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Cass R. Sunstein

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# Order Without Law

Cass R. Sunstein†

Under the leadership of Chief Justice William Rehnquist, the Supreme Court of the United States has generally been minimalist, in the sense that it has attempted to say no more than is necessary to decide the case at hand, without venturing anything large or ambitious.<sup>1</sup> To some extent, the Court's minimalism appears to have been a product of some of the justices' conception of the appropriately limited role of the judiciary in American political life. To some extent, the tendency toward minimalism has been a product of the simple need to assemble a majority vote. If five or more votes are sought, the opinion might well tend in the direction of minimalism, reflecting judgments and commitments that can command agreement from diverse people.

To be sure, the Court has been willing, on occasion, to be extremely aggressive. In a number of cases, the Court has asserted its own, highly contestable vision of the Constitution against the democratic process. This aggressive strand has been most evident in a set of decisions involving federalism;<sup>2</sup> it can be found elsewhere as well.<sup>3</sup> But generally these decisions have been minimalist too. Notwithstanding their aggressiveness, they tend to decide the case at hand, without making many commitments for the future. Sometimes those decisions have even been "subminimalist," in the sense that they have said less than is required to justify the particular outcome.<sup>4</sup>

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<sup>1</sup> For a general discussion of judicial minimalism, see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999).

<sup>2</sup> *United States v Morrison*, 120 S Ct 1740, 1759 (2000) (striking down the Violence Against Women Act as beyond the power of Congress under the Commerce Clause); *City of Boerne v Flores*, 521 US 507, 536 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress's remedial powers under the Fourteenth Amendment); *United States v Lopez*, 514 US 549, 567-68 (1995) (holding that the prohibition of firearm possession near schools was outside the power of Congress).

<sup>3</sup> Justices Antonin Scalia and Clarence Thomas are fairly consistent maximalists, on the ground that they favor rule-bound decisions. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1178-86 (1989) (discussing reasons to prefer rules over judicial discretion).

<sup>4</sup> See *Romer v Evans*, 517 US 620, 635 (1996) (holding law forbidding special government protections for homosexuals to be invalid under the Equal Protection Clause, without fully explaining its consistency with earlier decisions).

In the Court's two decisions involving the 2000 presidential election, minimalism was on full display. The Court's unanimous decision in *Bush v Palm Beach County Canvassing Board*<sup>5</sup> was firmly in the minimalist camp. Here the Court refused to resolve the most fundamental issues and merely remanded to the Florida Supreme Court for clarification. The Court's 5-4 decision in *Bush v Gore*<sup>6</sup> was also minimalist in its own way, for it purported to resolve the case without doing anything for the future. But here the Court effectively ended the presidential election. It did so with rulings, on the merits and (especially) on the question of remedy, that combined hubris with minimalism.

The Court's decision in *Bush v Gore* did have two fundamental virtues. First, it produced a prompt and decisive conclusion to the chaotic post-election period of 2000. Indeed, it probably did so in a way that carried more simplicity and authority than anything that might have been expected from the United States Congress. The Court might even have avoided a genuine constitutional crisis. Second, the Court's equal protection holding carries considerable appeal. On its face, that holding has the potential to create the most expansive, and perhaps sensible, protection for voting rights since the Court's one-person, one-vote decisions of mid-century.<sup>7</sup> In the fullness of time, that promise might conceivably be realized within the federal courts, policing various inequalities with respect to voting and voting technology. But it is far more likely that the Court's decision, alongside the evident problems in the Florida presidential vote, will help to spur corrective action from Congress and state legislatures.

The Court's decision also had two large vices. First, the Court effectively resolved the presidential election not unanimously, but by a 5-4 vote, with the majority consisting entirely of the Court's most conservative justices. Second, the Court's rationale was not only exceedingly ambitious but also embarrassingly weak. However appealing, its equal protection holding had no basis in precedent or in history. It also raises a host of puzzles for the future, which the Court appeared to try to resolve with its minimalist cry of "here, but nowhere else." Far more problematic, as a matter of law, was the majority's subminimalist decision on the issue of remedy. By terminating the manual recount in

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<sup>5</sup> 121 S Ct 471 (2000) (per curiam).

<sup>6</sup> 121 S Ct 525 (2000) (per curiam).

<sup>7</sup> See *Reynolds v Sims*, 377 US 533, 568 (1964) (holding an apportionment decision violative of the Equal Protection Clause because of the different weight given to different votes); *Baker v Carr*, 369 US 186, 208-37 (1962) (holding state apportionment decision not to present nonjusticiable political questions).

Florida, the Court resolved what it acknowledged to be a question of Florida law, without giving the Florida courts the chance to offer an interpretation of their own state's law.

In a case of this degree of political salience, the Court should assure the nation, through its actions and its words, that it is speaking for the law, and not for anything resembling partisan or parochial interests. A unanimous or near-unanimous decision can go a long way toward providing that assurance, because agreement between diverse people suggests that the Court is really speaking for the law. So too for an opinion that is based on reasoning that, whether or not unassailable, is so logical and clear as to dispel any doubt about the legitimacy of the outcome. The Court offered no such opinion.

From the standpoint of constitutional order, the Court might well have done the nation a service. From the standpoint of legal reasoning, the Court's decision was very bad. In short, the Court's decision produced order without law.

## I. PRELIMINARIES

*Bush v Gore* was actually the fourth intervention, by the United States Supreme Court, in the litigation over the outcome of the presidential election in Florida. In sequence, the Court's interventions consisted of the surprising grant of certiorari on November 24, 2000;<sup>8</sup> the unanimous, minimalist remand on December 4, 2000;<sup>9</sup> the grant of a stay, and certiorari, on December 9, 2000;<sup>10</sup> and the decisive opinion in *Bush v Gore* on December 12, 2000.<sup>11</sup>

### A. The Unanimous, Minimalist Remand

On November 13, Florida Secretary of State Katherine Harris announced that the statutory deadline of November 14, 2000, was final, and that she would not exercise her discretion so as to allow extensions.<sup>12</sup> On November 21, the Florida Supreme Court interpreted state law to require the Secretary of State to extend the statutory deadline for a manual recount.<sup>13</sup> This was a highly controversial inter-

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<sup>8</sup> *Bush v Palm Beach County Canvassing Board*, 121 S Ct 510 (2000) (granting first writ of certiorari).

<sup>9</sup> *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471.

<sup>10</sup> *Bush v Gore*, 121 S Ct 512 (2000).

<sup>11</sup> *Bush v Gore*, 121 S Ct 525.

<sup>12</sup> See *Palm Beach County Canvassing Board v Harris*, 772 S2d 1220, 1225–26 (Fla Nov 21, 2000), vacd and remd as, *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471.

<sup>13</sup> *Palm Beach County Canvassing Board v Harris*, 772 S2d at 1240.

pretation of Florida law, and it might well have been wrong.<sup>14</sup> At the time, however, any errors seemed to raise issues of state rather than federal law.

In seeking certiorari, Bush raised three federal challenges to the decision of the Florida Supreme Court.<sup>15</sup> First, he argued that by changing state law, the Florida Court had violated Article II of the United States Constitution, which provides that states shall appoint electors “in such manner as the Legislature,” and not any court, may direct.<sup>16</sup> Second, Bush invoked a federal law saying that a state’s appointment of electors is “conclusive” if a state provides for the appointment of electors “by laws enacted prior to the day fixed” for the election.<sup>17</sup> According to Bush, the Florida court did not follow, but instead changed, the law “enacted prior” to Election Day, and in his view this change amounted to a violation of federal law.<sup>18</sup> Third, Bush argued that the manual recount would violate the Due Process and Equal Protection Clauses, because no clear standards had been established to ensure that similarly situated people would be treated similarly.<sup>19</sup>

At the time, most observers thought it exceedingly unlikely that the Court would agree to hear the case. Even if the Florida Supreme Court had effectively “changed” state law, it appeared improbable that the United States Supreme Court could be convinced to say so. Whatever the merits, the Court seemed unlikely to intervene into a continuing controversy over the presidential vote in Florida. This was not technically a “political question,”<sup>20</sup> but it did not seem to be the kind of question that would warrant Supreme Court involvement, certainly not at this preliminary stage. To the general surprise of most observers, the Court agreed to grant certiorari, limited to the first two questions raised by Bush.<sup>21</sup>

Bush asked the United States Supreme Court to hold that because the Florida Supreme Court had violated the federal Constitu-

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<sup>14</sup> See, for example, Michael W. McConnell, *Two-and-a-Half Cheers for Bush v Gore*, 68 U Chi L Rev 657 (2001) (discussing how the state supreme court’s decision that the law mandates an extension is wrong); Richard A. Posner, *Bush v Gore: Prolegomenon to an Assessment*, 68 U Chi L Rev 719 (2001) (same).

<sup>15</sup> Petition for Writ of Certiorari, *Bush v Palm Beach County Canvassing Board*, No 00-836 (filed Nov 22, 2000) (available on Lexis at 2000 US Briefs 836).

<sup>16</sup> *Id* at \*18–20, citing US Const Art II § 1, cl 2.

<sup>17</sup> Petition for Writ of Certiorari at \*12–18 (cited in note 15), citing 3 USC § 5 (1994).

<sup>18</sup> Petition for Writ of Certiorari at \*12–18 (cited in note 15).

<sup>19</sup> *Id* at \*20–26.

<sup>20</sup> For a discussion of what constitutes a nonjusticiable political question, see *Baker v Carr*, 369 US 186, 208–37 (1962).

<sup>21</sup> *Bush v Palm Beach County Canvassing Board*, 121 S Ct 510 (2000) (granting certiorari).

tion and federal law, Florida's Secretary of State had the authority to certify the vote as of November 14. For his part, Gore wanted the Court to affirm the Florida Supreme Court on the ground that that court had merely interpreted the law.<sup>22</sup> The United States Supreme Court refused these invitations and took an exceptionally small step, asking the state supreme court to clarify the basis for its decision.<sup>23</sup> Did the state court use the Florida Constitution to override the will of the Florida legislature? In the Court's view, that would be a serious problem, because the United States Constitution requires state legislatures, not state constitutions, to determine the manner of appointing electors.<sup>24</sup> The Supreme Court also asked the state court to address the federal law requiring electors to be appointed under state law enacted "prior to" Election Day.<sup>25</sup> In its own opinion, the Florida Supreme Court had said nothing about that law.

This was judicial minimalism in action. Why did the Court proceed in this way? It seems possible that some of the justices refused to settle the merits on principle, thinking that the federal judiciary should insert itself as little as possible into the continuing electoral struggle. But the most likely explanation is that the Court sought unanimity and found, as groups often do, that unanimity is possible only if as little as possible is decided.

## B. The Astonishing Stay

On December 8, the Florida Supreme Court ruled, by a vote of 4-3, that a manual recount was required by state law, and it thus accepted Gore's contest.<sup>26</sup> This decision threw the presidential election into apparent disarray. With the manual recount beginning, it became quite unclear whether Bush or Gore would emerge as the winner.

On December 9, the Supreme Court issued a stay of the decision of the Florida Supreme Court.<sup>27</sup> This was the first genuinely extraordinary action taken by the United States Supreme Court. It was not only extraordinary but also a departure from conventional practice, and

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<sup>22</sup> See Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *Bush v Palm Beach County Canvassing Board*, No 00-836, \*13-21, 50 (filed Nov 28, 2000) (available on Lexis at 2000 US Briefs 836).

<sup>23</sup> See *Bush v Palm Beach County Canvassing Board*, 121 S Ct at 475 (remanding for further proceedings).

<sup>24</sup> *Id.* at 474.

<sup>25</sup> *Id.*

<sup>26</sup> *Gore v Harris*, 772 S2d 1243, 1260-62 (Fla Dec 8, 2000), *revd and remd as*, *Bush v Gore*, 121 S Ct 525.

<sup>27</sup> *Bush v Gore*, 121 S Ct 512 (2000) (granting certiorari and staying the implementation of the Florida Supreme Court's decision).

one that is difficult to defend on conventional legal grounds—not because Bush lacked a substantial probability of success, but because he had shown no irreparable harm.

To be sure, some harm would have come to Bush from the continuation of the manual recount. It is entirely possible that the recount would have narrowed the gap between Bush and Gore. This would have been an unquestionable harm to Bush, in the nontrivial sense that it would have raised some questions about the legitimacy of his ensuing presidency, if it had subsequently been determined that the manual recount was unlawful.<sup>28</sup> But the question remains: How serious and irreparable would this “harm” have been? If the manual recount was soon to be deemed unlawful, would the Bush presidency really have been “irreparably” harmed? This is extremely doubtful.

At the same time, the stay of the manual recount would seem to have worked an irreparable harm to Gore. For Gore, time was very much of the essence, and if the counting was stopped, the difficulty of completing it in the requisite period would become all the more serious. By itself, the Supreme Court’s stay of the manual recount did not hand the election to Bush. But it came very close to doing precisely that.

In these circumstances, can anything be said on behalf of the stay? A reasonable argument is available, at least in retrospect. Suppose that a majority of the Court was entirely convinced that the manual recount was unlawful, perhaps because in the absence of uniform standards, similarly situated voters would not be treated similarly. If the judgment on the merits was clear, why should the voting be allowed to continue, in light of the fact that it would undoubtedly have to be stopped soon in any case, and its continuation in the interim would work some harm to the legitimacy of the next president? The question suggests that if the ultimate judgment on the merits was clear, the stay would not be so hard to defend. If the likelihood of success is overwhelming, the plaintiff should not be required to make the ordinary showing of irreparable harm.<sup>29</sup> The problem, then, was less the stay than the Court’s ambitious, poorly reasoned judgment on the merits.

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<sup>28</sup> As emphasized by Justice Scalia, see *id.* at 512 (Scalia concurring).

<sup>29</sup> *Cuomo v United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (DC Cir. 1985).

## II. ORDER AND LAW

## A. Merits: What the Court Said

On the merits, there are two especially striking features to the Court's decision. The first is that six justices were unwilling to accept Bush's major submission, to the effect that the Florida Supreme Court had produced an unacceptable change in Florida law.<sup>30</sup> The second is that five members of the Court accepted the adventurous equal protection argument.

The equal protection claim does have considerable appeal, at least as a matter of common sense. If a vote is not counted in one area when it would be counted in another, something certainly seems to be amiss. Suppose, for example, that in one county, a vote will not count unless the stylus goes all the way through, whereas in another county, a vote counts merely because it contains a highly visible "dimple." If this is the situation, some voters can legitimately object that they are being treated unequally for no good reason.

In its *per curiam* opinion, the Court spelled out the equal protection rationale in some detail. "In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation."<sup>31</sup> The disparate treatment of these markings in different counties was unnecessary, because the "search for intent can be confined by specific rules designed to ensure uniform treatment."<sup>32</sup> In Florida, that search was not so confined, for the record suggested that in Miami-Dade County, different standards had been applied in defining legal votes; and Palm Beach County appeared to go so far as to change its standards during the process of counting. To this, the Court added "further concerns."<sup>33</sup> These included an absence of specification of "who would recount the ballots," leading to a situation in which untrained members of "ad hoc teams" would be involved in the process.<sup>34</sup> And "while others were permitted to observe, they were prohibited from objecting during the recount."<sup>35</sup> Thus the Court concluded that the recount process "is inconsistent with the minimum

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<sup>30</sup> I will not discuss that issue here. In brief, I think that the argument becomes less convincing the more one reflects on it. To be sure, a decision by a state court to disregard state law would raise serious questions under Article II. And I do not believe that the Florida Supreme Court correctly interpreted state law. But the majority's view was not so implausible as to amount to a change, rather than an interpretation. See *Bush v Gore*, 121 S Ct at 543–45 (Souter dissenting); *id* at 554 (Breyer dissenting).

<sup>31</sup> *Id* at 530.

<sup>32</sup> *Id*.

<sup>33</sup> *Id* at 532.

<sup>34</sup> *Id*.

<sup>35</sup> *Id*.



procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.”<sup>36</sup>

The Court was well aware that its equal protection holding could have explosive implications for the future, throwing much of state election law into constitutional doubt. Thus the Court emphasized the limited nature of its ruling: “The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.”<sup>37</sup>

## B. Merits: Three Problems

There are three problems with this reasoning. First, the Court’s decision lacked any basis in precedent. Second, the Court’s effort to cabin the reach of its decision seemed ad hoc and unprincipled—a common risk with minimalism. And third, the system that the Court let stand seemed at least as problematic, from the standpoint of equal protection, as the system that the Court held invalid.

### 1. Precedent.

Nothing in the Court’s previous decisions suggested that constitutional questions would be raised by this kind of inequality. The cases that the Court invoked on behalf of the equal protection holding—mostly involving one-person, one-vote and the poll tax<sup>38</sup>—were entirely far afield. To be sure, the absence of precedential support is not decisive; perhaps the problem had simply never arisen. But manual recounts are far from uncommon, and no one had ever thought that the Constitution requires that they be administered under clear and specific standards.

To make the problem more vivid, suppose that in 1998, a candidate for statewide office—say, the position of attorney general—lost after a manual recount, and brought a constitutional challenge on equal protection grounds, claiming that county standards for counting votes were unjustifiably variable. Is there any chance that the disappointed candidate would succeed in federal court? In all likelihood

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> *Harper v Virginia Board of Elections*, 383 US 663, 666 (1966); *Reynolds v Sims*, 377 US 533, 568 (1964).

the constitutional objection would fail; in most courts, it would not even be taken seriously. The rationale would be predictable, going roughly like this: “No previous decision of any court supports the view that the Constitution requires uniformity in methods for ascertaining the will of the voter. There is no violation here of the principle of one-person, one-vote. Nor is there any sign of discrimination against poor people or members of any identifiable group. There is no demonstration of fraud or favoritism or self-dealing. In the absence of such evidence, varying local standards, chosen reasonably and in good faith by local officials, do not give rise to a violation of the federal Constitution. In addition, a finding of an equal protection violation would entangle federal courts in what has, for many decades, been seen as a matter for state and local government.”

Of course it is possible to think that this equal protection holding would be wrong. Whether the federal Constitution should be read to cabin local discretion in this way is a difficult question. The problem is that in a case of such great public visibility, the Court embraced the principle with no support in precedent, with little consideration of implications, and as a kind of bolt from the blue.<sup>39</sup>

## 2. Reach.

It is not at all clear how the rationale of *Bush v Gore* can be cabined in the way that the Court sought to do. What is missing from the opinion is an explanation of why the situation in the case is distinctive, and hence to be treated differently from countless apparently similar situations involving equal protection problems. The effort to cabin the outcome, without a sense of the principle to justify the cabining, gives the opinion an unprincipled cast.

Suppose, for example, that a particular area in a state has an old technology, one that misses an unusually high percentage of intended votes. Suppose that many areas in that state have new technology, capable of detecting a far higher percentage of votes. Suppose that voters in that area urge that the Equal Protection Clause is violated by the absence of uniformity in technology. Why doesn't *Bush v Gore* make that claim quite plausible? Perhaps it can be urged that budget-

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<sup>39</sup> One of the real oddities of the majority opinion is that it was joined by two Justices—Scalia and Thomas—who have insisted in their commitment to “originalism” as a method of constitutional interpretation. There is no reason to think that by adopting the Equal Protection Clause, the nation thought that it was requiring clear and specific standards in the context of manual recounts in statewide elections. In fact it is controversial to say that the Fourteenth Amendment applies to voting at all. The failure of Justices Scalia and Thomas to suggest the relevance of originalism, their preferred method, raises many puzzles.

ary considerations, combined with unobjectionable and longstanding rules of local autonomy, make such disparities legitimate. In the context of a statewide recount administered by a single judge—the situation in *Bush v Gore*—these considerations appear less relevant. But it is easy to imagine cases in which those considerations do not seem weighty. I will return to these questions below.

### 3. Arbitrariness on all sides.

The system that the recount was designed to correct might well have been as arbitrary as the manual recount that the Court struck down—and hence the Court's decision might well have created an even more severe problem of inequality. Consider the multiple inequalities in the certified vote. Under that vote, some machines counted votes that were left uncounted by other machines, simply because of different technology. Where optical scan ballots were used, for example, voters were far more likely to have their votes counted than where punchcard ballots were used. In Florida, fifteen of every one thousand punchcard ballots showed no presidential vote, whereas only three of every optically scanned ballot showed no such vote.<sup>40</sup> These disparities might have been reduced with a manual recount. If the broad principle of *Bush v Gore* is correct, manual recounts might even seem constitutionally compelled. But the Court's decision, forbidding manual recounts, ensured that the relevant inequalities would not be corrected.

Nor were the machine recounts free from inequality. Some counties merely checked the arithmetic; others put ballots through a tabulating machine. The result is a significant difference in the effect of the machine recount. If the constitutional problem consists of the different treatment of the similarly situated, then it seems entirely possible that the manual recount, under the admittedly vague “intent of the voter” standard, would have made things better rather than worse—and that the decision of the United States Supreme Court aggravated the problem of unjustified inequality.

### 4. Overall evaluation.

On the merits, then, the most reasonable conclusion is not that the Court's decision was senseless—it was not—but that it lacked support in precedent or history, that it raised many unaddressed issues with respect to scope, and that it might well have authorized equality

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<sup>40</sup> *Bush v Gore*, 121 S Ct at 552.

problems as serious as those that it prevented. In these ways, the majority's opinion has some of the most severe vices of judicial minimalism. In fact this was a subminimalist opinion, giving the appearance of having been built for the specific occasion.

### C. Remedy

Now turn to the Court's decision on the issue of remedy. If the manual recount would be unconstitutional without clear standards, what is the appropriate federal response? Should the manual recount be terminated, or should it be continued with clear standards? At first glance, that would appear to be a question of Florida law. If the Florida legislature would want manual recounts to continue, at the expense of losing the federal safe harbor, then manual recounts should continue. If the Florida legislature would want manual recounts to stop, in order to preserve the safe harbor, then manual recounts should stop.

Why did the Supreme Court nonetheless halt the manual recount? The simple answer is that the Court thought it clear that the Florida Supreme Court would interpret Florida law so as to halt the process. As the Court wrote,

The Supreme Court of Florida has said that the legislature intended the State's electors to 'participate[ ] fully in the federal electoral process . . . . 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.<sup>41</sup>

Thus the Court concluded that as a matter of Florida law, a continuation of the manual recount "could not be part of an 'appropriate' order authorized by" Florida law.<sup>42</sup>

This was a blunder. It is true that the Florida Supreme Court had emphasized the importance, for the Florida legislature, of the safe harbor provision.<sup>43</sup> But the Florida courts had never been asked to say whether they would interpret Florida law to require a cessation in the counting of votes, if the consequence of the counting would be to extend the choice of electors past December 12. In fact the Florida Court's pervasive emphasis on the need to ensure the inclusion of law-

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<sup>41</sup> *Id.* at 533.

<sup>42</sup> *Id.*

<sup>43</sup> *Gore v Harris*, 772 S2d 1243, 1248 (Fla Dec 8, 2000), *revd and remd as*, *Bush v Gore*, 121 S Ct 525.

ful votes<sup>44</sup> would seem to indicate that if a choice must be made between the safe harbor and the inclusion of votes, the latter might have priority. It is not easy to explain the United States Supreme Court's failure to allow the Florida Supreme Court to consider this issue of Florida law.

Here, then, is the part of the United States Supreme Court's opinion that is most difficult to defend on conventional legal grounds.

### III. ALTERNATE HISTORY: WHAT MIGHT HAVE HAPPENED

Might anything unconventional help to defend the Court's conclusion? I have suggested that the Court's decision produced order. In fact it might well have averted chaos. It is worthwhile to spend some time on this question, because it provides the best explanation of the Court's otherwise inexplicable approach.

Let us briefly imagine what would have happened if the Court had affirmed the Florida Supreme Court, or remanded for continued counting under a constitutionally adequate standard. In the event of an affirmance, manual counting would of course have continued. In the event of a remand, the Florida Supreme Court would have had to sort out the relationship between the legislature's desire to preserve the safe harbor and its desire to ensure an accurate count. That Court had been divided 4-3 on the question whether a manual recount should be required at all. It is reasonable to speculate that the three dissenters would continue to object to the manual recount. The question is whether any of the four members of the majority would conclude that the December 12 deadline took precedence over the continuation of the contest. There is certainly a chance that the Florida Supreme Court would have terminated the election at that point. But if it failed to do so, things would have gotten extremely messy.

Almost certainly, the Republican-dominated Florida legislature would have promptly sent a slate of electors, thus producing two (identical) slates for Bush—the November 26 certification and the legislatively specified choice. The legislative slate would in turn have been certified by the Secretary of State and the Governor of Florida. In the meantime the counting would, by hypothesis, have continued, well after the expiration of the December 12 safe harbor date. If Bush had won the manual recount, things would be very simple. But suppose Gore had won; what then? Would the Secretary of State have voluntarily certified the new count? Would the Governor of Florida have signed off on the certification? It is not at all clear that Florida's

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<sup>44</sup> *Gore v Harris*, 772 S2d at 1256–57.

executive officials would do what the Florida courts wanted them to do. And if the Secretary of State and the Governor refused, how would the Florida courts have responded? Would they have threatened executive officials with contempt? How would they have responded to the threat? At the very least, there is a risk here of a minor constitutional crisis within Florida itself.

Suppose that this problem had been solved—and that three certified votes from Florida had come before Congress. At that point, both houses of Congress, acting separately, would have to vote on which certification to accept.<sup>45</sup> Almost certainly the Republican-dominated House of Representatives would have accepted a Bush slate. The Senate, split 50-50, would be much harder to call; perhaps some Democrats, in conservative states won by Bush, would have agreed to accept the Bush slate from Florida. But perhaps there would have been an even division within the Senate. If so, Vice President Gore would have been in a position to cast the deciding vote. Suppose that he did—and that he voted for the third Florida slate, and thus for himself, so as to ensure that the House and the Senate would come to different conclusions. At that point, the outcome is supposed to turn on the executive's certification.<sup>46</sup> But which was that? Here the law provides no clear answers. At this point, a genuine constitutional crisis might have arisen. It is not clear how it would have been settled. No doubt the nation would have survived, but things would have gotten very messy.

The Court's decision made all of these issues academic. It averted what would have been, at the very least, an intense partisan struggle, lacking a solution that is likely to have been minimally acceptable to all sides. I do not mean to suggest that the Supreme Court majority was correct. The Court owes a duty of fidelity to the law. Pragmatic concerns are certainly relevant in the face of ambiguous law, but there is a reasonable argument that the Court abandoned the law simply because of pragmatic concerns. What I hope to have shown is why the Court might have done the nation a big favor.

#### IV. A LARGE NEW RIGHT?

For the future, the most important question involves the scope of the right recognized in *Bush v. Gore*. Notwithstanding the Court's efforts, that right is not at all easy to cabin, at least as a matter of basic principle. On its face, the Court appears to have created the most expansive voting right in many decades.

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<sup>45</sup> See 3 USC § 15 (1994).

<sup>46</sup> *Id.*

### A. A Minimalist Reading

At its narrowest, the Court has held that in the context of a statewide recount proceeding overseen by a single judge, the standard for counting votes must be (a) uniform and (b) concrete enough to ensure that similarly situated people will be treated similarly. This holding extends well beyond the context of presidential elections; it applies to statewide offices, not just federal offices.

By itself this is a substantial renovation of current law, since over thirty states fail to specify concrete standards for manual recounts.<sup>47</sup> This does not mean that state legislatures must set down clear standards in advance; a decision by state judges should suffice. But the inevitable effect of the opinion will be to increase the pressure for legislative reform at the state and possibly even the national level. Any state legislature would be well-advised to specify the standard by which votes will be counted in the context of a manual recount. All this should count, by itself, as a gain for sense and rationality in the recount process.

### B. Equality in Voting

It is hard to understand why the principle of *Bush v Gore* does not extend much further than the case itself, at least in the context of voting. Consider the following easily imaginable cases:

1. Poor counties have old machinery that successfully counts 97 percent of votes; wealthy counties have newer machinery that successfully counts 99 percent of votes. Those in poor counties mount a constitutional challenge, claiming that the difference in rejection rates is a violation of the Equal Protection Clause.

2. Same as the immediately preceding case, except the division does not involve poor and rich counties. It is simply the case that some areas use machines that have a near-perfect counting rate, and others do not. The distribution of machines seems quite random.

3. Ballots differ from county to county. Some counties use a version of the controversial "butterfly ballot"; most do not. It is clear that where the butterfly ballot is used, an unusual number of voters are confused, and do not successfully vote for the candidate of their choice. Does this violate the Equal Protection Clause?

4. It is a national election. Citizens in Alabama use different machinery from that used by citizens in New York. The consequence is that citizens in Alabama are far more likely to have their votes un-

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<sup>47</sup> See *Bush v Gore*, 121 S Ct at 540 n 2 (Stevens dissenting).

counted than citizens in New York. Do they have a valid equal protection claim? What if the statistical disparity is very large?

The *Bush* Court's suggestion that ordinary voting raises "many complexities" is correct;<sup>48</sup> but how do those complexities justify unequal treatment in the cases just given? The best answer would point to two practical points: budgetary considerations and the tradition of local control. In light of these points, it might be difficult for some areas to have the same technology as others. Wealthy counties might prefer to purchase more expensive machinery, whereas poorer communities might devote their limited resources to other problems. Perhaps judicial caution in the cases just given can be justified in this way. But even if this is so, *Bush v Gore* plainly suggests the legitimacy of both state and national action designed to combat disparities of this kind. It is for this reason that the Court's decision, however narrowly intended, set out a rationale that might well create an extremely important (and appealing) innovation in the law of voting rights. Perhaps legislatures will respond to the invitation if courts refuse to do so.

### C. A General Requirement of Rules?

In fact the Court's rationale might extend more broadly still. Outside of the context of voting, governments do not impose the most severe imaginable constraints on official discretion. Because discretion exists, the similarly situated are treated differently.<sup>49</sup> Perhaps the most obvious example is the "beyond a reasonable doubt" standard for criminal conviction, a standard that different juries will inevitably interpret in different ways. Is this unacceptable?<sup>50</sup>

In the abstract, the question might seem fanciful; but analogous constitutional challenges are hardly unfamiliar. In the 1960s and 1970s, there was an effort to use the Due Process and Equal Protection Clauses to try to ensure more rule-bound decisions, in such contexts as licensing and admission to public housing.<sup>51</sup> Plaintiffs argued that without clear criteria to discipline the exercise of discretion, there was a risk that the similarly situated would not be treated similarly, and that this risk was constitutionally unacceptable. But outside of the

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<sup>48</sup> *Bush v Gore*, 121 S Ct at 532.

<sup>49</sup> This is the basic theme of Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (LSU 1969).

<sup>50</sup> A possible answer is that no more rule-bound approach would be better, all things considered. This is a difference from *Bush v Gore*, where it was easy to imagine a rule-bound approach that would add constraints on discretion without sacrificing any important value.

<sup>51</sup> *Hornsby v Allen*, 326 F2d 605, 610 (5th Cir 1964); *Holmes v New York City Housing Authority*, 398 F2d 262, 264-65 (2d Cir 1968).



most egregious settings, these efforts failed,<sup>52</sup> apparently on the theory that rule-bound decisions produce arbitrariness of their own, and courts are in a poor position to know whether rules are better than discretionary judgments. Does *Bush v Gore* require courts to extend the limited precedents here?

Perhaps it could be responded that because the choice between rule-bound and more discretionary judgments is difficult in many cases, judicial deference is generally appropriate—but not when fundamental rights, such as the right to vote, are at risk. If so, *Bush v Gore* has a limited scope. But does this mean that methods must be in place to ensure against differential treatment of those subject to capital punishment? To life imprisonment? I cannot explore these questions here. But for better or for worse, the rationale in *Bush v Gore* appears to make it necessary to consider these issues anew.

### CONCLUSION

If the Supreme Court is asked to intervene in an electoral controversy, especially a presidential election, it should try to avoid even the slightest appearance that the justices are speaking for something other than the law. Unanimity, or near-unanimity, can go a long way toward providing the necessary assurance. Whether or not this is possible, the Court's opinion should be well-reasoned and rooted firmly in the existing legal materials.

In *Bush v Gore*, the Court did not succeed on these counts. The 5-4 division was unfortunate enough; it was still worse that the five-member majority consisted of the most conservative justices. Regrettably, the Court's opinion had no basis in precedent or history. To be sure, the equal protection argument had a certain appeal in common sense. But even if it were correct, the natural remedy would have been to remand to the Florida Supreme Court, to ask that court to say whether Florida law would favor the manual recount over the safe harbor provision, or vice-versa. This remedy seems especially sensible in light of the fact that the inequalities that the Court condemned might well have been less serious than the inequalities that the recount would have corrected.

Nonetheless, there are two things to be said on behalf of the Court's ruling. First, the Court brought a chaotic situation to an abrupt end. From the standpoint of constitutional order, it is reasonable to

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<sup>52</sup> For examples of unsuccessful attempts to challenge unconditioned discretion violative of equal protection in these contexts, see *Phelps v Housing Authority of Woodruff*, 742 F2d 816, 822-23 (4th Cir 1984); *Atlanta Bowling Center, Inc v Allen*, 389 F2d 713, 715-17 (5th Cir 1968).

speculate that any other conclusion would have been far worse. In all likelihood, the outcome would have been resolved in Congress, and here political partisanship might well have spiraled out of control. Second, the principle behind the equal protection ruling has considerable appeal. In a statewide recount, it is not easy to explain why votes should count in one area when they would not count elsewhere. In fact the principle has even more appeal if understood broadly, so as to forbid similarly situated voters from being treated differently because their votes are being counted through different technologies. Understood in that broader way, the principle of *Bush v Gore* should bring a range of questionable practices under fresh constitutional scrutiny.

*Bush v Gore* is likely to intensify public concern about unjustifiably aggressive decisions from the Supreme Court, and perhaps that concern will give the Court an incentive to be more cautious about unsupportable intrusions into the democratic arena. Far more important, *Bush v Gore* might come to stand for a principle, in legislatures if not courts, that greatly outruns the Court's subminimalist holding—a principle that calls for an end to the many unjustified disparities in treatment in voting and perhaps beyond. It would be a nice irony if the Court's weak and unprecedented opinion, properly condemned on democratic grounds, led to significant social improvements from the democratic point of view.

