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Q: Will the Supreme Court Intervention in Florida Fail the Test of Time?

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Yes: The miscarriage of justice to minority citizens whose votes were discarded unfairly was ignored.

In 1857 the U.S. Supreme Court effectively upheld the constitutionality of slavery by striking down as unconstitutional a federal law that prohibited slavery in U.S. territories outside the South. Far worse than the decision in *Dred Scott v. Sanford* case itself was the language of the opinion supporting it. Chief Justice Roger B. Taney wrote that blacks were "subordinate and inferior beings" and that they had "no rights which the white man was bound to respect."

There probably has never been a Supreme Court decision more crushing to the hopes and aspirations of equal-rights advocates than *Dred Scott*. But Frederick Douglass, the leading black abolitionist of the time, did not react with despondence or despair. He said: "The Supreme Court is not the only power in this world. We, the abolitionists and colored people, should meet this decision, unlooked for and monstrous as it appears, in a cheerful spirit. This very attempt to blot out forever the hopes of an enslaved people may be one necessary link in the chain of events preparatory to the complete overthrow of the whole slave system."

It is not necessary to equate the Supreme Court’s decision on Dec. 12 with the *Dred Scott* decision — indeed, it would be obscene to do so. We should take Douglass’ reaction as a guide for our own. Our nation must now rededicate itself to assuring the equal right to vote. In this, the Supreme Court’s Dec. 12 decision contains a number of opportunities that the American Civil Liberties Union (ACLU) will begin to address through litigation in the coming weeks.

The equal-protection clause of the 14th Amendment was written in the first instance to address local and state-based racial inequalities. In *George W. Bush and Richard Cheney v. Al Gore*, et al., the U.S. Supreme Court discovered a 14th Amendment equal-protection violation in the differential ways that disputed ballots were being counted in Florida. But these disputed ballots and the methods used to evaluate them only arose because of the differential use of punch-card machines in some counties but not in others. In terms of practical impact, these and other inequalities almost certainly affected a greater number of votes than any inconsistencies that might have arisen from the manual recount that was under way in Florida and did so, moreover, in a way that clearly discriminated against racial minorities.

But it also provides an opportunity for those who truly are dedicated to the principles of equal protection to challenge prospectively the differential use of punch-card machines in Florida and also across the country. If the U.S. Supreme Court claims to be sensitive to equal-protection problems in the area of voting, the ACLU is ready to accommodate it.

Thus, if there were an equal-protection problem in Florida, it arose out of the racially disparate use or different voting machines, and was both more serious and prior to the equal-protection problem arising out of the evaluation and counting of disputed ballots. Indeed, the evaluation and counting of disputed ballots was a remedy for the prior equal-protection problem arising out of the different machines. For the Supreme Court to pretend, as it did, that an equal-protection problem arose initially at the stage of evaluation and counting disputed ballots, while it ignored the prior equal-protection problem, exposes the intellectual dishonesty of the court’s approach.

According to a Dec. 1 report in the *New York Times*, counties that used punch-card machines turned out ballots that showed no vote for president at a far higher rate than counties that used optical-scanner machines. In 30 Florida counties that used optical scanners, for example, only three-tenths of 1 percent of the ballots were recorded as having no presidential vote. But in 15 counties that used punch-card machines, 1.86 percent registered no presidential vote — more than six times the rate of optical scanners.

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No: The majority decision vindicated the rule of law and upheld the U.S. Constitution.

By Alan J. Meese

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On Dec. 12 the U.S. Supreme Court put an end to the seemingly endless Florida "recounts" that followed the Nov. 7 presidential election. Critics have claimed that the court overstepped its authority and infringed "states' rights"—here, the "right" of the Florida Supreme Court to order a 64-county recount without articulating any objective standards governing what did and did not constitute a "vote." Some even have questioned the legitimacy of the U.S. Supreme Court's action, claiming that the strong disagreement among the justices somehow undermines the authority of the decision. These criticisms, however, miss the mark. The court's intervention vindicated the rule of law, pursuing its statutory authority. Courts intervened occasionally, ordering boards to change their standards, extending deadlines and compelling further recounts. Yet, despite all appearances of a "legal" process, these recounts offended the rule of law. At a minimum, the rule of law requires the state to act according to the general rules that were in effect before the dispute at hand. These procedural requirements of prospectivity and generality ensure that law is made behind a veil of ignorance, without reference to any particular controversy, so that law reflects the lawmaker's unbiased judgment about the "best" rule. A decision that does not comport with these requirements is not "legal" in any meaningful sense, but is instead arbitrary human action, with no claim to legitimacy or respect.

The Florida recounts appeared "legal" in the ordinary sense of that word. Duly elected canvassing boards initiated the counts, pursuant to their statutory authority. Courts intervened occasionally, ordering boards to change their standards, extending deadlines and compelling further recounts. Yet, despite all appearances of a "legal" process, these recounts offended the rule of law. At a minimum, the rule of law requires the state to act according to the general rules that were in effect before the dispute at hand. These procedural requirements of prospectivity and generality ensure that law is made behind a veil of ignorance, without reference to any particular controversy, so that law reflects the lawmaker's unbiased judgment about the "best" rule. A decision that does not comport with these requirements is not "legal" in any meaningful sense, but is instead arbitrary human action, with no claim to legitimacy or respect.

The Florida recounts contravened each of the procedural requirements described above. A court ordered Palm Beach County to count "dimpled" chads as votes, in violation of the county's rule, promulgated in 1990, which expressly forbade the counting of dimples. While Broward County had no written policy, it never had counted dimples in the past. When it started its recount, Broward announced that it would follow prior practice and only count "two-corner" chads. A judge soon intervened, however, ordering the board to count some dimples as votes. Though ostensibly "legal," both of these orders changed the rules after the election and knowingly advantaged one candidate. Rule by judges replaced the "rule of law."

Florida did not stop there, however. It also violated the principle of generality—the requirement that like cases be treated alike. Palm Beach County refused to count ballots with isolated dimples as votes. Midway through its recount, however, Broward County relaxed its standard even further, counting such dimples as votes, even where the voter had punched the chad for a candidate for every other office on the ballot. The Miami-Dade County canvassing board could not agree on a standard; each board member applied his own. Thus, Florida treated different voters differently, based solely on their county of residence, and no official explained why. It just so happened, however, that the county (Broward) that had produced the most votes for Al Gore on Nov. 7 was applying the standard most likely to turn up even more.

Viewed in their entirety, then, the Florida recount proceedings were not legal in any sense, but were instead an exemplar of lawless and arbitrary state action. Unfortunately, the U.S. Constitution contains no general prohibition on retroactive lawmaking. (The ex post facto clause, for instance, only applies to criminal punishments.) The U.S. Constitution does, however, contain a sort of generality requirement in the form of the equal-protection clause of the 14th Amendment. For nearly four decades, the Supreme Court repeatedly has held that voting is a "fundamental" right and that practices granting some votes more weight than others violate the equal-protection guarantee, unless a compelling interest justifies such differential treatment. This "one person, one vote" line of cases, which no justice questions, applies regardless of whether the practice at issue discriminates based on race.

On Nov. 22, George W. Bush petitioned the U.S. Supreme Court to enforce the equal-protection guarantee by requiring Florida to adopt uniform standards governing the ongoing recounts. The court refused, thus giving the Florida Supreme Court a chance to clean up the constitutional mess that was evolving under its supervision. Inexplicably, the Florida high court proceeded to make things worse. In its Dec. 8 order reversing Judge N. Sanders Sauls, four Florida Supreme Court justices ordered the arbitrary results of the recounts in Palm Beach, Miami-Dade, and Broward counties included in the final certification. Moreover, the court ordered a count of the "undervotes" in the 64 Florida counties that had not completed recounts. In so doing, the court rejected Bush's claim that the equal-protection clause required a uniform standard, vaguely admonishing 64 counties to determine the "clear intent of the voter." This, of course, was the same "standard" purportedly followed by Palm Beach, Miami-Dade and Broward counties.

Within hours of this decision, Bush's lawyers implored Leon County Circuit Judge Terry Lewis, who was overseeing the recounts, to set a uniform standard. Lewis refused, leaving each county free to recount the undervotes however it saw fit. Standards began to multiply, as Hillsborough County—which had narrowly gone for Bush—announced that it actually would adhere to its customary approach and not count dimples. Four different counties had produced four different standards. The process was getting more, not less, arbitrary.

It was at this point that the U.S. Supreme Court finally stepped in, ordering a halt to the lawless spectacle unfolding on Dec. 9. Although only five justices voted for the initial stay, seven ultimately agreed with Bush that the recount ordered by the Florida (continued on page 42)
Overall, according to the *Times*, voters using the now infamous Votomatic machines showed no vote for president at a rate five times higher than voters using optical scanners. It defies reason to suggest that voters in counties using punch-card systems willfully decided not to vote for president at a rate five to six times higher than citizens in counties using optical scanners.

Moreover, these disparities had a clear racial subtext. According to the *Times*, 64 percent of Florida’s black voters live in counties that used punch-card systems, which are cheaper, while 56 percent of whites do. Sixty-three percent of Gore’s vote, which included heavy majorities among black voters, were counted on punch-card machines while only 55 percent of Bush’s vote was. This pattern was reversed in votes tallied by optical scanners.

There are other issues besides those raised by the racially disparate rejection of ballots by different machines. In Florida, according to the *Times*, some counties, mostly heavily white, had computers to relieve the problem of voters whose valid registration information was not available at the precinct, while other counties, mostly black, did not. Since Florida does not allow for provisional voting in such cases, black voters disproportionately were rejected, even though eligible.

In addition, disproportionate numbers of minority voters were purged from the voter rolls prior to the election based on alleged felony records that were never verified. A data-service firm hired by the Republican Party apparently provided a list of 8,000 “possible felons,” which local election officials had no time to investigate and did not investigate. But they did disqualify the 8,000, who were heavily minority.

Aside from inaccurate felony records, there is the issue of felony disenfranchisement itself. Throughout the nation, 13 percent of all African-American men are barred from voting as the result of prior felonies. In the South, the percentage is about 30 percent. In Florida, it was 31.2 percent—more than 200,000 citizens. The majority of these felonies were nonviolent offenses, many, if not most, for nonviolent drug offenses.

The explosion of drug-war arrests and convictions in recent years has led to an explosion of felony disenfranchisement. And the racial profiling inherent in how the drug war is enforced has been reflected in a racial disproportion in felony disenfranchisement. According to the federal government’s own statistics, approximately 13 percent of all monthly drug users are black (about their proportion in the population), while 35 percent of arrests for nonviolent drug offenders are black, as are 55 percent of convictions and 74 percent of prisoners. These disproportions are indefensible and lead to similar disproportions in felony disenfranchisement.

Moreover, prisoners and former felons no longer under the jurisdiction of the criminal-justice system are counted for the purposes of determining the number of a state’s congressional representation and Electoral College votes, even though they are not allowed to vote. This, of course, is like the three-fifths compromise that counted slaves for the purposes of determining the number of representatives and Electoral College votes while in other respects treating them like chattel and denying them all rights, including the right to vote.

Looking forward, our country must identify these problems systematically to see where and to what extent they and other similar problems exist and fashion a comprehensive plan to remedy them. The ACLU is fully prepared to propel these remedies through legal challenges, legislation and public campaigns to ensure that the principle of equal protection in voting so recently embraced by the conservative majority of the court does, indeed, apply to all people, regardless of race, color or previous condition of servitude.
including those in Broward and Palm Beach counties, under a uniform standard. Neither of these justices explained how these recounts could be consistent with the Florida Supreme Court's prior pronouncements about the Dec. 12 deadline and, by extension, Article II.

The claim that the majority decision somehow interfered with "states' rights" would be a strong one if it had been made in 1858, when the federal government was without authority to ensure equality between its citizens. Important events — including the Civil War and the adoption of the 14th Amendment — have intervened since then, radically altering the federal-state balance. By its very nature, the equal-protection clause requires the U.S. Supreme Court to second-guess state actions — including judicial decisions — that treat citizens differently for arbitrary reasons. The whole point of the "one person, one vote" decisions is that states have no right to treat the votes of one person differently from the votes of another. Taken to its logical (and horrifying) conclusion, a preference for states' rights over equal protection would empower states to reinstate segregation.

Certainly, the majority would have preferred unanimous agreement with its decision. Legitimacy, however, is not a numbers game. The authority of judges and the concomitant power of judicial review rests upon the law, in this case the supreme law contained in the U.S. Constitution. A judicial opinion that flouts this law does not become legitimate because it is unanimous or nearly so. (The doctrine of "separate but equal" announced in Plessy v. Ferguson did not derive one iota of legitimacy from the 7-1 vote that embraced it.) Conversely, an opinion that is correct does not become suspect because four dissenting justices get things wrong. West Coast Hotels v. Parrish, which rejected constitutional attacks on the minimum wage, was decided 5-4, with the dissenters declaring an end to constitutional government. In the end, a court's legitimacy depends upon its ability to articulate a convincing legal rationale for its decision. The five justices who joined the majority opinion in Bush v. Gore did just that, and they apparently believed that their oath required them to do their constitutional duty as they saw it, instead of brokering a political compromise designed to gain additional votes. In the long run, such fidelity to constitutional principle will enhance the legitimacy of the Supreme Court.

To be sure, the rationale offered by the majority already has come under attack from academics and others who claim that the court's five more conservative justices put an end to lawless recounts for political reasons. This drumbeat of criticism may lead nonexperts to question the correctness, and thus the legitimacy, of the result. But the general public should understand that individuals who comment on the work of the Supreme Court are not always neutral, dispassionate experts. Most members of the legal professoriat, for instance, are far left or left of center: few voted for George W. Bush, and most share Gore's admiration for an evolving Constitution.

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Many of these scholars hoped that Gore as president would appoint judges who would use the Constitution to advance their political agendas by voiding the death penalty, expanding the right to abortion and ignoring constitutional limits on congressional power. (So much for legitimacy and states' rights!) The true measure of the majority's decision will not be found in the opinion of partisan professors.

The legitimacy of governmental action depends upon adherence to the rule of law, and the Florida recounts did not pass this test. By voiding the arbitrary and standardless recounts ordered by the Florida Supreme Court, the U.S. Supreme Court's majority vindicated the rule of law and discharged its obligation to the Constitution as it understood it. We should have expected no less.