720090, at *2.

extrapolated across the respective counties to suggest that the results of the initial count could affect the outcome of the election was shown to be doubtful during the election contest.³⁴ For example, in Palm Beach County, the Canvassing Board “recovered” 19 votes for Gore from the 4,620 votes counted, which was roughly one percent of the total votes. The Board erroneously concluded that a full recount of the entire county would show a gain for Gore of 1,900 votes.³⁵ But this clearly ignores the fact that the initial 19 vote gain was obtained in the most heavily Democratic precincts and this gain could not accurately be presumed to hold in the Republican-leaning precincts.

The Palm Beach Canvassing Board sought an advisory opinion from the Division of Elections to determine whether it could lawfully conduct a manual recount based on the discrepancy between the result of the machine counts and that of the initial hand count.³⁶ The Division of Elections responded that manual recounts should be conducted only if the voting system had malfunctioned.³⁷ However, the Attorney General of Florida issued a conflicting advisory opinion to Palm Beach,³⁸ despite the fact that his authority to issue the opinion seemed doubtful in light of the legislature’s explicit grant of jurisdiction to the Department of State’s Division of Elections over election matters³⁹ and notwithstanding both his refusal to entertain requests for his opinion in previous election matters⁴⁰ and his disclaimer published on his official website.⁴¹

Because of delays in deciding to recount and then in actually starting the recount with all canvassing board members present, Palm Beach and Broward Counties informed the Secretary of State that they would be

34. See Proceedings: In re: Contest Trial, Gore v. Harris, 2000 WL 1802941, at *108 (Fla. 2d Cir. Ct. Dec. 2, 2000). Judge Charles Burton, a member of the Palm Beach Canvassing Board, testified of his dissatisfaction with the “method”—or lack thereof—employed by the Board in determining that the outcome of the election could be affected and that a full manual recount should be conducted. *Id.*

35. *Id.*

36. See *id.* at *105

37. See Opinion DE 00-13, reproduced in Supplement to Emergency Petition for Extraordinary Relief, Harris v. Circuit Court Judges, 2000 WL 1716219, at *14-15 (Fla. Nov. 15, 2000).

38. See *id.* at *22-24.

39. See FLA. STAT. ch. 106, § 23(2) (2000).

40. See, e.g., Op. Att’y Gen. Fla. 93048 (1993), reproduced in Supplement to Emergency Petition for Extraordinary Relief, Harris, 2000 WL 1716219, at *20, Ex. F (referring letters requesting advisory opinions from the Attorney General on election matters to the Division of Elections).

41. See *Frequently Asked Questions About Attorney General Opinions* (visited Dec. 12, 2000) <<http://legal.firn.edu/opinions/faq.html#when>>.

unable to meet the statutory deadline for submitting the results of their manual recounts.⁴² Palm Beach filed a petition with the state supreme court ostensibly for the purpose of declaring which of the two advisory opinions⁴³ regarding the legality of conducting manual recounts based on voter error was correct.⁴⁴ Meanwhile, the Gore campaign, along with Volusia and Palm Beach Counties, appealed an order by Judge Terry Lewis that the Secretary of State had complied with Florida law in refusing to accept late-filed returns by four counties.⁴⁵

The Supreme Court of Florida ordered a stay preventing the Secretary of State from certifying the results of the election and allowing the manual recounts to continue.⁴⁶ After hearing oral arguments, which were televised, the court issued its highly questionable opinion, in which it determined that manual recounts were permissible in the absence of any showing of fraud, misconduct by election officials, or machine malfunction and that the statutory deadline need not be observed.⁴⁷ The United States Supreme Court vacated this opinion and remanded the case to the Florida court, instructing the state court to explain the basis for its opinion, the extent to which the court relied upon the state constitution in rendering its decision, and the extent to which, if any, the

42. Broward County did not begin the initial 1% recount until November 13. The Board first voted not to conduct a full manual recount then reversed its decision, but because a board member was on vacation, it did not begin a full recount until November 15. See Petitioner Broward County Canvassing Bd.'s Initial Brief on the Merits, *Palm Beach v. Harris*, 2000 WL 1726646, at *3 (Fla. Nov. 18, 2000). Likewise, Palm Beach did not begin its initial recount until November 11. It voted on November 12 to conduct a full recount and did not begin that count until the evening of November 16. Miami-Dade County did not even meet to decide whether to conduct a full manual recount until November 14, at which time it determined that a full recount was unnecessary. *Latest Developments in the Presidential Recount*, MIAMI HERALD, Nov. 16, 2000. Three days later, the Board met again and decided to begin a full recount. *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 2000 WL 1790424, at *1 (Fla. 3d Dist. Ct. Nov. 22, 2000). The recount began on November 19. *Dade Decides to Recount: Process Could Take Weeks*, MIAMI HERALD, Nov. 18, 2000.

43. *Compare Manual Recount Procedures and Partial Certification of County Returns*, DE 00-13, and *Deadline for Certification of County Results*, DE 00-10, Nov. 13, 2000, cited in Supplement to Emergency Petition for Extraordinary Relief, *Harris*, 2000 WL 1716219, at *14-16, Exs. D-E with Op. Att'y Gen. 00-65, Nov. 14, 2000, *id.* at *22-25, Ex. G.

44. *Emergency Petition for Extraordinary Writ*, Palm Beach County Canvassing Bd. v. Harris, 2000 WL 1717643, at *2 (Fla. Nov. 16, 2000).

45. *Order Denying Emergency Motion to Compel Compliance with and for Enforcement of Injunction*, McDermott v. Harris, 2000 WL 1714590, at *1 (Fla. 2d Cir. Ct. Nov. 17, 2000).

46. *Stay Order*, *Palm Beach*, 2000 WL 1716505, at *1 (Fla. Nov. 17, 2000).

47. *Palm Beach*, 772 So. 2d at 1237-40 (Fla. 2000).

court considered 3 U.S.C. § 5⁴⁸ in its deliberations.⁴⁹ Astoundingly, the Florida Supreme Court virtually ignored this directive, issuing its revised and sanitized version of its initial opinion on December 11,⁵⁰ three days after it issued an order to conduct a statewide manual recount of undervotes in the presidential election⁵¹—a decision that shocked even the Gore attorneys who had booked their flights home.⁵²

As a context for the court battles between the two politicians, worth noting is that Republicans sought solace in the federal court system to have the manual recounts stopped. This was a highly criticized maneuver because of the view among many conservatives that states' rights have been largely eviscerated by the pervasive expansion of the federal police power.⁵³ The Democratic Party, on the other hand, engaged in political fratricide, crucifying Theresa LePore, a Democrat and the Supervisor of Elections for Palm Beach County, for designing the "butterfly ballot" that was said to confuse so many voters.⁵⁴ The Democratic Party filed suit against Palm Beach⁵⁵ and Miami-Dade⁵⁶ Counties to force the former Board to use a more liberal standard in counting ballots as registering votes and to force the latter to conduct a full recount. At least three television networks provided around-the-clock coverage of the chaos unfolding during the manual recounts.⁵⁷

48. 3 U.S.C. § 5 (2000). It reads in part: "If any State shall have provided, by laws enacted prior to [election] day . . . , for its final determination of any controversy or contest concerning the appointment of . . . the electors of such State . . . such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes."

49. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. __, __, 121 S. Ct. 471, 475 (2000).

50. *Palm Beach County Canvassing Bd. v. Harris*, 2000 WL 1805408, at *1 (Fla. Dec. 11, 2000).

51. *Gore v. Harris*, 2000 WL 1801246, at *1 (Fla. Dec. 8, 2000).

52. See Evan Thomas & Michael Isikoff, *Settling Old Scores in the Swamp*, NEWSWEEK, Dec. 18, 2000, at 36; Kenneth T. Walsh, *Confusion Reigns*, U.S. NEWS & WORLD REPORT, Dec. 18, 2000, at 21 (referring to the Florida Supreme Court's decision as "extraordinary, astonishing, historic, bizarre").

53. See Complaint for Declaratory and Injunctive Relief, *Siegel v. LePore*, 2000 WL 1694377 (S.D. Fla. Nov. 10, 2000).

54. See, e.g., Rick Bragg & Dana Canedy, *Anger and Chagrin After an Oops on a Ballot*, N.Y. TIMES, Nov. 10, 2000, at A1.

55. See *Florida Democratic Party v. Palm Beach Canvassing Bd.*, CL00-11078AH (Fla. 15th Dist. Ct. Nov. 15, 2000), cited in *Emergency Petition for Extraordinary Relief*, 2000 WL 1716222, at *2-3 (Fla. Nov. 15, 2000).

56. See *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179 (Fla. 3d Dist. Ct. 2000).

57. CNN, C-SPAN, and FOXNEWS each recorded the goings-on of the various canvassing boards, the protestors, and the courts throughout the 36 days during which the result of the election was disputed. For the viewers who watched the counting procedures

Each political party was creating a mantra and wrapping itself in the flag to garner public support.

Perhaps the oddest thing about this election is that absolutely nothing new happened during the election itself: Voters went to the polls and cast their votes, and some of the ballots were discarded as invalid because voters did not follow directions or chose not to vote for a presidential candidate. It has happened in every election in Florida.⁵⁸ It happens in every election in every state across the nation.⁵⁹ The difference is that in this election the Florida Supreme Court intervened to create a new right for some Florida voters: the right of voters who either cannot or do not follow instructions to have certain ballots inspected by hand in search of some undefined indication of that voter's intent. Other voters had their constitutional right to vote nullified by this same action: Those who chose not to vote for a presidential candidate but whose ballot may have indicated a scratch mark or indentation near a candidate's name quite likely voted for a candidate anyway, at least in some counties.

III. THE FLORIDA SUPREME COURT'S RESULT-ORIENTED DECISION

The Florida Supreme Court's decision in *Palm Beach* exemplifies a court caught up in a "means-justify-the-ends" attitude.⁶⁰ By flexing its equitable muscle, the court suspended a statutory deadline, stripped the Chief Elections Officer of her ability to do her job, reallocated the time between the statutory election protest and contest provisions, ignored the usual standards of review, ignored pertinent facts and legal questions, repudiated prior law, and reached an illogical conclusion, the result of which was a remedy whose woeful inadequacy demonstrated the fallacies in the court's reasoning. In *Gore v. Harris*, the court compounded its earlier offense, clearly ignoring the intervening command of the United States Supreme Court to tread cautiously, and ordered a statewide manual recount of undervotes in search of the "true intent" of the voters of Florida.⁶¹ The process established was funda-

and listened to the announcements of new standards for counting, the whole process was maddening. Judge Robert Rosenberg, a member of the Broward County Canvassing Board, actually used a magnifying glass in his search for voter intent.

58. See Kunerth, *supra* note 11.

59. See David Ho, *More Than 2 Million Ballots Nationwide Not Counted Toward Presidency*, AP Online (Nov. 28, 2000).

60. 772 So. 2d 1220 (Fla. 2000). This is the court's first opinion. The revised opinion issued in response to the United States Supreme Court's order is largely irrelevant, except to note the obvious omissions of the substantial references to the Florida Constitution. See *Palm Beach County Canvassing Bd. v. Harris*, 2000 WL 1805408 (Fla. Dec. 11, 2000).

61. 772 So. 2d 1243 (Fla. 2000).

mentally flawed and contradicted the court's purported desire to ensure that Florida voters would not be disenfranchised by failing to resolve its election contest in time to avail itself of the federal "safe harbor" provision for states' electors.⁶² Three justices acknowledged the folly of the majority's order and foreshadowed the reaction of the United States Supreme Court to this astonishing show of defiance by the state court in the face of the high court's reprimand.⁶³ Because the first of these two opinions paved the way for the chaotic outcome and created the initial outcry against judicial activism, it is the focus of analysis.

Much of the argument before the Supreme Court of the United States on December 1, 2000, centered on what the Florida Supreme Court had relied upon for its ruling in *Palm Beach*.⁶⁴ If the lower court had merely been engaged in "plain vanilla" statutory interpretation, the Supreme Court would lack jurisdiction in the absence of a federal question. However, if the state court relied on its constitution to change state law after the presidential election, the Court would have jurisdiction to consider whether the lower court's action was consistent with federal law.⁶⁵ Although the state court's suspension of the statutory deadline for certifying the election results received much attention as an unprecedented act and as a possible violation of either the federal Constitution or 3 U.S.C. § 5, the court's initial act of determining that manual recounts could be conducted merely because the election was close and because some voters may not have followed instructions has the most significance in many ways, because it was a departure from prior law and practice in virtually every respect.

The Florida Supreme Court, *sua sponte*, enjoined the Secretary of State from certifying the results of the election according to law.⁶⁶ Injunctive relief is appropriate only where the legal remedy is inadequate, and Florida's election code clearly provides for an election contest to dispute the results of a certified election.⁶⁷ The political implications of certifying an election are clear: Once a candidate is declared the certified winner, the losing candidate—aside from adopting the status of

62. See 3 U.S.C. § 5 (2000).

63. Chief Justice Wells dissented as did Justices Harding and Shaw. *Gore v. Harris*, 2000 WL 1801246, at *18-32 (Wells, C.J., dissenting) (Fla. Dec. 8, 2000).

64. See generally Transcript of Oral Argument, *Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1763817 (U.S. Dec. 1, 2000).

65. See *id.*

66. Stay Order, *Palm Beach*, 2000 WL 1716505, at *1.

67. See FLA. STAT. ch. 102, § 168 (2000). See also *State v. Latham*, 169 So. 597 (Fla. 1936) ("Statutory election contest proceeding affords sufficient remedy by which circuit court can investigate and determine not only legality of votes cast, but can correct any inaccuracies in count of ballots.").

“loser”—also faces the heavier legal burden of overturning the election results, which are presumptively correct.⁶⁸ While the supreme court claimed to be interested in protecting the “preeminent right” of the citizens of Florida in having their votes count,⁶⁹ the court essentially ignored the procedures established by the state legislature for ensuring the accuracy and security of the citizens’ votes—procedures that place tremendous responsibility upon election officials to provide the means of accurate voting processes so far as those processes depend upon forces *outside the voter*.

The Florida Supreme Court considered two issues in *Palm Beach*: (1) whether the Division of Election’s determination that Section 102.166(5) authorized full manual recounts in the event of machine error but not voter error was clearly erroneous, and (2) whether the Secretary of State abused her discretion in refusing to accept late-filed election returns on the basis that the canvassing boards were unable to finish manual recounts before the statutory deadline.⁷⁰ The first issue was raised in a petition by Palm Beach⁷¹ that sought an advisory opinion from the court determining which of two conflicting advisory opinions⁷² received from the Secretary of State and the Attorney General regarding the meaning of Section 102.166(5) was correct. The petition created jurisdictional problems for the court,⁷³ which the court handily side-stepped in *Palm Beach* by dismissing the original petition and claiming the issue was presented by the parties in the case before it.⁷⁴ Notwithstanding that the court lacked original jurisdiction to issue an advisory opinion in the first instance and that the court did not have to reach the issue had it upheld the plain language of the statute imposing the

68. Boardman v. Esteva, 323 So. 2d 259, 268 (Fla. 1975).

69. *Palm Beach*, 772 So. 2d at 1236-38.

70. *Id.* at 1228-30.

71. Emergency Petition for Extraordinary Writ, *Palm Beach*, 2000 WL 1717643 (Fla. Nov. 16, 2000).

72. See *supra* note 43.

73. The Florida Constitution limits the supreme court’s jurisdiction to issue advisory opinions to a very few specific instances. FLA. CONST. art. V, §§ 1(c), 10, 15 (2000). The court has construed its ability to advise under these provisions quite narrowly. See, e.g., *In re Advisory Opinion To Governor Request of August 28*, 388 So. 2d 554 (Fla. 1980). Beyond these limited circumstances, courts are without authority to issue advisory opinions. See *LaBella v. Food Fair, Inc.*, 406 So. 2d 1216 (Fla. 3d Dist. Ct. 1981) (quoting *William v. Howard*, 329 So. 2d 277, 283 (Fla. 1976)).

74. The court dispensed with this difficulty in a footnote, dismissing the troublesome petition on the basis that it could decide the issue in the case *sub judice* and that it had, in its stay, found “no legal impediment” to the manual recounts continuing” in its statement on November 16. The court offered no reasoning for this conclusion. *Palm Beach*, 772 So. 2d at 1225 n.1.

certification deadline, the court got it wrong and usurped the authority of the Secretary of State in the process.

A. *Misconstruing "Error in Vote Tabulation"*

In *Palm Beach* the court claimed the Division's interpretation of Section 102.166 to allow recounts for machine malfunctions was "contrary to law" because it "contravene[d] the plain meaning of [the statute]."⁷⁵ Yet, the court skimmed on its explanation of how the Division's construction offended the statute's plain meaning—and for good reasons. First, the statute's plain language clearly supports the Division's interpretation. Second, even if the plain language did not clearly support this construction, the resulting ambiguity in the phrase "error in the vote tabulation" would result in deference to the agency's reasonable interpretation. Therefore, the ground for overturning the administrative interpretation disappears. Finally, the court's reasoning behind its construction of the statute's "plain meaning" borders on nonsensical. On the other hand, the interpretation given by the Division was not only reasonable, it was consistent with the statute's plain language, the entire statute for election protests, existing case law, and the purpose of the statute. Therefore, the Division's interpretation should have been upheld.⁷⁶

The Florida Supreme Court erred in holding that the Division's construction of Section 102.166(5) contradicted that statute's plain meaning. The exact opposite is true. Section 102.166(5) authorizes canvassing boards to conduct manual recounts as one of three options if the initial manual recount conducted pursuant to Section 102.166(4) "indicates an error in the vote tabulation which could affect the outcome of the election."⁷⁷ The Division of Elections construed the statute to mean that manual recounts should be conducted only when the voting system, or the machine or method of casting and processing voted ballots,⁷⁸ malfunctioned and not when voters erred in failing to follow directions.⁷⁹ The court rejected this interpretation, holding that such a

75. *Id.* at 1228. This claim is ironic considering the court's conclusion that under § 102.112, the Secretary of State *must accept* late returns except in two extreme circumstances, directly contravening the plain language of that statute. *Id.* at 1237.

76. Although Katherine Harris, the Secretary of State, received the brunt of much criticism and personal attacks (among the derogatory names were "hack," "commissar," and "crook"), it is the Division of Elections that issues advisory opinions, and Laurence Clayton Roberts, Director, authored the ones at issue. See Opinions DE 00-10, DE 00-13, *Harris*, 2000 WL 1716219, at *14-16, Exs. D-E.

77. See FLA. STAT. ch. 102, § 166(5) (2000).

78. See *id.* ch. 97, § 021(30) (2000) (defining "voting system").

79. See Opinion DE 00-13, *supra* note 37.

construction contradicted the statute's plain language because the statute "provides a remedy for any type of mistake made in tabulating ballots."⁸⁰ Thus, according to the court, the Division's opinion unnecessarily limits the statute's application.⁸¹

However, the statute provides for mistakes in *tabulating* ballots, not in *casting* votes.⁸² The statute does not refer to an error "due to the manner in which a ballot has been marked or punched" or to any other type of voter error.⁸³ It refers to the vote tabulation, which occurs by machine in sixty-six of Florida's sixty-seven counties.⁸⁴ An error in vote tabulation can occur in only one of two ways in these sixty-six counties: The machine malfunctions, or the election officials err in transferring the vote totals from the machine counters to the certificates of return as established in great detail in Section 101.54.⁸⁵ The latter is highly unlikely to be the source of an "error in vote tabulation" because of the numerous procedural safeguards required by the governing statute.⁸⁶ What is more, if the latter process still produces an error, Section 102.166(3)⁸⁷ provides for the canvassing boards to correct the error.

For the court's interpretation of "error in the vote tabulation" to have any meaningful basis, one must assume that the machine's failure to read invalid ballots is an "error."⁸⁸ But this assumption defies logic. If the statute did refer, as the court concluded, to the machine's inability to read improperly cast ballots, the bulk of the election code would be rendered mere surplusage. No voting machine exists that can read an

80. *Palm Beach*, 772 So. 2d at 229.

81. *Id.*

82. See FLA. STAT. ch. 102, § 166(5) (2000).

83. *Palm Beach*, 772 So. 2d at 1228.

84. Union County is the only county still voting by paper ballot and manual count. See Kunerth, *supra* note 11.

85. See FLA. STAT. ch. 101, § 54 (2000).

86. *Id.* For example, two persons are employed to read the total number of votes for a candidate or issue from the machine counter with one person reading and the other ensuring the numbers read are accurate. Likewise, one person writes down the numbers called out while another looks on to ensure accuracy. These individuals switch roles and repeat the process until each person has performed each role. *Id.*

87. See FLA. STAT. ch. 102, § 166(3) (2000) (providing three ways for canvassing boards to ensure the accuracy of the returns from the precincts based upon the kind of voting system used).

88. The court had no record before it and sought no evidence to explain what, other than voter error, might cause the discrepancy in the machine counts. But numerous explanations for the discrepancy aside from rejection of valid legal votes were provided in the contest trial before the second circuit court. See Proceedings: In re: Contest Trial, 2000 WL 1802941, at *19-54 (Fla. 2d Cir. Ct. Dec. 2, 2000).

improperly marked ballot. Manual recounts—assuming they are, in fact, accurate, which is an assumption leaving much to be desired by those who have either had to count large numbers of anything or who watched the televised recounts proceed—would be necessary for every election.⁸⁹ Machines would be obsolete. This result could not be the intention of a legislature that required voting machines to be used in counties with populations exceeding 260,000.⁹⁰ Nor is it consistent with an election code that, in the event of a discrepancy between machine counts and election returns, requires election officials to presume the machine count is correct.⁹¹

Additionally, the court had to have assumed that the machine's inability to read certain ballots resulted in actual votes not being counted. However, this assumption is just that—an assumption. Had the court required any kind of evidentiary hearing, it would, no doubt, have discovered exactly what the contest trial before Judge N. Sanders Sauls revealed: Ballots can have marks, indentations, and even various versions of “hanging” chads that are not produced by the voter at all.⁹² Nor can a canvassing board, after the fact, determine with certainty whether those particular “indications of voter intent” are actually that.⁹³ All of these factors militate against the court's conclusion that an election protest should be conducted in the absence of some threshold showing of a reason to conduct that count other than one of the candidate's belief that he would win.

What is perhaps most significant in light of the court's attention to voters' intent is that the election code specifically addresses voter error. Sections 101.011(5)⁹⁴ and 101.5608(2)(b)⁹⁵ provide voters with an

89. Statisticians seem to agree that every count will produce a different number. *See, e.g.,* Gina Kolata, *In Research, Recounts Are Norm*, N.Y. TIMES, Nov. 10, 2000, at A24.

90. *See* FLA. STAT. ch. 101, § 36. It reads in pertinent part: “In counties above 260,000 population . . . which have adopted the use of voting machines or electronic or electro-mechanical voting, it shall be mandatory for all municipalities in such counties to use such voting machines or devices in all elections.”

91. Section 102.166 itself requires this presumption as do Sections 101.141 and 101.5614.

92. *See generally* Proceedings: In re: Contest Trial, 2000 WL 1802941, at *19-54 (revealing Gore's own expert witnesses' testimony that other causes of undervote besides voter's error were likely).

93. *See id.* at *58.

94. FLA. STAT. ch. 101, § 011(5) (2000). It provides in pertinent part: “Any elector who shall, by mistake, spoil a ballot so he or she cannot vote the ballot may return it to the inspectors In no case shall an elector be furnished with more than three ballots.”

95. FLA. STAT. ch. 101, § 5608(2)(b) (2000). It reads in pertinent part: “Any voter who spoils his or her ballot or makes an error may return the ballot to the election official and secure another ballot, except that in no case shall a voter be furnished more than three

opportunity to be furnished at least three ballots in their attempt to cast their votes correctly. Section 101.011(2)⁹⁶ delineates which voter errors are "acceptable" when paper ballots are used and which voter errors are not. In addition, the legislature has provided multiple safeguards to guard against voter error, including publishing sample ballots in newspapers, mailing sample ballots to registered voters, and posting at least two sample ballots at each polling place,⁹⁷ as well as furnishing all electors instructions to follow when voting.⁹⁸ Moreover, the voters choose their voting systems to the extent the county commissioners, who are themselves elected, decide on which voting system to employ.⁹⁹

When the court did refer to other portions of the election code to support its conclusion that manual recounts are authorized for voter errors, the court selected poorly and ignored those portions of the selected statutes that undermined its conclusion. For example, the court relied on language in Sections 101.5614(5)-(6) to reach a finding that the legislature intended manual recounts in search of voter intent when voters erred in casting their ballots.¹⁰⁰ However, this portion of the code provides for the situation in which, through no fault of the *voter*, the ballots are unreadable by the machine. When this error occurs, the statute requires the election officials at each voting precinct to make duplicates of ballots that are "damaged or defective" or to count those ballots manually, depending on which procedure is "best suited to the system used."¹⁰¹ More importantly, this statute states that any

ballots."

96. FLA. STAT. ch. 101, § 011(2) (2000). It states,

No paper ballot shall be voided or declared invalid . . . [because] the ballot is marked other than with an "X," so long as there is a clear indication thereon . . . that the person marking such ballot *has made a definite choice*, and provided further, that the mark placed on the ballot . . . shall be located in the blank space on the ballot opposite such candidate's name.

Id. (emphasis added).

97. See FLA. STAT. ch. 101, § 20 (2000).

98. See FLA. STAT. ch. 101, §§ 031, 5611 (2000). See also Proceedings: In re: Contest Trial, *Gore*, 2000 WL 1802941, at *63-64 (reciting the instructions on the voting booths used in Palm Beach County).

99. See FLA. STAT. ch. 101, § 32 (2000). See also Kunerth, *supra* note 11 (quoting the Supervisor of Elections for Broward County as repeatedly asking the County Commission to buy new voting equipment to replace the punch-card machines).

100. *Palm Beach*, 772 So. 2d at 1228-29.

101. FLA. STAT. ch. 101, § 5614(5)-(6). It reads in part:

If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot.

duplicate ballot “shall not include the invalid votes.”¹⁰² Instead, the ballot is valid with respect to “those names which are properly marked.”¹⁰³ Moreover, this entire process occurs prior to any election protest. Thus, the very statutory provision the court calls upon to support its conclusion actually contradicts that conclusion.

The same is true for the court’s use of Section 102.141, which instructs canvassing boards to examine the returns to determine whether they accurately reflect the vote count.¹⁰⁴ Once again, though, the court misrepresented the text of the statute. Section 102.141 provides for a recount of all ballots from a particular precinct if the returns from that precinct are missing, if there are omissions on the returns, or if there is an obvious error on the returns.¹⁰⁵ But before the Board canvasses those returns, it is to inspect the machine counters or tabulations, and, if a discrepancy exists between the returns and the counters or tabulations, the latter is presumed correct.¹⁰⁶ The votes are canvassed based on the machine counts. This provision, too, undercuts the court’s conclusion that the legislature clearly intended to provide for a means of rectifying voter error through manual recounts. If the legislature provided that in other instances in which a discrepancy exists in the reported vote totals the machines were to be presumed correct and that machine recounts were authorized to rectify any discrepancy, why would it authorize manual recounts in the absence of an error by the machines or elections officials?

Thus, the use of “error in vote tabulation” can be read consistently with the language of the statute and the election scheme only as either an error in the functioning of the vote tabulation equipment or in the human process of reading the numbers from the machine equipment and transferring those numbers to the certificates of return, in which case the machine results are presumptively correct. There simply is no support anywhere in the election code for the notion that “error in vote tabulation” refers to voter error in casting ballots. Any interpretation of this sort must be found outside the code.

Clearly then, the Division’s interpretation is not contrary to the statute’s plain meaning. Had the court had any lingering doubts, however, these could easily have been resolved by considering the statutory history of Section 102.166. Section 102.166 was amended in 1989 in response to the mechanical and software errors that occurred in

102. *See id.* § 101.5614(5).

103. *See id.* § 101.5614(6).

104. *Palm Beach*, 772 So. 2d at 1229.

105. *See* FLA. STAT. ch. 102, § 141 (2000).

106. *See id.*

the race between Connie Mack and Buddy MacKay for the United States Senate in 1988.¹⁰⁷ During that race, ballots became soggy and warped and could not be read by the machine. In addition, a software error caused Democratic votes to be counted while Republican votes were rejected.¹⁰⁸ Prior to the amendment, a losing candidate could protest the election results, but the machine counts were presumptively correct. The candidate could only protest fraudulent returns in the circuit court.¹⁰⁹ There was no provision for fixing the machine or the software. Thus, paragraphs (3)-(10) of Section 102.166 were enacted for the purpose of authorizing the canvassing board to correct any machine malfunctions rather than merely relying on totals that the Board knew to be faulty because of the malfunction.¹¹⁰

A final consideration is that the Division's interpretation was wholly consistent with Florida case law regarding the appropriateness of conducting manual recounts in only narrow, specified instances. In its recitation of facts, the court conveniently glossed over the admission that the manual recounts at issue were purely the result of the Florida Democratic Executive Committee's concern over the "closeness of the election," a significant fact for both legal and practical reasons.¹¹¹ As a legal matter, the closeness of an election as grounds for conducting even an initial manual recount is a novelty, as Attorney General Butterworth admitted in oral argument before the Supreme Court of the United States.¹¹² Case law clearly discredited losing political candidates' attempts to reverse the results of an election by hand-counting the ballots just because the results were close and a discrepancy existed between the machine recounts. In *Broward County Canvassing Board v. Hogan*,¹¹³ the canvassing board explained that voter error in using the punchcard ballot is caused by "hesitant piercing, *no piercing*, or

107. See Response Brief, *Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1741597, at *9 n.10 (U. S. Nov. 24, 2000) (citing 1989 FLA. LAWS chs. 89-348, § 15 and "The Senate Staff Analysis and Economic Impact Statement" for the Voter Protection Act).

108. *Id.*

109. See FLA. STAT. ch. 102, §§ 166(1)-(3).

110. See *supra* note 106.

111. *Palm Beach*, 772 So. 2d at 1232.

112. Paul F. Hancock argued on behalf of Butterworth. See Transcript of Oral Argument, *Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1763817, at *12. The Attorney General's conduct throughout the election is questionable. He engaged in *ex parte* conversations with the Volusia County Canvassing Board, resulting in their decision to conduct a manual recount. See Evan Thomas & Michael Isikoff, *Shootout in the Sun*, NEWSWEEK 30, 36 (Nov. 27, 2000). See also Third Party Complaint, *Gore*, 2000 WL 1770264, at *4 (Fla. 2d Cir. Ct. Dec. 2, 2000).

113. 607 So. 2d 508, 509-10 (Fla. 4th Dist. Ct. 1992). See also *Adams v. Canvassing Bd. of Broward County*, 421 So. 2d 34 (Fla. 4th Dist. Ct. 1982).

intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes” and that this error “create[s] loose or hanging paper chads which, although present on the first count, subsequently fall away on a recount, thereby causing the difference in count.”¹¹⁴ In addition, the court in *Hogan* reversed the trial court’s order for a new trial because “there was no evidence adduced that the machines were malfunctioning, improperly used, or improperly calibrated, nor any evidence adduced that there was fraud or impropriety in the manner in which the election was held.”¹¹⁵ Thus, a difference between the original election result and the result of the automatic recount is an insufficient ground for granting a request for a manual recount.¹¹⁶ The fact that this was a presidential election was even greater reason for following existing law, particularly considering the implications of federal law on the court’s decision,¹¹⁷ as well as the inability of non-Floridians to take advantage of any recourse against an activist court, such as voting not to retain the justices.¹¹⁸ What is more, the other counties could not simply decide to conduct manual recounts so that all Florida voters would receive the same treatment.

As a practical matter, close elections are no different from any other election in that, if manual recounts are necessary to validate the “true intent” of the voters, as the court concluded they are, there simply is no need for machine counts at all, much less machine recounts. Florida law already requires the canvassing boards to take precautions to ensure the accuracy of the vote totals.¹¹⁹ Further, most of the discrepancies that occurred in the November 8 machine recount were admittedly the result

114. 607 So. 2d at 509 (emphasis added).

115. *Id.*

116. The court sympathized with appellant: “It is understandable that an individual losing an electoral race by three votes and then by five votes upon recount would look upon the results with some consternation Th[is], however, [is] not the controlling factor[] in the statutory scheme.” *Id.* at 510.

117. Although the United States Supreme Court initially was interested in the effect of 3 U.S.C. § 5 and U.S. CONST. art. II, § 1, cl. 2 on the Florida court’s decision, it ultimately decided the issue on equal protection grounds. *See Bush v. Gore*, 531 U.S. ___, 121 S. Ct. 525 (2000).

118. FLA. CONST. art. V, § 10(a). This section provides for a retention vote for the justices of the state supreme court.

119. *See, e.g.*, FLA. STAT. ch. 101, § 101.5611 (providing specific types of instructions to voters); *id.* § 101.5612 (requiring voting equipment to be tested within 10 days before an election); *id.* § 101.5613 (requiring election board members to examine the voting devices periodically during the election); *id.* § 101.5614 (providing for duplicates to be made of spoiled ballots); *id.* § 101.733 (requiring the Division of Elections to adopt an emergency contingency plan); *id.* § 102.141 (requiring canvassing boards to ensure the accuracy of the returns and to make necessary corrections and report election difficulties).

of errors by election workers who processed some ballots twice, others not at all.¹²⁰ In addition, the court implicitly approved of the canvassing boards' exercise of discretion in determining that the results of their sample manual recounts indicated an "error in the vote tabulation which could affect the outcome of the election."¹²¹ However, this entire process places the constitutional right to vote—so far as the court considers that right manifested in ascertaining the voter's "true intent"—in the hands of a canvassing board, which may or may not believe voter error is reason to conduct a recount and which may or may not find that any sort of voter error "could affect the outcome of the election."¹²² Thus, proclaiming voter intent as the preeminent consideration becomes nothing more than mere lip service.

Even if the plain language of Section 102.166 did not indicate that manual recounts were authorized to remedy an error in tabulating the votes as opposed to voter error in casting votes, at most the court would legitimately be able to determine that the statute is ambiguous. In light of the provision in Section 102.166(3), which designates the particular course of action by the canvassing board depending upon which voting system was used, a reasonable interpretation of Section 102.166(5) is that the legislature replicated that designation in paragraphs (a)-(c). Thus, the canvassing board would select the appropriate remedy from paragraphs (a)-(c) depending on the nature of the voting system used. The options listed in Section 102.166(5) suggest an element of correlation between the voting system and the remedy to be selected. Another possibility is that the legislature listed the remedies in the order of initial to last resort. If the error could not be fixed, the canvassing

120. Pinellas County election workers fed one stack of ballots into the machine twice and failed to process another stack altogether. *See Tell, supra* note 28. The Democrats' suit against Nassau County involved an oversight by election officials who had inadvertently omitted 218 ballots from the automatic recount. The ballots had been left in a transport case and were overlooked. *See Proceedings: In re: Contest Trial, Gore*, 2000 WL 1802941, at *214-17. In Volusia County, an election worker left the ballot collection area with two uninspected bags on election night, and the following day, another election worker interrupted the recount when he walked in with a bag of ballots he had left in his car the night before. *See Levine, Volusia County, Florida, supra* note 24.

121. *Palm Beach*, 772 So. 2d at 1225. One of the factual issues that was determined against Gore in the trial before Judge N. Sanders Sauls was the reliability of the statistical methods of extrapolation employed by the Democrats in projecting the number of "votes" that could be found among the machine-rejected ballots. *See supra* notes 34-35.

122. The court fails to address the portion of the statute that modifies "error in vote tabulation." Only those that "could affect the outcome of the election" require any action by the canvassing board. But because only four heavily Democratic counties conducted the initial recounts in three of their most heavily Democratic precincts, any extrapolation based on those results is highly suspect for the entire county, much less for the entire state.

board should double-check the software. If neither of these could alleviate the problem, the canvassing board should manually count the ballots. Considering the historical context in which Section 102.166(5) was enacted, either of these interpretations is much more probable than the court's conclusion, which has no real foundation in the election code.

Therefore, assuming other possible legitimate constructions of an ambiguous statute exist, the Division's interpretation was entitled to deference under Florida law.¹²³ As long as the interpretation "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."¹²⁴ Florida law explicitly gives the Secretary of State, as the Chief Elections Officer, the authority to interpret election law.¹²⁵ Opinions of the Division of Elections are binding on subordinate agencies, such as the Palm Beach Canvassing Board, which sought the opinion at issue,¹²⁶ "until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter."¹²⁷ Palm Beach could not lawfully conduct a manual recount. Thus, the supreme court had to invalidate the Division's opinion in order to reach its result—including Palm Beach's manual counts in the certified election total.

Generally, respect for the separation of powers established in the Constitution requires courts to show deference to administrative agency decisions when the legislature uses its lawmaking power to delegate specific rule-making and enforcement authority to executive agencies.¹²⁸ The Florida courts, like other states and the federal courts, defer to administrative interpretations of laws within their subject

123. Ironically, Justice Pariente, with whom Justice Quince concurred, wrote a rather sharp rebuke of the majority's opinion in *Donato v. AT&T*, 767 So. 2d 1146, 1155-56, which the court cited in *Palm Beach*, 772 So. 2d at 1228 n.11. Justice Pariente opined that the deference due the administrative body authorized to administer the Florida Civil Rights Act was not, as the majority determined, restricted only to "cases of 'doubtful meaning.'" Justice Pariente further chastised the majority for failing to read all of the relevant provisions of the statute together to ascertain the legislative meaning, which is particularly ironic in the context of this dispute in which the most relevant provisions of the election code are ignored while other portions are read entirely out of context to serve a purpose.

124. *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st Dist. Ct. 1994) (quoting *Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1st Dist. Ct. 1984)).

125. See FLA. STAT. ch. 97, § 112(1) (2000).

126. See Opinion DE 00-13, *supra* note 37.

127. See FLA. STAT. ch. 106, § 23(2) (2000).

128. See generally *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See also FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

matter jurisdiction as long as the interpretation is reasonable.¹²⁹ In previous election cases, the court announced this standard of review:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if *rational* and *not clearly outside legal requirements* should be upheld rather than substituted by the impression of a particular judge or panel of judges might deem more appropriate.¹³⁰

Yet this situation is precisely what occurred in Florida. The justices of the supreme court substituted their judgment for that of the agency charged with executing the election code. Considering the language of the statute, its place in the statutory scheme, the statutory history, and prior case law on the issue, it is small wonder that the court resorted to constitutional platitudes and misrepresentations of other statutes in the election code to support its decision.

B. *The Statutory Deadline That Wasn't*

As an initial matter, it should be noted that all sixty-seven counties in Florida submitted *certified returns* to the Secretary of State by November 14, 2000.¹³¹ The election code establishes a process for certifying election returns.¹³² Essentially, the process begins with the inspectors of election at the individual precincts. Once the polls close, the inspectors lock the voting machines, open the counters, and call out the vote totals from the counters. Two other inspectors ensure that the totals called out are correctly recorded on the certificates of returns. Additional procedural safeguards are in place to ensure further the

129. *Smith*, 645 So. 2d at 521. See also *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993).

130. *Krivanek*, 625 So. 2d at 844 (quoting *Boardman v. Esteve*, 323 So. 2d 259, 268-69 n.5 (Fla. 1975)) (emphasis added). See also *Donato*, 767 So. 2d at 1153 (stating that the administrative agency charged with enforcement of a statute "is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute").

131. See Emergency Petition for Extraordinary Relief, *Harris*, 2000 WL 1716222, at *1. In fact, most counties had submitted their returns by November 9, following the automatic machine recount, and these returns were on file with the Department of State. Volusia County had finished its manual recount by the statutory deadline. Palm Beach had not begun its recount, and neither Broward nor Miami-Dade had even voted to begin a recount. Amended Answer Brief, *Palm Beach*, 2000 WL 1726664, at *17 (Fla. Nov. 19, 2000).

132. See FLA. STAT. ch. 101, §§ 101.5614, 101.54; and ch. 102, § 141.

integrity of the recorded totals.¹³³ All precincts are required to submit these returns to the county canvassing boards by noon on the day following the election.¹³⁴ In some cases, the precincts transport the ballots to a central counting location for tabulation.¹³⁵ The canvassing boards then compile the totals from all returns from the precincts, certify that those returns are correct, and submit those returns to the Department of State, along with a report noting any problems occurring from equipment malfunction or any other unusual circumstances during the canvassing process.¹³⁶ A special provision requires canvassing boards to submit their returns for the election of federal or state officers "immediately after certification of the election results."¹³⁷

But in this election, the Florida court enjoined the Secretary of State from certifying the results of the election as required by Florida law.¹³⁸ Instead, the court determined as an initial matter that manual recounts were lawful in the absence of any allegation of fraud, machine malfunction, or impropriety in the election process.¹³⁹ As previously discussed, this decision was contrary to the statute, the election code, prior case law, and the purpose of the statute as indicated by its history. It is also based on the faulty premise that the machines erroneously rejected "valid legal votes," despite the explanation by the canvassing board in *Hogan* that additional marks on the ballot are often not the result of an intention to vote.¹⁴⁰ But holding that the manual counts were lawful was only a first step and a necessary finding for the court to reach its desired outcome. The second issue before the court was whether the circuit court erred in holding that the Secretary of State did not abuse her discretion in refusing to accept the late-filed returns.

133. See § 101.5614.

134. See § 102.141(3).

135. See § 101.5614.

136. See § 102.141.

137. See §§ 102.111, 102.112.

138. *Palm Beach*, 772 So. 2d at 1239.

139. *Id.* at 1230. A perusal of Florida case law resolving election disputes quickly reveals the courts' emphasis on allegations (or the lack thereof) of fraud, machine malfunction, or impropriety in the election process. See, e.g., *Boardman*, 323 So. 2d at 271; *Hogan*, 607 So. 2d at 510; *Brake v. Gissendanner*, 206 So. 2d 10, 12 (Fla. 3d Dist. Ct. App. 1968).

140. 607 So. 2d at 509. The trial before Judge N. Sanders Sauls to contest the election made clear that not only can indentations on the ballot be made by a fingernail or ring but the infamous chads can also pop out from bending the ballots. See Proceeding: In re: Contest Trial, 2000 WL 1802941, at *40-42. None of these situations indicates any intention by a voter to vote for a particular candidate, but a manual count would probably result in this sort of vote.

On this issue, the court again faced a difficult obstacle: the standard of review. Courts routinely uphold determinations by a lower court or an official who is acting within the scope of the discretion granted that person. This freedom to act is inherent in the nature of "discretion." Only if the decision-maker can be shown to have acted arbitrarily is the decision overturned.¹⁴¹ Judge Terry Lewis understood this basic legal principle when he determined the Secretary of State had considered the relevant factors in making her decision not to accept late returns.¹⁴² Abuse of discretion is a low legal threshold. For the court to hold as it did on this issue, it had to find both that the Secretary of State, as an executive officer, abused her discretion in carrying out her legal duties and that the circuit court erred in finding that there was no abuse of discretion. This would be the third legal decision that the court was required to reverse, and a fourth decision was reversed¹⁴³ before the United States Supreme Court called a halt to the nonsense.

The court found two ambiguities within the relevant code provisions. The first was purely manufactured; the second, though legitimate, provided the court with an opportunity to construe the statute in a way that deprived it of any meaning. The court found that the time frame established for filing an election protest necessarily conflicted with the requirement in Sections 102.111¹⁴⁴ and 102.112¹⁴⁵ for canvassing

141. Abuse of discretion is subject to a reasonableness standard: If reasonable people could disagree, the judge or administrator cannot be said to have abused his or her discretion. *See White v. Consolidated Freightways Corp.*, 766 So. 2d 1228 (Fla. 1st Dist. Ct. 2000) (stating that reviewing courts will not find an abuse of discretion when reasonable people could differ).

142. *See Order Denying Emergency Motion to Compel Compliance with and for Enforcement of Injunction, McDermott v. Harris*, 2000 WL 1741600 (Fla. 2d. Dist. Ct. Nov. 17, 2000).

143. In *Gore v. Harris*, 2000 WL 1801246, at *1, *6, *9, *10 (Fla. Dec. 8, 2000), the state high court reversed the trial court's findings in almost every respect. But the trial transcript clearly reflects that no evidence was introduced that voters were prevented in any way from casting their votes or that the machines themselves failed accurately to register valid votes. *See Proceedings: In re: Contest Trial, Gore*, 2000 WL 1802941, at *19-54.

144. FLA. STAT. ch. 102, § 111. It reads in pertinent part:

Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

145. FLA. STAT. ch. 102, § 112. It states in pertinent part:

(1) The county canvassing board . . . shall file the county returns for the election of a federal or state officer with the Department of State immediately after

boards to submit their certified election results to the Department of State. But this interpretation is clearly not the case for several reasons.

First, the court created a worst-case scenario to establish the purported conflict between the statutory provisions.¹⁴⁶ In this scenario, the canvassing board had not certified the results of the election for that county by the sixth day following the election. On that sixth day, the losing candidate protested the election results as erroneous according to Section 102.166(2)¹⁴⁷ and also filed a request for a manual recount pursuant to Section 102.166(4).¹⁴⁸ Although the court skipped over this detail, the canvassing board would necessarily have had to grant the request, conduct the initial manual recount according to Section 102.166(4)(d),¹⁴⁹ and find “an error in the vote tabulation that could affect the outcome of the election,” all of which is left to the canvassing board’s discretion.¹⁵⁰ Then the canvassing board would need to select a manual recount of all ballots as the appropriate remedy. Thus, the court concluded, in a large county with a substantial number of voters, “logic dictates that the period of time required to complete a manual recount . . . may require several days.”¹⁵¹ Hence, a conflict exists between the statutes.

The court’s logic is problematic in numerous ways. Because of the rapidity with which the tabulating equipment can produce a final count, precinct officials are able to submit their certified returns to the appropriate county canvassing boards well before the deadline of noon on the day following the election as required by law.¹⁵² The canvassing boards have merely to transfer those totals onto their own certifi-

certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the . . . election If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at the time may be certified by the department. (2) The department shall fine each board member \$200 for each day such returns are late, the fines to be paid only from the board member’s personal funds.

146. *Palm Beach*, 772 So. 2d at 1232.

147. Section 102.166(2) states, “Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election was held, whichever occurs later.”

148. Section 102.166(4) requires that a written request for a manual recount be submitted, along with the reason for the desired recount, prior to the canvassing board’s certification of the results or within 72 hours after midnight of election day, whichever is later.

149. See FLA. STAT. ch. 102, § 102.166(4)(c)-(d) (requiring the selection of at least three precincts and at least one percent of the total votes cast for the candidate to be counted).

150. See § 102.166(5).

151. *Palm Beach*, 772 So. 2d at 1237.

152. See FLA. STAT. ch. 102, § 141(3).

cates of return, while checking for errors, before the county returns are ready to be submitted to the Department of State. In fact, Union County managed to count each of its 4,084 ballots by hand and report its results on election day.¹⁵³ Further, in practice, because the precincts transmit their results to the county by electronic means, the canvassing boards canvass the returns and report the results to the Division of Elections on election day or very shortly thereafter.¹⁵⁴

Even if the hypothetical canvassing board had experienced a virtually impossible "snag" that would prevent its submission of the returns until the sixth day following the election, the Board would, no doubt, consider this factor in its determination of whether to grant the request for an initial, limited manual recount.¹⁵⁵ Prior to the court's decision in this very case (and no doubt absent the intense political pressure created by the parties in this case), the Board would have denied the request summarily if it were based on nothing more than the closeness of an election. What is more, the candidate has no "right," not even a statutory right, to an initial recount. Thus, the candidate who chooses to wait until the day before the statutory deadline to file a protest can have little expectation of success. As was mentioned in the oral argument before the court on this issue, a student may have a week to complete an assignment, but if the student waits until the day before the assignment is due to begin, he will most likely fail to meet his deadline.¹⁵⁶ This failure does not mean the deadline does not exist.

In addition, the "conflict" created by the court was far from the facts that were before it. The Democrats filed an election protest and a request for a manual recount with Palm Beach, Volusia, Broward, and Miami-Dade Counties on November 9, well within the court's hypothetical conflicting time frame.¹⁵⁷ Volusia County conducted a full manual recount of its 179,661 votes and submitted its certified results to the Department of State within the statutory deadline.¹⁵⁸ After submitting its certified results the day before, on November 15 the Broward County

153. See Kunerth, *supra* note 11.

154. See, e.g., Levine, *Volusia County, Florida*, *supra* note 24 (noting that computer problems prevented six precincts from transmitting their returns to the county so that the county's returns were delayed until 3:00 a.m.).

155. See *Hogan*, 607 So. 2d at 510 (finding that the canvassing board's ability to conduct the requested manual recount in a short period of time was "immaterial" to the case).

156. Joe Klock, the outside counsel for the Secretary of State, made this point to the court. See Transcript of Oral Argument, *Palm Beach County Canvassing Bd. v. Harris* (visited Dec. 12, 2000) <<http://wfsu.org/gavel2gavel/transcript/00-2346.htm>>.

157. *Palm Beach*, 772 So. 2d at 1225 n.3.

158. See Appellant's Statement of Status, *Touchston*, 2000 WL 1720090, at *2.

Canvassing Board reversed its earlier decision and voted two-to-one to conduct a full manual recount.¹⁵⁹ The Miami-Dade Canvassing Board did not even meet and decide to conduct a full recount until November 17, three days after the deadline.¹⁶⁰ Palm Beach voted to begin a full manual recount two days before the statutory deadline but had not begun that count on November 16.¹⁶¹ Thus, any “conflict” in the time frame for protests and the statutory deadline for submitting returns was the result of delay and indecision by the canvassing boards. However, it cannot legitimately be concluded that the voters should not be “penalized” for the dilatory behavior of the canvassing boards because the canvassing boards can decide whether to conduct the initial recount in the first instance, whether the results of any such recount constitute an error in tabulation that could affect the outcome of the election, and then whether a manual recount is an appropriate response to the error.

Even if not the case, the governing statute specifically requires as part of the procedure for conducting a manual recount that “[t]he county canvassing board shall appoint as many counting teams . . . as necessary to manually recount the ballots.”¹⁶² While this language does not specify a deadline, the most natural reading of this statute, which should be read *in pari materia* with other relevant statutory provisions, is that the legislature intended “as necessary” to be read in conjunction with the deadline established in Section 102.112. Any other reading would render the provision meaningless because one counting team could complete the manual recount if there were no need for haste.

In the presence of only a hypothetical conflict, the court concluded that “[a]llowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent . . . with the statutory scheme.”¹⁶³ The irony in this statement is rich. The court denounced as arbitrary the legislature’s deadline, which was arrived at through the normal, slow, deliberative, law-making processes, and then the court proceeded to create its own arbitrary deadline of November 26. The irony grows when one considers that two of the four counties still did not meet this new, arbitrary deadline, and the Gore campaign had insufficient time to have the ballots manually inspected during the truncated time for an election contest before the federal

159. See *supra* note 42.

160. See *id.*; see also *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. 2000).

161. See *supra* note 42. See also Answer Brief, *Palm Beach*, 2000 WL 1726664, at *18 (Fla. Nov. 19, 2000); Appellant’s Statement of Status, *Touchston*, 2000 WL 1720090, at *2.

162. See FLA. STAT. ch. 102, § 166(7) (2000).

163. *Palm Beach*, 772 So. 2d at 1238.

deadline of December 12.¹⁶⁴ The legislature's "arbitrary" deadline makes abundant sense in light of the very events the court unleashed by negating that deadline.

One would think at this point the court would have run out of steam from having to overcome so many little "legalities" in reaching its conclusions, but the court needed to take one final step to eviscerate any meaning in the election code and any authority granted to the Secretary of State as the executive officer charged with administering that code. The court determined that Section 102.111 conflicted with Section 102.112 because the former stated that the Secretary "shall" ignore late-filed returns while the latter used the word "may."¹⁶⁵ Sound arguments can be made that the two statutes can, in fact, be read harmoniously, a canon of statutory construction to which the court paid lip service.¹⁶⁶ The statutes are directed at different officials. However, even assuming a conflict exists and Section 102.112 controls, the court still reached an illogical and impermissibly narrow interpretation of the statute.

Not surprisingly, the court turned to the state constitution to rationalize its final blow to the other two branches of government in creating and executing the laws governing elections in the state of Florida.¹⁶⁷ By referring to the right of suffrage as the "preeminent right . . . without [which] all other [freedoms] would be diminished,"¹⁶⁸ the court performed its own verbal legerdemain. A statutory provision authorizing the state's Chief Elections Officer to ignore late-filed returns suddenly became a requirement to accept late-filed returns unless one of two vague, undefined circumstances occurred: the tardiness would bar a losing candidate from exercising his statutory right to contest an election, or the tardiness would cause all Florida voters to be disenfranchised in a federal election.¹⁶⁹ But this is clearly an empty definition

164. The "safe harbor" provision in 3 U.S.C. § 5 "requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12." *Bush v. Gore*, 531 U.S. ___, ___, 121 S. Ct. 525, 533 (2000).

165. *Palm Beach*, 772 So. 3d 1233-34.

166. *Id.* at 1234-35. Worth noting is that the court did not refer to this canon while construing the statutes that supposedly conflict in their time requirements.

167. *See id.* at 1236-38. These vague references to the preeminent right to vote and restraints on the right of suffrage are noticeably absent in the court's "sanitized" version of this decision issued Dec. 11, 2000. This omission was a half-hearted attempt to convince the United States Supreme Court that it was not relying on the state constitution to change state election laws after the election but was only engaged in "generic" statutory interpretation.

168. *Id.* at 1236.

169. *Id.* at 1237.

of “discretion” because the Secretary of State would violate state or federal law if either of these results obtained. Considering the results of the court’s extension of the deadline by an additional twelve days, it would seem in retrospect that the Secretary of State was correct in exercising her discretion to reject late-filed returns because any extension of the statutory deadline would risk the very results the court created as predicates for denying the returns. Nevertheless, Florida case law indicates that past election contests for offices less “significant” to the nation than President can take many months to complete.¹⁷⁰ Thus, it seems ridiculous for the court to have chosen these particular events to establish the scope of the Secretary’s discretion under the statute, especially when the statute also applies to candidates for state offices.

IV. REFRAINING FROM ENTERING THE POLITICAL SPHERE

The Florida Supreme Court erred in almost every way possible during the presidential election litigation. While the politicians and pundits uttered their suspicions regarding the individual justices’ political motivations for their decisions, these suspicions are largely irrelevant insofar as the court was utterly wrong even if acting for all the “right” reasons. The court repeatedly voiced its concern that the voters were the central figures in the election process and that the “true intent” of the voters should be honored.¹⁷¹ The court stated that “[t]echnical statutory requirements must not be exalted over the substance” of the right to vote and that the voters whose ballots were at issue “did everything which the Election Code requires when they punched the appropriate chad with the stylus.”¹⁷² But this is not accurate. Either the voters erred in failing to follow instructions, which the code clearly requires to be provided to voters,¹⁷³ and the voters failed to correct their errors using their three opportunities to get it right,¹⁷⁴ or the discrepancy in the vote counts resulted from one or more of the numerous ways a ballot’s integrity is compromised from much handling. No allegations of fraud, misconduct, impropriety in the conduct of the election, or machine malfunction were made. Thus, there is little evidence and no assurance that Florida citizens’ right to vote was compromised.

170. See, e.g., *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976) (taking four years to resolve an election contest); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998) (taking two years to resolve an election contest).

171. *Palm Beach*, 772 So. 2d at 1228, 1236, 1238.

172. *Id.* at 1238.

173. See FLA. STAT. ch. 101, §§ 101.5611; 101.031.

174. See *id.* §§ 101.5608(2)(b), 101.011(5).

The state constitution does ensure that citizens have the right to vote, but it also clearly provides for the legislature to regulate elections.¹⁷⁵ And like any other right, the right to vote is not absolute. The value of the right varies among citizens. Just as the "right" to select abortion as a means of birth control or the right to bear arms is valueless to some, the right to vote is not exercised by many Americans and many Floridians. Moreover, the state can do only so much to ensure that a citizen maximizes his or her rights. At some point, citizens must take some responsibility in the exercise of their rights, including reading the instructions on how to vote, or risk disenfranchising themselves.

The court's decision sacrificed the law in its purported purpose of protecting Florida voters. The problem from the beginning, though, is that the court had no reason to believe the voters needed to be protected. A losing candidate claimed a hand count of ballots in certain counties would reveal he had actually won the election, but this claim is nonsensical. Courts cannot ignore burdens of proof, statutory schemes, and legal precedence simply to accommodate a political candidate's belief in victory no matter how earnest or sincere the belief and no matter how close the election. Further, the court ignored the political pressure faced by the canvassing boards to abandon established procedures and to exercise their discretion in a way that conformed to their political affiliations. The litigation documents surrounding Miami-Dade's flip-flopping over whether to count reveals the extent of the political pressure on that canvassing board. One of the board members admitted that press reports had influenced her vote,¹⁷⁶ and the Board initially concluded from the limited manual recount of three precincts in which Gore received six additional votes that "truly there was no error in the tabulation system."¹⁷⁷ That situation does nothing to protect Florida voters, particularly when the integrity of the ballots that were being counted had not been established as the law requires.¹⁷⁸ Although the court's decision occurred during the protest phase of the election, what the court was being asked to do rightfully belonged in the contest phase, during which the court would have discovered the facts it needed to

175. FLA. CONST. art VI, § 1 ("All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. *Registration and elections, shall . . . be regulated by law*") (emphasis added).

176. See Opposition Brief, *Gore v. Harris*, 2000 WL 1773459, at *2 (citing Nov. 17, 2000 Hearing Transcript, at 110-11).

177. *Id.* at *2 (citing Nov. 14, 2000 Hearing Transcript, at 49 (Supervisor Leahy, with whom Judge Lehr concurred)).

178. See *Brake v. Gissendanner*, 206 So. 2d 10, 12-13 (1968) ("The law is well settled that election ballots cannot be used to impeach an official return unless the integrity of the ballots is first clearly established by the plaintiff.").

avoid its erroneous decision based on an erroneous assumption that voters were being disenfranchised.

Sensibly, the state court had demonstrated great reluctance to involve itself in election disputes.¹⁷⁹ Courts become nothing more than a conduit to political power and engineers of social change if the justices abandon their limited role in government, particularly elections. Critics gain much ammunition for the argument that courts actually thwart the American system by which citizens make choices regarding their leaders, their social and economic preferences, and other values through accountable elected officials. If an individual or group cannot succeed through the legislative process, the court should not become a way to bypass the will of the majority. In this case, the usual process of government resulted in an election code that simply did not provide for "finding" additional votes that may or may not actually be valid indications of a voter's preference simply because the losing candidate believed he really won.

V. CONCLUSION

The Supreme Court of Florida seriously jeopardized its legitimacy as a court in *Palm Beach*. The court refused to give deference to the reasonable decision of an executive official who had explicitly been given authority to administer the election code. Instead, the court tortured statutory language and relied upon irrelevant provisions to achieve its desired result. Rather than harmonizing statutes, the court searched for conflicts and construed the statutes in a way that contradicted legislative intent.

While the court may actually have been concerned with protecting Floridians' constitutional right to vote, it acted without first discovering whether the right had been compromised, and it substituted its own judgment that manual recounts would provide an accurate reflection of the vote when the legislature clearly rejected that notion as evidenced by the entire election code. To reach an immediate, desired result, the court risked the loss of faith citizens place in the judiciary as an objective body operating according to principles and not personal predilection. The court confused a good decision with its view of a good result.

The judiciary's only accountability is in the appellate review process, and to a lesser extent, in the requirement to publish opinions justifying the court's conclusion. For a state supreme court, the first check rarely

179. See *Gore v. Harris*, 2000 WL 1801246, at *19. See also William Glaberson, *Florida Courts Tread Warily In Ballot Fights*, N.Y. TIMES, Nov. 10, 2000, at A1.

exists because those bodies are the final arbiters of state law and the state constitution in the absence of a federal question or a constitutional amendment by the state legislature. Therefore, it is imperative that the justices soberly consider their roles and refrain from pronouncing judgments that are self-serving or that are even "in the best interest of society" as determined by the judges except in those cases in which the legislature has not made those judgments. Policy decisions are inherently value decisions and as such are best left to the people who must be governed by the laws that reflect society's values. Assuming that Florida's high court was motivated by its belief that allowing manual recounts to continue was the "best" way to protect Florida's voters, this "desirable" end did not justify the means the court employed—ignoring, contorting, and undermining the law in order to "improve" it.

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