READINGS FOR CLASS 9, MAY 27, 2014: THE LEGITIMACY OF THE JUDICIAL ROLE *IN* DISPUTES ABOUT POLITICS:

A Note on the Excerpted Cases:

Although lengthy, this assignment substantially pares down the actual full text of the opinions in the relevant cases. Some of the subtleties of the legal doctrines have been sacrificed, as have some of the details about the electoral dispute context. The focus of the excerpts is on questions about the proper role of judges confronted by these questions. Of necessity, however, enough background must be provided about legal context to facilitate understanding.

Some points of form:
**Omissions in the text of opinions are noted by ellipses ("...")
**Footnotes and legal citations are omitted without indication.

The Key Focus of your Reading/Preparation:

As you read through this extensive assignment, please keep in mind the basic purpose of the assignment: to allow us to explore the issues surrounding judicial involvement in electoral disputes through some very controversial, high-profile examples. Of necessity, each case has specific and unique details relating to the election and electoral controversy in question; but the emphasis of your preparation and our class discussion should be on what these cases, individually and collectively tell you about the following questions:

1. What special dangers, if any, await judges when they get involved in electoral politics? (Specifically, do the dangers that judges will be perceived as acting "politically" vary depending upon (a) the nature of the legal question (e.g., a constitutional claim vs. a statutory one) or (b) the timing of the controversy (e.g., are judges being asked to decide the controversy during or after the votes are in)?

2. How well does each of the justices/judges in these case studies deal with those dangers?

3. To what extent are the differing decisions below explainable through "legal-system factors"? Specifically, to what extent is each decision affected by:
   --the basis for the legal claim (e.g., constitutional vs. statutory)
   --the procedural posture in which the claim is asserted (e.g., whether the judge is deciding a preliminary injunction; whether the judge is an appellate judge supposed to defer on factual matters and remedial judgment to the trial court)
   --the different justices'/judges' views about the proper judicial role in such controversies?

4. To what extent are the differing decisions instead explainable through ideological and partisan factors? (To help you assess this factor, at the beginning of each opinion you are told which president appointed the justice/judge mentioned. The names of appointees of Republican presidents appear in red; the names of appointees of Democratic presidents appear in blue)

5. To what extent are "group dynamics" (e.g., bargaining to narrow opinion rationales) likely to be in evidence? Specifically, to what extent do the 9th and 6th Circuit opinions appear calculated to avoid Supreme Court intervention?

I. THE "GREAT STEP FORWARD" (??!!) IN JUDICIAL INVOLVEMENT IN ELECTORAL DISPUTES: The Courts and the 2000 Presidential Election

Supreme Court of the United States

George W. **BUSH**, et al., Petitioners,
v.
Albert **GORE**, Jr., et al.

531 U.S. 98 (2000)
Dec. 12, 2000.

Chief Justice Rehnquist filed concurring opinion in which Justices Scalia and Thomas joined.

Justice Stevens filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Souter filed dissenting opinion in which Justice Breyer joined and Justices Stevens and Ginsburg joined in part.

Justice Ginsburg filed dissenting opinion in which Justice Stevens joined and Justices Souter and Breyer joined in part.

Justice Breyer filed dissenting opinion in which Justices Stevens and Ginsburg joined in part, and in which Justice Souter also joined in part.

***100 PER CURIAM.** *[NOTE from Professor Smith: A "per curiam" opinion is an unsigned generic opinion representing a majority of the Court. As you will see below, each of the justices then goes on to join one or more opinions expressing their particular reactions to this general opinion.]*

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President. The State Supreme Court noted that George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. The court further

held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican candidates for President and Vice President, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari.

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush v. Palm Beach County Canvassing Bd., ante,* 531 U.S. 70, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) *(per curiam) (Bush I)....*We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I,* 531 U.S., at 78, 121 S.Ct. 471. On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273, 1290.

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. Fla. Stat. Ann. § 102.168 (Supp.2001). He sought relief pursuant to § 102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest....

[T]he Florida Supreme Court...held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). *Id.,* at 1256. Noting the closeness of the election, the court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id.,* at 1261. A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.' " *Id.,* at 1257. The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," § 102.168(8), the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes ... to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.,* at 1262.

The Supreme Court also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id.,* at 1260. Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted ***103** past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Ibid*. The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of

the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot....

***104** This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

[I]n each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter....

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that ***105** of another.

There is no difference between the two sides of the present controversy on these basic propositions. Gore says that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations. In some cases a piece of the card--a chad--is hanging, say, by two corners. In other cases there is no separation at all, just an indentation.

...The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of ***106** the voter." 772 So.2d, at 1262. This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

....The want of [such rules] here has led to unequal evaluation of ballots in various respects.....As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered***107** a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders,* 372 U.S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.,* at 819.

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold [implicitly] that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, ***108** the so-called overvotes....As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami- Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be

complete....The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

***109** In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

....The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards....

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary, as required by Fla. Stat. Ann. § 101.015 (Supp.2001).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So.2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1220, 1237 (Fla.2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

***111** Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *post,* at 545 (SOUTER, J.,

dissenting); *post,* at 551-552 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy--remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001).

* * *

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring. *[Justice Rehnquist was appointed in 1971 as Associate Justice by Republican President Richard Nixon and in 1986 as Chief Justice by Republican President Ronald Reagan. Justice Scalia was appointed in 1986 by Republican President Ronald Reagan. Justice Thomas was appointed in 1991 by Republican President George H.W. Bush]*

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

***112** I

We deal here not with an ordinary election, but with an election for the President of the United States....

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.....But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, ***113** the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

....In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the

manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

....[Our] inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures.* To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

***116** II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. Ann. § 103.011 (1992).

[Detailed discussion of the statutory scheme and why these justices believed that the Florida Supreme Court "depart[ed] from" it, is omitted...]

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take ***121** advantage of the safe harbor provided by 3 U.S.C. § 5. *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 78, 121 S.Ct. 471 *(per curiam)*. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th--four days before this deadline--the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive--perhaps delusive--certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election....

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date....

For these reasons, in addition to those given in the *per curiam* opinion, we would reverse.

***123 Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.** *[Justice Stevens was appointed in 1975 by Republican President Gerald Ford. Justice Ginsburg was appointed in 1993, and Justice Breyer was appointed in 1994, by Democratic President Bill Clinton]*

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however,

either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial....

It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate."... Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

Nor is Bush correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. Ann. § 101.5614(5) (Supp.2001), is to be determined rises to the level of a constitutional violation.[FN2] We found such a violation ***125** when individual votes within the same State were weighted unequally, see, e.g., Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient--or will lead to results any less uniform--than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country.

> FN2. The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts....

***126** Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated--if not eliminated--by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in *its joints."* If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ--despite enormous differences in accuracy [FN4]--might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

> FN4. [F]or every 10,000 votes cast, punchcard systems result in 250 more nonvotes than optical-scan systems.

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, ***127** the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent--and are therefore legal votes under

state law--but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante,* at 532. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra,* at 540. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined....Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 532.

Finally, neither in this case, nor in its earlier opinion in *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1220 (2000), did the Florida Supreme Court make any substantive ***128** change in Florida electoral law. Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do--it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume--as I do--that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

What must underlie Bushs' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, ***129** the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

Justice SOUTER, with whom Justice BREYER joins, and with whom Justice STEVENS and Justice GINSBURG join as to all but Part III, dissenting. *[Souter was appointed in 198_ by Republican President George H.W. Bush. As noted above, Stevens was appointed by Republican President Ford, and Breyer and Ginsburg were appointed by Democratic President Clinton]*

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 70, 121 S.Ct. 471 (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see 531 U.S., at 102, 121 S.Ct. 471, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush v. Gore,* 531 U.S. 1046, 121 S.Ct. 512. If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15. The case being before us, however, its resolution by the majority is another erroneous decision.

....There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. § 5; whether that court's construction of the state statutory provisions governing contests impermissibly changes a state law from what the State's legislature has provided, in violation of Article II, § 1, cl. 2, of the National Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or ***130** due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

I

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

II

The starting point for evaluating the [second] claim [–] that the Florida Supreme Court's interpretation effectively rewrote § 102.168 must be the language of the provision on which Gore relies to show his right to raise this contest....[O]ther interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

[*Justice Souter's detailed statutory analysis is omitted here...]*

In sum, the interpretations by the Florida court raise no substantial question under Article II.....As Justice GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of the Florida court's determinations in this case.

III

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *per curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because the course of ***134** state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

....It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that

a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads)....I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing ***135** treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18....[C]ounsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice BREYER join as to Part I, dissenting. *[see previous notes re: partisanship of appointing president]*

I

THE CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante,* at 534 (concurring opinion). But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot ***136** properly be called judging. My colleagues have offered a reasonable construction of Florida's law....I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations with which it disagrees....

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction."....

Rarely has this Court rejected outright an interpretation of state law by a state high court....

....The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to a state high court's interpretations of the State's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. Were the other Members of this Court as mindful as they generally are of our system of dual ***143** sovereignty, they would affirm the judgment of the Florida Supreme Court.

II

....Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount....

Even if there were an equal protection violation, I would agree with Justice STEVENS, Justice SOUTER, and Justice BREYER that the Court's concern about "the December 12 deadline," *ante,* at 533, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward--despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante,* at 530--ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as Justice BREYER explains, *post,* at 556 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, *e.g.,* § 7 (specifying ***144** December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"--this year, December 27--as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. § 15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante,* at 533. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.

I dissent.

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join except as to Part I-A-1, and with whom Justice SOUTER joins as to Part I, dissenting. *[see previous notes re: partisanship of appointing president]*

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

I

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

***145** A

....[T]here is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single uniform standard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary of State (Secretary) to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state courts are in a far better position to address. Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida ***147** could or could not take further action is obviously a matter for Florida courts, not this Court, to decide.

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots....[I]n a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of Bush's claims, which are the focus of THE CHIEF JUSTICE's concurrence, raise no significant federal questions. I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case, see *ante,* at 545-550 (GINSBURG, J., dissenting), is justified by

reference either to Art. II, § 1, or to 3 U.S.C. § 5. Moreover, even were such ***148** review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

[*Justice Breyer's extensive analysis, and defense, of the Florida Supreme Court's interpretation of state election laws is omitted...]*

II

....With one exception, Bush's claims do not ask us to vindicate a constitutional ***153** provision designed to protect a basic human right. See, *e.g., Brown v. Board of Education,* 347 U.S. 483 (1954). Bush invokes fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Gore invokes a competing fundamental consideration--the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

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

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

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted ***154** after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5, 6, and 15.

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

[Detailed discussion of legislative history is omitted...]

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to

choose the Presidential electors "was out of the question." Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

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

***156** Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission....Initially the Commission was to be evenly divided between Republicans and Democrats...[T]he final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley.

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

Justice Bradley immediately became the subject of vociferous attacks....[T]he participation in the work of the electoral commission by [judges] did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

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

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally ***158** necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. [W]e...risk a self-inflicted wound--a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra,* at 71. What it does today, the Court should have left

undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

II. THE CALIFORNIA RECALL ELECTION CONTROVERSY: The Next Logical Post-*Bush* Step??

A. The 3-Judge Ninth Circuit Opinion That Would Have Postponed the October 2003 Gubernatorial Recall

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; Southern Christian Leadership
Conference of Greater Los Angeles; National Association for the Advancement of Colored People; California State Conference of Branches, Plaintiffs-Appellants**,**
v.
Kevin **SHELLEY**, Calif. Secretary of State,
Defendant-Appellee,
Ted Costa, Intervenor-Appellee.

Argued and Submitted Sept. 11, 2003.
Filed Sept. 15, 2003.

Appeal from the United States District Court for the Central District of California; ***888** Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-03-05715-SVW.

Before PREGERSON, THOMAS, and PAEZ, Circuit Judges. *[Judge Pregerson was appointed in 1979 by Democratic President Jimmy Carter. Judge Paez was appointed in 1994, and Judge Thomas was appointed in 1995, by Democratic President Bill Clinton.]*

OPINION

PER CURIAM:

On October 7, 2003, California voters will be asked to cast a ballot on some of the most important issues facing the State, including an unprecedented vote on the recall of a governor. However, forty-four percent of the electorate will be forced to use a voting system so flawed that the Secretary of State has officially deemed it "unacceptable" and banned its use in all future elections. The inherent defects in the system are such that approximately 40,000 voters who travel to the polls and cast their ballot will not have their vote counted at all. Compounding the problem is the fact that approximately a quarter of the state's polling places will not be

operational because election officials have insufficient time to get them ready for the special election, and that the sheer number of gubernatorial candidates will make the antiquated voting system far more difficult to use.

Plaintiffs allege that the use of the obsolete voting systems in some counties rather than others will deny voters equal protection of the laws in violation of the United States Constitution. They seek to postpone the vote until the next regularly scheduled statewide election six months from now, when the Secretary of State has assured that all counties will be using acceptable voting equipment, and all the polls will be open. We agree that the issuance of a preliminary injunction is warranted and reverse the order of the district court.

I

[Detailed discussion of history of punchcard voting, and problems with it, is omitted...]

Just as the black and white fava bean voting system of revolutionary times was replaced by paper balloting, and the paper ***890** ballot replaced by mechanical lever machine, newer technologies have emerged to replace the punchcard, including optical scanning and touch screen voting. Optical scanning systems use what is commonly termed a "marksense" form, in which voters use a pencil to indicate their choices on a pre-printed form. The marksense ballots are then counted by an optical scanner. Touch screen voting machines, also known as "direct recording electronic devices," allow the voter to touch the name of the candidate on a screen to record his or her vote. Direct recording electronic devices are programmed to prevent a voter from casting more than the allowed number of votes. Once the voter has completed voting, the computer records the vote electronically.

[As a result of litigation challenging the punchcard technology,] Secretary of State Bill Jones issued a proclamation decertifying VotoMatic and Pollstar pre-scored punch-card systems for use in California pursuant to Cal. Gov't Code § 12172.5 and Cal. Elec.Code § 19222, effective January 1, 2006. In the official decertification proclamation dated September 18, 2001, the Secretary of State stated:

> As I order this proclamation, I want to be very clear on two points. First, Votomatic and Pollstar voting systems are old technology and their use today can be seen as analogous to the use of typewriters--they worked well for many years but are now obsolete in the world of the personal computer. One of these systems was initially approved for use in 1965. Voters are entitled to have the infrastructure of democracy upgraded to reflect technological improvements to the voting process. Second, it is critically important that the transition to any new technologies be orderly and well thought out. A poorly planned rush to implement a new voting technology without providing adequate time for counties to purchase these systems, and to train their staff, pollworkers, and voters on the proper use of new equipment could easily result in great harm to the most fundamental right of the people, the right to vote.

In a press release accompanying the proclamation, the Secretary of State stated that "[w]e cannot wait for a Florida-style election debacle to occur in California before we replace archaic voting systems." The release noted that though the Secretary had previously decertified a number of obsolete voting systems, this marked the first time that California had decertified a system in use by California counties.

...The parties [in the previous litigation] then entered into an agreement under which the decertification of the punchcard voting systems would be advanced to March 1, 2004, in time for the next regularly scheduled statewide election....

On March 25, 2003, a petition for the recall of Governor Gray Davis was served on the Secretary of State pursuant to Cal. Const. art. II, § 14(a). On July 23, 2003, Secretary of State Kevin Shelley certified, pursuant to Cal. Elec.Code § 11109, that ***892** sufficient signatures had been obtained on the recall petition to hold an election. Under the California Constitution, the Lieutenant Governor is charged with setting the date of a gubernatorial recall election. *See* Cal. Const. art. II, § 17.

The California Constitution requires that the election be held not less than 60 days and not more than 80 days from the date of certification. *See* Cal. Const. art. II, § 15(a). The only temporal exception exists when a regular election is already scheduled to be held within 180 days of the date of certification. *See* Cal. Const. art. II, § 15(b). When the Secretary of State certified the gubernatorial recall, the next regular election was scheduled for March 2, 2004. Because that was more than 180 days from the certification date, the Constitution required the special recall election to be held not less than 60 and not more than 80 days from the certification date. If the Secretary of State had issued the certification a month and a half later than he did, as originally planned based on the date by which sufficient valid petition signatures needed to be filed, the recall election would have been held at the next regular election March 2, 2004.....

Plaintiffs commenced the instant action seeking to enjoin the proposed election until it can be conducted without the use of any pre-scored punchcard voting systems. The district court denied Plaintiffs' motion for a preliminary injunction. This appeal followed.

II

"Voting is one of the most fundamental and cherished liberties in our democratic system of government."....

In this case, Plaintiffs allege that the fundamental right to have votes counted in the special recall election is infringed because the pre-scored punchcard voting systems used in some California counties are intractably afflicted with technologic dyscalculia. They claim that the propensity for error in these voting systems is at least two and a half times greater than for any other voting technology used in California. The effect is not trivial. At least six California counties plan to employ the technology during the special election, namely, Los Angeles, Santa Clara, San Diego, Sacramento, Mendocino, and Solano. These counties comprise 44% of the total electorate. They include the most populous county ***893** in the State and the county in which the state capitol is located. Plaintiffs tendered evidence showing that 40,000 voters who cast ballots in these counties would not have their votes counted because of technological defects in the pre-scored punchcard voting system....Plaintiffs also allege that the affected counties contain a significantly higher percentage of minority voters than the other counties, causing a disproportionate disenfranchisement of minority voters.

In order to obtain a preliminary injunction on their claims, the Plaintiffs were required to demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff [s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest (in certain cases)." Alternatively, injunctive relief could be granted if the Plaintiffs "demonstrate[d] *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in [their] favor." *Id.* (internal citations and quotation marks omitted). "These two alternatives represent 'extremes of a single continuum,'

rather than two separate tests....", the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. *Id.* "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff."

The district court assumed that the Plaintiffs would suffer irreparable injury, but concluded that the Plaintiffs were not likely to prevail on the merits. It also concluded that the balance of hardships and consideration of the public interest weighed heavily in favor of allowing the special election to proceed.

III

A

We conclude that the Plaintiffs have satisfied the requirement of establishing a sufficient probability of success on their federal constitutional claims on the merits. As we recently noted, "[v]oting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment."....

In this case, Plaintiffs' Equal Protection Clause claim mirrors the one recently analyzed by the Supreme Court in *Bush v. Gore,* 531 U.S. 98 (2000). As the Supreme Court held in that case: "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."... *[The opinion here cites several earlier voting-rights cases...]*

Plaintiffs argue that the use of defective voting systems creates a substantial risk that votes will not be counted. In addition, they claim that the use of defective voting systems in some counties and the employment of far more accurate voting systems in other counties denies equal protection of the laws by impermissibly diluting voting strength of the voters in counties using defective voting systems. In short, the weight given to votes in non-punchcard counties is greater than the weight given to votes in punchcard counties ***895** because a higher proportion of the votes from punchcard counties are thrown out. Thus, the effect of using punchcard voting systems in some, but not all, counties, is to discriminate on the basis of geographic residence.

This is a classic voting rights equal protection claim. As the Supreme Court explained in *Bush,* " 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' "531 U.S. at 105, (quoting *Reynolds,* 377 U.S. at 555, 84 S.Ct. 1362). Further, the " 'idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.' " *Id.* at 107, (quoting *Moore v. Ogilvie,* 394 U.S. 814, 819 (1969)). As the Court stated much earlier in *Wesberry v. Sanders,* 376 U.S. 1, 8 (1964), "To say that a vote is worth more in one district than in another would ... run counter to our fundamental ideas of democratic government...."

Plaintiffs' claim presents almost precisely the same issue as the Court considered in *Bush,* that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause. In *Bush,* the Supreme Court held that using different standards for counting votes in different counties across Florida violated the Equal Protection Clause. 531 U.S. at 104-07. The Plaintiffs' theory is the same, that using error-prone voting equipment in some counties, but not in others will result in votes being counted differently among the counties. In short, they contend that a vote cast in Los Angeles or San Diego is entitled to the same weight as a vote cast in San Francisco.

No voting system is foolproof, of course, and the Constitution does not demand the use of the best available technology. However, what the Constitution does require is equal treatment of votes cast in a manner that comports with the Equal Protection Clause. Like the Supreme Court in *Bush,* "[t]he question before [us] is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." ***896** 531 U.S. at 109. Rather, like the Supreme Court in *Bush,* we face a situation in which the United States Constitution requires "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.*

It is virtually undisputed that pre-scored punchcard voting systems are significantly more prone to errors that result in a voter's ballot not being counted than the other voting systems used in California....

In addition to difficulties with punching the card, there are mechanical and software anomalies that compound the error rate....The Secretary of State conceded the fallacies in the system in the opening lines of its brief to this Court, stating:

> Punch-card voting systems are old technology more prone to voter error than are newer voting systems. Both the present and the prior Secretary of State have been acutely aware of this reality, and have taken aggressive steps to eliminate the use of punch-card machines statewide.

In addition, Plaintiffs tendered evidence that statistically significant disparities exist between the systems....

The experience of the presidential election in Florida in 2000 supports [the plaintiffs' expert testimony, *which has been omitted...*] There, counters were asked to ascertain the voters' intent by examining "hanging chads" (in which one corner of the chad is attached to the ballot card), "tri chads" (in which three corners of the chad are hanging but the hole has been punched), "pregnant chads" (in which the hole is punched through the chad but it still hangs from all four sides), and "dimpled chads" (in which there is an indentation in the chad, but no clean hole has been punched). In addition, the use of some mechanical guides, such as the one designed for the now infamous "butterfly" ballot, have proven confusing to the voter. Disabled and visually impaired voters have particular difficulty in using the technology. All of this demonstrates that pre-scored punchcard systems are more prone to human error than other certified systems. And errors may not be treated equally. The Supreme Court commented on one aspect of this problem in *Bush,* observing that under the pre-scored punchcard voting system:

> [t]he citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot.
>
> 531 U.S. at 108.

In addition, there are mechanical problems inherent in the use of the technology....

Independent research confirms the error difference between pre-scored punchcard systems and others in use....

Given the vast amount of data the authors of this study were able to incorporate, and given the many control variables to which the pattern of disparity is resistant, it is likely that Plaintiffs would prevail in rebutting any allegations that residual rate disparities in voting systems are completely attributable to different rates of voter intent to abstain or overvote, rather than to the use of different voting machines.

The district court discounted the impact of voting systems on the special election, relying in part on the Secretary of State's attestation that he would "be undertaking extensive voter education efforts that could have the effect of lowering the residual rate in the upcoming election." However, Plaintiffs effectively countered this unsupported assertion with statistical evidence showing that voter education was ineffective in counteracting the error rates inherent in the use of pre-scored punchcard voting systems. Indeed, the error rate in the use of punchcard systems after the national attention given the problems of punchcard voting in the 2000 election actually increased in the 2002 California gubernatorial rate when compared with the 1992 gubernatorial election. Further, as we shall discuss later, the Secretary of State has already missed statutory deadlines for submitting educational information to voters concerning the initiatives on the ballot and faces the additional impediment of having a quarter of the state's polling places non-operational for the special election....

....[T]he Secretary of State has already concluded that use of this technology is unacceptable and must be prohibited from future use in California. His decision to postpone the decertification ***899** was not because the technology was reliable; rather, his decision was based on what he considered a reasonable time for California counties to implement the change in systems.

Obviously, these are issues that each party disputes. However, as we have noted, to prevail on a motion for a preliminary injunction, a plaintiff need not demonstrate that he *will* prevail at trial, or that no other reading of the evidence possibly could be "conjured up," as the district court put it. A plaintiff must only show that the likelihood is such that, when considered with the demonstrated hardship, a preliminary injunction should issue to preserve the respective rights of the parties. Here, the Plaintiffs have tendered more than sufficient proof to satisfy that preliminary burden.

....Plaintiffs have tendered sufficient evidence to demonstrate a likelihood of success in establishing that there is no rational basis for using voting systems that have been decertified as "unacceptable" in some counties and not others. The State is not leaving pre-scored punchcard systems in place indefinitely because it cannot afford to update them, nor does it deem pre-scored punchcard voting systems acceptable for use in California elections. Rather, the State has conceded the deficiencies in the systems and agreed to remedy the deficiencies by the next statewide election.

The only potential justification is that the California Constitution requires that a recall election be held within sixty days of certification by the Secretary of State. ... As to the gubernatorial recall vote, this rationale is...weak. Indeed, had the recall petition been certified just a month and a half later than it was, the recall election would have been scheduled to take place not within sixty to eighty days as provided in the California Constitution, art. II, § 15(a), but instead in March 2004 under the California Constitution, art. II, § 15(b). That exception provides for the efficient consolidation of a recall election with an upcoming regularly scheduled election: "A recall election may be conducted within 180 days from the date of certification ... in order that the election may be consolidated with the next regularly scheduled election...." The operation of this exception produces arbitrary results; because the signatures were certified seven and a

half--instead of six--months in advance of the March 2004 election, this exception does not apply, and the deadline falls in early October. In essence, granting a preliminary injunction would put the election only one and a half months after the longer six-month time period provided for by the California Constitution. Regardless, the salient question for us is not whether the Plaintiffs *will* ultimately prevail on this question, but rather whether they have established a sufficient likelihood of success to satisfy this element of the preliminary injunction ***901** analysis. We conclude that they have and that the district court erred in its legal analysis....

IV

The second factor for our preliminary injunction analysis is the degree of harm that the Plaintiffs will suffer if preliminary injunction relief is not granted. *Johnson,* 72 F.3d at 1430. As we have noted, the district court assumed that the Plaintiffs would suffer irreparable harm, and we agree with its analysis. Plaintiffs have tendered credible evidence that if the election is held in October, a substantial number of voters will be disenfranchised by voting in counties utilizing pre-scored punchcard technology. Thus, their votes will be diluted in comparison to the votes cast in counties with more modern technology. Once the election occurs, the harm will be irreparable because Plaintiffs are without an adequate post-election remedy. "Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury." *Cardona v. Oakland Unified School Dist.,* 785 F.Supp. 837, 840 (N.D.Cal.1992). As the Plaintiffs have noted, those whose votes are not counted by the punchcard machines are irreparably denied their vote and to have an equal say in the choices facing the electorate on Oct 7. There is no possible post-election remedy that could remedy this violation. Thus, this factor also favors the issuance of a preliminary injunction.

V

As we have observed, the harm faced by the Plaintiffs is irreparable. The question then is the relative burden on the Secretary of State. To this, there are different answers. The burden of canceling the election entirely at this late hour will involve expense to the State. However, this is the inverse of the usual election situation. Normally, enjoining an election would require that a special election be held later, at great financial cost. But here, the election Plaintiffs seek to enjoin is itself a special election, and if enjoined, voting would occur at a regularly scheduled ***908** election. Thus, the great difference in cost between regularly scheduled and special elections is not as significant a factor as in the usual election case. Nevertheless, there is undoubtedly a burden and expense to the State in canceling the election, although the Secretary of State chose not to quantify this cost in his submissions....

As to the gubernatorial recall, the balance of hardships is a closer question, but, in our judgment, slightly favors the Plaintiffs.

VI

The fourth traditional factor in preliminary injunction analysis in cases such as this is the public interest.

A.

The district court placed dispositive weight on the public interest in complying with state election law. We agree that the Secretary of State has an interest in complying with state election law, and that this interest must be accounted for in the balance of hardships. However, the district court erred in treating this state interest as if it were a large part of the public interest.

An abstract interest in strict compliance with the letter of state law is a strong state interest, but it is a less important public interest in the context of challenges to state law under the equal protection clause of the Fourteenth Amendment. Of course, the public has an interest in lively public debate, being informed of political issues, orderly elections, speed in resolving challenges to officials, confidence in fair elections, and the like, and many state election laws are designed to promote these interests. To the extent compliance with those laws promotes these important public interests, they deserve great weight in assessing which way the public interest factor points. But it is the principles and spirit of these state laws, not the necessarily the letter, that deserve weight in examining the public interest.

....Strict compliance with state law deserves weight in contexts where state interests deserve deference. But this is not such a context. In this context, it is the public, not the State, whose interests must be protected.

Federal law is supreme over state law. The Fourteenth Amendment was enacted during post-Civil War Reconstruction, a special time in our history when the federal government took on a much greater role in protecting citizens from unjust state infringements of their rights....The public interest is an essential factor in determining whether to enjoin an election due to a likely violation of the equal protection clause, ratified to secure important rights of citizens. Thus, placing dispositive weight on compliance with state law as part of the public interest calculus would introduce a deference to state law that is entirely inappropriate in the context of the equal protection clause. It would erroneously equate state interests with public interests. The district court erred as a matter of law in so doing.

....The appropriate examination of the public interest in this context will instead place heavy weight on the principles *underlying* state law. Those principles of fair and efficient self governance belong in a court's assessment of the public interest regardless of the presence of state election laws motivated by them. State election law can merely highlight for a court which of those democratic principles the people of a State hold in particularly high regard.

B

....There is a strong public interest in holding elections as scheduled....In the case of a vote on a recall petition, these concerns are considerably lessened because governmental functions will continue. California's very short schedule for recall voting exemplifies the significant public interest in a rapid resolution to a challenge to existing leadership. Candidates have already invested considerable sums in the election, as well as time and energy, in reliance on the recall date.

But there are substantial competing public interest considerations. The public has a substantial interest in taking all reasonable steps to avoid violating its ***910** citizens' rights to equal protection....Thus, public interest strongly favors holding the recall election during the general election in March 2004 to avoid an equal protection violation. The California Constitution already permits up to a six month delay to advance the State's interest in efficiency and convenience; the requested injunction would result in only a seven and a half month delay to cure a substantial constitutional violation. As the Supreme Court put it in *Bush:* "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees." 531 U.S. at 108.

The State has an interest in holding a fair election--one trusted by the candidates and the voters to yield an accurate and unbiased result. The high error rate associated with the decertified machines to be used by 44 percent of the voters in October would undermine the

public's confidence in the outcome of the election. The margin of victory could well be less than the margin of error in the use of punchcard technology. This would not be the case in an election held in March 2004, when all the obsolete machines will have been totally withdrawn from use. Avoiding an election that promises to dilute the votes of *any* particular community--let alone communities with a disproportionately high concentration of minority voters--firmly promotes the public interest in a fair election.

In addition, although the State and counties have spent money to organize the October election, it may conserve resources by consolidating the recall with the regularly-scheduled statewide March 2004 election. Such savings undoubtedly would favor the public interest.

There are also some unique pragmatic problems associated with this election that may be alleviated by a short postponement. For example, because of the short timetable established for this election, approximately a quarter of California's polling places--5,000 of 20,000--will not be ready for use and voters will be forced to vote at a different polling place. This has the potential of creating substantial voter confusion on election day. Further, the sheer number of gubernatorial candidates--there are currently 135 names on the October 2003 ballot--will make operation of the plastic guide substantially more cumbersome to use, potentially compounding the inherent problems in its use.

Further, many members of the armed forces and California National Guard members did not fill out absentee ballot requests because they did not expect to be overseas for this length of time and did not anticipate a special election. A short postponement of the recall election will serve the public interest by permitting California men and women who are serving our country overseas and who did not anticipate an October election more time to request and submit absentee ballots, thus allowing them to enjoy one of the fundamental rights for which they put themselves in harm's way--the right to vote.

On balance, as to the gubernatorial recall vote, public interest considerations favor postponing the election.

C

....

D

In sum, in assessing the public interest, the balance falls heavily in favor of postponing the election for a few months. The choice between holding a hurried, constitutionally infirm election and one held a short time later that assures voters that the "rudimentary requirements of equal treatment and fundamental fairness are satisfied" is clear. *See* Bush, 531 U.S. at 109. *These issues are better resolved prophylactically than by bitter, post-election litigation over the legitimacy* ****913*** *of the election, particularly where the margin of voting machine error may well exceed the margin of victory. The Supreme Court's admonition in Bush* bears re-quoting:

> The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

Id. at 108.

In addition to the public interest factors we have discussed, we would be remiss if we did not observe that this is a critical time in our nation's history when we are attempting to persuade the people of other nations of the value of free and open elections. Thus, we are especially mindful of the need to demonstrate our commitment to elections held fairly, free of chaos, with each citizen assured that his or her vote will be counted, and with each vote entitled to equal weight.

A short postponement of the election will accomplish those aims and reinforce our national commitment to democracy.

VII

In considering all the relevant factors, we conclude that the district court erred as a matter of law in denying the preliminary injunction with respect to the vote on Propositions 53 and 54 and the gubernatorial recall. Therefore, we reverse the order of the district court. The Secretary of State is enjoined from conducting an election on any issue on October 7, 2003. In view of the pendency of the election, we direct the Clerk of Court to issue the mandate forthwith, but stay our order for seven (7) days to allow the parties to seek further relief from this decision, if they so desire.

B. The Ninth Circuit En Banc Reversal, Clearing the Way for the Recall Election

344 F.3d 914
Argued and Submitted En Banc
Sept. 22, 2003.
Filed Sept. 23, 2003.

Before: SCHROEDER, Chief Judge, KOZINSKI, O'SCANNLAIN, KLEINFELD, TASHIMA, SILVERMAN, GRABER, McKEOWN, GOULD, TALLMAN, and RAWLINSON, Circuit Judges.
[The "judge count" for this 11-judge panel is:
--Appointees of Democratic President Jimmy Carter: Judge Schroeder (1979)
--Appointees of Republic President Reagan: Judges Kozinski (1985) and O'Scannlain (1986)
--Appointees of Republican President George H.W. Bush: Judge Kleinfeld (1991)
--Appointees of Democratic President Bill Clinton: Judges Tashima (1996) Silverman (1998), Graber (1998), McKeown (1998), Gould (1999), Tallman (2000) and Rawlinson (2000)

***916 OPINION**

PER CURIAM.

This matter has been reheard by the United States Court of Appeals for the Ninth Circuit, sitting en banc, upon the vote of a majority of the non-recused active judges pursuant to 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35. We thank all the parties and their counsel, as well as the amici, for the prompt and professional presentations to this court on an expedited basis.....

STANDARD OF REVIEW

The standard of review is important to our resolution of this case. [The applicable standard] creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.

We review the district court's decision to grant or deny a preliminary injunction for abuse of discretion. Our review is limited and deferential.....Thus we have held that an order "will be reversed only if the district court relied on an erroneous legal premise or abused its discretion." "[W]e do not review the underlying merits of the case."

DISCUSSION

We are met with legal authority on both sides of the contest. There is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election. *The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.*

....That a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ. In *Bush v. Gore,* the leading case on disputed elections, the court specifically noted: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. We conclude the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim.

Plaintiffs have made a stronger showing on their Voting Rights Act claim. In a nutshell, plaintiffs argue that the alleged disparate impact of punch-card ballots on minority voters violated Section 2 of the Act, 42 U.S.C. § 1973. Plaintiffs allege that minority voters disproportionately reside in punch-card counties and that, even within those counties, punch-card machines discard minority votes at a higher rate. To establish a Section 2 violation, plaintiffs need only demonstrate "a causal connection between the challenged voting practice and [a] prohibited discriminatory result". There is significant***919** dispute in the record, however, as to the degree and significance of the disparity. Thus, although plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood.

We therefore must determine whether the district court abused its discretion in weighing the hardships and considering the public interest. In this case, hardship falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California, because this case concerns a statewide election. The public interest is significantly affected. For this reason our law recognizes that election cases are different from ordinary injunction cases. Interference with impending elections is extraordinary, *id.,* and interference with an election after voting has begun is unprecedented.

If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election's proceeding on the announced date. Time and money have been spent to prepare voter information pamphlets and sample ballots, mail absentee ballots, and hire and train poll workers. Public officials have been forced to divert their attention from their official duties in order to campaign. Candidates have crafted their message to the voters in light of the originally-announced schedule and calibrated their message to the political and social environment of the time. They have raised funds under current campaign contribution laws and expended them in reliance on the election's taking place on October 7. Potential voters have given their attention to the candidates' messages and prepared themselves to vote. Hundreds of thousands of absentee voters have already cast their votes in similar reliance upon the election going forward on the timetable announced by the state.

These investments of time, money, and the exercise of citizenship rights cannot be returned. If the election is postponed, citizens who have already cast a vote will effectively be told that the vote does not count and that they must vote again. In short, the status quo that existed at the time the election was set cannot be restored because this election has already begun.

We recognize that there may be a stronger case on the merits for delaying the initiatives than the recall, because the initiatives were originally scheduled to be voted upon in March 2004 and would not take effect until at least 2005, while the result of the recall would be immediate. Because votes are already being cast on both the recall and the initiatives, however, moving the initiatives to a later election creates the same problem as moving the recall; an election would be halted after it has already begun. Although the claimed state electoral law violations do implicate the public interest, and the voters and ballot proponents anticipated a later election based on earlier certification, we cannot say that the district court abused its discretion in balancing the harms. Finally, we are reluctant to intercede in ballot timing of the initiatives, an electoral matter that falls within the province of the state to determine.
We must of course also look to the interests represented by the plaintiffs, who are legitimately concerned that use of the punch-card system will deny the right to vote to some voters who must use that system. At this time, it is merely a speculative possibility, however, that any such ***920** denial will influence the result of the election.

For these reasons, the district court did not abuse its discretion in concluding that plaintiffs will suffer no hardship that outweighs the stake of the State of California and its citizens in having this election go forward as planned and as required by the California Constitution.

The judgment of the district court is AFFIRMED. The Clerk is directed to issue the mandate forthwith.

C. Excerpts from the Initial District Court Opinion, Rejecting Postponement of the Recall Election

United States District Court,
C.D. California.

Aug. 20, 2003.

ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND MOTION FOR PRELIMINARY INJUNCTION

WILSON, District Judge. *[Judge Wilson was appointed in 1985 by Republican President Ronald Reagan]*

A. Likelihood of Success

....Plaintiffs have failed to prove a likelihood of success on the merits with regard to both their equal protection and Voting Rights Act claims.

While the Court assumes that Plaintiffs can show a likelihood that the punch-card machines will suffer a higher error rate than other technologies, the Court concludes that Plaintiffs are not likely to prevail on the merits of their claims.

a. *Alleged Error Rates*

It is disputed whether punch-card balloting is guaranteed to produce a higher "error rate" than other technologies. It is possible, for instance, to conjure explanations other than machine error for a residual vote rate, including affirmative decisions by voters not to vote in particular races or on particular issues....

....In any case, even assuming that Plaintiffs can show a likelihood that punch-card machines will evidence a higher rate of erroneously uncounted ballots--a finding the Court does not make at this time--Plaintiffs' claims still are not likely to succeed. This is true because, even if Plaintiffs can show disparate treatment in this regard, the Court concludes that such would not amount to illegal or unconstitutional treatment.

b. *Equal Protection Claim*

It is, of course, "beyond cavil that voting is of the most fundamental significance under our constitutional structure."....

....Plaintiffs in this case do not-- indeed, cannot--challenge the use of punch-card machines generally, but rather contest their use *in this election.* Thus, even if the Court were to reach the merits of Plaintiffs' equal protection claim, the State would not be obligated to justify the use of punch-card machines as a general means of gauging voter preference. Rather, the State would merely need to adduce sufficient justifications for their use *in this election.*

That, the State undoubtedly can do. Alternative technologies will not be available in several of the affected counties in time for the October election. Because the State cannot under its own constitution conduct the election later than the date currently set, and short of a court order compelling something different, the State's choice is between using punch-card machines in several counties and using nothing at all in those counties. The State clearly has a compelling interest in not disenfranchising the voters of at least six counties, and the limited use of punch-card voting in this election is a narrowly tailored means to achieve that end....

c. *Voting Rights Act*

Plaintiffs allege that punch-card machines are used in counties with disproportionately large minority populations, and thus that the machines' allegedly higher error rate "results in a denial or abridgement of the right ... to vote on account of race or color," in violation of Section 2(a) of the Voting Rights Act (codified at 42 U.S.C. § 1973(a)).

While Plaintiffs accurately state the general rule of Section 2(a), they seem to ignore Section 2(b), which provides an analytical framework for determining whether that rule has been violated:

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. ***1142** The extent to which

members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered ....
42 U.S.C. § 1973(b);

As that Section reflects, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thus, the express intent of the Voting Rights Act is to combat electoral structures and procedures that deprive minority voters of an opportunity to participate effectively in the political process. See Gingles, 478 U.S. at 44.

Indeed, the Senate Report accompanying the 1982 amendments to the Voting Rights Act lists a number of additional factors that may inform the Section 2 analysis, and which confirm the Section's central purpose. These include: a history of official discrimination in the jurisdiction; racially polarized voting; the lingering effects of prior discrimination; a lack of electoral success among minority candidates; the comparative unresponsiveness of elected officials to the needs of minorities; and, whether the policy justification for the challenged practice is "tenuous."

There is little about the violation alleged here that would suggest it is of the type contemplated by Section 2 of the Voting Rights Act. Plaintiffs contend that the affected counties have average minority populations that are 15% larger than counties using other voting technologies, and that the punch-card machines in the affected counties have a residual vote rate of 2.23%, as compared to an average residual vote rate of approximately 1% in other localities. This is not a situation where, for instance, punch-card machines are alleged to be used only in minority-majority precincts, or where the error rate is so high as to consistently disable minority voters from electing their candidates of choice. Nor have Plaintiffs argued that historical discrimination or present animus, together with the lingering effects of prior discrimination, somehow combine to exacerbate the effect of this particular practice vis-à-vis minority voters. Nor do Plaintiffs even allege that punch-card machines are intended to limit, or have the effect of limiting, the ability of minority voters to participate effectively as members of the electorate, or have rendered office-holders comparatively less responsive to minority voters.

....In sum, Plaintiffs suggest a Voting Rights Act violation based exclusively upon the alleged error rate of machines that poll "majority" as well as minority voters, and are used in counties containing nearly one-half of California's voters. They contend that some 40,000 votes may be lost as a result of higher error rates (many if not most of which votes will be cast by non-minority voters) in a state of nearly eight million voters. Accordingly, there is, at best, a slim chance that Plaintiffs will be able to prove that punch-card machines in California "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."

B. Irreparable Injury

....[A]s the Court cannot envision an effective remedy that would be available to Plaintiffs after the votes have been cast, it assumes for purposes of this analysis that the alleged injury would be irreparable.

C. Balance of Hardships

Even assuming the above analysis suggests a serious question on the merits (which it does not), the balance of hardships weighs heavily in favor of allowing the election to proceed.

Here, the Court must balance the potential hardship to Plaintiffs (namely, the risk of having their votes diluted or denied through use of punch-card balloting), against the hardship to the State of California if the injunction is granted (i.e., canceling or postponing its scheduled election). Because the hardships implicated in this case are, in essence, both matters of public concern, the Court turns to the public interest prong of the analysis.

D. Public Interest

The public interest factor is particularly important in a case such as this, where the plaintiff seeks to enjoin an election. See Cano v. Davis, 191 F.Supp.2d 1135, 1139 (C.D.Cal.2001) (decided by a three-judge panel, which included Circuit Judge Reinhardt); Cardona, 785 F.Supp. at 842. "Because the conduct of elections is so essential to a state's political self-determination, ***1144** the strong public interest in having elections go forward generally weighs heavily against an injunction that would postpone an upcoming election." Cano,s22 191 F.Supp.2d at 1139 (citations omitted). The Cano court explained that "enjoining an election is an extraordinary remedy involving a far-reaching power, [citation], which is almost never exercised by federal courts prior to a determination on the merits...." Id. at 1137; see also Diaz v. Silver, 932 F.Supp. 462, 465 (E.D.N.Y.1996) (decided by three-judge panel, which included Circuit Judge McLauglin) ("[A] preliminary injunction enjoining an election is an extraordinary remedy involving the exercise of a very far-reaching power.").[FN6]

> FN6. To support their proposition that this Court may enjoin the forthcoming election, Plaintiffs point almost exclusively to cases involving judicial elections that were enjoined for failure to comply with the preclearance requirements of Section 5 of the Voting Rights Act. See, e.g., Clark v. Roemer, 500 U.S. 646 (1991). That context is distinguishable in material respects. First, an alleged Section 5 violation presents a single, clear-cut issue: whether or not a regulated jurisdiction has obtained preclearance before conducting an election. If such preclearance has not been sought or granted, a court may easily determine that the merits are likely to be resolved in a plaintiff's favor....Second, and most significantly, Section 5 provides the district court with little discretion and does not mandate the balancing of equitable factors required here....Third, every case cited by Plaintiffs in which a court enjoined an election arose in the context of a judicial election. The Court notes that the policy factors implicated by enjoining the October 7 election (discussed herein) are likely far different than those at issue in judicial elections.

In Reynolds v. Sims, the Supreme Court explained:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding relief, a court is entitled to and should consider the proximity of the forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. 377 U.S. 533 (1964).

Relying in part on this principle, the courts in both *Cano* and *Cardona* refused to issue injunctions despite potentially meritorious challenges. As in those cases, allowing this election to go forward in October is "essential to [the] state's political self-determination." *Cano,* 191 F.Supp.2d at 1139. The recall is an unprecedented event, which directly reflects the will of the people of California. Delaying the election for half a year beyond the date set pursuant to the California Constitution undoubtedly works against the public interest implicit in a recall election.

....Here, the allegedly unlawful use of punch-card balloting is being remedied pursuant ***1145** to the *Common Cause* Consent Decree. Indeed, the March 2004 decertification date was proposed by plaintiffs in the prior litigation, and has been unchallenged since the Consent Decree was signed....

Further, there is some question whether the remedy contemplated would even have the effect Plaintiffs seek. Plaintiffs ask the Court to postpone the recall and ballot initiative votes until alternative voting mechanisms are in place. Yet if such relief were ordered, the State would be in an untenable position: it would be forced either to conduct the election outside the time frame required by the California Constitution, or to cancel the election to avoid that predicament. Clearly, the public interests in avoiding wholesale disenfranchisement, and/or not plunging the State into a constitutional crisis, weigh heavily against enjoining the election.

Moreover, even if the election could somehow be conducted at a later date, it is relevant in the public interest analysis to consider whether such a delayed election would not itself work strongly against the voting rights of all Californians. Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution. Arguably, then, the Court by granting the relief sought could engender a far greater abridgement of the right to vote than it would by denying that relief.

Furthermore, the recall election in particular is an extraordinary--and in this case, unprecedented--exercise of public sentiment. Implicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office.

Accordingly, the public interest in going forward with the scheduled election, including the gubernatorial recall and ballot ***1146** initiatives, strongly favors denial of the preliminary injunction...

III. PROVISIONAL VOTING CONTROVERSIES: Interjecting the Federal Judiary (and Judicial Politics?) in A "Battleground State" Immediately Before the 2004 Presidential Election

A. October 26 Ruling on Ohio Secretary of State Provisional Ballot Regulations

United States Court of Appeals,
Sixth Circuit.

SANDUSKY COUNTY DEMOCRATIC PARTY; The Ohio Democratic Party; Farm Labor Organizing Committee; North Central Ohio Building and Construction Trades Council; and Local 245 International Brotherhood of Electrical Workers,

Plaintiffs-Appellees,
v.
J. Kenneth **BLACKWELL**, Defendant-Appellant (04-4265),
Gregory L. Arnold; Glenn A. Wolfe; and Thomas W. Noe, Intervenors-Appellants (04-4266).

Submitted: Oct. 23, 2004.
Decided and Filed: Oct. 26, 2004.

Before: BOGGS, Chief Judge; GILMAN, Circuit Judge; and WEBER, District Judge [Senior United States District Judge for the Southern District of Ohio, sitting by designation]. *[Judge Weber was appointed in 1985, and Judge Boggs was appointed in 1986, by Republican President Ronald Reagan. Judge Gilman was appointed in 1997 by Democratic President Bill Clinton.]*

***568 PER CURIAM.**

At bottom, this is a case of statutory interpretation. Does the Help America Vote Act require that all states count votes (at least for most federal elections) cast by provisional ballot as legal votes, even if cast in a precinct in which the voter does not reside, so long as they are cast within a "jurisdiction" that may be as large as a city or county of millions of citizens? We hold that neither the statutory text or structure, the legislative history, nor the understanding, until now, of those concerned with voting procedures compels or even permits that conclusion. Thus, although we affirm many of the rulings of the district court and its proper orders requiring compliance with HAVA's requirements for the casting of provisional ballots, we hold that ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes.

To hold otherwise would interpret Congress's reasonably clear procedural language to mean that political parties would now be authorized to marshal their supporters at the last minute from shopping centers, office buildings, or factories, and urge them to vote at whatever polling place happened to be handy, all in an effort to turn out every last vote regardless of state law and historical practice. We do not believe that Congress quietly worked such a revolution in America's voting procedures, and we will not order it.

I

The States long have been primarily responsible for regulating federal, state, and local elections. These regulations have covered a range of issues, from registration requirements to eligibility requirements to ballot requirements to vote-counting requirements....One aspect common to elections in almost every state is that voters are required to vote in a particular precinct. Indeed, in at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct.

***569** The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes

and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.

The responsibility and authority of the States in this field are not without limit. Although the United States Constitution, and Supreme Court decisions interpreting the Constitution, give primary responsibility for administering and regulating elections to the States, the States must adhere to certain constitutional and statutory requirements. States may not in any election deny or abridge the right to vote on the basis of race, *see* U.S. Const. amend. XV § 1, for example, and must adhere to the principle of one person, one vote, *see Reynolds v. Sims,* 377 U.S. 533, 565-566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In addition, Congress has imposed upon the States certain statutory requirements for the administration of federal elections, such as the National Voter Registration Act, 42 U.S.C. § 1973gg et seq. ("NVRA"). In 2002, Congress passed the Help America Vote Act,Pub.L. 107- 252. Title III, § 302, 116 Stat. 1706 (codified at 42 U.S.C. § 15301 *et seq.*) ("HAVA"), which is the subject of this appeal.

HAVA was passed in order to alleviate "a significant problem voters experience [, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters." H.R. Rep. 107-329 at 38 (2001). HAVA dealt with this problem by creating a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote.

Section 302 of HAVA, the section most pertinent to this appeal, requires States to provide voters with the opportunity to cast provisional ballots and to post certain information about provisional ballots at polling places on election day. The section's requirements relating to the casting of provisional ballots are *[quoted extensively in the opinion, but omitted here...]*

> In essence, HAVA's provisional voting section is designed to recognize, and compensate for, the improbability of "perfect knowledge" on the part of local election officials. [T]he person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot. *Ibid.* "On further review--when, one hopes, perfect or at least more perfect knowledge will be available--the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place." *Ibid.*

II

On September 27, 2004, the Sandusky County Democratic Party, the Ohio Democratic Party, and three labor unions ("Appellees") filed an action in the United States District Court for the Northern District of Ohio against J. Kenneth Blackwell, Ohio Secretary of State ("the Secretary") Appellees' Complaint alleged that the Secretary's promulgation to Ohio County Boards of Elections of Ohio Secretary of State Directive 2004-33 ("Directive 2004-33 ") conflicts with the requirements of HAVA.

Appellees alleged that Directive 2004-33 violates HAVA because, *inter alia,* it limits a voter's right to cast a provisional ballot to those situations where a voter has moved from one Ohio precinct to another; allows poll workers to withhold a provisional ballot from anyone who is not--according to the poll worker's on-the-spot determination at the polling place-- a resident of the precinct in which the would-be voter desires to cast a provisional ballot; does not require that potential voters be notified of their right to cast a provisional ballot; and unduly limits the circumstances in which a provisional ballot will be counted as a valid ballot.

On October 14, 2004, the district court issued an Order granting preliminary injunctive relief to Appellees. Sandusky County Democratic Party v. Blackwell, No. 3:04CV7582 (N.D.Ohio Oct.18, 2004) ("Order"). The district court found that HAVA created an individual right to cast a provisional ballot in accordance with the requirements of 42 U.S.C. § 15482(a), that this right is individually enforceable under 42 U.S.C. § 1983, and that Appellees had standing to bring a § 1983 action on behalf of Ohio voters. The district court's injunction required that the Secretary issue a revised directive that (1) permits any voter to cast a provisional ballot upon affirming that he or she is eligible to vote and is registered to vote in the county in which he or she wishes to vote; (2) requires poll workers to notify any voter making this affirmation of his or her right to cast a provisional ballot, even if the poll worker determines that the voter does not reside in the precinct in which he or she is attempting to vote; and (3) that provisional ballots cast by a voter in the county in which he or she is registered to vote must be counted as a valid ballot even if it was not cast in the precinct in which the voter resides.

On October 15, 2004, Defendant-Appellee and Intervenors appealed the district court's Order to this court. On October 22, 2004, in response to the district court's October 14 Order, and two subsequent Orders issued on October 20, 2004, the Secretary sent to all Ohio County Election Boards two revised directives, designed to comply with the district court's injunction in the event that the October 14, 2004 Order was upheld by this court in full or in part....

***572 III**

[In this section the circuit court held that HAVA did not preclude citizen use of the usual means of challenging government action violative of the U.S. Constitution or statutes.]

IV

[In this section the circuit court found that the individual challengers had standing to challenge the merits of the legal issues involved in this litigation.]

V

HAVA requires that any individual affirming that he or she "is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office ... shall be permitted to cast a provisional ballot." *See* 42 U.S.C. § 15482(a).

Unfortunately, HAVA does not define what "jurisdiction" means in this context, which leaves unclear whether a voter must affirm that he or she is registered to vote in the *precinct* in which he or she desires to vote, the *county* in which he or she desires to vote, or even simply the *state* in which he or she desires to vote. The district court concluded that the term should be given the same meaning as the term "registrar's jurisdiction" is given in the NVRA; namely the geographic reach of the unit of government that maintains the voter registration rolls, *see* 42 U.S.C. § 1973gg-6(j), which in Ohio is each county board of election, *see* Ohio Rev.Code Ann. §§ 3501.11(U), (Y) (West 2004)....

We disagree with the district court's interpretation of the term "jurisdiction."

....In the absence of a compelling reason for defining HAVA's use of this term to mean the geographic reach of the unit of government that maintains the voter registration rolls, we look to the overall scheme of the statute to determine its meaning. Nowhere in the language or

structure of HAVA as a whole is there any indication that the Congress intended to strip from the States their traditional responsibility to administer elections; still less that Congress intended that a voter's eligibility to cast a provisional ballot should exceed her eligibility to cast a regular ballot. After all, the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, pending determination of that eligibility.

In Ohio, like many other states, a voter may cast a ballot only in his or her precinct of residence. As such, in Ohio, HAVA requires that a provisional ballot be issued only to voters affirming that they are eligible to vote and are registered to vote in the precinct in which they seek to cast a ballot. Directive Number 2 satisfies this requirement, and is even more lenient....
HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be "turned away" from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. Any error by the state authorities may be sorted out later, when the provisional ballot is examined, in accordance with subsection (a)(4) of section 15482. But the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted. Directive 2 exactly preserves this distinction, while generally curing the other defects correctly found by the district court.

VI

In addition to finding that HAVA requires that voters be permitted to cast provisional ballots upon affirming their registration to vote in the county within which they desire to vote, the district court also held that provisional ballots must be counted as valid ballots when cast in the correct county. We disagree.

***577** The only subsection of HAVA that addresses the issue of whether a provisional ballot will be counted as a valid ballot conspicuously leaves that determination to the States. That subsection provides:

> "If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law."

42 U.S.C. § 15482(a)(4)....In essence, the district court would have state officials ask only whether a voter was eligible to vote *in some polling place* within the county at the start of election day....Because the district court found that voters are eligible to vote under Ohio law anywhere in their county of residence, the court held that a provisional ballot cast anywhere in a voter's county of residence must be counted as valid.

The district court's interpretation of this subsection of HAVA is incorrect....

Under Ohio law, a voter is eligible to vote in a particular polling place only if he or she resides in the precinct in which that polling place is located....

There is no reason to think that HAVA, which explicitly defers determination of whether ballots are to be counted to the States, should be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be counted, thereby overturning the longstanding precinct-counting system in place in more than half the States....

Nor does the legislative history of the statute provide any reason to believe that HAVA requires that ballots cast in the wrong precinct be counted....

We therefore hold that HAVA does not require that any particular ballot, whether provisional or "regular," must be counted as valid. States remain free, of course, to count such votes as valid, but remain equally free to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted.

It should be noted that this holding in no way rests upon our discussion above about the meaning of the term "jurisdiction." Even if the district court was correct to find that provisional ballots must be *offered* to any voter affirming residence in the county in which he or she desires to vote, it remains true that HAVA's single provision relating to the counting of ballots refers only to eligibility under State law to vote, and makes no reference either explicitly or implicitly to the jurisdiction in which a provisional ballot was cast. In ***579** any event, there is no contradiction between requiring all voters in a county to be given a provisional ballot in case they are subsequently found to reside in the precinct in which they seek to vote, and then allowing the state to continue its practice of not counting votes cast outside of precinct. Although Congress certainly intended that some provisional ballots would be counted as valid after it was determined that voters should in fact have appeared on the list of qualified voters, there is no suggestion in either the legislative history of the statute or the statutory text that Congress intended all provisional ballots to be deemed valid.

Directive Number 2 therefore comports with HAVA's requirements insofar as it states that "An individual's provisional ballot will only be counted if he or she has voted in the proper precinct," and requires that poll workers "[a]dvise the voter that, if he or she does not vote at the correct precinct, the voter's ballot will not be counted for any issue or office."

VII

The judgment of the district court is therefore AFFIRMED IN PART, REVERSED IN PART, and REMANDED to the district court for further proceedings consistent with this opinion. The district court may order the Secretary to enforce the proffered "Revised Directive Number 2," with any appropriate technical modifications such as noted at footnote 3 of this opinion. The district court may not order the enforcement of "Revised Directive Number 1" or any other order requiring the counting of provisional votes cast outside the precinct of the voter's residence.

B. November 2 Decision About Vote Challengers on Election Eve

United States Court of Appeals,
Sixth Circuit.

SUMMIT COUNTY DEMOCRATIC CENTRAL AND EXECUTIVE COMMITTEE, et al.,
Plaintiffs-
Appellees,
v.
J. Kenneth **BLACKWELL**, et al., Defendants,
Matthew Heider; Sam Ewing; Elizabeth Coombe; David Timms, Defendants-
Intervenors-Appellants.

Nos. 04-4311, 04-4312.

Nov. 2, 2004.

Before: RYAN, COLE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. *[Judge Rogers was appointed in 2002 by Republican President George W. Bush]*

The appeals in these cases have been consolidated. Both appeals involve Ohio Revised Code § 3505.20, which provides that "Any person offering to vote may be challenged at the polling place by any challenger, any elector then lawfully in the polling place, or by any judge or clerk of elections." Ohio Rev.Code Ann. § 3505.20 (Anderson 2004). The challengers referred to in § 3505.20 are provided for in § 3505.21, which provides:

> At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint to any of the polling places in the county or city one person, a qualified elector, who shall serve as challenger for such party or such candidates during the casting of the ballots, and one person, a qualified elector, who shall serve as witness during the counting of the ballots; provided that one such person may be appointed to serve as both challenger and witness.

Ohio Rev.Code Ann. § 3505.21 (Anderson 2004).

The first appeal, *Summit County Democratic Central and Executive Committee v. Blackwell,* # 04-4311, is an appeal from an order entered on October 31, 2004, by the Honorable John R. Adams of the United States District Court for the Northern District of Ohio, which granted a motion for a temporary restraining order, ordering that "persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters" on November 2, 2004, the date of the Ohio general election. In that case, plaintiffs, the Summit County Democratic Central and Executive Committee and others, had filed a complaint on October 28, 2004, against J. Kenneth Blackwell, the Secretary of State of Ohio, members of the Summit County Board of Elections, unknown "challengers," and other unknown government officials pursuant to 42 U.S.C. § 1983. The complaint sought an order "prohibiting Defendants, while acting under color of state law, from depriving citizens of Ohio of their constitutional rights to due process and equal protection, through the application or enforcement of the so-called "challenge" procedures set forth in Ohio Rev.Code § 3505.20 ... in the Ohio general election for local, state, and national offices on November 2, 2004, and thereafter." On October 31, 2004, the district court granted a motion to intervene filed by Matthew Heider, Sam Ewing, Elizabeth Coombe, and David Timms, challengers from the Ohio counties of Allen, Franklin, Summit, and Warren. The district court also granted a motion to intervene filed by the State of Ohio. On November 1, 2004, Defendants-Intervenors-Appellants Matthew Heider, Sam Ewing, Elizabeth Coombe, and David Timms filed a motion in this Court for an emergency stay of the district court's order, and also filed a notice of appeal.

The second appeal, *Spencer v. Blackwell,* No. 04-4312, is an appeal from an order entered on November 1, 2004, by the Honorable Susan J. Dlott of the United States District Court for the Southern District of Ohio, which granted a motion for injunctive relief, enjoining "all Defendants from allowing any challengers other than election judges and other electors into the polling places throughout the state of Ohio on Election Day." In that case, plaintiffs Marian and Donald Spencer had filed a complaint on October 27, 2004, against J. Kenneth Blackwell, the Secretary of State of Ohio, the Hamilton County Board of Elections, and the chair and members of that Board pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1973(a). The Amended Complaint in that action, filed on October 29, 2004, alleged that "African American voters ... will face an imposing array of 'challengers' deployed to their precincts on Election Day. African American voters will

be intimidated; racial tension will rise and African American voters will be blocked from exercising their right to vote." The district court found that

> "[t]he evidence before the Court shows that in Tuesday's election, the polling places will be crowded with a bewildering array of participants--people attempting to vote, challengers (Republican, Democrat, and issue proponents or opponents), and precinct judges. In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters by challengers, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls, there exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door."

On November 1, 2004, Defendants-Intevenors-Appellants Clara Pugh, Sam Malone, and Charles Winburn filed a motion for an emergency stay of the district court's order, and filed a notice of appeal.

There is a significant question as to plaintiffs' standing. As the Supreme Court has held on many occasions, "the irreducible constitutional minimum of standing contains three elements," injury in fact, causation, and the likelihood that the injury will be redressed. Standing in this case is a difficult issue, considering the nature of the alleged injuries. However, I assume without deciding that the plaintiffs have standing, given the short time in which we have to consider this issue, and the nonspeculative possibility that at least some actual injury will occur, in the form of greater delay and inconvenience in voting. To the extent that the lower court relied on additional "injury," such injury is speculative.

The next question is whether this court should grant Defendants-Intervenors-Appellants' motion for an emergency stay. The factors to be considered in determining whether an order should be stayed are the same factors considered in determining whether to issue a temporary restraining order of a preliminary injunction....

Although it is possible that the plaintiffs will succeed on the merits, it is not likely. Neither district court relied upon racial discrimination as a basis for finding a likelihood of success on the merits. Instead, the courts below found a likelihood that the right to vote would be unconstitutionally burdened by having challengers present at the polling place, and that the presence of such challengers was not a sufficiently narrowly tailored way to accomplish legitimate government interests. [T]he plaintiffs do not appear likely to succeed on the necessary primary finding that the presence of challengers burdens the right to vote. Challengers may only *initiate* an inquiry process by precinct judges, judges who are of the majority party of the precinct. The lower court orders do not rely on the likelihood of success of plaintiffs' challenges to the procedure that will be used by precinct judges once a challenge has been made. Longer lines may of course result from delays and confusion when one side in a political controversy employs a statutorily prescribed polling place procedure more vigorously than in previous elections. But such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional.

The balance of harms in this case is close. If plaintiffs are correct in their view of the law, assuming they have standing because of the likelihood of significant delay, they will suffer irreparable harm. On the other hand, if the plaintiffs are not correct in their view of the law, the State will be irreparably injured in its ability to execute valid laws, which are presumed constitutional, for keeping ineligible voters from voting. In particular, the State's interest in not having its voting processes interfered with, assuming that such processes are legal and

constitutional, is great. It is particularly harmful to such interests to have the rules changed at the last minute.

On balance, the public interest weighs against the granting of the preliminary injunction. There is a strong public interest in allowing every registered voter to vote freely. There is also a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote. Finally, there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election.

The above reasons support the GRANT of Defendants-Intervenors-Appellants' motions for emergency stays pending appeal.

RYAN, Circuit Judge, concurring. *[Judge Ryan was appointed in 1985 by Republican President Ronald Reagan]*

I join Judge Rogers in granting the motion to expedite the appeal, consolidating the captioned cases, and staying the orders of the district court in each of the cases....I do so, however, solely for the reason that, in my judgment, the plaintiffs have not shown the requisite standing to warrant the injunctive relief granted them by the district courts. By that, I mean that the plaintiffs have failed to demonstrate that they have suffered any "injury in fact" that is "actual or imminent, not conjectural or hypothetical."

The plaintiffs have pleaded and the district courts have found a possible chamber of horrors in voting places throughout the state of Ohio based on no evidence whatsoever, save unsubstantiated predictions and speculation. The statute allowing for the presence of challengers at the polling place has been on the books for decades. In neither of the cases before us have the plaintiffs shown that the intimidation, chaos, confusion, "pandemonium," and inordinate delay they allege will occur tomorrow is "actual or imminent [and] not conjectural or hypothetical." *Id.*

The statute authorizing the presence of challengers at the polling places is presumed to be constitutional. The plaintiffs have offered no evidence that the injury they allege will occur tomorrow, has ever occurred before in an Ohio election or that there has been any threat by the defendants or anyone else that such injury will occur. The "injury" the district courts found that the plaintiffs will suffer tomorrow is wholly speculative, conjectural, and hypothetical.

Quite aside from the presumption of the constitutionality of the statute authorizing the presence of the challengers at the polling places, the people of the State of Ohio are entitled to anticipate that tomorrow's election will be conducted in a lawful, orderly, and suitably expeditious fashion, to preserve every elector's right to vote. Should the inordinate delay and related horrors the plaintiffs posit become a reality tomorrow, the federal courts will be open to respond to proof-supported allegations of an unconstitutional burden on Ohio citizens' right to vote.

I agree that the temporary restraining orders issued by the district courts must be stayed.

R. GUY COLE, Jr., Circuit Judge, dissenting. *[Judge Cole was appointed in 1995 by Democratic President Bill Clinton]*

We have before us today a matter of historic proportions. In this appeal, partisan challengers, for the first time since the civil rights era, seek to target precincts that have a majority African-

American population, and without any legal standards or restrictions, challenge the voter qualifications of people as they stand waiting to exercise their fundamental right to vote.

When the fundamental right to vote without intimidation or undue burden is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise. In this case, we need not go so far as to balance these interests in a vacuum, however, because here, the rights of those seeking to prevent voter fraud are already well protected by the election protocols established by the state: at each polling place, there are election officials, election judges, and ordinary voters who can challenge potential voter fraud.

The movant in this case bears the burden to show why this Court should reverse the well-reasoned decisions by two district court judges, appointed by a Democrat and Republican President respectively. Each judge independently came to the conclusion that a Temporary Restraining Order ("TRO") against the Challengers was constitutionally required. The Republican Ohio Secretary of State, J. Kenneth Blackwell, has publicly stated that he wants all Challengers banned from the polls on election day. *Spencer v. Blackwell,* No. C-1-04-738, at 6 (S.D. Ohio Order of Oct. 27, 2004). Now, this Court steps in to overturn the district court, permitting Challengers to go to any polls they wish to target tomorrow. As troubling as the public policy ramifications from this decision are, the legal implications are equally astonishing.

Judge Ryan's concurrence asserts that plaintiffs lacked standing at the outset of this case.

In a case where no voter can know that it is he or she who will be injured, such a specific showing is not necessary for standing. *Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, ---- (6th Cir.2004). All that is needed is a showing that an injury is likely to occur to *some* group of voters. This potential injury, necessary for the purposes of standing, as well as for the merits of this case, was shown at the district court level.

....Here, two separate district courts each heard testimony and reviewed evidence to support explicit factual findings that such a procedure may lead to suppression, intimidation, and chaos at the polls. Nonetheless, without the benefit of reviewing any of this testimony or evidence, the lead opinion would reverse the decisions of two trial courts on the grounds that evidence establishes only a "questionable" burden. But our standard of review clearly indicates that in cases where the evidence is "questionable," we will defer to the reasoned discretion of the district court.

The burden on the right to vote is evident. In this case, we anticipate the arrival of hundreds of Republican lawyers to challenge voter registrations at the polls. Behind them will be hundreds of Democrat lawyers to challenge these Challengers' challenges. This is a recipe for confusion and chaos. Further, although the district courts did not render their decisions on Equal Protection grounds, Plaintiffs' evidence on this point is relevant to show the harm that will naturally ensue from the presence of the partisan Challengers. Numerous studies have documented the dramatic effect of poll watchers on African-American voters. *See, e.g.,* Complaint, *Spencer v. Blackwell,* No. C-1-04-738, at 9-10 (S.D.Ohio).[FN1] These studies are strong evidence of both an effect and a burden on the voting rights of *all* voters. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement* of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims,* 377 U.S. 533, 561-62 (1964) (emphasis added).

The Supreme Court's decision in *Burson v. Freeman,* 504 U.S. 191 (1992), is also instructive. In that case, the Supreme Court found that allowing vote solicitation near the polls would cause

voter intimidation. *Id.* at 206. This case is similar. In fact, in this case, voter intimidation is likely to be even greater because the partisan operatives at the polls will be challenging the right to vote itself, rather than merely campaigning for a particular candidate or issue. There is no question that this poses a burden.

Second, the balance of harms is not at all close in this case. The magnitude of burden imposed on voters is great. Although the State of Ohio does have a compelling interest in preventing voter fraud, that interest is served by election officials, election judges, and other voters lawfully at the polling place. Ohio Rev.Code § 3505.20. The statute providing for additional Challengers at the poll is not narrowly tailored to serve this interest, and is not the least restrictive means for doing so. The harm caused by the chaos and uncertainty imposed by hundreds of additional Challengers at the poll far outweighs any minor decrease in voter fraud as a result of the Challengers' presence. The election judges and other voters perform the same function as these Challengers. The potential harm to the defendants is protected by [voter officials]. The potential harm to the plaintiffs, in contrast, is not addressed. The balance of harms, therefore, weighs strongly in favor of denying the motion to stay.

Third, the public interest weighs in favor of allowing registered voters to vote freely. The freedom to vote is best served by allowing election officials, election judges, and citizens to protect against voter fraud. Permitting hundreds of election Challengers to challenge voters at particular polls will promote chaos and uncertainty; it will divert the attention of election judges; and most importantly, it will create a level of voter frustration that could deter citizens from exercising their constitutional right to vote. There is no great justification for this infringement since the interests of the Challengers will be served by other parties. Election Judges represent both parties, with no one party having more than 50% of the judges. Ohio Rev.Code § 3501.22. This requirement alleviates any fear that the appellants have in this case. There is no reason to believe that these election judges, many of whom are members of the same party that insists on sending more lawyers to the polls, will fail to detect voter fraud, especially when it is their job to do so.

The majority indicates that the procedures for partisan political operatives to challenge an Ohio citizen's right to vote will not result in voter suppression, intimidation, or chaos at the polls. I deeply and sincerely hope they are right.

However, as voting is the very foundation of this Republic, our Constitution requires more than mere hope. Rather, the citizens of Ohio have the right to vote without the threat of suppression, intimidation, or chaos sown by partisan political operatives.

> FN1. For example, the Complaint notes: A study published in the 1981 Civil Rights Research Review, reported that in almost half the counties in Georgia, poll watchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by Associated Press reporter Jim Abrams quoted an anonymous Justice Department Official about post-1988 developments in Los Angeles: "All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence[s] if there are problems with voter records." In a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a "concerted effort to threaten and harass black and Hispanic voters" via a "ballot security" effort.