Legal Memorandum
Published by The Heritage Foundation
No. 36
January 30, 2009

Ensuring "Equal Treatment" in the Minnesota Recount: *Bush v. Gore* Redux

Hans A. von Spakovsky

> *Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.*
>
> —U.S. Supreme Court, *Bush v. Gore*[1]

> *We actually have a chance in Minnesota to reverse some of the damage that Florida 2000 did to the trust that Americans overall have in our system. Recounts are normal. They are very important, they happen all the time. In Minnesota, we do them and we do them well.*
>
> —Mark Ritchie,
> Minnesota Secretary of State[2]

In contrast to Secretary of State Mark Ritchie's claim that Minnesota would do a good job conducting the recount in the election contest between incumbent Republican Senator Norm Coleman and Democratic challenger Al Franken, the carelessness of local election officials, the arbitrary and capricious decisions of the Minnesota Canvassing Board, and the strange decisions of the Minnesota Supreme Court likely have caused the state to violate the Equal Protection Clause of the Fourteenth Amendment. Unless the Minnesota Supreme Court corrects these mistakes in the ongoing election contest, there is little question that Senator Coleman would have a viable federal case under the precepts of the *Bush v. Gore* decision[3] and the similar mistakes made by Florida election officials in the 2000 presidential election.

Talking Points

- In a series of cases culminating in *Bush v. Gore*, the Supreme Court has ruled that the Equal Protection Clause of the Fourteenth Amendment prohibits states through arbitrary and disparate treatment from weighing one person's vote differently from another's.
- The Minnesota Canvassing Board and local election officials allowed duplicate ballots, missing ballots, and rejected absentee ballots that had not been cast on election day to be included in the recount.
- The Canvassing Board and local election officials also inconsistently applied state statutory rules governing the determination of a voter's intent on defective ballots and the requirements for valid absentee ballots.
- This disparate treatment of voters likely violates the Equal Protection Clause as applied by the Supreme Court in *Bush v. Gore*, and the inappropriate departure from the state's legislative structure may be a violation of the Elections Clause of Article I of the Constitution.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm36.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

The Legal Doctrine of *Bush v. Gore*

The question before the U.S. Supreme Court in *Bush v. Gore* was whether the recount procedures adopted by Florida in the aftermath of the November 2000 general election were "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."[4] The Florida Supreme Court had ordered that the "intent" of Florida voters be discerned by local election officials from punch-card ballots that, either through error or through deliberate omission, had not been perforated sufficiently for a counting machine to register a vote.

Trying to discern voters' intent was not objectionable, but the "absence of specific standards to ensure its equal application" was a problem.[5] In fact, the U.S. Supreme Court noted that it was acknowledged at oral argument that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[6]

Some of the examples of this disparate treatment included three members of the Miami–Dade County canvassing board each applying different standards defining a legal vote, Palm Beach County changing its standards in the middle of the counting process, and Broward County using "a more forgiving standard than Palm Beach County."[7] The Florida Supreme Court then magnified these errors by ratifying this uneven treatment and mandating that the recount totals from these counties be included in the certified statewide total, as well as approving partial recounts from some counties.

Seven Justices of the U.S. Supreme Court agreed that this unequal treatment was unconstitutional; the only disagreement among them was on the remedy.[8] In their concurring opinion, Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas also pointed out the Florida Supreme Court's interference with the detailed legislative structure governing the election process established by the Florida legislature.

Normally, the distribution of power among the different branches of a state's government raises no federal issue, except for the requirement that "the government be republican in character."[9] Thus, federal courts normally defer "to the decisions of state courts on issues of state law."[10] However, since the Constitution conveys broad power to state legislatures to define the method of appointment of presidential electors, "[a] significant departure from the legislative scheme…presents a federal constitutional question."[11] It is state legislatures that have the exclusive right to define the method of appointment of presidential electors.

The orders of the Florida Supreme Court departed from the state's legislative structure by taking such actions as extending the seven-day statutory certification deadline established by the legislature and defining a "legal vote" in a way that plainly departed from the legislative scheme. This

1. Bush v. Gore, 531 U.S. 98, 104–105 (2000).
2. *No Model for U.S.: Minnesota's Senate Recount Deeply Suspect*, SAN DIEGO UNION-TRIB., Jan. 6, 2009 [hereinafter *No Model for U.S.*].
3. There has been considerable academic debate about the soundness of this decision. *See, e.g., Election 2001 Symposium*, 68 U. CHI. L. REV. (2001), with articles by Richard A. Epstein, Samuel Issacharoff, Cass R. Sunstein, and John C. Yoo, among others. Whatever the debate, however, the decision stands and seems particularly to apply in this recount.
4. 531 U.S. at 105.
5. *Id.* at 106.
6. *Id.*
7. *Id.* at 106–107.
8. *Id.* at 111.
9. *Id.* at 112.
10. *Id.*
11. *Id.* at 113.

could not be deemed "appropriate" constitutionally and was an additional reason to reverse the state court.[12]

The Minnesota Recount

Minnesota uses opti-scan paper ballots. Voters, in a procedure similar to the one used in completing answer sheets for standardized tests like the SAT, complete a paper ballot by filling in an oval next to the name of the candidate for whom they want to vote. The ballot is then fed through a computer scanner before the voter leaves the polling place so that the votes can be tallied by the computer.

On election day, Coleman won reelection by a margin of 725 votes out of 2.9 million cast.[13] After the initial canvass, which is the process by which counties resubmit to the Secretary of State the vote totals of local precincts from election day, Coleman's lead shrank to 221 votes because almost all of the "corrections" sent in by local election officials benefited Franken.[14] A hand recount of the paper ballots was then initiated, and after a series of dubious decisions by local election officials and the Minnesota Canvassing Board overseeing the recount, Franken was certified as the winner by 225 votes.[15] Senator Coleman then filed suit contesting the certification.[16]

As in most states, Minnesota allows election officials to make an exact duplicate of a ballot if it "is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment."[17] Opti-scan paper ballots that have been properly filled out by a voter but folded, for example, sometimes cannot be read by the computer scanner because of the fold. A copy of the damaged ballot is made in the presence of two judges from different political parties by filling in the same circles for the same candidates as on the original card. Duplicate ballots must be clearly labeled as "'duplicates,' indicate the precinct in which the corresponding damaged or defective ballot was cast, bear a serial number which must be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot card."[18] The defective original ballots must be segregated from the other counted ballots and "placed in envelopes marked or printed to distinguish" the number and type of ballots in the envelope.[19]

In this case, however, local election officials in 26 counties apparently did not follow this Minnesota requirement and did not properly mark or segregate the duplicate ballots to distinguish them from the originals. As a result, duplicate ballots were hand-counted along with the original ballots, resulting in more votes being recorded than there were voters who showed up on election day.[20] Thus, some voters in at least 26 counties had their votes counted twice, while voters in Minnesota's other 61 counties had their votes counted only once—a clear and obvious example of unequal and disparate treatment.

One of the members of the Minnesota Canvassing Board admitted that there was "a very good likelihood that there is double counting here," yet

12. *Id.* at 122.
13. *Tensions High in Minnesota Ahead of Senate Recount*, FOXNews.com, Nov. 11, 2008.
14. John Lott has questioned the dubious statistical probability of this one-sided improvement in Franken's vote totals, pointing out that virtually all of his new votes came from just three out of 4,130 precincts, almost half of them in a heavily Democratic precinct in Two Harbors, Minnesota. None of the other races had any changes in their vote totals in that precinct. *See* John R. Lott, Jr., *Minnesota Ripe for Election Fraud*, FOXNews.com, Nov. 10, 2008.
15. Pat Doyle & Kevin Duchschere, *Coleman Goes to Court Over Senate Recount*, StarTribune.com, Jan. 7, 2009; State Canvassing Board, Certificate of Recount of the Votes Case for United States Senator, *available at* http://www.sos.state.mn.us/docs/us_senatorrecountcanvassingdraft1__2_.pdf (last visited Jan. 30, 2009).
16. Notice of Contest, Coleman v. Franken, No. 62-CV-09-56 (Ramsey Cty. Dist. Ct. Jan. 6, 2009).
17. MINN. STAT. § 206.86.
18. *Id.*
19. MINN. STAT. § 204C.25.
20. *No Model for U.S.*, *supra* note 2.

the Board allowed these vote totals that violated Minnesota law to be included in the recount, benefiting Franken by an additional 80 to 100 votes.[21] One of the members of the board, Judge Kathleen Gearin, dismissed the concern over double counting, saying it was not a problem "because there was very little of it."[22]

When conducting its recount, Ramsey County found 177 more ballots than were recorded by the precinct computer scanners on election day.[23] Election officials ignored the electronic total and included the extra 177 ballots in the vote total of their hand recount, netting Franken an additional 37 votes.[24]

Yet when Hennepin County conducted its recount, there were 133 fewer ballots in Minneapolis than were recorded by precinct computer scanners on election day.[25] In direct conflict with what occurred in Ramsey County, Hennepin election officials ignored the missing ballots and used the electronic vote total from election day for their recount total, providing Franken with an additional 46 votes.[26] This despite the fact that Minneapolis's election director, Cindy Reichert, said that these ballots "likely were a result of ballots with write-in candidates being run through a counting machine twice."[27]

In other words, the "missing" ballots may never have existed in the first place. All of these actions were approved by the Canvassing Board.

Minnesota law requires that a "ballot shall not be rejected for a technical error that does not make it impossible to determine the voter's intent."[28] The specific rules governing how to determine a voter's intent were defined by the legislature. One of those rules is that if "the names of two candidates have been marked, and an attempt has been made to erase or obliterate one of the marks, a vote shall be counted for the remaining marked candidate."[29]

Yet when it was determining voter intent on ballots with such technical errors, the Minnesota Canvassing Board applied those rules inconsistently. For example:

- It has been reported that on some ballots where voters had completely filled in the oval for Coleman and then put an "x" through the oval, the board determined that there was no vote for Coleman.
- However, on other ballots where the exact same type of markings were made for Franken, the board determined that they were valid votes for Franken.[30]
- On a ballot where the voter had placed an "x" next to the Constitution Party candidate but

21. Editorial, *Funny Business in Minnesota*, WALL ST. J., Jan. 5, 2009 [hereinafter *Funny Business*].
22. Minutes of State Canvassing Board, Dec. 16–19, 2008, p. 12.
23. Curt Brown, *Minnesota's Vote: Cast Into Doubt*, StarTribune.com, Dec. 14, 2008.
24. *Funny Business, supra* note 21.
25. Kevin Duchschere & Mark Brunswick, *Senate Recount: 133+5÷87=1 Big Muddle*, StarTribune.com, Dec. 12, 2008.
26. *Funny Business*, *supra* note 21.
27. Rachel E. Stassen-Berger & Jason Hoppin, *Minnesota U.S. Senate Race: Glut of Ballot Challenges Chokes Recount*, PIONEER PRESS, Dec. 4, 2008. When Ms. Reichert appeared before the Canvassing Board, she changed her story and denied that ballots had been counted twice even though a search had failed to find any missing ballots. Minutes of State Canvassing Board Meeting of Dec. 12, 2008, pp. 3–6. In a bizarre development, the Board later claimed that Ms. Reichert "was not providing testimony when she appeared before the board" since the Canvassing Board cannot hear testimony or hold evidentiary hearings. *Id*. at 5.
28. MINN. STAT. § 204C.22.
29. MINN. STAT. § 204C.22(11).
30. For the ballots and the decisions of the Minnesota Canvassing Board, *see* Minnesota Senate Recount: Latest Coleman–Franken Results, StarTribune.com, http://senaterecount.startribune.com/ballots/index.php?review_date=2008-12-18&index=9 (last visited Jan. 30, 2009). *See also* John R. Lott, Jr., & Ryan S. Lott, *Ballot Madness: Tipping the Scales in Minnesota's Senate Recount*, FOXNews.com, Dec. 22, 2008.

had filled in the oval for Coleman, the board determined that there was no vote for anyone.

- On another ballot where the oval next to Coleman was filled in but an "x" had been place next to Franken, the board determined this was a vote for Franken.[31]

There was no consistency in the board's determinations of intent other than the fact that their inconsistent decisions overall seemed to benefit Al Franken.

Another problem in the recount was the 12,000 absentee ballots that were not counted on election day after they were rejected by local election officials for not complying with Minnesota law.[32] Many of the ballots that were rejected were reexamined, and 933 were included in the recount. [33]

Under Minnesota law, the *only* ballots that should have been included in the recount were those that were actually cast in the election. As Minnesota Assistant Attorney General Kenneth E. Raschke, Jr., told Secretary of State Richie on November 17, 2008, rejected absentee ballots are not considered as "cast" in an election.[34] Section 204C.35, subd. 3 of the Minnesota Code specifies that "[o]nly the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process."

In fact, Ritchie's own administrative rules (which he ignored) as outlined in the Hand Count instructions of his 2008 Recount Guide explained that:

> [A]n **administrative** recount…is not to determine who was eligible to vote. It is not to determine if campaign laws were violated. It is **not** to determine if absentee ballots were properly accepted. It is **not**—except for recounting the ballots—to determine if [election] judges did things right. It is simply to physically recount the ballots **for this race**![35]

As Assistant Attorney General Raschke said, the proper forum to remedy the claimed wrongful rejection of any absentee ballots was "a judicial election contest." However, a second letter submitted to the Canvassing Board in December, this time from the Minnesota Solicitor General, took the opposite view. He provided an opinion that "a reviewing court would likely uphold a determination by the State Canvassing Board to accept amended reports…that include absentee ballots of voters…whose votes were improperly rejected by election officials due to administrative errors" even though such actions are "not necessarily contemplated under a strict reading of the statutes.[36]

Despite Minnesota law, the instructions issued by the Secretary of State for recounts, and the conflicting opinions from the office of the state Attorney General, the Minnesota Canvassing Board recommended that counties sort and count absentee ballots that were "mistakenly" rejected on election day.[37] When Senator Coleman filed a petition with the Minnesota Supreme Court to stop this procedure, the court inexplicably ruled that such absentee ballots could be counted if "local election officials and the parties agree that an absentee ballot envelope was improperly rejected."[38]

Minnesota law does provide that obvious errors of election judges and county canvassing boards "in the *counting or recording*" of votes can be corrected if the candidates for that office unanimously agree in

31. Minnesota Senate Recount: Latest Coleman–Franken Results, *supra* note 30.

32. There are four grounds given for rejecting an absentee ballot, including the lack of a signature. *See* MINN. STAT. § 203B.12(2).

33. Mark Brunswick & Pat Doyle, *Senate Recount Trial Underway*, StarTribune.com, Jan. 26, 2009.

34. Letter from Kenneth E. Raschke, Jr., Asst. Attorney General, to Mark Ritchie, Secretary of State, on Canvass of Rejected Absentee Ballots (Nov. 17, 2008).

35. *Id.* (emphasis in original).

36. Letter from Alan I. Gilbert, Solicitor General, to the State Canvassing Board (Dec. 10, 2008).

37. Duchschere & Brunswick, *Senate Recount: 133+5÷87=1 Big Muddle*, *supra* note 25.

38. Coleman v. Ritchie, No. A08-2169, slip op. at 2 (Minn. Dec. 18, 2008).

writing that an error occurred.[39] However, the Minnesota Supreme Court specifically held that the "improper rejection of an absentee ballot envelope is not within the scope of errors subject to correction" under this law.[40]

Despite that determination, the court allowed competing candidates and local election officials to waive the applicable law established by the Minnesota legislature on absentee ballots and make decisions on which votes should count. As a professor of election law at Hamline University in St. Paul said, this basically gave the "campaigns a veto over the counting."[41] In his dissent, Justice Page pointed out that this holding would "arbitrarily disqualify enfranchised votes on the whim of the candidates and political parties without the benefit of the legislatively authorized procedures" of Minnesota law.[42]

Secretary of State Ritchie also stopped this review of disputed absentee ballots "before many Coleman-leaning counties had provided theirs."[43] The dissent noted that there were "at least 600 absentee ballots" that were improperly rejected and might never be counted[44] and the Coleman campaign claimed there were 654 improperly rejected ballots that should have been examined by the Canvassing Board.[45]

Applying *Bush v. Gore* to the Recount

Regrettably, we have an entire series of actions in the Minnesota recount that fit squarely within the unequal treatment problems that ensnared Florida officials in 2000 and led directly to the Supreme Court's decision in *Bush v. Gore*. These problems range from allowing double votes in some counties to allowing votes that violated state law.

The disparate treatment of votes was clearly present in the Minnesota recount. Because of the failure of local election officials to properly mark and segregate the original, defective ballots that could not be counted by precinct computer scanners and the duplicate ballots created as substitutes, both the original and duplicate ballots were hand-counted in a number of counties. Thus, the value placed on the ballots of some persons was greater than the value placed on ballots of other Minnesota voters, in violation of the Equal Protection Clause.[46]

The fact that the total vote count from one county was based on the election-day electronic total and apparently included nonexistent ballots, while the vote totals from other counties were based on the hand count, is another example of the application of a disparate standard. The arbitrary and inconsistent application of the "intent" standard by the Canvassing Board is also too similar to the problems the U.S. Supreme Court noted in Florida in 2000, when different counties applied different and varying rules to what would be considered a vote with punch-card ballots, to survive scrutiny by the federal courts.

Under the Constitution, "[t]he times, Places and Manner of holding election for Senators…shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[47] This clause "is a default provision; it invests the States with responsibility

39. MINN. STAT. § 204C.38 (emphasis added).

40. *Coleman*, slip op. at 2. "Counting" or "recording" errors are arithmetic errors in the vote totals.

41. Editorial, *Recount Will Get Worse Before It Gets Better*, ROCHESTER POST-BULL., Jan. 7, 2009.

42. *Coleman*, slip op. at D-2.

43. *No Model for U.S.*, *supra* note 2.

44. *Coleman*, slip op. at D-5.

45. Coleman v. Ritchie, No. A08-2169, slip op. at 5 (Minn. Jan. 5, 2009). In the litigation filed contesting the election and the decisions of the Canvassing Board, Coleman claims there are 5,000 wrongly rejected absentee ballots. Alex Robinson & Karlee Weinmann, *Subpoenas to Stall Senate Trial*, MINN. DAILY, Jan. 27, 2009.

46. 531 U.S. at 104–105 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) and Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

47. U.S. CONST., Art. I, § 4.

for the mechanics of congressional elections" unless Congress preempts states' legislative choices.[48]

As in Florida, the Minnesota legislature set out a detailed legislative structure for recounts and the requirements for absentee ballots, and Congress has not preempted the state's "legislative choices." Before the election, the Secretary of State issued rules pursuant to authority delegated by the legislature[49] on how recounts would be conducted if one became necessary. Yet the Canvassing Board, of which the Secretary of State is a member, with the seeming approval of the Minnesota Supreme Court, did not adhere to the legislative structure or the Secretary's own recount rules promulgated prior to the election in its consideration of absentee ballots.

In fact, the court decided to waive the application of the rule that specifies that recounts shall consist only of the ballots actually cast on election day. It also gave competing political candidates the ability to make decisions about whether specific absentee ballots should be counted regardless of applicable law, giving the candidates virtual veto power over the legislative requirements. This would likely be considered an "inappropriate" departure from the legislative structure and therefore unconstitutional under the concurring opinions in the *Bush v. Gore* decision, since states regulate congressional elections pursuant to a constitutional "delegation of power under the Elections Clause."[50] There is also an indication that certain counties, just as in Florida, had "a more forgiving standard" when reviewing previously rejected absentee ballots.

Unless either the three-judge panel that is currently hearing the election dispute or the Minnesota Supreme Court can correct all of these problems, there is little question that Senator Coleman would be able to argue successfully in federal court that the recount process violated the Equal Protection Clause of the Fourteenth Amendment. As the Supreme Court said in *Bush v. Gore*, "it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work."[51]

However, one problem that may not be capable of correction no matter how much additional work is done by the state is the intermingling by some counties of duplicate and original ballots. If duplicate votes cannot be identified and removed from the vote totals, then it will not be possible for Minnesota to conduct a recount that values every person's vote equally.

Under such circumstances, the state would be forced to stand by the original electronic count from election day along with (1) any corrections in the absentee ballot count (which may properly be considered under Minnesota law at the "contest" phase) and (2) new and consistent determinations of voter intent on defective ballots—both as determined by the court in *full* compliance with Minnesota law. Otherwise, the only constitutionally acceptable remedy will be to conduct a new, special election for the vacancy in the position of the United States Senator from Minnesota.

—Hans A. von Spakovsky is a Visiting Legal Scholar in the Center for Legal and Judicial Studies at The Heritage Foundation. He is a former Commissioner on the Federal Election Commission and a former Justice Department official.

48. Foster v. Love, 522 U.S. 67, 69 (1997).

49. MINN. STAT. § 204C.361.

50. Cook v. Gralike, 531 U.S. 510, 523 (2001).

51. 531 U.S. at 110.