

Chapter 4

Bush v. Gore and the Distortion of Common Law Remedies

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The lasting importance of *Bush v. Gore* will be its impact on the law of remedies. The decision is an aberration setting new legal ground that distorts the remedial principles that have traditionally governed the courts. Indeed, commentators have uniformly scoffed at the implausible remedial decision in *Bush* and instead have looked for ulterior political or legal motives explaining the result (McConnell 2001, 674; Farnsworth 2001, 230; Strauss 2001, 187).¹ While others have focused on what the Court should or could have done in the case, this chapter focuses on what the Court actually did by analyzing the text of the decision and examining more fully the remedial platform that formed the Court's consensus. This textual analysis reveals that the Court used the law of remedies in an unprecedented way ultimately to substitute its own broad, but unachievable, remedy for the recount remedy crafted by the state court.

The potential impact of *Bush* on the law of remedies is particularly significant because remedies are the operative component of every legal right. A "remedy" in legal parlance is the consequence a court can order to redress a proven wrong such as damages (money for plaintiff's loss), injunction (an order to a defendant to prevent harm), or restitution (money to remove defendant's gain). Conceptually, a remedy is the lifeblood of one unified right that makes real the otherwise inert skeleton of the descriptive or substantive guarantee (Thomas 2001, 687). In one of the earliest American cases, *Marbury v. Madison* (5 U.S. 137, 163 [1803]), Chief Justice Marshall endorsed the now-common maxim that "where there is a right, there must be a remedy." Thus, the Supreme Court's remedial decision in *Bush v. Gore* is not merely a

throwaway decision about one particular election contest. Instead, it is a decision about the future viability of judicial remedies to give meaning and life to important constitutional and statutory rights.

The Unusual Remedial Decision

Bush v. Gore is comprised of three critical decisions about remedies that worked together to achieve the result of denying any relief for either the state election or federal constitutional violations. The Court's three decisional steps were: 1) the Florida recount remedy violates equal protection; 2) the necessary remedy to cure the unconstitutional state remedy is an injunction requiring additional safeguards for a recount; and 3) any appropriate recount remedy under Florida state law must be completed by December 12 (*Bush v. Gore*, 531 U.S. 98 [2000]). Seven justices agreed with the first step that the Florida remedy violated equal protection, but only five justices agreed with the last two remedial decisions. The three-tiered decision of *Bush v. Gore* represented a stark departure from previous remedial standards commonly applied by the Court. Moreover, the tripartite remedial decision operated to expand the scope of remedies for constitutional violations, while at the same time, denying all relief in this particular case.

The Supreme Court first concluded that the Florida recount remedy violated equal protection. The Florida Supreme Court found a violation of its state election law, Fla. Stat. § 102.168(3)(c), based on the failure of several counties to count a number of legal votes that was sufficient to change or place in doubt the result of the election. To remedy this tabulation error, the Florida Supreme Court issued an injunction including the vote totals from previous county recounts and ordering a statewide manual recount in all other counties with undervotes that would be supervised by one trial judge (*Gore v. Harris*, 772 So.2d 1243 [2000]). The Florida

Court determined that the recounts would be governed by the standard for determining a “legal vote” established by the state legislature, which was that a vote shall be counted as legal if there is a “clear indication of the intent of the voter” (Fla. Stat. § 101.5614(5)). The U.S. Supreme Court found that this Florida injunction violated equal protection because it failed to adopt specific uniform standards for the recount.² The Florida remedy, the Supreme Court held, endorsed and authorized the use of arbitrary standards in the county-by-county recount process because, for example, a hanging chad was counted in one county as a legal vote, but excluded in another. Justice Stevens disagreed, arguing that the appointment of the single trial judge to oversee the recount process sufficed to ensure uniform standards, but the majority held that specific standards should have been ordered by the Florida court.

The Supreme Court’s foray into the validity of a state remedy for a state law violation is unusual in and of itself. Indeed, there are few cases in which the Supreme Court has reviewed the constitutionality of state court remedies for state law violations. One rare example is *Mitchum v. Foster* (407 U.S. 225 [1972]) in which the Supreme Court invalidated an injunction under the First Amendment that had been issued by a Florida state court closing down an obscene bookstore for violating state nuisance law. While the Supreme Court has reviewed state court remedies for violations of federal rights (*e.g. McKesson Corp v. Div. of Alcoholic Bev.*, 496 U.S. 18 [1990]), federal court remedies for violations of state rights intertwined with federal law (*e.g. Schenck v. Pro-Choice Network*, 519 U.S. 357 [1997]) and violations of federal rights committed by other non-judicial state actors (*e.g. Fortson v. Morris*, 385 U.S. 231 [1967]), it has rarely examined the conduct of state courts issuing remedies for state law violations. The initial case in the Florida court in *Bush v. Gore* was simply one of a state court issuing a remedy for a

state election law violation caused by technical vote tabulation errors (*Siegel v. LePore*, 234 F.3d 1163, 1187 [2000]).³

Indeed, Supreme Court examination of state court remedies generally is futile because the Court lacks the power under the Anti-Injunction Act, 28 U.S.C. § 2283, to order any change in the state court. The Anti-Injunction Act, enacted in 1793, prohibits any federal court, including the Supreme Court, from granting an injunction to stay proceedings in a state court, including all remedial and enforcement proceedings (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 554 [1972]). The Supreme Court has repeatedly emphasized that the Act is not a mere discretionary principle of comity or abstention,⁴ but rather is an absolute prohibition against federal equitable intervention in a pending state court proceeding, regardless of how extraordinary the particular circumstances may be (*Mitchum v. Foster*, 407 U.S. 225 [1972]). One of the narrow statutory exceptions to this absolute ban is where Congress has expressly authorized the injunction, as for example with 42 U.S.C. § 1983 authorizing injunctive relief to redress constitutional harms committed by state actors. Arguably, this exception permitted the Supreme Court's intervention in *Bush* as it did in *Mitchum* where the claim was made that a state actor, the Florida Supreme Court, violated the Constitution.⁵ However, unlike past cases where the Court has authorized an exception to the Anti-Injunction Act, the *Bush* Court did not engage in detailed discussion justifying its intervention. Rather, it ignored the issue altogether.

After making the unprecedented decision to review the state court remedy, the Supreme Court then took a second novel step of creating broad injunctive relief to remedy the equal protection violation and protect against future violations. A majority of five justices expressly held "a recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work" that builds in the constitutionally necessary

safeguards to protect the right to vote (*Bush v. Gore*, 531 U.S. 532). These additional constitutionally-required safeguards according to the *Bush* majority include: 1) the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote; 2) practicable procedures to implement the standards; 3) orderly judicial review of any disputed matters that might arise; and 4) evaluation of the accuracy of vote tabulation equipment by the Florida Secretary of State.

The final remedial decision made by the Court was its conclusion that Florida law required any recount remedy to be completed by December 12. The Supreme Court acknowledged that Florida law, Fla. Stat. § 102.168(8), authorized the state court to award “any relief appropriate” to redress vote tabulation errors. However, it proceeded to substitute its own interpretation of that state law by holding that “appropriate” relief must mean relief completed by December 12, which is the safe harbor date established by 3 U.S.C. § 5 for a state to submit its electoral votes to Congress without challenge. Since Florida could not accomplish a recount with all of the required prophylactic measures by the deadline (the very day of the Supreme Court’s decision), the Court prohibited any recount from proceeding. As a result, there was no remedy for the state election violation and no remedy for the violation of equal protection.

A New Model of Prophylactic Relief

Ratcheted-up Relief

Contrary to popular opinion, the Court in *Bush v. Gore* did not order too little relief, but rather too much. The *Bush* Court ordered a myriad of standards and procedures as constitutionally necessary for any recount to protect against further arbitrary treatment. Thus, one

potential legal consequence of the *Bush* decision is its liberal use of a prophylactic injunction as a constitutional remedy.

Prophylactic relief is defined as a specialized injunction that includes additional precautionary measures that restrict legitimate conduct in order to ensure that harm does not occur in the future (Thomas 2001, 723). A classic example of prophylactic relief is the injunctive order issued in sexual harassment cases. These orders typically include enumerated measures ordering new employment policies, employee training, and grievance procedures in order to ensure against future illegal incidents of sexual harassment (*e.g. Women Prisoners v. District of Columbia*, 968 F. Supp. 744 [D.D.C. 1997]). The injunction sweeps wide to include within its ambit legal activity (employment policies and procedures) as preventive measures to protect against future illegal actions (Schoenbrod 1988, 678-79). Similarly, in *Bush v. Gore*, the Court determined that the only appropriate remedy to prevent future constitutional violations by arbitrary election recounts was a prophylactic injunction that mandated a system of standards, procedures, and review to protect the right to vote.

In this way, the Court ratcheted up the required remedy for a constitutional violation to a new level, but one that was impractical, if not impossible, to achieve. The remedy was impossible to effectuate, in part, because the Florida court was required to adopt a uniform standard of a legal vote that it may have been without authority to define. While the majority expressly stated that it was not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme to define a legal vote, Justice Rehnquist argued in his concurrence that Article II, § 1, cl. 2 providing that each state shall appoint electors for President “in such manner as the legislature may direct” precluded the court from defining the standard of a “legal vote” differently than the legislature or the executive agencies to whom the legislature

had statutorily delegated such responsibility (*Bush*, 531 U.S. 114, 118). Indeed, the Florida Supreme Court also believed it was bound by the legislative definition of a legal vote as it stated in conforming its recount order to the statutory definition of the “intent of the voter” (*Gore v. Harris*, 772 So.2d 1262 [2000]). In addition, the Court created an impossible remedy by mandating the involvement of multiple actors in the creation of a judicial recount remedy. This significantly increased the transaction costs of imposing the remedy and directly contravened the Florida legislature’s decision to provide the state judiciary with full discretion to redress and prevent election violations.⁶ Moreover, the imposition of a complex series of legislative-type procedures of notice and comment and expert agency input combined with the time constraints of any election, and in particular this presidential election, made it unlikely that any such recount remedy could be implemented. The Supreme Court thus created too much relief by imposing a series of procedures and mandates that could not practically be accomplished.

As Judge Shaw of the Florida Supreme Court expressed in the subsequent decision dismissing the state case, “I am not convinced that additional safeguards could have been formulated that would have satisfied the United States Supreme Court. Given the tenor of the opinion in *Bush v. Gore*, I do not believe that the Florida Supreme Court could have crafted a remedy under these circumstances that would have met the” concerns of the Court (*Gore v. Harris*, 773 So.2d 528). Perhaps, as Judge Shaw suggests, the Supreme Court engaged in a disingenuous attempt to provide meaningful relief for the constitutional violation by ordering this ratcheted-up relief to preclude manual recounts. It is clear, however, that the Supreme Court used prophylactic relief in an unprecedented way in this case. The Court used the prophylactic measures as burdensome impediments to bar actual relief rather than as protective measures providing additional relief for the harm.

Disconnected from Prior Principles

The prophylactic remedy employed by the majority in *Bush v. Gore* deviates from accepted legal rules for determining the propriety of judicial remedies. The Court abandons traditional rules for crafting an injunctive remedy and substitutes its own unconstrained judicial discretion. With no doctrinal constraints, the Court awards broad prophylactic relief in a context where such relief is not justified, and where the relief fails to satisfy the proportionality requirement of a proper injunction.

The *Bush* Court violated the rules of remedies law by first awarding relief that does not fit the scope of the harm. Case law generally emphasizes that the ultimate goal of remedies is equalization, nothing more or nothing less, and thus, the scope of the remedy must match the scope of the harm (Thomas 2001, 733). The Supreme Court itself reiterated in *Madsen v. Women's Health Center* (512 U.S. 753, 765 [1994]) that the attention to the fit between the objectives of an injunction and its restrictions is consistent with the general rule that “injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.” This fit or proportionality is needed to maintain equilibrium so that the wrongdoer is not punished – an inappropriate goal for civil remedies aside from punitive damages – and so the plaintiff is not given a windfall beyond her rightful entitlement (Laycock 1994, 272). Yet the prophylactic remedy in *Bush* goes beyond the minimum necessary to protect against future harm and instead burdens the state with procedures and mandates that gave the *Bush* challengers a windfall beyond simply curing the equal protection violation. The harm was the use of arbitrary standards for determining legal votes in the recounts, i.e., the use of differing standards to decide whether to count dimpled or hanging chads as a legal vote. A proportional

injunction would have prohibited the use of arbitrary standards or ordered the use of a uniform standard to cure that identified harm.

Indeed, the four dissenting justices in *Bush v. Gore* advocated this type of proportional relief. The dissenters found that the appropriate remedy was to remand the case to Florida for its adoption of a uniform standard.⁷ This tailored relief is consistent with other Supreme Court cases in which the Court has confined the injunctive relief to the scope of the harm conforming to the general rule. For example, in *United States v. Virginia* (518 U.S. 515 [1996]), the Court found that the Virginia Military Institute (VMI) violated the equal protection clause by excluding women from VMI. The Court held that the harm of exclusion of women from VMI must be remedied by including women at VMI. In *Lewis v. Casey* (518 U.S. 343 [1996]), the Court rejected injunctive relief that reached too far by ordering prison library services and reforms such as noise control, Spanish speaking services, and expanded hours that were not connected to the harm of denying an illiterate prisoner access to the courts.

The *Bush* majority, however, ordered relief that extended beyond the harm of the arbitrary standards. It created a role for the Secretary of State in the court remedy, required certification of tabulation software, and added several levels of executive and judicial review – none of which was connected to the equal protection violation. It mandated the adoption of statewide standards for legal votes, but only after argument allowing the input of many actors. It required judicial review of any disputed matters, thus presumably requiring more than the single judge oversight ordered by the Florida Supreme Court. Furthermore, the Supreme Court's order suggests that overvotes should be included in the recount, even though Gore never alleged that overvotes were a part of the election harm. The Court's remedy thus clearly exceeds the minimum necessary to produce a proportional response to the harm.

Such broad relief, however, is permitted in the exceptional case justifying prophylactic relief. While at least one justice, Justice Scalia, has denounced the use of prophylactic relief, (*Lewis*, 518 U.S. 343; *Dickerson v. United States*, 530 U.S. 428, 446 [2000]), the remaining justices have approved the use of such relief in narrow circumstances (Landsberg 1999, 960). In the abortion protest cases of *Madsen* (519 U.S. 361) and *Schenck* (512 U.S. 753), the Court upheld extra safeguards including no-protest zones around abortion clinics, noise restrictions, and restrictions on approaching clinic patients. Recently in *Dickerson v. United States* (530 U.S. 428 [2000]), the Court upheld a challenge to Miranda rights stating that the judicial rules requiring detailed warnings to be issued to criminal suspects by police officers were necessary safeguards to protect against violations of the constitutional right against self-incrimination. The Court found that the exceptional risk to individuals in these cases – to their personal safety and freedom – justified the broad sweeping relief.

However, the *Bush* Court issued prophylactic relief that was not justified under the existing legal standards, thus further distorting the rules of remedies. Courts have authorized prophylactic injunctions where the defendants have a prior history of similar wrongful behavior (as in the abortion protest cases), where the harm is a particularly egregious act (personal assaults in the protest cases; incarceration in Miranda cases), or where other remedies are ineffective at curing the harm (Thomas 2001, 735; Landsberg 1999, 961). Here, the Florida state courts had no pattern of constitutional violations, nor had the Supreme Court found that other ordered remedies were ineffectual. Indeed it rejected the minimalist approach recommended by the dissent of simply ordering a uniform standard. The only plausible argument justifying prophylactic relief in the *Bush* case was that a particularly egregious act was threatened by the impending constitutional crisis. But that is not the legal harm that the Court is empowered to remedy.

Indeed, the Constitution provides for a resolution of such a crisis through the other branches of government (Posner 2001, 133). The Court's remedial power is limited to redressing the harm of arbitrary counting, which does not rise to the personal threats demonstrated in prior cases.

Thus, the remedial decision in *Bush v. Gore* follows none of the generally-accepted rules for awarding injunctive relief. Indeed, the Court fails to acknowledge that such rules exist or to explain its deviation from the rules. Such an unprincipled decision gives credence to those attempting to explain the decision by political motives. However, what is more significant is that the decision sets forth a new model that potentially expands prophylactic relief in future cases.

Future Model for Expansive Relief

The prophylactic injunctive relief issued in *Bush v. Gore* may impact future cases by dictating the types of remedies that can be awarded for voting and equal protection violations. With respect to remedies for election violations, the case may stand for the restriction of available remedies. Some have expressed concern that *Bush v. Gore* effectively prohibits recounts (Mulroy 2001, 215; *Gore v. Harris*, 773 So.2d 531). Others have argued that recounts, while not prohibited, will be practically impossible for a court to order in the aftermath of an election because of the complex "constitutional requirements" or prophylactic measures necessary for any recount to satisfy equal protection and due process (*Gore v. Harris*, 773 So.2d 529).

However, the *Bush* decision can also be read as a case expanding available remedies in the context of constitutional violations. The decision provides good precedent for broad, sweeping prophylactic relief to cure equal protection violations in the future. The Court does much more than simply issue a preventive order to stop the arbitrary treatment, and thus suggests

that such a simple injunction is not an appropriate remedy when important constitutional rights are at stake. Thus, the *Bush* remedial decision does not represent a case of the so-called leveling down of constitutional rights by denying the benefit to all rather than extending the benefit to the excluded class (Karlson 2001, 1361). The leveling down case is best exemplified by *Palmer v. Thompson* (403 U.S. 217 [1971]) where the city of Jackson, Mississippi closed down the public pools for all citizens rather than granting access to African-American citizens. In contrast, in the *Bush* case, the prophylactic remedy extends recount benefits equally to all voters. It was only the imposition of the safe harbor deadline that worked to deny the recount benefit. The decision imposing a remedy for the federal constitutional violation itself was broad, and can be used in the future to support similar prophylactic relief in other cases of constitutional violations.

Using Remedial Power to Nullify Rights

The second key legal consequence emanating from the *Bush v. Gore* decision is the Court's use of its remedial power to nullify state rights. Nullification of a right is accomplished by the denial of a remedy. The unified right theory explains that a remedy is a necessary component to every right in order to make the right tangible and meaningful (Thomas 2001, 689). The unified right theory conceives of the remedy as the lifeblood of one unified right rather than a separate mechanism secondary in importance to the primary substantive right (Thomas 2001, 687). If no remedy is imposed for the violation of state law, then the state right is not vindicated and it is relegated to mere normative value. So for example, the law against trespass consists of the descriptive norm prohibiting interference with another's property and the remedy of damages requiring a trespasser to pay for the harm she has caused by the interference. Without a remedy of damages (or other substitute remedy) to redress or prevent the harm, the

law of trespass is nothing more than a moral expectation that cannot be enforced in real life. This is precisely the result of *Bush* where the Supreme Court crafted an impractical remedy and imposed an impossible deadline that operated to deny meaningful relief for the state election right, thereby nullifying that right.⁸

In *Bush*, the majority took the unprecedented move of making its own interpretation of state law, which proved to be the death knell to any meaningful remedy. Florida statute §102.168(8) authorized the state court to “fashion such orders as he or she deems necessary . . . to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances.” The Supreme Court boldly concluded that appropriate relief under this state law could not include votes counted after December 12. The Court supported its conclusion by arguing that the Florida Supreme Court previously stated that the safe harbor date of December 12 established by federal law must be met and that any later action contemplated a violation of the Florida Election Code (*Bush*, 531 U.S. 110-11). However, nothing in the Florida election statutes mandates compliance with the safe harbor provision. And, while the Florida court indicated in its opinion addressing the protest recounts that the Secretary had discretion to ignore amended recount returns not submitted in time for the December 12 deadline (*Palm Beach Canvassing Board v. Harris*), it did not consider the relative priority of the December 12 goal compared to the goal of concluding a thorough contest recount in its decision ordering the statewide recount (*Gore v. Harris*) (Farnsworth 2001, 231; Strauss 2001, 188). Rather, it was two dissenting Florida judges who suggested that December 12 was a mandatory deadline for the contest conclusion (*Gore*, 772 So.2d 1243, 1268, 1272).⁹ Yet, two other Florida judges rejected December 12 as a deadline and suggested December 18 or even January 6 as operative dates (*Gore*, 773 So.2d 524, 530), which might have allowed the recount remedy to be implemented

even under the U.S. Supreme Court's ratcheted-up standard (see Tribe 2001, 269; Posner 2001, 133). The *Bush* majority's foray into state law, however, precluded the imposition of any recount remedy determined by the state court to be necessary to remedying the harm.

More fundamentally, the Supreme Court's ruling on the safe harbor date violates a bedrock principle that the Court does not have authority to render opinions solely on the basis of state law (Farnsworth 2001, 230). For over one hundred and twenty-five years, the Supreme Court has steadfastly held that it cannot interpret issues of state law (*Murdock v. City of Memphis*, 87 U.S. 590 [1874]). Thus, what is "appropriate" relief under Florida law for a Florida statutory violation is not a question the U.S. Supreme Court has power to decide. The only exception to this prohibition is that the Court may interpret state law where a federal issue is implicated (*Williams v. Kaiser*, 323 U.S. 471 [1945]). Take for example the case of an unconstitutional tax in *McKesson Corp. v. Division of Alcoholic Beverages* (496 U.S. 18 [1990]). In *McKesson*, the Florida state court determined that a state beverage tax violated the federal commerce clause and ordered a prospective remedy prohibiting the continued application of the tax. The Supreme Court intervened to review the state remedy because the federal interest of vindicating the commerce clause was involved. The Court held that the state remedy for a federal law violation failed to provide the plaintiffs with meaningful relief by denying them retrospective relief, that is, damages for past harm. Meaningful relief for unconstitutional deprivations, the *McKesson* Court held, is required by due process. Thus, the Court may intervene in cases where the state remedy for a *federal* right is inadequate.

Justice Rehnquist in his concurrence in *Bush* (531 U.S. 113-14) tried to fit the decision into this exception justifying federal court intervention into state law. He argued that Florida's failure to recognize the safe harbor date violated Article II of the Constitution. Basing the

decision upon the Article II grounds would have made the issue of the safe harbor date a federal issue and explained the Court's meddling into state law (Posner 2000, 48). However, only three justices agreed with this argument. Thus, the absence of a federal interest with respect to the safe harbor date should have precluded the Court from rendering its own decision on state law (Farnsworth 2001, 231). The bottom line, as Justice Ginsburg acknowledged in her dissent in *Bush* (531 U.S. 142), is that the decision creates a new basis for the Court to opine on issues of state law in contravention of settled law.

Conclusion

We have not seen the last of *Bush v. Gore*. Its tripartite remedial decision altered the common law understanding of remedies in ways that may have potential widespread application. Indeed, since the *Bush* decision, a voluminous number of cases have cited to some principle from the case. *Bush v. Gore* is a dangerous and potentially exciting case because it can be used as ammunition for many different arguments that deviate from accepted legal principles. For example, in *Costo v. United States* (248 F.3d 863 [9th Cir. 2001]), the dissenting judge argued that the classification crafted by the U.S. Supreme Court creating different tort remedies for military and civilian personnel violated equal protection under the principles of *Bush v. Gore*. Thus, the Supreme Court's decision carefully crafted in terms of remedies may in fact come back to haunt it.

¹ Commentators have suggested that the decision was motivated by the personal political agendas of the individual Supreme Court justices (Dershowitz 2001), the perceived need to

curtail the partisanship of the Florida Supreme Court (Strauss 2001, 185), structural inter-branch policy concerns (Farnsworth 2001), or jurisprudential choices between rules and standards (Overton 2002).

² This issue had been presented to the Supreme Court several times by Bush in his petitions for certiorari in *Siegel v. LePore* (234 F.3d 1163 [2000]) and *Bush v. Palm Beach Canvassing Board* (772 So.2d 1220 [2000]). Bush argued that the Florida statutes permitting protest manual recounts violated equal protection and due process, in part, because they failed to include specific uniform standards for initiating and conducting manual recounts. The Court, however, declined to address the equal protection issue until it was raised again as an afterthought in *Bush v. Gore*.

³ *Siegel*, 234 F.3d at 1187 (Anderson, J., concurring). See *Gold v. Feinberg*, 101 F.3d 796, 802 (2d Cir. 1996) (holding that human errors resulting in the miscounting of votes and other voting errors presented only an issue of state law for which adequate state remedies existed); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (voting errors in federal congressional primary did not present issue of federal law).

⁴ There are also abstention principles that guide a federal court's discretion as to when it should avoid interpreting state law. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (federal court should not intervene into complex state administrative processes involving state law with substantial public policy implications); *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941) (federal court will defer to state court resolution of underlying issues of state law where state law issue is unsettled and dispositive in the case). The United States Court of Appeals for the Eleventh Circuit held in *Siegel v. LePore* (234 F.3d 1163, 1173 [2000]) that neither of these abstention

doctrines precluded the federal court from considering issues of Florida state law regarding manual recounts.

⁵ See also *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1994) (federal court had power to issue injunction preventing compliance with state court remedy ordering inclusion of votes from erroneous absentee ballots where remedy violated federal constitutional rights). Except that Bush's petition for certiorari does not mention § 1983 and the Court has held that the congressional authorization exception to the Anti-Injunction Act is not satisfied where the complaint fails to rely upon or mention § 1983 even where it alleges constitutional violations. *Imperial County v. Munoz*, 449 U.S. 54, 60 n.4 (1980). See also *Roudebush v. Hartke*, 405 U.S. 15 (1972) (Anti-Injunction Act did not bar federal court from enjoining Indiana statutory recount procedure administered by state court in congressional election where court was performing nonjudicial function). In addition, even where federal intervention is not prohibited, the Court will generally abstain from enjoining state court proceedings in a civil case absent some great and immediate irreparable harm or flagrant violation of the constitution by the state, both of which arguably were satisfied in the *Bush* case. *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975).

⁶ The Florida legislature has since revised its law to delete the provision granting the court such discretion to determine the appropriate relief to cure the election harm. Fla. Stat. § 102.168 (effective Jan. 1, 2002).

⁷ *Bush v. Gore*, 531 U.S. at 134 (Souter, J., dissenting) (remand to courts of Florida with instructions to establish uniform standards for evaluating several types of ballots that have prompted different treatments to be applied within and among counties); *id.* at 146-47 (Breyer, J., dissenting) ("Court crafts a remedy out of proportion to the asserted harm" whereas the "appropriate remedy is remand to recount all undervotes with a single uniform standard"); *id.* at

126 (Stevens, J., dissenting) (assuming a constitutional violation, “the appropriate course of action would be remand to allow more specific procedures for implementing the legislature’s uniform general standard to be established”).

⁸ It may be that as a practical matter, that the Florida Supreme Court could have avoided the nullification by crafting some other relief that would have addressed the wrong. The Supreme Court mandated only that a statewide recount be conducted with certain standards and procedures and that it be done by December 12. But several other remedial options were possible. The Florida court could have ordered preventive relief to prevent future harm by requiring counties to use the same voting equipment, prohibiting punch card machines (*Black v. McGuffage*, 2002 WL 483403 [N.D. Ill. 2002]), or prohibiting butterfly ballots (Issacharoff 2001, 140). It could have ordered reparative relief designed to cure the continuing effects of the past election harm by excluding the total votes from suspect counties or by prohibiting the Secretary from sending the electoral votes to Congress (Issacharoff 2001, 126). In *re* Protest of Election Results, 707 So.2d 1170 (Fla. Ct. App. 1998) (voiding all absentee ballots in election rather than holding new election). Or it could have ordered structural relief to change the state election system by requiring the election board to redesign vote tabulation procedures or requiring the commission to establish uniform standards for recounts (Issacharoff 2001, 140). However, the Florida Supreme Court merely opted out of the case after the *Bush* decision stating “we hold that appellants can be afforded no relief.” *Gore v. Harris*, 773 So.2d 524, 526 (Fla. 2000).

⁹ Justice Wells assumed that the majority would recognize a need to protect the votes of Florida’s presidential electors under 3 U.S.C. § 5, and that therefore, all recounts must be completed by December 12 (*Gore*, 772 So.2d 1243, 1268). Justice Harding argued that the Florida Supreme

Court in its prior protest opinion and all of the parties agreed that election controversies and contests must be finally and conclusively determined by December 12 (*Gore*, 772 So.2d 1272).