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A Critical Guide to Bush v. Gore Scholarship

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A CRITICAL GUIDE TO *BUSH V. GORE* SCHOLARSHIP

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■ **Abstract** This article evaluates the emerging legal and political science scholarship created in the wake of the United States Supreme Court's decision in *Bush v. Gore*, the case that ended the 2000 Florida election controversy between supporters of George W. Bush and Al Gore. It surveys answers that scholars have given to four central questions: (1) Were the Supreme Court's majority or concurring opinions legally sound? (2) Was the Supreme Court's result justified, even if the legal reasoning contained in the opinions was unsound? (3) What effects, if any, will the case and the social science research it has spurred have on the development of voting rights law? (4) What does the Court's resolution of *Bush v. Gore* tell us about the Supreme Court as an institution?

INTRODUCTION

Emotions ran high during the controversy that followed the U.S. presidential election of 2000. Political inclinations seemed to drive both public and elite opinion regarding how the courts should resolve the various legal challenges brought by Democratic nominee Al Gore, Republican nominee George W. Bush, and others in the battle over Florida's 25 electoral votes.

The pattern persisted after the Supreme Court decided *Bush v. Gore*, a case that struck down, on constitutional equal protection grounds, the recount of ballots ordered by the Florida Supreme Court. The decision handed Florida's electoral votes, and therefore the presidency, to George W. Bush. With a few notable exceptions, political orientation tended to be a very reliable predictor of whether one supported or opposed the result (though not necessarily the reasoning or remedy) of the Supreme Court case.

Legal scholars and political scientists who wrote in the immediate wake of the decision were not immune to this phenomenon. It was not that scholars deliberately skewed their analyses to favor one side or the other. Rather, as Sunstein (2001a) noted, ideology or political sensibility seemed to color one's view of the salient facts and ambiguous language in the Court's opinion.

The trend continued into 2003, when a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued an order delaying the election that would consider a recall of California governor Gray Davis (*Southwest Voter Registration and Education Project v. Shelley*). The panel said that the selective use of punch-card voting machines, with their allegedly higher error rates, violated the right of equal protection the Supreme Court had established in *Bush v. Gore*.

As a larger panel of the Ninth Circuit reconsidered this ruling (it ultimately reversed, without really deciding the merits of the *Bush v. Gore* claim), scholars took sides again, but with an interesting twist. At least some of those who had supported the Democratic side in *Bush v. Gore* now argued that *Bush v. Gore* should be read broadly to protect voting rights. At least some of those who championed Bush's arguments in 2000 now argued that *Bush v. Gore* had no (or practically no) precedential value, or at least that it should be read narrowly.

I offer these observations to caution that what has been written thus far about the case--including this essay---may lack a more dispassionate perspective that comes with the passage of time and the cooling of emotions. Certainly, reactions to the Ninth Circuit's punch-card ruling (nearly three years after the Florida controversy) indicate that emotions continue to run high. Still, enough has been written about *Bush v. Gore* that it is worth surveying the current landscape and fault lines.

Journalists were the first to emerge with book-length accounts of the 36 days between Election Day and December 12, 2000, when the Supreme Court decided *Bush v. Gore* (Downie 2001, Merzer 2001, Wright 2001). Scholarly chronologies of events soon followed, included within larger analyses of the controversy (Gillman 2001, Greene 2001, Issacharoff et al. 2001, Jacobson & Rosenfeld 2002, Lowenstein & Hasen 2001, Sunstein & Epstein 2001). This essay begins with a description of the salient events that surrounded the emergence of the *Bush v. Gore* decision so as to situate the emerging

scholarship. It then turns to the four major questions that *Bush v. Gore* scholarship thus far has addressed:

1. Were the Supreme Court majority or concurring opinions legally sound?
2. Was the Supreme Court's result justified, even if the legal reasoning contained in the opinions was unsound?
3. What effects, if any, will the case and the social science research it has spurred have on the development of voting rights law?
4. What does the Court's resolution of *Bush v. Gore* tell us about the Supreme Court as an institution?

A BRIEF BACKGROUND ON *BUSH V. GORE*

In the days before the 2000 election, everyone recognized that George W. Bush was locked in an extremely close race with Al Gore. In fact, the election was so close that the final outcome depended on the results in Florida, where the initial count showed Bush leading by 1784 votes out of millions of votes cast in the state.¹

Florida law provided for an automatic machine recount of the votes in such a close election, and while those recounts occurred, analysts examined more closely both the voting technology and ballot forms used in various Florida counties. Many previously ignored problems with election administration came to light as a result of the controversy. For example, Democrats focused on the "butterfly ballot" used in Palm Beach County, a ballot that listed candidates for president on two pages facing each other with a punch-card vote to be cast along the ballot's spine. Democrats claimed that ballot design made it unduly likely that voters would cast votes for someone other than their preferred candidate. Reform Party candidate Pat Buchanan received 3704 votes in Palm Beach County, nearly 2700 more than he received in any of Florida's other counties; in addition, ~19,000 ballots were thrown out as "overvotes" (ballots containing votes for more than one presidential candidate).

¹ Different versions of this brief chronology appear elsewhere (Hasen 2001a, 2003, 2004).

As the automatic recounts continued, Gore filed an election “protest” asking for a manual recount of the vote in four counties, three of which used punch cards. When it seemed the recounts could not be done in time to meet state deadlines, Gore sought an extension of time for the manual recounts; Republicans argued against the extension and argued that the law did not allow for manual recounts absent a machine error in counting the votes. The Florida Supreme Court issued an opinion allowing the recounts and extending the time to complete them (*Palm Beach County Canvassing Board v. Harris*).

Bush appealed the decision to the U.S. Supreme Court. He contended that the Florida Supreme Court’s opinion violated Article II of the Constitution, which provides that “[e]ach state shall appoint, in such manner as the legislature thereof may direct, a number of electors....” Bush argued that the Florida opinion was in essence “new law” and therefore constituted the choosing of electors in a manner other than that directed by the Florida legislature. The Supreme Court issued a brief, unanimous, *per curiam* (unsigned) opinion remanding the case to the Florida Supreme Court for clarification as to whether the opinion was consistent with the Florida legislature’s rules for choosing electors or was potentially in violation of Article II.

After the Florida secretary of state certified Florida’s electoral votes in favor of Bush, Gore filed a separate election “contest,” asking for a selective manual recount of nearly 10,000 undervotes from Miami-Dade County and ~4000 votes set aside in Palm Beach County where their legality was in dispute. (Undervotes are ballots that fail to record a valid vote for any candidate.) The trial court held that Gore failed to meet the statutory standard for a contest, and Gore appealed to the Florida Supreme Court.

The Florida Supreme Court, in a 4--3 vote, reversed the trial court. The court held that the trial court had applied the wrong legal standards in judging the merits of Gore’s claim (*Gore v. Harris*). The Florida Supreme Court ordered that certain recounts, conducted after the deadline it had set in an earlier case, be included in the totals and that a manual recount of undervotes go forward. The court held that all Florida counties---and not just the counties singled out by Gore---had to conduct manual recounts of the undervotes.

The court further held that in examining the undervotes to determine whether the ballots indeed contained a valid vote for a presidential candidate, the counters should use a “clear intent of the voter” standard, as indicated in Florida statutes. The court failed to

be more specific, perhaps out of fear that a more specific standard would violate the U.S. Supreme Court's understanding of Article II of the U.S. Constitution expressed in the *Harris* opinion (Dershowitz 2001, p. 45).

While a state court judge organized the recount process, Bush filed a petition for a writ of certiorari and a stay in the U.S. Supreme Court. As the recounts began on Saturday, December 9, the Supreme Court, by a 5--4 vote, stayed the Florida Supreme Court's order, thereby suspending the recount.

The U.S. Supreme Court heard oral argument on December 11, and late in the evening of December 12, the Supreme Court issued its opinion on the merits of the case. Five justices (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas) joined in a *per curiam* opinion reversing the Florida Court on equal protection grounds (*Bush v. Gore*). The Chief Justice, joined by Justices Scalia and Thomas, issued a concurring opinion that decided the case under Article II of the Constitution. Four justices dissented (Justices Breyer, Ginsburg, Souter, and Stevens), although Justices Souter and Breyer expressed support for the equal protection rationale (though not the remedy).

The Court majority held that the recount mechanism adopted by the Florida Supreme Court did "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote under the Equal Protection Clause for four related reasons:

1. Although the Florida court had instructed that the individuals conducting the manual recounts judge ballots by discerning the "intent of the voter," it failed to formulate uniform rules to determine such intent, such as whether to count as a valid vote a ballot whose chad is hanging by two corners.
2. The recounts already undertaken included a manual recount of all votes in selected counties, including both undervotes and overvotes, but the new recounts ordered by the Florida court included only undervotes.
3. The Florida Supreme Court had ordered that the current vote totals include results of a partial recount from Miami-Dade County. From this fact, the U.S. Supreme Court concluded that the "Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete."

4. The Florida court did not specify who would count the ballots, forcing county boards to include team members without experience in recounting ballots. Nor were observers permitted to object during the recount.

The U.S. Supreme Court then declined to remand the case to the Florida Supreme Court to order procedures that satisfied these concerns, as Justices Souter and Breyer urged. The Court held that the Florida Supreme Court had recognized the Florida legislature's intention to participate fully in the federal electoral process. Under a federal statute, 3 U.S.C. section 5 (designated a "safe harbor" provision by the Court), states that designate their electors by a certain date---in this election by December 12---cannot have their choice challenged in Congress when Congress later counts the electoral votes.

That date [of December 12] 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.

Bush v. Gore. Three justices issued a concurring opinion, which stated that the recount order issued by the Florida Supreme Court violated Article II of the United States Constitution. The concurrence's theory was that the Florida Supreme Court's recount standards constituted new law, in derogation of the exclusive power of the state legislature to choose the rules for selecting presidential electors.

THE LEGAL REASONING OF THE *BUSH V. GORE* MAJORITY AND CONCURRING OPINIONS

The Majority Opinion

EQUAL PROTECTION HOLDING The dominant initial reaction of the admittedly liberal legal academy to the *Bush v. Gore* majority opinion was swift and harsh. More than 600 law professors signed a statement, which appeared in the *New York Times*, accusing the Court of using its power "to act as political partisans, not as judges of a court of law" (see Gillman 2001, Radin 2002).

Critics argued that the *Bush v. Gore* majority applied equal protection law and remedies rules in an unprincipled manner to insure that George W. Bush and not Al Gore

would be sworn in as the next American president. As Gillman (2001, p. 189) put it, “The five justices in the *Bush v. Gore* majority are thus the only judges involved in this election dispute who fall uniquely within the category that is most indicative of partisan justice: they made a decision that was consistent with their political preferences but inconsistent with precedent and inconsistent with what would have been predicted given their views in other cases.”² The fact that the opinion contained language intended to limit its precedential value only added to these scholars’ concerns (Dworkin 2002a; see also Tribe 2002 for sustained criticism of the Court’s decision).

These scholars were surely right to assert that the Supreme Court had never before extended equal protection jurisprudence to the “nuts and bolts” of elections, an area in which the courts had granted a large degree of local discretion in the past (Hasen 2001a).³ Indeed, in the aftermath of the *Bush* opinion, virtually no one defended the Court’s equal protection analysis as a principled application of prior precedent (Dworkin 2002a, pp. 9--10; but see Lund 2002 for the most sustained---though strained---effort). At best, *Bush* was a considerable stretch of existing precedent in the context of a highly charged political case (Pushaw 2001).

But *Bush v. Gore* fits a pattern of Supreme Court regulation of the political process that dates back to the 1960s (Hasen 2003). Warren Court cases venerated by the liberal academy, such as *Baker v. Carr* (which allows courts to entertain challenges to malapportioned districts) and *Harper v. Virginia State Board of Elections* (which struck down a neutrally applied poll tax), also were cases in which the Court sidestepped or overruled earlier contrary authority. In terms of affecting political outcomes, the reapportionment revolution ushered in by *Baker v. Carr*, *Wesberry v. Sanders*, and

² Dershowitz (2001, p. 68) further argues that the decision to end the recount created a larger equal protection problem than it solved by not recounting valid votes for president on ballots that were misread by the vote-counting machines.

³ The Court appeared to create the new equal protection right using the language of “strict scrutiny,” potentially making it difficult for local jurisdictions in the future to engage in meaningful and appropriate variation in their practices of election administration (Briffault 2001).

Reynolds v. Sims is at least as momentous as the political changes wrought by *Bush v. Gore*.

A few scholars have attempted to rehabilitate the legal analysis of *Bush v. Gore*. Rehabilitative efforts reconceive the problem with the Florida Supreme Court's recount rules as one of "due process" (Schotland 2002) or procedural fairness. Elhauge (2001) decries "standardless discretion," and Greene (2001), drawing on First Amendment cases, refers to "unconstrained discretion." The Florida court's failure to enunciate a uniform standard for the recounting of votes, this argument goes, would have led to an arbitrary outcome in the recount because different vote-counting officials, both within and across counties, could apply different standards to the same question. These scholars emphasize that recount decisions were to be made initially by partisan decision makers rather than by neutral election-law officials, by judges elected on nonpartisan ballots, or by machines.

REMEDY Many scholars with some sympathy for the Court's equal protection holding have vehemently attacked the Court's decision on remedy. The Court could have remanded the case to the Florida Supreme Court to issue a recount standard comporting with the newly announced equal protection right. If, indeed, the Court believed that strict scrutiny applied to questions of how to count votes (see footnote 4), it is odd that the Court allowed a federal statute setting a time limit for counting electoral votes to trump the right to have votes counted according to a uniform vote-counting standard (Hasen 2001a).

The due process/procedural fairness rehabilitation does not remove the remedy problem, and some rehabilitative scholars, e.g., Schotland (2002), do not defend the remedy. Critics assert that procedural problems would have been solved in the course of a recount; the state trial judge whom the Florida Supreme Court charged with supervising the statewide recount could have insured uniformity of counting standards Chemerinsky (2004, p. 95). The argument is difficult to assess because the counting never took place, and we do not know what kind of supervision that trial judge would have or could have exercised to resolve disparities in vote-counting rules within or among counties.

Moreover, the counterargument goes, after remand the Florida Supreme Court could have solved due process problems by adopting a uniform vote-counting standard and

taking discretion away from ballot judges. Elhauge (2001) argues that this would have been no solution because the Florida court would have chosen a standard with knowledge of which standard would help Gore or Bush. Elhauge's argument incorrectly assumes the Florida court had adequate information to help one side or the other if it wanted to do so; it is belied by retrospective analyses (see footnote 8) showing that the recount standards advocated by Gore would have helped Bush and the recount standards advocated by Bush would have helped Gore.

Some conservatives joined liberals in attacking the Court's remedy. McConnell (2001, p. 118), for example, wrote a piece called "Two-and-a-Half Cheers for *Bush v. Gore*," leaving off the last half-cheer for the Court's remedy. Those who defend the remedy tend to take the view that pragmatic reasons, rather than equal protection problems, justify the Court's decision in the case, an issue I return to in Part II.

The Concurring Opinion

The three most conservative justices on the Supreme Court---Chief Justice Rehnquist and Justices Scalia and Thomas---both joined in the majority opinion on equal protection grounds and issued a separate opinion on the alternative ground that the Florida Supreme Court's decision violated Article II of the Constitution by taking away the power to choose presidential electors from the Florida legislature.⁴ These Justices stated that the Florida Supreme Court's interpretation of Florida election law was so far from the accepted rules of statutory interpretation as to constitute "new law" improperly empowering the Florida court, rather than the Florida legislature, as the ultimate arbiter of the rules for choosing presidential electors.

The concurrence echoed the Supreme Court's unanimous decision in the first Florida election case, *Harris*, where the Court suggested that the state legislature's decisions on the means of choosing presidential electors trumped even the Florida constitution's provisions governing the right to vote .

⁴ Abramowicz & Stearns (2001), applying public choice theory, suggested that these three Justices joined in the majority opinion because otherwise there would have been a majority of Justices rejecting both the equal protection rationale and the Article II rationale.

Conservative commentators who approve of the Supreme Court's result give more support to this argument than to the equal protection rationale offered by the *Bush v. Gore* majority (Posner 2001a,b; McConnell 2001). Epstein (2001) is probably the strongest supporter of the Article II rationale. Calling the equal protection rationale "a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it" (Epstein 2001, p. 14), Epstein believes a constitutional violation occurs when "the state court's interpretation [of the legislative provisions governing the choosing of presidential electors] does not fall within the boundaries of acceptable interpretation, but rather represents what must be called, for want of a better term, a gross deviation from the scheme outlined in the statute" (Epstein 2001, p. 20). Epstein then sets forth his views on how the Florida Supreme Court opinions fell on the wrong side of this line [but see Kramer's (2001) defense of the Florida Supreme Court's analysis].

Attacks on the Article II interpretation come in two varieties. Some argue that the scope of Article II has itself been misinterpreted, that at least historically it was not understood to favor state legislatures to the exclusion of state courts or state constitutions. Smith (2001). Others argue that the Florida Supreme Court's interpretation of Florida law did not violate Article II: "Although the principle underlying the Rehnquist concurrence is sound, the application is bewildering. The Florida Supreme Court's construction of Florida law, while in no way dictated by precedent or the plain language of the statutory scheme, was at a minimum, plausible" (Krent 2001, p. 497).

DEFENDING AND ATTACKING THE RESULT IN *BUSH V. GORE*⁵

The analysis in the previous section illustrates some of the difficulties that the Supreme Court faced in resolving the Florida election dispute. The Court could have avoided these difficulties by denying review; review of the Florida Supreme Court's decisions was entirely discretionary under the Supreme Court's certiorari procedure. Indeed, few predicted before Court intervention that the Court would enter the dispute (Tribe 2002, p. 150).

A number of scholars have argued that the Court was wrong to intervene. Had the recount ordered by the Florida Supreme Court taken place and had the Florida courts

⁵ A portion of this section appeared in slightly different form in Hasen (2001b).

declared Gore the winner, entitled to a slate of electors from Florida, it seems likely that the Florida legislature would have chosen an alternative Bush slate of electors, and the question would have been resolved by Congress. These scholars contend that the Florida election controversy raised a political question best resolved by the political branches---the Florida legislature and Congress under the Electoral Count Act (Garrett 2001, Issacharoff 2001).

That prospect of political resolution, however, worried some scholars, e.g., Sunstein (2001b, p. 221), and was anathema to others. Judge Posner (2001a,b) has offered the most sustained argument that the Supreme Court's intervention and decision to stop the recount was a pragmatically defensible position that averted a constitutional crisis. Posner rejects the *Bush v. Gore* majority's equal protection analysis and expresses tepid support for the Article II argument. His main argument is the pragmatic crisis-prevention rationale: Had the recounts continued, argues Posner (2001b, p. 134), "what could have ensued is fairly described as chaos, providing a practical argument in favor of the Court's remedy."

Posner sets out several alternative scenarios---such as Florida presenting Congress with rival slates of electors---that could have occurred. He is right to recognize the possibility, although there was a significant possibility (seriously discounted by Posner) that Bush would have been declared the winner of the recount or that the Florida courts would have ended the recounts because of lack of time to complete them. Posner even spins out a far-fetched scenario in which former Treasury Secretary Lawrence Summers is appointed acting president, as those in the constitutional line of succession decline or are found ineligible to serve in office.

The most likely scenario, as Posner perhaps would admit, is that Congress would have counted electoral votes from each state and resolved the dispute before January 20, 2001, when the new president was to take office. Although some argue that Congress would probably have supported Bush, Marshall (2001, p. 803) suggests that Congress might have deadlocked on choosing a slate of electors.

How is political resolution a crisis? Posner (2001b, p. 138) suggests that the "new President would have started behind the eight ball, with an irregular and disputed accession, an abbreviated term of office, and no transition." At another point, Posner

suggests there might have been rioting in the streets, although that seems highly unlikely. He also suggests that congressional resolution of the crisis would have been seen as illegitimate by the American public.

Posner's argument is unconvincing. It is not clear how weakened a presidency Bush would have assumed (of course, no one could have foreseen the events of September 11, 2001). After all, the United States had survived Gerald Ford with no transition at a time of much greater political turmoil. Ultimately, Posner's analysis exhibits an unhealthy fear of politics and lack of faith in the American people's ability to abide by a political solution made by the political branches. As discussed below, Posner in this regard has much in common with the *Bush v. Gore* majority. Posner (2001b, p. 145) is gratified that the Supreme Court imposed a political solution and provided a "tincture," or veneer, of justice.

***BUSH V. GORE*, SOCIAL SCIENCE, AND THE SCOPE OF VOTING RIGHTS**

A smattering of social science research on voting technology existed before the 2000 election controversy introduced the term "hanging chad" into the American lexicon (see, e.g., Saltman 1975). But research on voting technology, ballot design, and related issues exploded after the controversy revealed that these seemingly technical matters had real-world political implications.⁶

On the question of ballot design, Wand et al. (2001) convincingly argue that the Palm Beach County "butterfly ballot" design effectively cost Al Gore the election if everything else is held constant. To be sure, it was the combination of a bad ballot design and an extremely close race [what Ceasar & Busch (2001) call "the perfect tie"] that led to such a result, but there are enough close races across the many federal, state, and local elections that the issue of ballot-design effect on voter choices continues to attract attention.

Social scientists have paid even more attention to the question of voting technology. The *Bush v. Gore* litigation revealed that voter or tabulating-machine error was a

⁶ Al Gore's ability to capture the popular vote but lose the Electoral College has spurred some political scientists to consider Electoral College reform, though the prospects seem dim (see Polsby 2002).

significant problem with balloting and that error rates varied with the type of voting technology used.

Much scholarship focused on punch-card technology. In jurisdictions that have adopted punch-card technology, voters use a stylus to punch a perforated piece of paper (or “chad”) out of a ballot card. The chad punched out corresponds to the candidate or issue the voter prefers. The tabulating machines then read the holes in those cards to tally votes.

Post-Florida studies by the Caltech-MIT Voting Technology Project (2001) and others revealed punch-card voting technology among the least reliable for correctly counting voters’ intended votes.⁷ Paper ballots and optical scan machines with error correction at the polling places showed the lowest error rates. Social scientists have begun to consider the precise reason why punch-card technology causes high error rates, as well as a related question: whether race correlates with voter error when punch card machines are used (cf. Alvarez et al. 2004, Ansolabehere 2002, Ansolabehere & Stewart 2004, Herron & Sekhon 2004, Tomz & van Houweling 2003).

No consensus has yet emerged on the issue. Tomz & van Houweling (2003) find that the use of lever and electronic voting machines, compared to punch cards and optically scanned ballots, considerably lessens the gap between African-Americans and whites in

⁷ The National Organization for Research (NORC) at the University of Chicago, on behalf of a consortium of news organizations, conducted a manual recount of the ~180,000 Florida ballots cast in the 2000 presidential election that failed to record a valid vote for president (NORC Florida Ballot Project 2001). Using the NORC data, Calmes & Foldessy (2001) reported that Bush would have won Florida by 493 votes if the statewide undervote counting ordered by the Florida Supreme Court had continued, and by 225 votes if hand recounts had been conducted in the four counties picked by Gore. Keating & Balz (2001) reported similar conclusions and added that if Gore had found a way to trigger a statewide recount of all disputed ballots, or if the courts had required it, the election may have gone to Gore by “the narrowest of margins.” Barstow & Van Natta (2001) reported the results of a separate *New York Times* study showing that 680 late-arriving absentee ballots did not meet Florida’s standards yet were still counted. A vast majority of those flawed ballots were accepted in counties that favored Bush.

the percentage of overvotes. The analysis suggests the elimination not only of punch cards but also of optical scanning machines, whose reliability rates (at least in those poll sites with error-correction technology) have been relatively high. Herron & Sekhon (2004), in contrast, provide evidence that many African-American nonvotes are intentional and depend in part on the absence of a black candidate on the ballot.

The issue of punch-card error attracted renewed attention when the American Civil Liberties Union (ACLU) filed suit during the 2003 California gubernatorial recall race. The ACLU sought to have the election delayed until California could replace the punch-card technology used in six California counties, including its largest, Los Angeles. Plaintiffs argued that the selective use of punch-card voting in some but not all jurisdictions violated the constitutional right of equal protection established in *Bush v. Gore*.⁸ A three-judge panel of the Ninth Circuit initially accepted the argument and ordered a delay in the election, but a larger (en banc) panel of the same court later overturned this result (*Southwest Voter Education and Registration Project v. Shelley*). The California recall race was not close, and so the choice of voting technology did not appear to affect the outcome of the race.

The recall litigation was not the first post--*Bush v. Gore* court challenge to the use of punch-card voting. California, Florida, Georgia, and Illinois agreed to phase out punch-card voting in the face of such a challenge. The recall litigation arose because California's settlement did not require the phase-out until March 2004. The Illinois case settled after a federal district court held that the selective use of punch-card technology could violate *Bush v. Gore*'s equal protection claim (*Black v. McGuffage*).

The legal question that voting technology research raises is the extent to which *Bush v. Gore*'s admonition that it is impermissible for a state to "value one person's vote over that of another," combined with new social science, opens a window for more litigation to ensure better (or at least more equal) voting rules and equipment.

Hasen (2004) argues that the Supreme Court opinion opened a window for plaintiffs who seek voting reform to use social science to force jurisdictions to make certain

⁸ As a matter of disclosure, I filed an amicus brief on my own behalf supporting the ACLU's position in this litigation. I also consulted for the city of Compton in the litigation described below.

changes in their voting rules or equipment (see also Mulroy 2002). The window may soon close if the Supreme Court revisits the meaning and precedential value of *Bush v. Gore*. Schwartz (2002, pp. 681--82) puts forward an even more ambitious attempt to use equal protection law to force jurisdictions to make such changes, urging the courts to go beyond a generous reading of *Bush v. Gore*. The en banc Ninth Circuit's decision to let the California recall election go forward as scheduled demonstrates that even if *Bush v. Gore* leaves open the window for election reform, it does not necessarily allow changes in the midst of an election process already under way.

Litigation to spur election reform at least sometimes has salutary results for political equality, but the picture is not all rosy. The danger is that courts will become too enamored by the social science research and lose sight of the need for legally significant proof. One unprecedented recent example occurred in an election contest involving the small southern California city of Compton. The trial court held that the Compton city clerk violated state law by placing one candidate's name before the other candidate's name in violation of the "randomized" alphabet order that state law mandated be used for the election. The court credited the testimony of Krosnick that it was extremely likely that the ballot order affected the outcome of the election. Krosnick et al. (2004) finds that candidates listed first on the ballot gain an advantage in voting. Surprisingly, the judge did not simply order a new election; she ordered the losing candidate declared the winner and immediately sworn into office (Hasen 2004, p. 195). A California appellate court reversed the verdict of the trial judge and reinstated the original winner, but the trial court decision serves as a reminder of the dangers of social science conjecture in the courtroom.

The Florida election controversy and subsequent social science research also produced a legislative response. In addition to action in the states, in 2002 Congress passed the Help America Vote Act (HAVA, 42 U.S.C. §15301, 116 Stat. 1666). Among other things, that statute provides funds for jurisdictions to phase out punch-card voting technology. Future scholarship will no doubt consider HAVA's effect on achieving parity in voting systems, assuming (a big assumption at the time of this writing) that Congress appropriates sufficient funds to pay for HAVA's programs.

***BUSH V. GORE* AND THE SUPREME COURT AS AN INSTITUTION**

Not surprisingly, scholars have attempted to put the Supreme Court's *Bush v. Gore* decision into a larger institutional context. Given the scorn that many liberal scholars have heaped on the opinion, it is not surprising that some see the decision as little more than a partisan (i.e., Republican-majority) court advancing its agenda through *Bush v. Gore* and other antidemocratic (and sometimes anti-Democratic) opinions. Raskin (2003, p. 3) offers the most forceful and sustained version of this argument: "Far from rendering neutral justice, the conservative Court has developed racial and partisan double standards to govern democratic politics."

Raskin thus ties *Bush v. Gore* to, other election law cases he views as antidemocratic—especially the *Shaw v. Reno* line of cases (discussed below) holding certain racial "gerrymanders" unconstitutional and the Court's recent third party cases, where the Court has lately allowed states affirmatively to favor the two-party system. Raskin's critique is strong, although convincingly attributing partisan motives to the Justices is difficult even in *Bush v. Gore* (Kramer 2001, p. 150).

Moreover, Raskin's analysis could benefit from a comparison with election law cases predating the Rehnquist Court. He remarks that liberals "starstruck by the Warren Court" forget that "[w]e cannot really expect the Court to render active justice for us" (Raskin 2003, p. 2). But he fails to consider the extent to which the Warren Court was similarly activist and unmoored from constitutional text or history, only in a way that favored a more liberal political agenda. Hasen (2003) describes a series of Warren Court voting-rights precedents that overturned existing precedents or advanced novel constitutional interpretations.

Pildes (2001, 2002) offers a more nuanced view of what he terms the constitutionalization of democratic politics, in which the Court sees itself as the ultimate arbiter of the form of political processes acceptable in the United States. "Constitutional law now sharply constrains the possibilities for experimentation with the forms of democratic politics; constitutional law now limits the structural changes through which disaffection with the current practices of democratic politics can be given institutional expression" (Pildes 2002, p. 155). Pildes is surely right to assert that much more election law has been constitutionalized in recent years. During the period 1901--1960, the Court decided an average of about 10 election law cases per decade. After the Warren Court's

revolution in the 1962 *Baker v. Carr* case, that number jumped to about 60 per decade (Hasen 2003, p. 1).

Pildes also admirably describes the recent direction of constitutional change. Tying *Bush v. Gore* to cases such as *California Democratic Party v. Jones*, which struck down California's blanket primary, Pildes (2002, p. 183) identifies on the Court a Posnerian fear of politics. "[T]he Court's actions seem to manifest anxiety about the capacity of other institutions, including political ones such as Congress, to avoid unleashing what the Court might well have perceived as 'the furies of civil commotion, chaos, and grave dangers'"

Pildes is disturbed less by the Court's activism than by its agenda. He laments Court intervention on grounds other than that "political insiders are manipulating the rules of democracy for self-interested reasons." Pildes (2002, p. 186), . Endorsing a process-oriented approach to election law cases (see Ely 1980), Pildes has called for an activist Court to "destabilize political lockups in order to protect the competitive vitality of the electoral process" and to preserve an "appropriately competitive political order" (Issacharoff & Pildes 1998), a structuralist project that assumes "unlimited judicial wisdom" (Hasen 2003, p. 155).

Indeed, others see in *Bush v. Gore* the Court already embarking down the structuralist path, being less concerned with individual or group rights than with the proper functioning of the political process. Karlan (2001) ties the *Bush* equal protection holding to the earlier controversial 1993 Supreme Court case *Shaw v. Reno*. In *Shaw*, the Court for the first time recognized a cause of action for an "unconstitutional racial gerrymander," in which a jurisdiction draws lines in redistricting that take race into account in a way that conveys to those in the district that there is separation on the basis of race. In *Shaw*, the bizarre shape of the district seemed key to evaluating this "expressive harm," but in later cases the Court majority (the same five justices as in the *Bush* majority) explained that the problem occurs when race is the "predominant factor" motivating the legislative body's redistricting decision (*Miller v. Johnson*).

Karlan (2001) sees *Shaw* and *Bush* as raising "structural equal protection" claims. Rather than remedying state discrimination in voting rights that affect the political power of individuals or groups, these cases are concerned about the proper structure or function

of the political process. “In this newest model of equal protection, the Court deploys the equal protection clause not to protect the rights of an individual or a discrete group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted” (Karlan 2001, p. 78).

No discussion of the Supreme Court as an institution post--*Bush v. Gore* can ignore the question of the decision’s effect on the Court’s legitimacy. There appears to be a fundamental divide between the mostly liberal legal academy and the American public, with the academy much more skeptical of the Court’s performance in 2000 than the public has been [but Yoo (2001, pp. 226--27) notes at least an initial partisan split among the public]. Ackerman (2002) dedicated an entire book to the question of the Court’s legitimacy in light of *Bush v. Gore*, and most contributors to Ackerman’s volume have serious questions about the Court’s performance on December 12, 2000. An exception is Fried (2002), a conservative, who disputes Ackerman’s points on legitimacy. Ackerman’s analysis seems fundamentally disconnected from the willingness of the public---apart from some core Democratic activists---to move on and not connect the Court’s legitimacy to the case. Gibson et al. (2003) finds little if any diminution of the Court’s legitimacy in the aftermath of *Bush v. Gore*, even among African-Americans.

The main public manifestation of disputes over the Court’s legitimacy in light of *Bush v. Gore* has been to embolden Democrats to block more of Bush’s judicial nominees, as Polsby (2002, p. 282) and Gillman (2001) predicted. At the time of this writing, Bush had not yet had the chance to make a nomination to the Supreme Court, and that could well open up the 2000 wounds yet again. In the meantime, the larger political meaning of the Supreme Court’s unprecedented intervention remains uncertain.

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