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“YOU DON’T HAVE TO BE A STRUCTURALIST TO
HATE THE SUPREME COURT’S DIGNITARY HARM
ELECTION LAW CASES”

Professor Richard L. Hasen

YOU DON'T HAVE TO BE A STRUCTURALIST TO HATE THE
SUPREME COURT'S DIGNITARY HARM ELECTION LAW CASES
RICHARD L. HASEN*

INTRODUCTION

In his characteristically thoughtful and provocative contribution to this symposium, *The Dignity of Voters — A Dissent*,¹ Professor James A. Gardner offers a sustained critique of a line of Supreme Court election law cases recognizing “dignitary rights” of voters. In Gardner’s crosshairs are *Shaw v. Reno*,² recognizing the “unconstitutional racial gerrymander;” *Bush v. Gore*,³ recognizing the right to have one’s vote counted in a recount according to uniform voting procedures; and *Purcell v. Gonzales*,⁴ a voter identification case in which the Court recognized a right of voters not to have their votes “cancelled out” by voter fraud (or their “feelings” hurt by such fraud).⁵ Gardner argues that these cases were wrongly decided: the cases increase election law litigation and create uncertainty just before or after elections, when the societal need for certainty and finality is the highest.⁶ At the same time, these dignitary rights serve no social purpose. Gardner contends that voters voting in elections serve a public purpose akin to jurors serving on a jury and, under this understanding, a recognition of second-order dignitary rights is unjustifiable.⁷

In this brief response to Gardner’s excellent article, I make two points. First, as I explain in Part I, Gardner mistakenly explains these jurisprudential developments as the Supreme Court embracing the “individual” rights side in the

* William H. Hannon Distinguished Professor of Law, Loyola Law School, Los Angeles. The title of this article borrows shamelessly from Daniel Hays Lowenstein, *You Don’t Have to Be a Liberal to Hate the Supreme Court’s Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998). That title in turn borrows from the old Levy’s rye bread commercial stating that “You Don’t Have to Be Jewish to Love Levy’s Real Jewish Rye.” See http://www.adslogans.co.uk/hof/ad_levys.html and http://en.wikipedia.org/wiki/Henry_S._Levy_and_Sons. Like this article, Lowenstein’s article criticizes the Supreme Courts unconstitutional racial gerrymandering cases, though from a different perspective.

¹ James A. Gardner, *The Dignity of Voters — A Dissent*, ___ U. MIAMI L. REV. ___ (2010).

² 509 U.S. 630 (1993). See Gardner, *supra* note 1, at ___ (manuscript at 24-25).

³ 531 U.S. 98 (2000). See Gardner, *supra* note 1, at ___ (manuscript at 24).

⁴ 549 U.S. 1 (2006).

⁵ See Gardner, *supra* note 1, at ___ (manuscript at 26) Gardner also takes aim at and some earlier campaign finance and one person, one vote cases. See *id.* at ___ (manuscript at 8 n.26, 36-37).

⁶ See *id.* at ___ (manuscript at 31-37).

⁷ See *id.* at ___ (manuscript at 27-31).

“rights-structure” debate among election law scholars. Instead, these developments show the Court embracing a misguided structural approach to election law cases (albeit clothed in the language of rights). *Shaw* reined in what the Court majority viewed as an out-of-control Justice Department overly interfering with state prerogatives in redistricting; *Bush* reined in what the Court majority viewed as an out-of-control Florida Supreme Court overly interfering with administrative recount procedures in the highly-charged context of a presidential election recount. *Purcell* reined in civil rights plaintiffs interfering with state administrative prerogatives in setting forth the rules for conducting elections. In each of these cases, voter “rights” are merely a stand-in for structural concerns of the Court.

Second, as I explain in Part II, using the individual rights approach, these cases were incorrectly decided. Under the individual rights approach, the Court should protect only “core” equality rights that affect the real allocation of political power among political equals in a democracy. In *Shaw*, the Court incorrectly protected voter rights in the districting process that had no potential to affect political power relationships. In *Bush* and the voter identification cases, the Court failed to recognize rights on *both sides* of the case, and that the rights of voters on what turned out to be the losing side easily trumped rights on the winning side of the case. Thus, Gardner’s conclusion that these cases were wrongly decided is absolutely correct, even using an individual rights framework to reach this result. The Court should continue to focus on rights in its election law jurisprudence, but not on inchoate “dignitary” rights that fail to affect the allocation of political power.

I.

DON’T BLAME SUPPORTERS OF THE RIGHTS APPROACH FOR *SHAW*, *BUSH*, AND *PURCELL*

Gardner’s article makes many fine points about which I have no quibble. He is especially interesting and persuasive in his discussion of political theory, and the question of how to conceive of the role of the voter in a democracy. Gardner is able to make considerable progress on this question by viewing voters as akin to jurors engaged in public service, and this model surely has implications for other election law questions frequently considered by scholars and courts.⁸ But there is one point in Gardner’s discussion with which I disagree, relating to

⁸ For Gardner’s more extended and nuanced treatment of related questions, see JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* (2009).

the *cause* of the Supreme Court's recognition of dignitary rights in these controversial cases.

Gardner locates the cause as the Supreme Court taking sides in the rights-structure debate among election law scholars. This is not the place to rehash this debate, and Gardner's article cites the relevant literature for readers unfamiliar with it.⁹ In Gardner's view, the Court has developed a rights fetish, and its preoccupation with its conception of rights has blinded it to the negative effects of recognizing mere dignitary rights in election law cases. Gardner tells us that "[t]his is bad because the fights and structural approaches frequently conflict, and the Court's preference for a rights-based approach therefore often leads it to decisions that are not only substantively wrong, but also at war with the requirements of a properly functioning democracy."¹⁰ He concludes that

[r]ather than approach issues involving democratic process as problems of power or the proper functioning of a system of representative democracy, as the rights-structure critique would require, the Court instead approaches such issues as problems of the maltreatment of individual voters. Just as importantly, the kind of maltreatment that counts is the kind that causes voters to experience their treatment at the hands of the state as insulting or degrading—that is, undignified. Thus, *Shaw* rights, *Bush v. Gore* rights, one-person, one vote rights, 'anticancellation' rights — all constitutionalize dignitary rights that voters may wield, as voters, to avoid treatment that they subjectively experience as insulting, undignified or as relegating them to some kind of second-class citizenship.¹¹

It is true that in *Shaw*, *Bush*, and *Purcell*, the Court majority couched its decision in terms of individual rights. In *Shaw*, the Court embraced what has come to be known as the "expressive harm" theory¹² that it violates equal protection when one is forced to live in a jurisdiction in which voters have purportedly been separated by race for redistricting purposes without compelling justification.¹³ In *Bush*, the Court accepted an argument that voters' equal protection rights required that a jurisdiction-wide electoral recount be conducted according to uniform standards for considering the validity of a recounted

⁹ Gardner, *supra* note 1, at ____ (manuscript at 2-8).

¹⁰ *Id.* at ____ (manuscript at 7-8).

¹¹ *Id.* at ____ (manuscript at 9).

¹² Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

¹³ *Shaw*, 509 U.S. at 642.

ballot.¹⁴ In *Purcell*, a unanimous Court explained that voter rights could be violated when legitimate votes are cancelled out by fraudulently cast votes or when voters “feel disenfranchised” by such votes.¹⁵

Nonetheless, a close reading of these cases in the context in which they were decided shows that the Court was concerned more about the structure and functioning of the political process than about dignitary rights, and that the “rights talk” was really just talk. What should be bothersome to a structuralist like Gardner then is not that the Court applied a structuralist approach in these cases, but that it applied the *wrong* structuralist approach, valuing some aspects of the functioning of our electoral system more than others.

Shaw is a good launching point for our discussion. The North Carolina legislature passed a redistricting plan that created some majority-minority electoral districts with unusual shapes. Because 40 of North Carolina’s counties are covered by section 5 of the Voting Rights Act, a new redistricting plan could not be put into effect until the Department of Justice “precleared” the plan upon proof from the state that it had no discriminatory purpose or effect. The DOJ took a hard-line position on preclearance, and insisted that the state draw as many majority-minority districts as possible under the plan. With that constraint, the state drew district lines that would create the required number of majority-minority districts consistent with the legislature’s political goals, including incumbency protection and party interests.¹⁶

The plaintiffs in *Shaw* did not argue that their votes were “diluted” under the North Carolina redistricting plan. Instead they made what the *Shaw* Court described as an “analytically distinct”¹⁷ claim of an “unconstitutional racial gerrymander.” The Court accepted this argument. Like Gardner, most election law scholars have rejected the wisdom and coherence of this analytically distinct claim. As Dan Lowenstein has persuasively argued,¹⁸ the *Shaw* case is a classic

¹⁴ *Bush*, 531 U.S. at 109.

¹⁵ *Purcell*, 549 U.S. at 4.

¹⁶ *Shaw*, 509 U.S. at 633-38.

¹⁷ *Id.* at 652.

¹⁸ Lowenstein, *supra* note *, at 780; see also *id.* at 784 (“Consider the statement [in *Shaw*] that race ‘was the criterion that, in the State’s view, could not be compromised.’ In the State’s view? Why could race not be compromised, ‘in the State’s view’? Because the members of the North Carolina legislature were driven by ideological fervor to create a second [multi-member district]? Of course not. The legislature had already adopted a plan containing one [multi-member district], but was forbidden to place it into effect by the Justice Department, which denied it preclearance. ‘Race was the criterion that, in the State’s view, could not be compromised,’ for the excellent reason that the federal government prohibited the state from compromising the racial criterion. The federal government absolutely required North Carolina to redistrict, and the federal government absolutely prohibited North Carolina from redistricting without creating two [multi-member districts]. That the racial criterion ‘could not be compromised’ was not a question of ‘the

example of blaming the victim: the Legislature, in need of preclearance from the Department of Justice under section 5 of the Voting Rights Act, really had no choice about the number of majority-minority districts it had to draw. Its only choice was in *where* to locate those districts, a choice that the *Shaw* line of cases limited significantly.

Understood as a rights case, and as explained in Part II below, *Shaw* is weak. But it is more persuasively understood as a case in which the Court attempted to affect the structure of the electoral process. To the *Shaw* majority, the real problem lay in the overzealous enforcement of the Voting Rights Act by what the Court saw as an out-of-control Justice Department.¹⁹ Through a series of unconstitutional racial gerrymandering cases and voting rights cases in the 1990s, the Court ultimately reined in the Justice Department's muscular understanding of section 5, as well as a broad understanding of the scope of section 2 of the Act.²⁰ Though Dan Lowenstein is correct that the *Shaw* opinions initially imposed greater limits on state authority to redistrict in contravention to federalism rights,²¹ states ultimately enjoyed greater freedom as the Department of Justice had to relax its requirements for the creation of majority-minority districts taking pressure off the voting rights side of the problem.

A similar structural story may be told for both *Bush v. Gore* and *Purcell*. *Bush v. Gore*'s equal protection holding has been almost universally excoriated in its reasoning.²² But understood structurally, it seems pretty clear that the motivating factor of the Court was reining in the Florida Supreme Court, not protecting the dignitary rights of unnamed, and unknown, Florida voters. Thus, Chief Justice Rehnquist viewed the Florida Supreme Court's interpretation of Florida statutes to require a manual recount of punch-card ballots²³ as "absurd,"²⁴

State's view,' but an objective circumstance imposed on North Carolina by the federal government.") (footnotes omitted).

¹⁹ This became clearer in the next case in this line, *Miller v. Johnson*, 515 U.S. 900, 924-25 (1995) in which the Court is quite dismissive of Department of Justice efforts to force a "max-black" plan on the Georgia legislature.

²⁰ In addition to the *Shaw* line of cases described in DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW—CASES AND MATERIALS* 197-242 (4th ed. 2008), see *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (rejecting DOJ regulation requiring adherence to section 2 of the Voting Rights Act for jurisdictions subject to preclearance under section 5's "effects" prong); *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (same holding under section 5's "purpose" prong); see also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 199-200 (2007) (explaining DOJ reliance on purpose prong of section 5 until the second *Bossier Parish* decision).

²¹ See *supra* note 18.

²² See Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004). For a rare defense of the equal protection holding, see Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

²³ *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1273 (Fla. 2000).

“peculiar,”²⁵ and an interpretation “no reasonable person”²⁶ would embrace. To the *Bush v. Gore* majority, too, the United States Supreme Court’s “unsought responsibility”²⁷ was to rein in an out-of-control Florida Supreme Court which was making up new rules for the counting of votes to benefit Al Gore.²⁸ To conservatives generally, the Florida Supreme Court was the lawless entity changing the rules of the game after the fact to help Gore get elected.²⁹

Purcell too is best understood structurally. Since the 2000 Florida electoral meltdown culminating in the Court’s opinion in *Bush v. Gore*, the amount of election law litigation has increased markedly.³⁰ For obvious reasons, the Supreme Court is wary of getting involved in such disputes, especially in the days leading up to the election. *Purcell* was a case in which the Ninth Circuit reversed a federal district court denial of a preliminary injunction in which plaintiff’s sought to block enforcement of Arizona’s new voter identification law. The Ninth Circuit enjoined enforcement, and the Supreme Court, in a surprise order on a request for a stay of the Ninth Circuit’s order, granted a writ of certiorari and issued an opinion on the merits reversing the Ninth Circuit.³¹

Though the Court couched its language in terms of individual rights being on both sides of the voter fraud/voter turnout question, the upshot of the decision is to keep similar cases out of federal courts in the days before the election. Changes in election rules in the days before an election are disruptive and potentially confusing. In *Purcell*, the Court not only recognized the need to balance competing interests in such cases, leaving questions in the sound discretion of the trial court; it also admonished courts not to change the rules at

²⁴ *Bush v. Gore*, 531 U.S. at 119.

²⁵ *Id.* at 120.

²⁶ *Id.* at 119.

²⁷ *Bush v. Gore*, 531 U.S. at 110.

²⁸ As Justice Scalia told the television program “60 Minutes:” “Gee, I really don’t wanna get into - I mean this is - get over it. It’s so old by now. The principal issue in the case, whether the scheme that the Florida Supreme Court had put together violated the federal Constitution, that wasn’t even close. The vote was seven to two.” 60 Minutes, Sept. 14, 2008, http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290_page3.shtml?tag=contentMain;contentBody.

²⁹ This is the position taken by the conservative scholars Professor Amar discusses, including Professors Epstein, Fried, and McConnell. See Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct: Bush v. Gore Defended*,” in *THE VOTE*, *supra* note 5, at 13; Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY 3* (Bruce Ackerman ed. 2002); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in *THE VOTE*, *supra* note 5, at 98.

³⁰ Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. (forthcoming 2009).

³¹ *Purcell*, 549 U.S. at 2-4.

the last minute.³² *Purcell*, far from being concerned solely with a vacuous dignitary interests, appeared more interested in the smooth operation of elections, which might explain the unanimous vote in the case despite the troubling and controversial language about such dignitary rights.

As Pam Karlan put it in discussing *Shaw* and *Bush*, the Court's project is one of "structural equal protection:" "[t]he Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through the operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted."³³

To say that the Supreme Court's dignitary rights cases are really about structuralism is not to say that the Court got it right even under its structural approach. To take *Bush v. Gore* again, to some scholars the Florida Supreme Court *followed* the existing rules for resolving election disputes, and it was the U.S. Supreme Court that changed the rules midstream.³⁴ Thus, while all structuralists can recognize a "lawlessness principle"³⁵—that election disputes must be resolved under the rules of the game as established by election day—there can be considerable dispute over implementation of this principle in election law cases.

In sum, Gardner should not be taken in by the rhetoric of *Shaw*, *Bush*, and *Purcell*. In each of these cases the Court was more concerned about the structure and functioning of the electoral system than about the dignitary rights of voters. Gardner's article is so important in stripping the Court of the façade of the dignitary interests, which should force the Court to more clearly and nakedly articulate the structural interests upon which it is relying and allowing for criticisms of those structural interests.

II.

³² *Id.* at 4-5 ("Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.")

³³ Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 73 N.C. L. REV. 1345, 1246 (2001).

³⁴ Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, FLORIDA L. REV. (forthcoming 2009). A video of the original presentation is available at <http://streaming.video.ufl.edu/~law/20090324-dunwody.asx>.

³⁵ Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Amar*, FLORIDA L. REV. (forthcoming 2009).

AN INDIVIDUAL RIGHTS CRITIQUE OF *SHAW*, *BUSH*, AND *PURCELL*

As someone who has been associated with the individual rights position in the rights-structure debate, I find little to commend from an individual rights perspective in *Shaw*, *Bush*, and *Purcell*. As I have explained in great detail elsewhere,³⁶ courts (and especially the Supreme Court) should be cautious in protecting individual rights, because broad pronouncements of rights have the potential to ossify the political process and lead to unintended consequences that hurt political participation. Accordingly, courts should protect only *core equality rights*, leaving peripheral concerns to the political processes themselves.

Under these principles, the dignitary rights cases were wrongly decided. Consider *Shaw*:

Taking race into account in districting violates *no core equality principle*. It denies no one essential political rights; it does not violate the antiplutocracy principle by taking wealth or property ownership into account; and it violates no collective action principle. It does not even violate any *contested* political equality principle that the Court might recognize. In short, though the *Shaw* Court used the label of equal protection, there does not appear to be any political equality problem at issue in these cases. Even when the government “sends a message with its conduct” in a political equality case, we should view that message as irrelevant if it has no bearing on real political power relationships.³⁷

As for *Bush* and *Purcell*, both cases have the same objectionable feature: in recognizing inchoate dignitary rights, the Court maligns *real* equal protection rights on the other side of each case. Thus, in crafting the remedy in *Bush* to end the statewide recount of ballots,³⁸ the Court violated a core political equality principle: the right to have one’s vote *counted*. “The Court did so by refusing to

³⁶ RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* chs. 2,3 (2003).

³⁷ *Id.* at 142.

³⁸ *Bush*, 531 U.S. at 533 (“The Supreme Court of Florida has said that the legislature intended the State’s electors to “participat[e] fully in the federal electoral process,” as provided in 3 U.S.C. § 5. 772 So.2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1237 (Fla.2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court’s order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.”)

remand the case to the Florida courts for a recount in accordance with a uniform standard.”³⁹ When the Court ended the case without a remand, “it essentially decided the presidential election, rather than allowing the decision to be determined by votes cast where the voter’s intention was clear.”⁴⁰

In *Purcell*, the Court purported to balance the fundamental right to vote of voters lacking identification against the interest of supposedly disillusioned voters who “will feel disenfranchised.”⁴¹ Aside from the fact that the Court offered absolutely no evidence for its empirical statements that voters are deterred from voting out of fear that their legitimately cast votes will be diluted by those committing voter fraud,⁴² “the Court offered no explanation *why* it is appropriate to balance *feelings* of disenfranchisement against *actual* disenfranchisements.... Moreover, the Court did not acknowledge that some voters might ‘feel’ disenfranchised when the state imposes barriers on voting such as a voter identification law without proof that such laws are necessary to deter voter fraud.”⁴³

These points dovetail into Gardner’s observations of the inherent weakness of the Court’s recognition of inchoate dignitary rights. Not only are such rights ill-formed and ill-conceived once one properly recognizes the role of voters as part of the democratic process. The recognition of such rights also has the potential to blind courts to violations of *real* political rights that get shunted to second-order status. That the Court has failed to recognize these violations lends further support to my argument in Part I that these dignitary rights cases are not rights cases at all—they are (misguided) structural adjudications aimed at assuring the proper functioning and allocation of powers and responsibilities in the electoral process.

CONCLUSION

Professor Gardner has once again shed considerable light on the Supreme Court’s election law jurisprudence. Through a theoretical examination of the role of voters in a democratic polity, Gardner has made a strong case against the recognition of second-order dignitary rights in cases such as *Shaw*, *Bush*, and *Purcell*. But Gardner has been wrong to lay the blame for these cases at the feet

³⁹ *Id.* at 84.

⁴⁰ *Id.*

⁴¹ *Purcell*, 549 U.S. at 4.

⁴² *Id.* (stating that concerns about voter fraud “drive[] honest citizens out of the democratic process and breed[] distrust of our government”). See Richard L. Hasen, *The Untimely Death of Bush v. Gore* 35 (2007) (criticizing Court in *Purcell* for failing to cite any evidence supporting this conjecture).

⁴³ *Id.* at 36.

of those of us who subscribe to an individual rights view of election law jurisprudence. Properly understood, these cases are indefensible on individual rights grounds: they are really structural cases in disguise.

For those, like Gardner, subscribing to the structuralist program for deciding election law cases, the next task is to show how the Court applied the *wrong* structuralist values to these cases, and what should replace it. One place to begin is with *Purcell*. If I am right that the best understanding of *Purcell* is as a structural case designed to keep last-minute election litigation out of the Supreme Court, perhaps Gardner—who expresses similar concerns in his article⁴⁴—should reconsider and embrace the case rather than criticize it. If he will not, perhaps he thinks more of the individual rights approach than he would care to admit.

⁴⁴ Gardner, *supra* note 1, at ____ (manuscript at 36) (stating it is “especially damaging” for the Court to inject itself “just at the point in the electoral process when the need for finality and prompt conferral of a collective imprimatur of democratic legitimacy is greatest”).