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James Bopp Jr.
James Madison Center for Free Speech

Richard E. Coleson
Attorneys, Bopp, Coleson & Bostrom

VOTE-DILUTION ANALYSIS IN *BUSH V. GORE*

JAMES BOPP, JR. & RICHARD E. COLESON*

"I consider it completely unimportant who in the party will vote, or how; but what is extraordinarily important is this—who will count the votes, and how." – Joseph Stalin[1]

* Attorneys, Bopp, Coleson & Bostrom, Terre Haute, Indiana. James Bopp is General Counsel, James Madison Center for Free Speech.

1. Attributed to Joseph Stalin (1923), *in* BORIS BAZHANOV, VOSPOMINANIIA BYVSHEGO SEKRETARIA STALINA [MEMOIRS OF THE FORMER SECRETARY OF STALIN] (III Tysiacheletie, 2002). For an online version of the memoirs written in Russian, see LIB.RU, LIBRARY OF MAXIM MOSHKOVA, http://lib.ru/MEMUARY//BAZHANOW/stalin.txt (last visited Mar. 1, 2011); *see also* WIKIQUOTE.ORG, Joseph Stalin, http://en.wikiquote.org/wiki/Joseph_Stalin (last visited Mar. 1, 2011) (providing a version of the English translation). This statement has been widely quoted, and is loosely translated as, "[T]he people who cast the votes decide nothing. The people who count the votes decide everything," or, "[I]t's not the people who vote that count. It's the people who count the votes." David Emery, *It's Not the People who Vote that Count; It's the People Who Count the Votes*, ABOUT.COM URBAN LEGENDS (Nov. 3, 2008), http://urbanlegends.about.com/od/dubiousquotes/a/stalin-quote.htm; *see also* VOTEFRAUD.ORG, *The Joseph Stalin Vote Fraud Page*, http://www.votefraud.org/josef_stalin_vote_fraud_page.htm (last visited Mar. 1, 2011) (listing several uses of the loose translation, including in connection with the 2000 presidential election).

After the November 7, 2000 presidential election, the electoral-college vote hinged on whether Governor George W. Bush or Vice President Albert Gore, Jr. had won Florida. Candidates, officials, and voters battled in Florida and federal courts.[2] This article is about the equal-protection, vote-dilution constitutional analysis that would ultimately decide the matter.

On December 12, the United States Supreme Court held that "[t]he recount process in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . . ."[3] In its analysis, the Court noted that "'[f]or purposes of resolving the equal protection challenge,' it was enough that '[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirements for nonarbitrary treatment of voters necessary to secure the fundamental right.'"[4] "Upon due consideration of the difficulties identified to this point," the Court later noted, "it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work."[5] Consequently, the Court held: "With respect to the equal protection question, we find a violation of the Equal Protection Clause."[6] Four problems were identified: (1) "unequal evaluation of ballots";[7] (2) failure to evaluate voter intent in "overvotes"[8] as was done with "undervotes"[9] in the manual recounts;[10] (3) including totals from a partial recount of Miami-Dade County;[11] and (4) "concerns" about the counting process, including ad hoc,

2. *See infra* Part I.
3. Bush v. Gore (*Bush II*), 531 U.S. 98, 109 (2000) (per curiam).
4. *Id.* at 106.
5. *Id.* at 110.
6. *Id.* at 103.
7. *Id.* at 106.
8. *Id.* at 107 (explaining an "overvote" ballot is essentially one that on the machine count shows two votes for the same office and so is not counted for that office). When reviewed on a manual recount (they were not so reviewed in Florida's scheme), they might show the voter's intent to vote for only one of the candidates, e.g., by a written indication of which hole punch to consider. *Id.* at 108. If "voter intent" was the standard, there was no legitimate reason to exclude review of these ballots, which were numerous, to see if voter intent could be determined. *Id.*
9. *Id.* at 107 (explaining an "undervote" ballot is essentially one that shows no vote for a particular office in the machine count). When reviewed in a manual recount, it may be determined to have some indication of an intent to vote for a candidate (depending on the rules set for recounting in advance), e.g., by having a swinging chad that was closed when the ballot was fed through the counting machine in a stack but swung open when the ballot was unstacked. *See id.* at 108.
10. *Id.* at 107.
11. *Id.* at 108.

untrained counting teams and observers prohibited from objecting.[12] None of these problems was identified as conclusive. But the sum of them was held to fall short of what equal protection required in order to avoid the vote-dilution problem recognized in the Court's "one-person, one-vote jurisprudence" as applied to "arbitrary and disparate treatment to voters in . . . different counties."[13] The Court cited *Moore v. Ogilvie*[14] for the vote-dilution principle as applied to counties—"[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."[15] The Supreme Court remanded the case to the Florida Supreme Court, which decided on December 22, that there was no remedy to be offered to Gore.[16]

Was the equal-protection claim properly before the United States Supreme Court? At the *St. Thomas Law Review* Symposium, Bush v. Gore*: A Decade Later*, Florida Supreme Court Justice R. Fred Lewis claimed the equal-protection argument was not properly before the United States Supreme Court:

> [T]alking about the equal protection arguments . . . , I don't think that those were really preserved . . . as a basis for the U.S. Supreme Court's ruling. I'm sorry . . . . I've gone through those briefs. I've understood the arguments . . . . You go through here, and I will challenge you to find the argument that was the ultimate decision in this case, other than in one lone dissenting opinion in the Florida Supreme Court that was based on things that were never presented to us. That's my view.[17]

And Professor Tribe earlier described the difficulty of success in representing Gore based in part on "the perverse audacity of the Bush assault" to assert a vote-dilution argument "against the Florida Supreme Court for

12. *See id.* at 109.

13. *Id.* at 107. The Court noted that "[s]even Justices . . . agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy." *Id.* at 111.

14. 394 U.S. 814 (1963).

15. *Bush II*, 531 U.S. at 107 (quoting *Moore*, 394 U.S. at 819).

16. *See* Gore v. Harris (*Harris IV*), 773 So. 2d 524, 526 (Fla. 2000) (per curiam). See *Bush II*, 531 U.S. at 117–20 (Rehnquist, C.J., joined by Scalia & Thomas, JJ.), for the short name nomenclature we follow for Florida Supreme Court decisions, though not all such "*Harris*" names are the same case. *See* Palm Beach County Canvassing Bd. v. Harris (*Harris I*), 772 So. 2d 1220, 1225 (Fla. 2000) (per curiam) (Nov. 21); Gore v. Harris (*Harris II*), 772 So. 2d 1243 (Fla. 2000) (per curiam) (Dec. 8); Palm Beach County Canvassing Bd. v. Harris (*Harris III*), 772 So. 2d 1273 (Fla. 2000) (Dec. 11); Gore v. Harris (*Harris IV*), 773 So. 2d 524 (Fla. 2000) (per curiam) (Dec. 22).

17. *Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 415 (2011) (View from the Bench Panel Presentation).

permitting the counting of those ballots."[18] In Tribe's opinion, it was the United States Supreme Court's decision that "would violate the one-person, one-vote principle by arbitrarily distinguishing between ballots counted for a candidate and those tossed out as not machine-readable despite the clarity of the voter's intent . . . ."[19] Wrote Tribe:

> It was as though the Bush lawyers had the foresight to imagine the strongest possible arguments that could be made against the kind of Supreme Court victory they ultimately obtained, then reflected those arguments in a diabolical mirror capable of displaying what looked like legal propositions even though they were in fact nonsensical or at least logically inverted, and then put those pseudo-arguments—those—forth, without embarrassment and indeed with genuine conviction, as arguments against the Florida courts' construction of the state's election code in a manner that favored counting every legal vote, that is, every ballot cast by an eligible voter that clearly manifested the voter's intent.[20]

Where did that "audaci[ous]" vote-dilution claim come from, and was it before the Florida Supreme Court and the United States Supreme Court? Part I of this article explains how that successful vote-dilution claim arose. Part II explains how the claim was argued. Part III explains who prevailed on the claim. The article is written from the practical perspective of litigators who were early advisors to Bush's lawyers and litigated *Touchston v. McDermott*,[21] which argued the vote-dilution claim on behalf of voters. Given the topic, the article is necessarily somewhat autobiographical, as was the lengthy article on *Bush II* by Professor Tribe,[22] who served on Gore's legal team.[23]

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18. Laurence H. Tribe, EroG v. HsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors, 115 HARV. L. REV. 170, 183–84 (2001).

19. *Id.* at 184.

20. *Id.*

21. Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001).

22. *See* Tribe, *supra* note 18, at 172, 182–83, 277 n.433, 301–02 (discussing Professor Tribe's ideas and arguments from his own perspective).

23. Many have debated *Bush II*. Nelson Lund collected early attacks from liberals and conservatives along with *Bush II* defenders. *See* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1219 n.2 (2002) [hereinafter *Unbearable Rightness*]. Professors Lund and Tribe exchanged barbs over *Bush II*. *See* Tribe, *supra* note 18; Lund, *Unbearable Rightness*, *supra*; Nelson Lund, *"Equal Protection, My Ass"? Bush v. Gore and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMM. 543 (2002); Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMM. 571 (2002); Nelson Lund, *Carnival of Mirrors: Lawrence Tribe's "Unbearable Wrongness,"* 19 CONST. COMM. 691 (2002); Laurence H. Tribe, *Lost at the Equal Protection Carnival: Nelson Lund's* Carnival of Mirrors, 19 CONST. COMM. 619 (2003). We find Lund's defense of *Bush II* the more convincing argument.

Touchston was important for raising the vote-dilution claim early, providing much of the vote-dilution briefing before the Eleventh Circuit and United States Supreme Court, and obtaining the only injunction forbidding election officials to change the election results until the United States Supreme Court resolved the matter. On December 9, an injunction pending certiorari consideration was issued in *Touchston* preventing Florida officials from "changing . . . any previously certified results of the presidential election based upon any manual recounts after the existing certification."[24] Also on December 9, the United States Supreme Court granted a stay of the mandate of the Florida Supreme Court in *Gore v. Harris*,[25] which had ordered "commence[ment of] the tabulation of the Miami-Dade ballots immediately" (and similar expedition as to "any further statewide relief"),[26] and accepted that case for expedited review.[27] After *Bush II* decided that vote-dilution was occurring in the Florida recount in violation of the equal-protection guarantee, certiorari was denied in *Touchston* on January 5.[28]

I. HOW THE VOTE-DILUTION CLAIM AROSE.

How did the vote-dilution claim originate? What was its nature?

Some context will be helpful. The election was on Tuesday, November 7, 2000. On Wednesday, November 8, Florida election officials reported that machine-counted[29] tallies showed that Bush had received 1,784 more votes than Gore.[30] The close result triggered a statutory machine recount, which left Bush ahead by a reduced margin.[31] In the final official tally, Bush would be certified the winner by 537 votes, a hundredth of a

24. Touchston v. McDermott, 234 F.3d 1161, 1162 (11th Cir. 2000) (granting stay pending ruling on certiorari petition). The Eleventh Circuit Court of Appeals' order granted a stay pending a ruling on the certiorari petition. *Id.*

25. *Harris II*, 772 So.2d 1243, 1262 (Fla. 2000) (responding finally on December 8 to the U.S. Supreme Court's remand in *Bush I* by reissuing instructions for the recount and certification). *See* Bush v. Palm Beach County Canvassing Bd. (*Bush I*), 531 U.S. 70, 78 (2000) (per curiam).

26. *Harris II*, 772 So.2d 1243, 1262 (Fla. 2000).

27. *See* Bush v. Gore, 531 U.S. 1046, 1046 (2000).

28. *See* Touchston v. McDermott, 531 U.S. 1061 (2001).

29. *See* Siegel v. LePore, 234 F.3d 1163, 1195 n.2 (11th Cir. 2000) (Carnes, J., joined by Tjoflat, Birch & Dubina, JJ., dissenting) (explaining Volusia County had malfunctioning optical-scan machines and for that reason did a manual recount).

30. *See Harris II*, 772 So.2d 1220, 1225 (Fla. 2000) (per curiam) (stating Bush had 2,909,135 votes and Gore had 2,907,351 votes on November 8).

31. *See Unbearable Rightness*, *supra* note 23, at 1228, 1228 n.34 (explaining how Bush was then ahead by 327 votes, but it was expected and later confirmed that absentee ballots would widen Bush's margin).

percent.[32] Given this statistical tie, a variation in standards for counting ballots might put Gore ahead if manual recounts could be done only in populous counties favoring Gore.

On Thursday, November 9, Gore, through the Florida Democratic Party, as permitted by statute, requested manual recounts, under statutory authority, in Broward, Miami-Dade, Palm Beach, and Volusia Counties.[33] Gore's selected counties were populous and had heavily favored Gore in earlier tallies.[34]

Many, ourselves included, perceived Gore's actions (though legal under Florida law) as fishing for votes, not just making sure all votes were counted (as the slogan put it).[35] As we argued to the Eleventh Circuit in *Touchston*:

> Twenty-six Florida Counties used the punch ballot. Punch ballot systems have a predictable error rate of 2% to 5% that was well-known to Florida's election officials for the 2000 election. Thus, anyone motivated by a sincere desire to see that *all* ballots be counted would not focus only on four counties. Thus, the Manual Recount Statute has created the unconstitutional "effect of treating voters differently depending on what county they voted in." Significantly, the [Florida Democratic] Party has never denied that the statute may be exploited in this fashion. Nor has it denied that it intended to create a partisan advantage by carefully targeting only counties where its candidate stands to

32. *Id.* at 1224–25.

33. *See* Bush v. Palm Beach County Canvassing Bd. (*Bush I*), 531 U.S. 70, 73–74 (2000). Volusia County used an optical scan system, but had equipment failures in tabulating its vote, and "there is no evidence that the manual recount . . . was for any reason except to correct those failures and ensure that they did not taint the reported results." *Siegel*, 234 F.3d at 1195 n.2 (Carnes, J., joined by Tjoflat, Birch & Dubina, JJ., dissenting). Consequently, it will be excluded from the further discussion of selected counties.

34. *See Siegel*, 234 F.3d at 1201 (Carnes, J., joined by Tjoflat, Birch & Dubina, JJ., dissenting). The manual recount requests in these three counties had "two common grounds" as the sole reasons for requesting the recounts: (1) they had punch card systems, which had an inherent expectation of missing undervotes, and (2) the race was close. *Id.* Under these criteria, the other 21 counties with punch card systems should also have been counted; but the evidence shows why Gore's team chose these three counties: they were the largest-population counties that heavily favored him. *Id.* at 1202. In Broward County, Gore got 68.55% of the vote; in Palm Beach County, 63.81%; in Miami-Dade County, 53.18% of the vote. *Id.* The other county where Gore gained a large percentage of the vote was Jefferson County (55.1%), but that county was sparsely populated so there would be few net votes resulting from a manual recount of its undervotes. *Id.*

35. The strategy of asking for manual recounts in counties that Gore had *won* was brilliant because the usual strategy in recount requests had been to ask for recounts of counties a candidate had *lost* in an effort to disqualify votes. *Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 343 (2011) (View from the Litigants Panel Presentation) (comments of James Bopp, Jr.). By choosing the largest, most favorable counties and getting looser and looser standards for qualifying votes, Gore could hope to gain a significant number of new votes. *Id.*

gain a significant advantage. The Party has simply asserted that it followed the rules.[36]

A. A VOTE-DILUTION CLAIM IS RECOMMENDED.

Late afternoon on Thursday, November 9, James Bopp, Jr., received a call from Charles T. Canady, then legal counsel to Florida Governor Jeb Bush, and George J. Terwilliger III, a member of Bush's campaign legal team.[37] They asked for ideas and research on potential federal claims in planned litigation in federal court.[38] Their initial ideas were possible claims under the Due Process Clause of the Fourteenth Amendment and under the Voting Rights Act. A conference of lawyers in Bopp's law firm was promptly called to consider possible claims. An equal-protection, vote-dilution claim was recommended. Research was assigned. Later in the evening, Bopp conferred by phone with attorneys Canady, Terwilliger, and Timothy E. Flanigan about the research and recommended claims. They were advised that the Voting Rights Act idea lacked merit, a due process claim might have merit, and an equal-protection, vote-dilution claim would be strong and should be the principle claim. They requested a draft complaint. As the complaint was being drafted, Bopp again talked by phone to Terwilliger and Flanigan, who made it clear that "under no circumstances" were they going to pursue the vote-dilution claim. Bopp strongly objected to this omission. At 2:34 a.m., November 10, Bopp emailed the draft complaint to Flanigan. The email included an apology by Bopp for "snap[ping]" at Bush's legal team for saying they would not pursue the vote-dilution claim.

B. A DRAFT COMPLAINT IS SENT.

A lawyer's job in litigation is fourfold: (1) select appropriate arguments to be made; (2) make the arguments effectively; (3) effectively manage procedural matters; and (4) provide objective legal advice to the client.

36. Appellants' Opening Brief at 25, *Touchston*, 234 F.3d 1133 (11th Cir. 2000) (No. 00–15985) (citations omitted; paragraph break eliminated).

37. Then, as now, our law firm had a national political-law practice, with experience including numerous cases involving recounts, election law, and campaign-finance law. *See, e.g.*, *Mission Statement of James Madison Center for Free Speech*, http://www.jamesmadisoncenter.org/Main/index.html (last visited Mar. 1, 2011).

38. From a litigation strategy perspective, given the feared favorability of the Florida Supreme Court to Gore, two things needed to be done: (1) get a federal court to decide the case and (2) base the case on federal law. *Symposium*, Bush v. Gore: *A Decade Later*, 23 St. Thomas L. Rev. 343–44 (2011) (View from the Litigants Panel) (Comments of James Bopp, Jr.). So we supported a federal case and would file our own.

In the Bush litigation case, we could only provide appropriate arguments for the Bush team to make. Whether they accepted those was beyond our control, as was the rest. They would make some tactical and strategic errors, in our opinion, some of which we would try to repair in our own federal case, as discussed below.

The draft complaint we prepared for the Bush team contained an equal-protection claim and two due-process claims.[39] The plaintiffs were to be candidate Bush and voters for Bush from counties other than those Gore selected for manual recounts. Plaintiffs from non-selected counties would have standing to raise the vote-dilution claim, thus eliminating possible disputes over Bush's standing to raise voters' equal-protection claims. All claims were against parts of section 102.166(4) of the Florida Statutes (the "Manual Recount Statute"), which authorized canvassing boards to approve requested manual recounts.[40] Actions later identified in *Bush II* as violating equal protection had not yet occurred. For example, as the case progressed, the different and changing standards for determining voter intent in different counties would be added—and ultimately recognized—as a vote-dilution violation.

The draft equal-protection claim (count 1), challenged section 102.166(4)(a), which allowed a candidate or political party to select counties in which to conduct a manual recount:

> Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidate's names appeared on the ballot may file a written request with the County canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

This was challenged for allowing a candidate to seek a manual recount in favorable, populous counties, thereby skewing the election results in his favor by the addition of a proportionally higher number of undervotes in his favor.[41]

This ability to skew the results arises because manual recounts, which are not constitutionally problematic in themselves, typically find votes not

39. The Draft Complaint is appended. *See Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 500–08 (2011).

40. FLA. STAT. ANN. § 102.166 (West 1999). Florida Statute Section 102.166 governed "protests," whereby candidates could challenge returns as being erroneous. *Id.* A "contest" provision allowed a later challenge to certified results. *See* FLA. STAT. ANN. § 102.168 (West 1999). *Harris II* was brought under the contest provision. *See Harris II*, 772 So.2d 1243, 1248–49 (Fla. 2000).

41. *See* Draft Complaint, *supra* note 39, ¶ 27.

counted by a machine.[42] These are generally evenly distributed, so that if a candidate got 55% of all votes he could be expected to get 55% of the newly found votes. Thus, in a populous county substantially favorable to a candidate, a manual recount could be expected to net the leading candidate many more additional votes than his opponent.

Some states have recognized this fundamental problem and provide that a manual recount request triggers either an opportunity for the opponent to select counties for a recount after the ordinary deadline for requesting a recount has passed (which is often the case because the time is short and the first candidate can wait until the last minute before the deadline to request a manual recount), or a statewide recount.[43] These may help offset the partisan advantage of the first requesting candidate's ability to select only favorable, populous counties. The Manual Recount Statute provided no such opportunity for offsetting partisan advantage.[44] This was a fundamental flaw at the core of Florida's recount scheme existing before other problems with varied standards arose. The Complaint claimed that manual recounts in only the four counties that Gore selected would dilute voter-plaintiffs' votes, denying them equal protection of the laws.[45] This is so be-

42. *See* Appellants' Opening Brief at 24–25, *Touchston*, 234 F.3d 1133 (No. 00-15985) 2000 WL 33980515 (11th Cir. 2000). In our *Touchston* appellate brief, we stated the argument thus:

> "Undervotes" are randomly occurring, inadvertent events that do not follow party affiliation, so reconstructed undervotes will occur in close to the same proportion for candidates as the pool from which they were selected. In the statewide pool of votes cast for President, reconstructing undervotes would likely have little net effect on the outcome of a statewide election. That is not the case, however, when the pool of votes favors one candidate over the other in a ratio of 2 to 1, as is the case in Broward County, for example. . . . Reconstructed undervotes in Broward County will predictably favor Vice President Gore by a 2 to 1 ratio. As a result, adding reconstructed undervotes from Broward County will artificially skew the statewide vote totals in the direction of the candidate disproportionately favored by Broward County voters and away from the candidate favored by the voters in 51 of Florida's 67 counties. . . . For the same reason, the Party did *not* request manual recounts in heavily populated counties favoring the Republican candidate, like, for example, Duval County, . . . because the reconstructed undervotes in those counties could offset the gains made in the four selected counties.

Id.

43. *See infra* at Part III.A. Bush did not select counties for manual counts, though at the time we thought it a mistake for him not to do so. *Id.* Had he done so, however, the vote-dilution problem would not have been immediately apparent and would only have materialized as different counties applied different standards to their manual recounts. *Id.* There were doubtless political calculations involved in the Bush team's decision not to request recounts in his own counties, and there were statutory problems, but his choosing not to do so would be a recurrent theme. *Id.* In any event *voters* subject to vote-dilution could not request a manual recount in their own counties, so any argument that Bush might have waived the vote-dilution claim could not succeed. *Id.*

44. *See* Draft Complaint, *supra* note 39, ¶ 28.

45. *See id.* ¶¶ 29–30.

cause it was more likely that a voter would have her vote counted by being in a manual-recount county than in a non-manual-recount county. Thus, the Manual Recount Statute, by allowing such selective manual requests, violated the Equal Protection Clause of the Fourteenth Amendment[46] facially and as applied.[47]

The other two counts in the draft complaint were based on due-process claims. They challenged the discretion afforded canvassing boards that would allow both such biased recounts and the standardless actions[48] that later would also be deemed an equal-protection violation in *Bush II*.[49] Boards should not have this discretion and the Manual Recount Statute was fundamentally flawed for giving them such discretion and should have been struck for that reason—resulting in no possible manual recounts under the authority of that statute.

C. THE FIRST VOTE-DILUTION CLAIMS ARE MADE.

On Friday, November 10, James Baker III held a press conference. He was George W. Bush's chief legal adviser at the time and oversaw Bush's efforts in connection with the recount. Baker asserted that manual counts were less accurate than machine counts, which we believed to be erroneous and a strategic mistake, but it seemed to indicate a theme of the coming complaint.

On Saturday, November 11, Bush's team made exactly that claim when they filed their complaint in federal court in *Siegel v. LePore*.[50] Plaintiffs included Bush and Dick Cheney along with registered voters, both from counties selected for a manual recount and non-selected counties, who sought to vote for Bush and Cheney.[51] They failed to include Secretary of State Katherine Harris, who under state law was responsible for certifying election results. We thought this was a mistake.

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46. *See id.* ¶ 31.

47. *See id.* at prayer for relief ¶¶ (1)–(2).

48. *See id.* ¶ 37.

49. *See Bush II*, 531 U.S. 98, 103 (2000). *Bush II* noted that both equal-protection and due-process claims were made and held that, "with respect to the equal protection question, we find a violation of the Equal Protection Clause." *Id.* It noted that the use of varying standards allowed a disproportionate finding of additional votes. *See id.* at 107. And it held that "the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work." *Id.* at 110. The court also noted that statewide uniform standards need to be adopted to determine what a legal vote is. *See id.*

50. 234 F.3d 1163, 1163 (11th Cir. 2000).

51. *See* Complaint at 1, Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000) (No. 00-9009-CIV), *available at* http://election2000.stanford.edu/siegelleprcmplt.pdf

The Complaint's first claim was that the canvassing boards' "unbridled discretion, as applied to the circumstances of this case, results in the arbitrary deprivation of the Voter Plaintiffs' right to vote under the Fourteenth Amendment."[52] In arguing a violation of the right to vote, the Complaint raised three subsidiary issues: First, it argued that "Florida Statute 102.166 provide[ed] no standards to guide the discretion of the canvassing board in determining whether a manual recount is warranted";[53] Secondly, it argued that "Florida Statute 102.166 establishes no criteria to limit the discretion of the canvassing boards in determining how to conduct the tally of votes";[54] and Thirdly, it argued that "if a manual recount gives effect to partially punched ballots, or counts ambiguous ballots based on the canvassing boards' subjective interpretation of voters' intent, it has the effect of unconstitutionally diluting the votes of the other voters both in the affected county and in the counties not subject to recount."[55] It also argued, inter alia, that manual recounts are less accurate than machine recounts, especially where "boards are given unbridled discretion to affect the results of an election through individual subjective decisions."[56] Here, vote-dilution was raised as debasing a right to vote.

The second claim was that, for the reasons in the first claim, "the scheme also violate[d] the Equal Protection Clause . . . ."[57] This was so because it "produces arbitrary and capricious decision-making by state and county officials as to whose votes will count . . . in different precincts and counties . . . ."[58] Looking forward, the Complaint argued that if different boards would count "partially punched ballots" and "ambiguous ballots based on . . . subjective interpretation of voters' intent," they would "arbitrarily subject[] voters in other counties to unequal treatment . . . ."[59]

The third claim made a vote-dilution, equal-protection claim. It did so without targeting any statutory provision, such as the Manual Recount Statute (which we considered a mistake):

> Because the recount begun or about to begin by Defendants is limited to portions of only four counties, the Voter Plaintiffs who are not residents or voters in those four counties are being deprived of rights accorded to voters of those counties and/or will have their votes diluted

52. *Id.* ¶ 53.
53. *Id.* ¶ 45.
54. *Id.* ¶ 46.
55. *Id.* ¶ 47.
56. *Id.* ¶ 49. Based on considerable experience with recounts, we considered the argument that manual counts were less accurate per se than machine recounts to be erroneous.
57. *Id.* ¶ 55.
58. *Id.*
59. *Id.*

in violation of the Fourteenth Amendment.[60]

The fourth claim was that the Voter Plaintiffs' First Amendment right to vote was being violated.[61] This was so because of "the standardless nature of the recount and contest scheme," resulting in "government officials . . . vested with arbitrary power and authority to deny the vote . . . ."[62]

The fifth claim was for Bush and Cheney.[63] It claimed a due-process violation "with regard to the fair and timely counting and reporting of the votes cast for that candidate."[64]

Since we considered the Bush complaint inadequate, we filed our own federal lawsuit, *Touchston*,[65] on Monday, November 13. It prominently featured the vote-dilution argument, named Secretary of State Harris as a defendant (along with members of the state Elections Canvassing Commission), and targeted specific statutory provisions. That challenge is discussed further in Part II.B.[66]

Moreover, on November 14, Florida Attorney General Robert A. Butterworth (a Democrat active in the Gore campaign), issued a letter recognizing the equal-protection problem that would be created by "a two-tier system" based on voters' county of residence:

> If hand recounts have already occurred in Seminole County and an unknown number of other counties without the restraint of a legal opinion while similar hand counts are blocked in other counties due to a newly issued standard, a two-tier system for reporting votes results.
>
> A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.
>
> As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the

60. *Id.* ¶ 57. This is the only substantive paragraph in the Complaint devoted to this claim.

61. *See id.* ¶¶ 59–62.

62. *Id.* ¶ 62.

63. *See id.* ¶ 63.

64. *Id.* ¶ 64.

65. 234 F.3d 1133 (11th Cir. 2000).

66. *See infra* Part II.B. We advised the Bush team of our intent to file our own lawsuit and received approval before filing. That case and Bush's federal case would be considered together in the Eleventh Circuit, though not consolidated. We thought consolidation would have been appropriate because the cases complemented each other in several ways, but the Bush team resisted consolidation.

> U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.[67]

So within one week of the election, two federal lawsuits and the Florida Attorney General had recognized a vote-dilution problem and articulated a vote-dilution argument. Thus, it would be incorrect to say that the argument was not advanced or advanced early, though as we shall see it got less attention in the state-court proceedings than it should have. Since vote-dilution was the basis of the United States Supreme Court decision in *Bush II*,[68] the general course of arguments (when and where made) will be the focus of Part II, with Part III focusing on why vote-dilution was a winning argument.

II. HOW THE VOTE-DILUTION CLAIM DEVELOPED.

The two federal suits quickly went to the Eleventh Circuit. Bush's *Siegel v. LePore*,[69] is discussed next. Our case for voters in non-selected counties, *Touchston*,[70] is discussed in Part II.B. The argument in state court litigation is discussed in Part II.C.

A. VOTE-DILUTION IS ARGUED IN *SIEGEL V. LEPORE*.

On November 11, the day their complaint was filed, Bush's team also moved for a temporary restraining order and preliminary injunction.[71] Their memorandum argued the fundamental right to vote "is '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.'"[72] It cited *Reynolds* for necessary voter equality: "'The conception of political equality . . .can mean only one thing—one-person, one-vote. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.'"[73] It also cited and quoted two Eleventh Circuit cases that held that counting

67. Letter from Robert A. Butterworth, Att'y Gen. of Fl., to Hon. Charles E. Burton, Palm Beach Canvassing Bd. (Nov. 14, 2000), *reprinted in* Appendix to Brief of Respondents-Intervenors Carr et al. at 14, *Bush II*, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/respcarr.949.pdf.

68. 531 U.S. at 105.

69. 234 F.3d 1163 (11th Cir. 2000).

70. 234 F.3d 1133 (11th Cir. 2000).

71. Emergency Motion for Temporary Restraining Order and Preliminary Injunction, Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000) (No. 00-9009-CIV), *available at* http://election2000.stanford.edu/siegelleporemot.pdf.

72. *Id.* at 7 (quoting Reynolds v. Sims, 377 U.S. 533, 554 (1964)).

73. *Id.* at 7–8 (quoting *Reynolds*, 377 U.S. at 557–58).

invalid (under state law) ballots not historically counted constituted vote-dilution.[74] These cases rejected a decision that had ordered the counting of absentee ballots that did not comply with the requirements for absentee ballots. The Bush team's memorandum quoted *Roe I* for the holding that "'counting ballots that were not previously counted would dilute the votes of those voters who met the requirements [of state law] as well as those voters who actually went to the polls on election day.'"[75]

Applying these *Roe* decisions to the current case, the memorandum argued that "the votes of citizens across the state of Florida will be unconstitutionally diluted if the Defendants conduct a manual recount of only select ballots in portions of four heavily Democratic counties."[76] Noting the lack of uniform standards, the memorandum argued that "under Florida's scheme, *identical* ballots in two different counties will be treated differently."[77] So "a partial punch" may be counted in one county that decides both to do a manual recount and to count partial punches, while "[a]n identical ballot in another County will not be counted for that candidate in a county that has refused to engage in the manual recount."[78] This violated "the Due Process and Equal Protection Clauses, as well as the First Amendment," the memorandum asserted.[79]

The federal district court understood that a vote-dilution claim was being made:

> Implicit in their argument is a concern that selective manual recounts in some counties but not others may skew the election results even if the hand count is accurate. This is so because the machine counting process may reject ballots which upon visual inspection can be determined to be valid, and the machine error rate is likely to be spread equally across all precincts. If only selected precincts or counties are manually counted, the hand count, assuming it is more accurate, may

74. *Id.* (citing and quoting Roe v. Alabama (*Roe I*), 43 F.3d 574, 581 (11th Cir. 1995); Roe v. Alabama (*Roe II*), 68 F.3d 404 (11th Cir. 1995), *cert. denied*, 516 U.S. 908 (1995)).

75. *Id.* (quoting *Roe I*, 43 F.3d at 581).

76. *Id.* at 8.

77. *Id.*

78. *Id.*

79. *Id.* The memorandum also argued that Florida's scheme violated equal protection by allowing "arbitrary distinctions among similarly situated citizens," *id.*, and that "standardless discretion over the exercise of a First Amendment right such as voting is, standing alone, unconstitutional," *id.* at 9. In the factual assertions of the memorandum, the Bush team argued that "the repetitive counting of ballots—especially *manual* counting—diminishes the accuracy of the counts," though this was not argued in the merits discussion. *See* Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *supra* note 71, at 5 (emphasis in original). We thought arguing that manual recounting was less accurate was a mistake. However, we thought that the argument that the canvassing boards should not have discretion was correct (this topic would be revisited later).

help the candidate favored in those areas.[80]

Later the Court said that "[t]he gravamen of their complaint is that a manual recount may diminish the accuracy of a vote count because of ballot degradation and the exercise of discretion on the part of the county canvassing boards in determining a voter's intent."[81] However, when the court opinion returned to the vote-dilution claim, the Court showed its understanding of the assertions regarding problems with varying standards for determining voter intent and with the Manual Recount Statute's authorization of limited manual recounts that would skew the results:

> The thrust of Plaintiffs' position is that Florida's decentralized county-by-county electoral system can yield disparate tabulating results from county to county. For instance, similarly-punched ballots in different counties may be tabulated differently in a manual recount due to the introduction of human subjectivity and error. Further, if manual recounts are held in certain counties but not others, ballots previously discarded by electronic tabulation in manual recount counties would be counted, while similarly-situated ballots in non-manual recount counties would not—thereby diluting the vote in non-manual recount counties.[82]

The court dismissed these concerns. Regarding different standards, it noted that the decentralized nature of our voting system meant that there would naturally be differences and that some "solace" should be taken in the lack of any central control.[83] Regarding the ability of one candidate to skew an election by selective manual recounts, the Court noted that "any presidential candidate was afforded an equal opportunity under the statute to ask for a manual recount in each Florida county."[84]

The district court denied the motion for preliminary injunction on November 13. A notice of appeal was filed on November 14. The documents employed in the district court were lodged in the Eleventh Circuit, which chose to hear the case initially en banc.[85]

Bush's opening appellant brief was filed Wednesday, November 15. In arguing that the Bush plaintiffs had likely success on the merits, the brief led with an extended equal-protection argument featuring vote-dilution problems.[86]

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80. Siegel v. LePore, 120 F. Supp. 2d 1041, 1044 (S.D. Fla. 2000).
81. *Id.*
82. *Id.* at 1051.
83. *Id.* at 1052.
84. *Id.* at 1052 n.10.
85. Siegel v. LePore, 234 F.3d 1163, 1170 n.2 (11th Cir. 2000).
86. Opening Brief for Appellants at 22–27, Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000) (No. 00-15981).

Meanwhile many things were happening. Before the Eleventh Circuit's decision on December 6, the Florida Supreme Court had issued *Harris I*[87] on November 21, and the United States Supreme Court had vacated that opinion in *Bush I*[88] on December 4. The Eleventh Circuit in *Siegel* noted that "[t]he Florida Supreme Court [in *Harris I*] expressly stated that neither party had raised as an issue on appeal of the constitutionality of Florida's election laws, and it did not address federal constitutional issues in its opinion."[89] Also before the Eleventh Circuit's December 6 decision in *Siegel*, Bush's lawyers had filed a petition for a writ of certiorari (before judgment) for the *Siegel* case in the United States Supreme Court on November 22,[90] which raised the vote-dilution argument but was denied without prejudice on November 24.[91] Also on November 22, the Bush team petitioned for certiorari in what became *Bush I*,[92] which as noted above vacated *Harris I*.[93] Though the Bush team had raised no constitutional arguments in *Harris I*, the *Bush I* petition presented a vote-dilution issue (Question III), but certiorari was not granted on that question on November 24—perhaps because the Court did not want to reach that issue if the case could be resolved on more deferential grounds—so the merits brief necessarily dropped the argument.[94] In any event, as of November 22, two articulations of the vote-dilution argument had been set before the United States Supreme Court, which had declined to consider it, likely for reasons having nothing to do with the perceived merits of the argument.

The Eleventh Circuit held oral argument in *Siegel* on December 5 and issued its opinion on December 6.[95] The Court noted there were two main claims. The first was a claim that the lack of standards in the manual recount resulted in unequal treatment and violated equal-protection and due-

87. *Harris I*, 772 So. 2d 1220, 1228 (Fla. 2000) (authorizing continued manual recounts with extended deadlines and requiring the Secretary of State to accept the results except under restricted circumstances). "Neither party [in *Harris I*] . . . raised as an issue on appeal the constitutionality of Florida's election laws." *Id.* at 1228 n.10.

88. Bush v. Gore, 531 U.S. 70 (2000).

89. Siegel v. LePore, 234 F.3d 1163, 1170 (11th Cir. 2000).

90. Emergency Application for a Stay of Enforcement of the Judgment below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Supreme Court of Florida, Siegel v. Lepore, 531 U.S. 1005 (2000) (No. 00-949).

91. *See Siegel*, 531 U.S. 1005.

92. *Bush I*, 531 U.S. 70 (2000).

93. *Harris I*, 772 So. 2d 1220, 1240 (Fla. 2000).

94. *See Bush I*, 531 U.S. at 73. This may have influenced the part of the Bush team working on the state-court litigation track to minimize the equal-protection argument in their early briefing, perhaps on the mistaken notion that the U.S. Supreme Court was uninterested in an equal-protection argument.

95. *Siegel*, 234 F.3d at 1163.

process guarantees.[96] The second was the vote-dilution claim:

> Plaintiffs assert that they are denied due process and equal protection because, under Fla. Stat. §102.166(4), ballots in one [C]ounty may be manually recounted while ballots in another [C]ounty are not. They contend that, as a result, similarly situated voters will not be treated similarly based purely on the fortuity of where they reside; a ballot that would be counted in one county pursuant to a manual recount may not be counted elsewhere because that voter's county did not conduct such a recount.[97]

The Court declined to reach the merits because the case involved an appeal of a preliminary injunction denial and the Court decided there was no irreparable harm, an essential factor for a preliminary injunction.[98] The Court rejected the idea that a violation of the constitutional right to equal protection was irreparable harm.[99]

However, dissenting opinions developed the vote-dilution argument at length.[100] These provided valuable additions to the equal-protection analysis and will be considered further in Part III, discussing why the vote-dilution argument ultimately succeeded.

B. VOTE-DILUTION IS ARGUED IN *TOUCHSTON V. MCDERMOTT.*

The *Touchston* case was filed in the Middle District of Florida on Monday, November 13. On November 14, that Court held a hearing and denied the voter-plaintiffs' preliminary injunction motion. The same day, a notice of appeal of that denial was filed and the voters moved for an injunction pending appeal in the district court, which was denied.

The voters' Opening Brief in the Eleventh Circuit was filed on November 27. It asked the appellate court not only to reverse the lower-court's denial of a preliminary injunction, but to go to the merits.[101] The first issue focused on vote-dilution:

> Whether the manual recount provisions of Fla. Stat. §102.166 ("the

96. *See id.* at 1174–75.

97. *Id.* at 1175.

98. *See id.* at 1175–76.

99. *See id.* at 1177–78.

100. *See id.* at 1190 (Tjoflat, J., joined by Birch & Dubina, JJ., dissenting) (citing *Touchston*, 234 F.3d 1133) ("The Florida election scheme at issue is unconstitutional for the reasons set forth in my dissenting opinion in *Touchston* . . . and by Judge Carnes in his dissenting opinion."); *id.* at 1190 (Birch, J., joined by Tjoflat & Dubina, JJ., dissenting); *id.* at 1193 (Dubina, J., joined by Tjoflat & Birch, JJ., dissenting); *id.* at 1194 (Carnes, J., joined by Tjoflat, Birch & Dubina, JJ., dissenting).

101. *See* Appellants' Opening Brief at 56, *Touchston*, 234 F.3d 1133 (11th Cir. 2000) (No. 00-15985).

> Manual Recount Statute") create an unconstitutional two-tiered system for counting votes by allowing a candidate to seek, and by allowing a county canvassing board the absolute discretion to grant, manual recounts to reconstruct "undervotes" only in heavily populated counties where the candidate received a disproportionate share of the vote, thus diluting and debasing the vote of those who voted in counties that favored the candidate's opponent where no manual recount would be conducted.[102]

The second issue focused on the lack of standards:

> Whether the Manual Recount Statute is unconstitutional because it (a) lacks standards circumscribing a county's power to grant or deny a manual recount; (b) because it lacks standards delineating when to recognize a valid ballot during a manual recount, which results in different rules being applied within a county, and among counties, allowing ballots to be counted that have been cast contrary to voting instructions issued by the county; and (c) it fails to provide for notice and an opportunity for a non-requesting candidate to be heard before manual recounts are conducted and before a manual recount is expanded from a few precincts to include the entire county.[103]

Regarding vote-dilution, the brief argued that the Manual Recount Statute was unconstitutional under equal protection for "allowing partisan political candidates and political parties in *statewide* elections to request manual recounts in heavily populated *counties* where the candidate received a disproportionate share of the votes."[104] Such "selectively conducted manual recounts achieve a partisan political advantage" and dilute the votes of voters in non-selected counties in violation of *Moore v. Ogilvie*.[105] The brief outlined the schemes of several other states that did not allow such partisan advantage in manual recounts.[106] The argument also featured Attorney General Butterworth's "two-tier" letter for the proposition that "[a] voter in a county where a manual recount was conducted would benefit from *having a better chance of having his or her vote actually counted* than a voter in a county where a hand count was halted."[107]

Regarding the lack of adequate standards for determining voter intent, the brief argued that such lack violated the voter-plaintiffs' due-process rights and further diluted their votes.[108] Some of the detail explained that

102. *Id.* at 1.
103. *Id.*
104. *Id.* at 14–15.
105. *Id.* at 15 (citing Moore v. Ogilvie, 394 U.S. 814 (1969)).
106. *See id.* at 27–28.
107. Appellants' Opening Brief at 3, *Touchston*, 234 F.3d 1133 (No. 00-15985) (quoting Letter from Robert A. Butterworth, *supra* note 67).
108. *See id.* at 15.

voting instructions required the voter to "[p]unch straight down through the ballot card," to assure that holes were cleanly punched, and to check to make sure no chads remained on the ballot.[109] "If the vote is properly cast by punching through the ballot, the tabulating machine will count the vote."[110] The brief noted that the Manual Recount Statute authorized "reconstructing" undervote ballots based on voter intent thereby adding to the machine-generated totals, creating "a strong incentive for a candidate to request a manual recount in heavily populated counties where the machine tabulated vote favors the candidate because it invariably results in addition of reconstructed undervotes in numbers that disproportionately favor the requesting candidate."[111] The brief argued that:

> If a ballot is not punched through, there are two equally plausible explanations. First, the voter attempted to push the stylus through, but because of weakness, frailty, or lack of attention, failed to fully disengage[] the chad from the ballot. Second, the voter realized she made a mistake and stopped, simply changed her mind, or accidentally putting the stylus on the wrong chad, leaving a slight indentation.[112]

And the brief recited a Palm Beach County Canvassing Board policy, that was in place on November 7, 2000, that "an indentation is not evidence of intent to cast a vote."[113] Yet, the brief noted, a Florida judge had ordered the Board "to abandon this standard and to attempt to divine the intent of voters where only a dimple exists on the ballot."[114] The brief observed that different counties were using different schemes for determining vote intent, that these differed from those in place before the election, and that one county had changed standards and then changed them back after the counting proceeded.[115] The brief argued that "the statute fails to provide any standards for determining 'voter intent,' during a manual recount, resulting in the use of standards that are vague, subjective, arbitrary, and capricious and that are contrary to the instructions given voters on how to cast a valid vote and to the practice of counting votes in previous elections."[116]

The brief noted, however, that the voter-plaintiffs "d[id] not claim that manual recounts are always invalid or that it is always improper to

109. *See id.* at 4 (citation omitted).
110. *Id.*
111. *Id.* at 4–5. The brief noted that "overvotes," where more than one hole is punched for an office, would not be counted under either machine or manual counts, though of course they might also indicate voter intent on manual examination. *See id.* at 5.
112. Appellants' Opening Brief at 39, *Touchston*, 234 F.3d 1133 (No. 00-15985).
113. *Id.* (citation omitted).
114. *Id.* (citation omitted).
115. *See id.* at 29–31
116. *Id.* at 15.

seek to determine a voter's intent by visual examination of a ballot."[117] Rather, it continued, "[t]he heart of the problem . . . is that the statutory process for determining what counties are manually recounted is fundamentally unfair and leads to a partisan result."[118]

Even as briefing was ongoing in the Eleventh Circuit, the election disputes remained a fast-moving target. On November 26, the Florida Election Canvassing Commission certified election results, with Bush still the winner, by 537 votes.[119] On November 27, the same day the *Touchston* voter-plaintiffs' opening merits brief was filed, Gore filed his "contest" lawsuit to challenge the state-certified vote tallies.[120]

In their *Touchston* reply brief, the voter-plaintiffs explained that their challenge to the Manual Recount Statute, which governed "protests," was still relevant after the "contest" was filed because the results of recounts done under the Manual Recount Statute in Volusia and Broward Counties were included in the newly certified results.[121] Further, vote-dilution was threatened because the Gore side had demanded, in the contest case, that results of manual recounts so far conducted in Palm Beach and Miami-Dade Counties be included in the certified results.[122] Voter-plaintiffs' votes had been and would be diluted by the "counting [of] votes cast contrary to voter instructions and past practices," which violated *Roe I*, which said that vote-dilution occurred from post-election changes to prior practices.[123] Additionally, the inclusion of results from the selective manual recounts shifted the burden of proof as to their validity to Bush because certified results are presumed correct.[124] Since this presumption shift could alter the outcome of the election, there was harm to the voter-plaintiffs.

The Eleventh Circuit released its *Touchston* opinion on December 6, simultaneously with the *Siegel* decision,[125] holding simply that "[t]he district court's denial of a preliminary injunction is affirmed for the reasons set forth in *Siegel*."[126] However, *Touchston* had dissents that provided

117. *Id.*
118. Appellants' Opening Brief at 15, *Touchston*, 234 F.3d 1133 (No. 00-15985).
119. *Harris II*, 772 So. 2d 1243, 1247 (Fla. 2000).
120. *See id.*
121. Appellants' Reply Brief at 4–5, *Touchston*, 234 F.3d 1133 (11th Cir. 2000) (No. 00-15985).
122. *See id.* at 5.
123. *Id.* at 3–4 (citing *Roe I*, 43 F.3d 574, 581 (11th Cir. 1995)).
124. *Id.* at 5–6.
125. *Touchston*, 234 F.3d 1133 (per curiam); Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000).
126. *Touchston*, 234 F.3d at 1134 (per curiam).

valuable additions to the equal-protection analysis.[127]

We continued work already begun on a certiorari petition to the United States Supreme Court and simultaneously sought an injunction in the Eleventh Circuit pending resolution of our planned certiorari petition. On December 8, we filed our petition for a writ of certiorari, which clearly set out the vote-dilution argument and was accompanied by an appendix containing the opinions (including dissents) in *Siegel* and *Touchston*. Also on December 8, the Florida Supreme Court issued *Harris II*,[128] which, inter alia, ordered further manual recounts and amendment of certified totals to include partial-recount results. On December 9, the Eleventh Circuit injunction in *Touchston* was issued, preventing Florida officials from "changing . . . any previously certified results of the presidential election based upon any manual recounts after the existing certification."[129]

Thus, by December 9, when the United States Supreme Court stayed the Florida manual recounts,[130] and December 12, when *Bush II* was decided,[131] the United States Supreme Court had before it another certiorari petition arguing vote-dilution (this time with no question over whether the issue had been raised below) and extended, articulate dissents from the Eleventh Circuit clearly making the vote-dilution argument and answering the Gore team's objections to the analysis. And it is likely that some individual Justices and their clerks were already tracking the Eleventh Circuit decisions since their December 6 release and had noted the extended dissents on the vote-dilution claim.

C. VOTE-DILUTION GETS MINIMAL ATTENTION BEFORE THE FLORIDA SUPREME COURT.

As noted earlier, Florida Supreme Court Justice Lewis asserted that he did not think that the equal-protection argument was "preserved as a basis for the U.S. Supreme Court's ruling" and "challenge[d the listener] to find the argument that was the ultimate decision in this case, other than in

127. Justice Tjoflat wrote a dissenting opinion, in which Justices Birch and Dubina joined, and in which Justice Carnes joined as to Part V. *Id.* Justice Birch wrote a separate dissenting opinion, in which Justices Tjoflat and Dubina joined. *Id.* at 1158. Justice Dublina wrote a separate dissenting opinion, in which Justices Tjoflat and Birch joined. *Id.* at 1161. Finally, Justice Carnes dissented "[f]or the reasons set out in [his] opinion in Siegel v. LePore, [234 F.3d 1163 (11th Cir. 2000)]" and was joined by Justices Tjoflat, Birch and Dubina. *Id.*

128. *Harris II*, 772 So. 2d 1243 (Fla. 2000).

129. *Touchston*, 234 F.3d 1161 (11th Cir. 2000).

130. Bush v. Gore, 531 U.S. 1046 (2000).

131. *Bush II*, 531 U.S. 98 (2000).

one lone dissenting opinion in the Florida Supreme Court."[132] It is true that no constitutional arguments were made in *Harris I*.[133] But Justice Lewis by context was referring to *Harris II* (Gore's contest case that became *Bush II*), where there were *two* dissents—for *three* of the seven justices in *Harris II*—that recognized an equal-protection problem.

The first opinion was by Chief Justice Wells, who said, "I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution."[134] He elaborated:

> I am persuaded that even with these procedures manual recounts by the canvassing board are constitutionally suspect. *See* [*Touchston*], 234 F.3d 1133 (11th Cir. 2000) (Tjoflat, J., dissenting). This would be compounded by giving that power to an individual circuit judge and providing him or her with no standards.[135]

And, he concluded, "[c]ontinuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress."[136]

The second opinion was by Justice Harding, joined by Justice Shaw and joined in part by Chief Justice Wells, which opinion set out the vote-dilution problem as follows:

> Moreover, assuming that there may be some shortfall in counting the votes cast with punch card ballots, such a problem is only properly considered as being systemic with the punch card system itself, and any remedy would have had to be statewide. Any other remedy would disenfranchise tens of thousands of other Florida voters, as I have serious concerns that appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.[137]

So clearly, equal-protection was considered at issue by three of the seven Florida Supreme Court justices. And these three dissenters clearly saw an equal-protection problem that—regardless of other problems with the majority's *Harris II* opinion—doomed the *Harris II* decision on equal-

132. *Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 415 (2011) (View from the Bench Panel Presentation).

133. *See Harris I*, 772 So. 2d 1220, 1228 n.10 (Fla. 2000).

134. *Harris II*, 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting).

135. *Id.* at 1266 n.28

136. *Id.* at 1267.

137. *Id.* at 1272 (Harding, J., dissenting). Justice Harding was joined in his opinion by Justice Shaw, and on this point by Chief Justice Wells. *Id.* at 1262.

protection grounds. They were prescient.

It should also be noted that Justice Lewis himself said that he recognized an *equality* requirement under the contest statute at the time of *Harris II*, when he said the following at the *St. Thomas Law Review* Symposium: "I would not have signed onto an opinion . . . that just let one side select what you're going to do, select which counties. 'Well, I'm going to go get this heavily Republican county; I'm going to get this heavily Democratic county.' That system was not going to work under the last clause of the contest statute."[138] That last clause of the contest statute provided as follows: "The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."[139] Fundamental fairness in providing equal treatment, of course, underlies the concept of equal protection of the laws. And Justice Lewis's statement concerning the fairness required by the last clause of the contest statute is in tension with the Manual Recount Statute, which *did* allow such unfair, one-sided, partisan selection of counties.

From the foregoing, it is clear that the equal-protection argument was in consideration in *Harris II*—influenced by *Touchston*'s dissenters—with the dissent clearly articulating an equal-protection problem and Justice Lewis describing a fundamental-fairness, equality problem. Moreover, an equal-protection problem had been identified by the trial court below, in its opinion from the bench. Judge Sauls noted that Attorney General Butterworth had issued a letter warning that including manual recount totals with total or partial hand recounts would risk violating the United States Constitution because "'[a] two-tier system would have the effect of treating voters differently, depending upon which county they voted in.'"[140]

But what did the Bush team actually *assert*? In their answer to Gore's contest complaint, they stated the following equal-protection affirmative defense on November 30: "Plaintiffs' request that this Court count the votes cast by voters in two selected counties differently from those cast by voters in the remaining 65 counties would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States

138. *Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 412 (2011) (View from the Bench Panel Presentation).

139. FLA. STAT. ANN. § 102.168(8) (West 1999).

140. Transcript of Order from Bench at 11, Gore v. Harris (Leon County Cir. Ct. Dec. 3, 2000) (No. 00-2808) (citation omitted), *available at* http://election2000.stanford.edu/00-2431_transcript.pdf.

Constitution . . . ."[141]

In the Bush team's motion-to-dismiss memorandum, equal protection was not expressly mentioned.[142] Rather, the arguments focused on the requirements of the Florida contest statute. But the memorandum did argue fundamental-fairness equality at multiple levels. In response to Gore's motion to count undervotes in Miami-Dade County, the Bush team replied that a partial manual recount that excluded overvotes would be "illegal, inappropriate, and manifestly unfair."[143] They argued, under the provision to which Florida Supreme Court Justice Lewis cited as requiring fundamental fairness,[144] that counting all undervotes would be required because "the court would be constrained to enter 'relief appropriate under the circumstances'"[145] and "[t]he one-sided relief sought by [Gore] does not meet that standard."[146] The Bush team argued that a selective recount was impermissible because, "[i]n order to prevail in a statewide contest, Plaintiffs must clearly establish that [Gore] received a majority of *all* votes cast in the state."[147] They argued that, "[t]his, of course, cannot be done by counting the Plaintiffs' selectively chosen handful of predominantly Democratic counties."[148] They recited decisions from other state supreme courts that required counting all counties, not selected ones, to determine who won a statewide race and concluded thus:

> These cases merely confirm what common sense dictates: Three predominantly Democratic counties out of 67 counties of Florida cannot determine which candidates prevailed in this statewide and, ultimately, national contest. Accordingly, to the extent that this Court manually recounts any ballots at all, it must recount ballots from all other counties as well."[149]

From this it is clear that there were equality-fairness, statutory, and

141. Answer and Affirmative Defenses of Defendant's George W. Bush and Richard Cheney to Complaint to Contest Election at 13 (¶ 9), Gore v. Harris (Leon County Cir. Ct. Nov. 30, 2000) (No. 00-2808), *available at* http://election2000.stanford.edu/CV-00-2808ar.pdf.

142. *See* Motion and Memorandum in Support of Defendants George W. Bush and Dick Cheney's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to Name Indispensable Parties, and Failure to State a Claim, Gore v. Harris (Leon County Cir. Ct. Nov. 30, 2000) (No. 00-2808), *available at* http://election2000.stanford.edu/CV-00-2808al.pdf.

143. *Id.* at 17.

144. *See supra* note 139 and accompanying text.

145. Motion and Memorandum in Support of Defendants George W. Bush and Dick Cheney's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to Name Indispensable Parties, and Failure to State a Claim, *supra* note 142, at 20 (quoting § 102.168(8)).

146. *Id.*

147. *Id.* at 41 (citations omitted).

148. *Id.*

149. *Id.* at 43.

precedential challenges to partial recounts, including ignoring overvotes and counting only cherry-picked counties. To the extent that an equality-fairness argument equates with equal protection, an equal-protection argument was made, but it was not so named in this memorandum.[150]

Of course, the Bush side *won* in the state trial court with this sort of arguments.[151] So on appeal they were entitled to defend their favorable judgment below, both with the equality-fairness argument that it had developed at length and with a clearly-identified equal-protection argument, which had been stated in their answer and supported by equality-fairness arguments.

In the Bush team's *Harris II* brief before the Florida Supreme Court, the federal equal-protection and due-process claims were expressly asserted, albeit briefly, just before the brief's "conclusion":

> Finally, the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selected portions of counties violates the equal protection and due process clauses of the U. S. Constitution. As Florida's Attorney General recently opined, "[a]s the State's chief legal officer, I feel a duty to warn that [if] the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both United States and state constitutions." Findings at 12.[152]

In the earlier summary of the argument, the Bush team stated the argument thus: "[I]f ballots in one county were reviewed under a standard different than that applied in other counties, significant disparities could arise . . . in the impact of individual votes creating a situation that would violate federal constitutional standards."[153] These equal-protection argu-

150. It should be noted that a different team of lawyers worked on this memorandum than worked on Bush's federal-court briefing, with only Barry Richard, a Florida lawyer, overlapping the two. *Compare id.* at 46 (listing as counsel Barry Richard; Fred H. Bartlit, Jr. and Philip Beck of Colorado; Jason L. Unger and George N. Meros, Jr. of Florida; and Daryl B. Bristow and G. Irvin Terrell of Texas), *with* Opening Brief of Appellants at 41, Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000) (No. 00-15981) (listing as counsel Barry Richard; Theodore B. Olson and Benjamin L. Ginsberg of Washington, D.C.; and Alberto Cardenas, George J. Terwilliger III, Timothy E. Flanigan, and Marcos D. Jimenez of Florida). Given the demanding time constraints, there surely was a division of labor between teams on different tracks. The failure to expressly argue equal protection in the state court indicates some lack of communication (or some unknown calculation) between the two teams.

151. *See* Final Judgment, Gore v. Harris (Leon County Cir. Ct. Nov. 30, 2000) (No. 00-2808).

152. Amended Brief for Appellees George W. Bush and Dick Cheney at 45, *Harris II*, 772 So. 2d 1243 (Fla. 2000) (No. SC00-2431) (the lawyers for Bush listed on this brief were Benjamin L. Ginsberg, George J. Terwilliger, III, Timothy E. Flanigan, Kirk Van Tine, and Barry Richard).

153. *Id.* at 26.

ments were brief, but they were there. So when dissenting Florida Supreme Court Justice Harding said he had "serious concerns" about a violation of "other voters' rights to due process and equal protection . . . under the . . . United States Constitution,"[154] that *was* in response to an argument set before the Florida Supreme Court. But the fact that Justice Lewis later could not recall the argument, believing it not preserved, shows how weakly it was argued (which was a strategic error). However, since the argument was made in the Florida Supreme Court, it was clearly appropriate for the United States Supreme Court to consider it.[155]

D. VOTE-DILUTION GETS MORE ATTENTION BEFORE THE UNITED STATES SUPREME COURT.

On December 8, the Bush team sought a stay in the United States Supreme Court while they petitioned for certiorari. In arguing their likely success on the merits, they argued three things, the third of which was that "the Florida Supreme Court's decision violates the Equal Protection and Due Process clauses of the Fourteenth Amendment."[156] The third question presented was as follows:

> Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.[157]

Three pages were devoted to the equal-protection argument. The ap-

154. *Harris II*, 772 So. 2d at 1272 (Harding, J., dissenting).

155. In light of the holding in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), that the U.S. Supreme Court may reconsider and overrule *Austin v. Michigan Chamber of Com.*, 494 U.S. 652 (1990), based on a one-line assertion in the opening merits brief of *Citizens United* that "*Austin* was wrongly decided and should be overruled," there can be little doubt that the Bush team's brief mention of the equal-protection argument before the Florida Supreme Court was enough for Supreme Court consideration. *See Citizens United*, 130 S. Ct. at 893 (quoting Brief for Appellant at 30, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205)). In any event, as discussed next, if the Court had not reached the equal-protection argument in *Bush II*, it could readily have done so in *Touchston*, which was before the Court on a certiorari petition and had fully developed the equal-protection argument in the trial court, on appeal, and in its certiorari petition. *See infra* Part II.D.

156. Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the Supreme Court of Florida at 34, *Bush II*, 531 U.S. 98 (2000) (No. 00-949) (the lawyers on this brief were Barry Richard, Michael A. Carvin, George J. Terwilliger III, Timothy E. Flanigan, Theodore B. Olson, Douglas R. Cox, Thomas G. Hungar and Benjamin L. Ginsberg).

157. *Id.* at 2.

plication argued, in part:

> [T]he necessarily disparate manual recount ordered by the Florida Supreme Court arbitrarily treats voters differently based solely on where they happen to reside in Florida. For example, where there is a partial punch or mark for one candidate on a ballot, that ballot may be counted as a "vote" in the counties (and now courts as well) undertaking a manual recount, but not in any other Florida county. The court's order also entails the result that the ballots that are counted as part of the contest proceedings be evaluated under a different standard than those used to evaluate ballots in the other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent they existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county.[158]

Here the equal protection argument was clearly presented. There was no question that it was properly before the United States Supreme Court this time.

On December 9, the United States Supreme Court stayed the mandate of the Florida Supreme Court, treated the stay petition as a petition for a writ of certiorari, granted that petition, and ordered expedited briefing.[159] In Bush's merits brief, filed December 10, the equal-protection and due-process arguments were again featured prominently.[160] Gore's merits brief, also filed on December 10, argued that the equal-protection claim was not "raised properly below."[161] And it devoted thirteen pages to an attempt to refute Bush's equal-protection claim and another four pages to the due process challenge. The Brennan Center filed an amicus brief arguing (in nearly four pages) that "[t]he recount process sanctioned by Florida statute and executed by the Florida Supreme Court prevents a violation of the Equal Protection Clause by remedying the disparities that result from an electoral scheme that produces widespread intercounty variation in the mechanics of voting."[162]

In sum, the equal-protection claim was properly at issue in *Bush II*,

158. *Id.* at 35–36.

159. *See* Bush v. Gore, 531 U.S. 1046, 1046 (2000).

160. *See* Brief for Petitioners at 40–49, *Bush II*, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/bush949brief.pdf. For roughly nine pages in a fifty page brief, just shy of 20% of the entire document, Petitioners presented an equal-protection argument. *Id.*

161. Brief for Respondent Albert Gore, Jr. at 35, *Bush II*, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/gore949brief.pdf.

162. Brief Amicus Curiae of the Brennan Center for Justice at New York University School of Law in Support of Respondents at 16, *Bush II*, 531 U.S. 98 (2000) (No. 00-949), *available at* http://election2000.stanford.edu/brennan.pdf.

received considerable briefing, and was developed to take account of changing circumstances.

III. WHY THE VOTE-DILUTION CLAIM PREVAILED.

The vote-dilution claim prevailed, first and foremost, because seven Justices of the United States Supreme Court decided that there were constitutional problems[163] with the recount scheme instituted by the Florida Supreme Court in *Harris II*[164]—the problem immediately at hand in *Bush II*—and a majority identified a four-part package of readily recognized problems constituting an equal-protection, vote-dilution constitutional violation.[165] This analysis was well-founded in considerations that had been capably addressed in briefing, in the dissents of four of the twelve en banc Eleventh Circuit Judges in *Siegel*[166] and *Touchston*[167] and in dissents for three of seven justices in the Florida Supreme Court.[168] And the analysis

163. *See Bush II*, 531 U.S. at 111 (per curiam); *see also id.* at 134 (Souter, J., dissenting). This part of the dissent was joined by Justice Breyer, but not the other dissenting Justices, Stevens and Ginsburg. *Id.* at 129. The dissenters found the distinctions "wholly arbitrary," and no "legitimate state interest served by[,] these differing treatments of the expressions of voters' fundamental rights" with "a different order of disparity obtain[ing] under rules for determining a voter's intent that have been applied . . . to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics." *Id.* at 134. *See also id.* at 145 (Breyer, J., dissenting). This part of the dissent was joined by Justice Souter. *Id.* "The majority's third concern [re "the absence of a uniform, specific standard to guide the recounts"] does implicate principles of fundamental fairness." *Id.*

164. *Harris II*, 772 So. 2d 1243, 1262 (Fla. 2000). The Florida Supreme Court ordered manually recounting certain ballots in Miami-Dade County and adding certain partial vote counts, and it suggested recounting ballots statewide based on "'a clear indication of the intent of the voter.'" *See id.* (citation omitted).

165. *See Bush II*, 531 U.S. at 106–09. The Court found problems with the "arbitrary and disparate treatment to voters in different counties," the fact that the three different counties, namely Miami-Dade, Broward, and Palm Beach counties, were using different standards to determine what constituted a legal vote. *Id.* at 107. "[T]he recounts in these three counties were not limited to so-called undervotes, but extended to all of the ballots." *Id.* The votes certified to be recounted included a partial total from Miami-Dade county, thus giving "no assurances that the recounts included in a final certification must be complete." *Id.* at 108. The Florida Supreme Court did not specify who would recount the ballots, and the various counties were "forced to pull together ad hoc teams comprised of judges from various Circuits who had no previous training in handling and interpreting ballots." *Id.* at 109.

166. *See* Siegel v. LePore, 234 F.3d 1163, 1190 (11th Cir. 2000) (8-4 decision) (Tjoflat, J., dissenting). "The Florida election scheme at issue is unconstitutional for the reasons set forth in my dissenting opinion in [*Touchston*, 234 F.3d 1133,] and by Judge Carnes in his dissenting opinion." *Id.*; *see also id.* (Birch, J., dissenting); *id.* at 1193 (Dubina, J., dissenting); *id.* at 1194 (Carnes, J., dissenting).

167. *See Touchston*, 234 F.3d 1133, 1134 (11th Cir. 2000) (per curiam); *see also id.* (Tjoflat, J., dissenting); *id.* at 1158 (Birch, J., dissenting); *id.* at 1161 (Dubina, J., dissenting); *id.* (Carnes, J., dissenting).

168. *See Harris II*, 772 So. 2d at 1262 (Wells, C.J., dissenting); *see also id.* at 1270 (Harding,

has been well defended in academia by Professor Lund.[169] We shall focus here on two important factors: (A) the Gore team's selective manual recount was a strategic error that was an unfair fishing for votes, revealed foundational flaws in Florida's scheme, and cast doubt on all Gore's arguments and favorable decisions that followed; and (B) the Florida Supreme Court failed to understand that it was on probation, after the United States Supreme Court's deferential ruling in *Bush I*, because the state court appeared partisan and unable to achieve a fair outcome.

A. GORE'S SELECTIVE MANUAL RECOUNT WAS LEGAL, UNFAIR, AND A STRATEGIC ERROR.

Gore's initial selective manual recount request was the biggest strategic error of the Gore team. The idea of mining for manual-recount votes in a populous county that one had won by a large margin was technically astute, for it assured a net gain of votes for Gore, especially if looser and looser standards could be employed for determining the supposed intent of the voter. But strategically, the choice was flawed because it seemed fundamentally unfair, even to those unfamiliar with the nuances of the modern equal-protection, vote-dilution cases. The equality-fairness problem was intuitively recognized by Florida Supreme Court Justice Lewis, who declared that he would never sign onto an opinion that allowed such a partisan voting scheme.[170] And as Gore lawyers acknowledged at the *St. Thomas Law Review* Symposium, that cherry-picked, manual-recount request, which they said they personally opposed, became a problematic theme against Gore throughout the case.[171]

Gore's defenders argue that it was legal, which is true. But that only shows the fundamental constitutional flaw in the Manual Recount Statute, which we identified on November 9, and was the foundation for all that followed. And merely asserting that it was legal ignores the fundamental-fairness problem that the partisan recount would forever raise.

The usual effort to blunt this unfairness is to argue that Bush could have chosen counties of his own for manual recounts. For example, in *Siegel*, Eleventh Circuit Chief Judge Anderson argued that there was no equal-protection violation, in part for this reason:

J., dissenting). Justice Harding was joined in his separate dissenting opinion by Justice Shaw. *Id.* at 1273.

169. *See* sources cited *supra* note 23.

170. *See supra* notes 138–39 and accompanying text.

171. *Symposium*, Bush v. Gore: *A Decade Later*, 23 ST. THOMAS L. REV. 44–45 (2011) (View from the Litigants Panel Presentation) (comments of Kendall Coffey & Benedict P. Kuehne).

> Especially with respect to the Plaintiffs' concern that political candidates can select particular counties, but also relevant to the Plaintiffs' concern about the discretion of canvassing boards, any candidate has an equal right and an equal opportunity to request manual recounts in any county. *See* Fla. Stat. §102.166(4)(a). The Florida statute clearly placed the political parties in this case on notice of this right and opportunity.[172]

And regarding notice, he footnoted the following:

> The Plaintiffs do not claim to have lacked timely actual notice that manual recounts were requested by the Florida Democratic Party in the four counties at issue in this case. Indeed, the record reveals that the manual recounts were requested on Thursday, November 9, 2000, and that the Republican Party representatives in Miami-Dade County and Broward County filed responses opposing the manual recounts on the same day, well within the 72-hour statutory deadline for making requests in other counties, i.e., midnight of Friday, November 10, 2000.[173]

But dissenting Judge Carnes, in *Siegel*[174] and *Touchston*,[175] had the better argument on this as on other issues. It must be recalled that his detailed exposition of the equal-protection, vote-dilution analysis, on December 6, was before the United States Supreme Court (by way of the *Touchston* certiorari petition filed on December 8) when (on December 9) the United States Supreme Court stayed the Florida Supreme Court's mandate in *Harris II* and then (on December 12) decided *Bush II*.[176] In fact, Judge Carnes's opinion might well have been similar to the one the Unites States Supreme Court could have written in *Bush II* if time had permitted a more expanded treatment. So those who would fault the *Bush II* opinion should necessarily consider also Judge Carnes's dissent as part of the analytical package on the vote-dilution argument.

Regarding the notion that there was no equal protection violation because Bush could request manual recounts, Judge Carnes offered an extended discussion of why this did not fix the constitutional flaw.[177] The whole is worth reading on this point, but highlights must suffice.

First, Judge Carnes noted that a Bush request could only have been granted under the statute if "a sample manual recount indicates 'an error in

172. Siegel v. LePore, 234 F.3d 1163, 1183 (11th Cir. 2000) (Anderson, C.J., concurring specially).

173. *Id.* at 1183 n.6.

174. *Id.* at 1194 (Carnes, J., dissenting).

175. *See Touchston*, 234 F.3d 1133, 1161 (11th Cir. 2000) (Carnes, J., dissenting).

176. *See supra* Part II.B.

177. *See Siegel*, 234 F.3d at 1209–11.

the vote tabulation which could affect the outcome of the election.'"[178] Since some punch card counties had few voters, "the result of that sample recount would not have indicated that a full manual recount in the county could affect the outcome of the election."[179] Consequently, full recounts would not occur in those counties and "the process would still have ended up treating some punch card voters differently based upon the counties in which they lived. The Constitution forbids that."[180] This may, in fact, be the technical reason why Bush (or his party in Florida on his behalf) did not request manual recounts. Or perhaps it was a strategic decision to not be seen as mining for votes and to let the Gore mining endeavor stand starkly alone. Or perhaps it was some combination of factors. But in any event, it didn't matter, as Judge Carnes noted next.

Second, Judge Carnes noted "another, more fundamental flaw in the argument that" it was permissible to treat voters in different counties differently because Bush did not request manual recounts.[181] "The constitutional rights involved are those of the voters in the other punch card counties," and they "are not permitted to request a manual recount."[182]

Third, Judge Carnes addressed the argument that it didn't matter whether there were partisan, selective manual recounts because "a voter can later file an election contest and try to get the court to conduct a manual recount as part of that contest."[183] But, Judge Carnes responded, "the practical and legal burdens imposed upon an individual who seeks to contest an election are entirely different, and far more burdensome, than those that a party or candidate must meet in order to obtain a manual recount."[184] Explaining problems of a presumption shift that engages at the contest stage and the lack of time for a proper contest and appeal in such circumstances, Judge Carnes concluded that "[a]n election contest . . . is not a practical remedy for voters who have been discriminated against in the Florida Democratic Party's selection of punch card counties in which to request a manual recount."[185] Finally, there is yet another serious problem. Florida law would have required the voters to show that the contest "would change the results of the election."[186] Voters unable to show this would not suc-

178. *Id.* at 1209 (quoting Fla. Stat. § 102.166(5)).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1209–10.
183. *Siegel*, 234 F.3d at 1210.
184. *Id.*
185. *Id.* at 1211.
186. *Id.* (citing Fla. Stat. § 102.168(3)(c)).

ceed in pursuing a challenge, even if their votes were being diluted by differential treatment based on county of residence.[187] Judge Carnes concluded that "[w]hile Florida's interest in bottom line election results is certainly expedient, the Constitution demands more than expediency," and "[t]he one person, one vote principle is not so fickle as to depend upon the closeness of an election."[188]

Fourth, Judge Carnes dismissed the notion that there was no equal-protection, vote-dilution problem "because there are variations among the counties in election systems and different systems give rise to different error rates."[189] Judge Carnes asked, "[w]hy are differences in the number of vote errors that occur as a result of local variations in choice of vote systems before an election the constitutional equivalent of selective correction of errors based upon county of residence after the election?"[190] As to the first, he noted: "[t]here is no reason to believe that any county would attempt to choose for itself a voting system with a high error rate in order to disadvantage its citizens compared to those of other counties."[191] As to the second: "[t]here is every reason to believe that political parties or candidates will selectively choose the counties in which to initiate the process of manual recounts based upon how those counties voted and their population."[192] So "[t]he intent between the two actions is different."[193]

Thus, nothing ameliorated Judge Carnes's conclusion that there was a constitutional problem when "the Democratic Party predictably acted in its own best interests using the state law recount machinery to ensure that intended votes which would otherwise be disregarded would only be counted in counties favoring its candidate . . . ."[194] That "statute encourages and, in some cases—where the pre-manual recount statewide difference in votes is larger than the votes that could be picked up by a full manual recount in a less-populated county—may require discrimination against less-populous counties."[195]

So there was a fundamental-fairness, equal-protection problem in the Manual Recount Statute, and Gore's team availed themselves of it in a fundamentally unfair (though legal) manner, and that statutory flaw and choice

187. *See id.*
188. *Id.*
189. *Siegel*, 234 F.3d at 1211–12.
190. *Id.* at 1212.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 1205.
195. *Siegel*, 234 F.3d at 1204.

would cloud all the rest of the litigation for the Gore side—belying the notion that the effort was simply to count every vote.[196] And votes favorable to Gore from these partisan manual recounts were included in the certified votes for Gore, so the fruit of this poison tree continued to poison the whole recount effort. Even though the United States Supreme Court did not recite the inherent flaw in the Manual Recount Statute, it had to be in the mind of anyone who read the *Touchston* certiorari petition, Judge Carnes's dissent in *Siegel* and *Touchston*, or Part IV of Eleventh Circuit Judge Tjoflat's dissent in *Touchston*,[197] which focused on the constitutional flaws with the "gamesmanship [that] works a constitutional injury not only to the individual voters who are not chosen for enfranchisement, but also to those *groups* of voters whose power is intentionally and systematically diluted by the selective validation of votes for an opposing party's candidate."[198] And the United States Supreme Court did recognize the equal-protection problems with the failure to evaluate voter intent in overvotes and with including totals from a partial recount of Miami-Dade County[199]—both of which are of a kind with the partial counting of votes that was the initial problem, all of which is the opposite of making sure every vote is counted.

Thus, the problems of perceived unfairness in the 2000 Florida presidential recount scheme began with the foundational flaw of the Manual Recount Statute (which allowed partisan recounts), with the Gore team's legal decision to take advantage of it to mine for votes, with the canvassing boards' decisions in the four selected counties to approve such partisan manual recounts, and with the refusal of the Florida Supreme Court (and federal courts, until the United States Supreme Court) to treat the resulting constitutional violation as a problem. But there were further problems, as

196. Despite these identified and well-articulated flaws with the Manual Recount Statute, Professor Tribe dismissed the possibility of an equal-protection problem with a partial, partisan, manual recount because "the protest system in Florida encourages each candidate to file protests in populous counties that lean heavily toward that candidate's party" as part of "harness[ing] rather than . . . exil[ing] partisan motives and political self-interest . . . ." Tribe, *supra* note 18, at 215. Likewise, Tribe endorsed court-ordered inclusion of partial recounts because of "the incentive effects of such inclusion . . . ," i.e., "a rule that permits inclusion of all legal votes identified through the preliminary manual recount, and only those votes, encourages each candidate to mobilize the county canvassing boards to count all votes in the precincts that the candidate deems most favorable." *Id.* Though Tribe cites to Carnes's dissent, *id.* at 215 n.170, his "incentives" argument does not even begin to address the carefully articulated vote-dilution problems that Judge Carnes identified.

197. *See Siegel*, 234 F.3d at 1194 (Carnes, J., dissenting); *Touchston*, 234 F.3d at 1161 (Carnes, J., dissenting) (stating simply "[f]or the reasons set out in my opinion in *Siegel*"); *Touchston*, 243 F.3d at 1149–55 (Tjoflat, J., dissenting); Petition for a Writ of Certiorari, *Touchston*, 531 U.S. 1061 (2001) (No. 00-0942).

198. *See Touchston*, 243 F.3d at 1152 (citation omitted).

199. *See Bush II*, 531 U.S. 98, 107–08 (2000) (per curiam).

discussed next—the Florida Supreme Court seemed eager to give the Gore team what it said it needed to win, and the court misunderstood its probationary status after *Bush I*.

B. THE FLORIDA SUPREME COURT FAILED TO UNDERSTAND ITS PROBATIONARY STATUS AFTER THE UNITED STATES SUPREME COURT'S INITIAL DEFERENCE.

In *Harris I*,[200] the Florida Supreme Court addressed Gore's problem with his partial, partisan manual recount under the Manual Recount Statute in the counties that favored him. The problem centered on a state statutory deadline, seven days after the election (i.e., November 14), by which time the county canvassing boards were to have their completed vote tallies to state officials to be certified. But Gore's manual recounts were not done by November 14. That statutory date for the conclusion of the "protest" stage of the dispute was important both because of the need for expeditious resolution of the election outcome and to allow adequate time for the "challenge" stage (to certified results) to be litigated (and appealed as necessary). The Secretary of State,[201] under authority of Florida law, had decided that manual recounts were to correct tabulation errors, not voter error, that the counts based on voter error did not warrant extending the deadline, and that counties had not provided legally sufficient reasons for extending the protest-stage deadline. Gore's side sued and the trial court held that the Gore team failed to show that the Secretary of State had acted illegally in declining to accept results after the mandatory statutory deadline. The Gore side appealed.

So what did the Florida Supreme Court do? On November 17, it issued—on its own initiative—an order enjoining the Secretary of State from certifying the election results and making clear that it was not stopping ongoing counting of ballots.[202] On November 21, it held that the Secretary of State could not reject manual-recount tallies beyond the statutory deadline unless doing so precluded a statutory vote "contest" or "preclud[ed] Florida voters from participating fully in the federal electoral process."[203] And it

200. *See Harris I*, 772 So. 2d 1220 (Fla. 2000) (per curiam).

201. Like everyone else in the election, Secretary of State Katherine Harris had a political point of view. She was active in the Bush campaign. But if political motives are assigned to her, then they also must be assigned to the numerous Democrats involved in the administrative and legal conflicts of the election. For example, Attorney General Robert A. Butterworth was active in the Gore campaign.

202. *See Harris I*, 772 So. 2d at 1240 (mentioning stay order).

203. *Id.* at 1239.

created a new deadline for the manual recounts to be concluded, November 26 (at 5:00 p.m.), which supposedly "allow[ed] maximum time for contests" to be considered and resolved.[204] This new deadline was clearly not the one set by the Florida legislature. And the certification stay and extended deadline for the "protest" phase would come back to haunt the Gore side because it meant that the "contest" phase would be shortened beyond the possibility of completion, so in effect the Gore side here put all of its eggs in one basket—it needed to get enough votes to win in the manual recounts under the protest phase.

The United States Supreme Court's *Bush I*[205] decision, issued December 4, was unanimous and deferential. Though an equal-protection issue was included in the three certiorari issues, the Court did not grant review of that issue.[206] We know from *Bush II*, which *was* decided on equal-protection grounds,[207] that the Court did not decline the equal-protection question because of failing to see equal-protection problems. The Court could have gone that route in *Bush I*, but it had a more deferential approach in mind. But the possibilities that the voters' right to equal protection yet required safeguarding and that the state supreme court should tread carefully seemed lost on at least four members of the Florida Supreme Court. What *Bush I* did was to rather gently remind the Florida Supreme Court that Article II of the United States Constitution gave the Florida *legislature* the sole authority to decide how Florida's presidential electors would be chosen and to ask the state court to consider whether it was not invading the legislature's exclusive domain.[208] And it reminded the Florida Supreme Court of the safe-harbor provision of 3 U.S.C. § 5—which provided that vote certifications based on laws in effect *before* the election and submitted by *six days before* (i.e., December 12) the electoral college vote (on December 18) would be considered conclusive—and that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."[209] As Professor Lund put it, this was a clear message:

> Thus, the message that the unanimous Court was sending to the Florida judges should have been quite clear: We are not anxious to decide difficult questions of federal constitutional law without giving you an opportunity to address those questions first. But you had better take fed-

204. *Id.* at 1240.
205. *See Bush I*, 531 U.S. 70 (2000) (per curiam).
206. *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 1004 (2000).
207. *See Bush II*, 531 U.S. 98, 103 (2000) (per curiam).
208. *See Bush I*, 531 U.S. at 76–78 (2000) (per curiam).
209. *Id.* at 78.

eral law much more seriously than you did in your first opinion.[210]

Did the Florida Supreme Court take the advice? No. Four days later, on December 8, it issued *Harris II*.[211] That case arose because, under the guidelines and new November 26 deadline created in *Harris I*, the Florida Secretary of State had certified the election results with Bush still the winner by 537 votes.[212] The basket in which the Gore side had placed its eggs had failed. So on November 27, Gore filed under the "contest" statute, challenging the certified results. On December 4, the trial court rejected the challenge, and the case went to the Florida Supreme Court. Time, of course, was now running too short for a "contest" because of the extension of the "protest" deadline to November 26. The safe-harbor provision required finished results (under laws in place on election day) by December 12, and the electoral college would vote on December 18. Nonetheless, the Florida Supreme Court decided several things favorable to the Gore team and ordered implementation of its decision.

What did *Harris II* do? For one thing, it decided "that a legal vote is one in which there is a 'clear indication of the intent of the voter,'"[213] but without indicating how such things as hanging chads and dimpled ballots should be counted. This vague standard was a problem because different counties used different standards and one county had changed standards after the election and then changed the standard back as the manual recount was ongoing.[214] Of course, the state court was in a difficult situation because if it had issued more specific guidelines—after the election and not done by the legislature—it likely would have been in violation of Article II. But the failure to give guidelines left a violation of the Equal Protection Clause of the Fourteenth Amendment because voters in different counties were being treated differently based on where they lived. Nonetheless, the court pressed ahead with the choice most favorable to Gore, i.e., ordering recounts based on a loose standard with interpretation left to the discretion of local canvassing boards.

The Florida Supreme Court also ordered some other things favorable to Gore. At oral argument on December 1, the court asked Gore's lawyer, David Boies, how he could meet the statutory requirement of showing that

210. Lund, *Unbearable Rightness*, *supra* note 23, at 1235.

211. *Harris II*, 772 So. 2d 1243 (Fla. 2000).

212. *Id.* at 1247.

213. *Id.* at 1257.

214. *See Bush II*, 531 U.S. 98, 106–07. For example, "[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. And testimony at trial also revealed that at least one county changed its evaluation standards during the counting process." *Id.* (citation omitted).

the contest would change the election results.[215] Boies's answer was a virtual roadmap to how the election result could be changed. He spoke of 215 votes for Gore, which were the net gain from a full but tardy manual recount in Palm Beach County,[216] and 168 votes for Gore, which were from a *partial* manual recount in Miami-Dade County that was stopped when the Board realized it couldn't meet the deadline,[217] that needed to be counted against Bush's 537-vote lead, and he noted that Miami-Dade County had not finished its manual recount.[218] The Florida Supreme Court ordered that the 215 and 168 votes be included in Gore's totals and that the Miami-Dade count of 9,000 undervotes be immediately done.[219] It also gave a nod—but not an order—to equality by suggesting that *if* the circuit court decided to provide any "statewide relief" it should do so promptly.[220] And though *Bush I* was decided by the United States Supreme Court four days before, on December 4, the Florida Supreme Court's December 8 decision in *Harris II* did not even mention *Bush I*.

On December 9, the United States Supreme Court stayed the Florida Supreme Court's *Harris II* mandate.[221] And on December 11, the Florida Supreme Court issued yet another opinion, *Harris III*,[222] taking the same approach as it had taken in *Harris II*, though this time it mentioned *Bush I* because it was the remanded case in *Bush I*.[223] In *Harris III*, the Florida Supreme Court sought to eliminate the Article II problem by insisting that it was merely interpreting statutes, not usurping the legislative role.[224] But

215. Real-Time Transcript of Oral Argument at 19, *Harris II*, 772 So.2d 1243 (No. SC00-2431), *available at* http://www.wfsu.org/gavel2gavel/transcript/00-2349.htm.

216. *Harris II*, 772 So.2d at 1260. The Court noted that Bush disputed this as being only 176 votes. *Id.* at 1260 n.19.

217. *Id.* at 1260.

218. Real-Time Transcript of Oral Argument at 20, *Harris II*, 772 So.2d 1243 (No. SC00-2431), *available at* http://www.wfsu.org/gavel2gavel/transcript/00-2349.htm. The court also brought up the "problem that continues to recur in the case, of not having recounts in other counties, where the same voting mechanisms were used and where there may have been under votes but that the proportion of votes, for instance, may have favored your opponent . . . ." *Id.* at 21. The court explained that it was yet "a concern of the court, in terms of the appearance of fairness or equity . . . ." *Id.* Bois argued that there was no rule that all votes should be counted in a contest proceeding and that "Governor Bush's campaign should [not] be protected from Governor Bush's lawyers," who "didn't ask for a recount . . . ." *Id.* The gamesmanship is clear here, belying any concern that all votes be counted and ignoring *voter*'s rights. Also clear is the fact that the sort of fairness concerns protected by the Equal Protection Clause of the Fourteenth Amendment were at issue.

219. *See Harris II*, 772 So.2d at 1262.

220. *Id.*

221. Bush v. Gore, 531 U.S. 1046 (2000).

222. *Harris III*, 772 So. 2d 1273 (Fla. 2000) (per curiam).

223. *See id.* at 1279 & n.1.

224. *See id.* at 1291–92.

it did nothing to ameliorate equal-protection and due-process problems in Florida's statutory scheme and court orders. On December 12, the United States Supreme Court—forced to reach constitutional issues it had tried to avoid—identified a package of four problems that constituted an equal-protection violation and remanded the case to the Florida Supreme Court.[225]

The Florida Supreme Court's failure to respect the deferentially expressed concerns in *Bush I* made it appear that the state court had little regard for constitutional concerns of its superior court. And it caused many to believe that it was acting in a partisan fashion for Gore, whether or not the four-member *Harris II* majority intended to create such an impression.

A similar rejection of the Supreme Court's effort to avoid reaching weighty constitutional issues occurred in a series of events that culminated in *Citizens United v. Federal Election Commission.*[226] That decision reversed *Austin v. Michigan State Chamber of Commerce*[227] and part of *McConnell v. Federal Election Commission,*[228] which cases had upheld bans on corporate "independent expenditures"[229] and "electioneering communications."[230] But the Supreme Court's action in *Citizens United* was a direct result of a thwarted effort to avoid reaching these constitutional issues in *FEC v. Wisconsin Right to Life.*[231] In *WRTL II*, the controlling opinion by Chief Justice Roberts and Justice Alito protected issue advocacy from the electioneering-communication ban with an appeal-to-vote test.[232] That test held that a communication that met the electioneering-communication definition could not be prohibited unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[233] But the Federal Election Commission ignored the Supreme Court's effort to protect issue-advocacy, core political speech, and

225. *See Bush II*, 531 U.S. at 106–09, 111.

226. 130 S. Ct. 876 (2010).

227. 494 U.S. 652 (1990), *overruled by* Citizens United, 130 S. Ct. 876 (2010).

228. 540 U.S. 93 (2003), *overruled in part by* Citizens United, 130 S. Ct. 876 (2010).

229. *See Austin*, 494 U.S. 652; *Citizens United*, 130 S. Ct. at 886. *Austin* involved a state ban. *See* 494 U.S. at 654. The federal ban is at 2 U.S.C. § 441b. "Independent expenditures" are for communications expressly advocating the election or defeat of a candidate. *See* 2 U.S.C. § 431(17).

230. *See Citizens United*, 130 S. Ct. at 913 (holding that the government may not suppress political speech on the basis of the speaker's corporate identity); 2 U.S.C. § 434(f)(3) (2006) (defining "Electioneering communications" essentially as targeted broadcast communications identifying candidates in periods near elections).

231. FEC v. Wisconsin Right to Life, Inc. (*WRTL II*), 551 U.S. 449 (2007).

232. *See id.* at 470 (this opinion stated the holding, *see* Marks v. United States, 430 U.S. 188, 193 (1977)).

233. *Id.*

took what the Supreme Court called its "objective" appeal-to-vote test[234] and turned it into "a two-part, 11-factor balancing test."[235] The Supreme Court said this was " precisely what WRTL sought to avoid."[236] That disrespect for, and evasion of, the Supreme Court's holding in *WRTL II* undoubtedly played an important part in the Court's decision to overrule the prohibition on corporate and labor union "independent expenditures" and "electioneering communications" in *Citizens United*.[237] The FEC had proved itself untrustworthy in protecting constitutional rights for which the Supreme Court had shown special solicitude. The Florida Supreme Court did the same, in failing to protect constitutional rights despite the United States Supreme Court's deferential warning of the need for care. In this light, *Bush II* was no more surprising than *Citizens United*.

IV. CONCLUSION

We have seen that the vote-dilution theme was raised early and broadly, preserved, and rightly before the United States Supreme Court in *Bush II*. We have also seen that the Florida election scheme was fundamentally flawed, from its statutory foundation to its judicial decisions, with regard to vote-dilution. And we have seen that the Gore team's initial decision at the protest stage to choose a partisan manual recount (though legal) was a foundational strategic error that belied its slogan of counting every vote, as did its resistance to counting every vote in the contest stage.[238] In this context, *Bush II* was a straightforward application of existing federal law in *Moore v. Ogilvie*,[239] *Reynolds v. Sims*,[240] *Roe I*,[241] *Roe II*,[242] and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

234. *Citizens United*, 130 S. Ct. at 895.

235. *Id.*

236. *Id.* at 896.

237. *See* James Bopp, Jr. & Richard E. Coleson, Citizens United v. Federal Election Commission: *"Precisely What WRTL Sought to Avoid,"* 2010 CATO SUP. CT. REV. 29, 51 (2009–10) (developing this argument at greater length).

238. Real-Time Transcript of Oral Argument, *supra* note 217, at 22 (resisting counting all undervotes even at the contest stage).

239. 394 U.S. 814, 818–19 (1963).

240. 377 U.S. 533, 554–55 (1964).

241. *Roe I*, 43 F.3d 574, 580 (11th Cir. 1991).

242. *Roe II*, 52 F.3d 300, 303 (11th Cir. 1995).