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So Much for States' Rights

A narrow ideological majority on the U.S. Supreme Court has made George W. Bush our next president. A decent patriotism requires all of us to hope—and those of us so inclined to pray—that Bush's four years in office will be successful for our country.

But a robust patriotism demands that we never forget how he achieved office, in order to make sure that this terrible venture away from the territory of democracy never happens again. And a genuine patriotism does not require anyone to accept the logic of five Supreme Court justices who clearly contorted their own principles and created new law to achieve this result.

The most troublesome aspect here is *not* that the five most conservative appointees on the court ruled in favor of the Republican presidential candidate. It is that the same five chose to intrude in Florida's election process having always claimed to be champions of the rights of states and foes of "judicial activism" and "judicial overreach."

It is nearly grotesque that the majority opinion invoked the equal protection doctrine to stop a recount whose very purpose was to move more closely toward equal protection of all those voters—many of them poor and members of minority groups—who may have lost their ballots because of unreliable voting equipment.

It is amazing, as well, that the court showed an admirable concern for the need to count "overvotes" (ballots on which more than one candidate was chosen) as well as "undervotes"—and then offered absolutely no remedy for either. Because the Florida court didn't fix *all* of the problems, the Supreme Court majority chose to block its efforts to fix *any* of the problems.

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

count."

By the logic of the majority, the entire election in Florida could have been thrown out, since the certified result already includes a mix of counting methods. But that wouldn't have helped Bush.

And suddenly, there is this touching bit of judicial restraint: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." No kidding. But not so many as to stop the Supreme Court majority from doing the one thing that will prevent our knowing in a timely way who really won Florida.

Justices David Souter and Stephen Breyer shared the majority's concern for equal protection, but they dissented sharply when it came to stopping the count. They held what seemed on this day to be an exotic principle: The high court couldn't condemn a lower court and then offer it no opportunity to right a perceived wrong.

"There is no justification for denying the state the opportunity to try to count all disputed ballots now," wrote Justice Souter. Justice Breyer called the majority's bluff by pointing out how sweeping, interventionist and activist its ruling really was, when he wrote that "the majority's reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election." So much for states' rights.

And just to make sure its decision left the bitterest possible taste in the mouths of those who disagreed with it, the majority that had abruptly stopped the recounting of ballots on Saturday afternoon on the theory that Al Gore would suffer no "irreparable harm" proved the opposite. Oops, said the majority, sorry, that Dec. 12 deadline Gore's lawyers were worried about is upon us. It's too late to have a recount that "comports with minimal constitutional standards."

Bush, with lots of help from the nation's highest court, was allowed to run out the clock in what is not supposed to be a mere game. This court majority has handed Bush the presidency in a way that can only make an excruciating job even more difficult.

The great conservative writer Robert A. Nisbet wrote long ago about the difference between "power" and "authority." Power, he said, is "based upon force." Authority is "based ultimately upon the consent of those under it." In a democracy, we recognize the authority even of leaders with whom we disagree because we accept the legitimacy of the process that got them there. Bush now has power. He will have to earn authority.