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A Very Streamlined Introduction to Bush v. Gore

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A VERY STREAMLINED INTRODUCTION TO *BUSH V. GORE*

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Bush v. Gore[2] is among the most reviled Supreme Court decisions in recent times. It is also one of the most widely misunderstood. This is partly because of the highly complex series of events that preceded the Court's decision. But it is mostly because the Court's opinion has been insistently mischaracterized by legions of academics and other pundits who simply hate what the Court did. Elsewhere, I have provided detailed analyses of the decision.[3] Here, I will offer a concise explanation of what the Court did and why, and perhaps equally important what it did *not* do. Interested readers can use the citations in the footnotes to find further elaboration and confirmation of the points summarized in this article.

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2. 531 U.S. 98 (2000).

3. *See, e.g.*, Nelson Lund, Bush v. Gore *at the Dawning of the Age of Obama*, 61 FLA. L. REV. 1001 (2009) [hereinafter Lund, *Dawning*]; Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002) [hereinafter Lund, *Unbearable Rightness*]; Nelson Lund, *"EQUAL PROTECTION, MY ASS!"?:* Bush v. Gore *and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT. 543 (2002) [hereinafter Lund, *Hall of Mirrors*]; Nelson Lund, *Carnival of Mirrors: Laurence Tribe's "Unbearable Wrongness,"* 19 CONST. COMMENT. 609 (2002) [hereinafter Lund, *Carnival of Mirrors*].

I. BACKGROUND

Here are the essential facts. The 2000 Florida presidential election was extremely close, with George W. Bush getting slightly more votes than Al Gore in the initial count of the ballots, and slightly more votes than Gore in a recount of the ballots mandated by Florida law in close elections.[4] Both the initial count and the recount were conducted primarily by machines,[5] which are programmed to detect which candidate, if any, the voter chose for each office on the ballot.[6] A counting machine records no vote for a particular office when: (1) it detects no choice for any candidate for that office (undervote ballots) or (2) it detects a choice for more than one candidate for that office (overvote ballots).[7] The machines are fallible, and in some cases, a human observer will interpret the ballot differently than the machine did.[8] Humans are also fallible, and different people will sometimes interpret the same ballot differently.

Invoking Florida law, Gore demanded that some ballots be recounted yet again, this time by human beings.[9] Shrewdly, he chose to ask for these manual recounts only in heavily Democratic jurisdictions.[10] If the machines randomly mistook some legally valid ballots for undervotes or overvotes, Gore could expect to be a net gainer in these partial recounts on the basis of chance alone. And since much of the recounting would be conducted by partisan officials in these heavily Democratic jurisdictions,

4. *See* Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225 (Fla. 2000), *vacated by* 531 U.S. 70, 78 (2000); *see also* Lund, *Unbearable Rightness*, *supra* note 3, at 1224–26.

5. *See Bush*, 531 U.S. at 101; *see also* Lund, *Dawning*, *supra* note 3, at 1002.

6. *See* FLA. STAT. § 101.015 (2011) (stating that minimum standards must be established "for hardware and software for electronic and electromechanical voting systems" to guarantee correctness in the voting procedures).

7. *See* Lund, *Unbearable Rightness*, *supra* note 3, at 1241; *see also* FLA. ADMIN. CODE ANN. 1S-2.031 (2011). An "undervote" is defined as "the tabulator recorded no vote for the office . . . or that the elector did not designate the number of choices allowed for the office . . . " and an "overvote" as "the elector designated more names than there are persons to be elected to an office . . . ." FLA. ADMIN. CODE ANN. 1S-2.031(g); *see also* Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush*, WASH. POST, Nov. 12, 2001, at A1 (explaining that overvotes and undervotes were rejected by voting machines on Election Day in Florida).

8. *See* FLA. STAT. § 102.166 (2011) (requiring manual recounts to compare the duplicate ballots "with the original ballot to ensure correctness of the duplicate"); *see also Bush*, 531 U.S. at 104.

> This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

Bush, 531 U.S. at 104.

9. *See* Lund, *Unbearable Rightness*, *supra* note 3, at 1228–29.

10. *Id.*

Gore might be further helped by biased interpretations of the ballots (whether arising consciously or subconsciously). Gore's cherry-picking strategy faced serious impediments under Florida law, but the Florida Supreme Court brushed aside those obstacles, dismissing them as "technical statutory requirements."[11]

These selective recounts were initiated, but they were not all completed when the deadline arrived for declaring the final results.[12] At that point, Bush was still ahead by 537 votes.[13] Gore filed a lawsuit challenging the results, a trial was held, and the court ruled that Gore had failed to produce sufficient evidence in support of his challenge.[14]

II. THE FLORIDA SUPREME COURT DECISION

The Florida Supreme Court reversed the trial court, and remanded the case with orders to take several actions that Gore had sought.[15]

- The trial court was ordered to add about 200 votes to Gore's total based on the Palm Beach recount, although the results of that recount had not been reported to state officials until after the deadline established by the Florida Supreme Court itself.[16]

- The trial court was also ordered to add 168 votes to Gore's total based on an *incomplete* recount in Miami-Dade. That recount had begun with heavily Democratic precincts, and more Republican precincts had not been recounted.[17]

- The trial court was ordered to conduct a manual recount of some 9,000 undervote ballots in Miami-Dade that Gore believed might shift the statewide totals in his favor.[18]

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11. Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237 (Fla. 2000), *vacated by* 531 U.S. 70, 78 (2000); *see also* Lund, *Dawning*, *supra* note 3, at 1002. For an additional discussion of the background, see Lund, *Unbearable Rightness*, *supra* note 3, at 1224–33.

12. *See id.* at 1229.

13. *See id.* at 1225.

14. *See* Gore v. Harris, 772 So. 2d 1243, 1255 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98, 111 (2000). For further detail about the trial court's decision, see Lund, *Unbearable Rightness, supra* note 3, at 1236, 1238 nn.62–63, 65 & 1241 n.75.

15. *Gore*, 772 So. 2d at 1262.

16. *Id.* at 1248, 1262. The Court had created this deadline after it decided to ignore the deadline set out in the Florida election statute. Lund, *Unbearable Rightness*, *supra* note 3, at 1229–30, 1232 n.46, 1237.

17. *Gore*, 772 So. 2d at 1262; *see also* Lund, *Unbearable Rightness*, *supra* note 3, at 1239–40 n.68.

18. *Gore*, 772 So. 2d at 1262; *see also* Lund, *Unbearable Rightness*, *supra* note 3, at 1237.

Gore can hardly be blamed for asking that a recount be conducted in a way that was highly biased in his favor, but the Florida Supreme Court had other obligations. Apparently recognizing that Gore's proposal could make the outcome of the election turn on "strategies extraneous to the voting process,"[19] and would not even pass a straight-face test of fairness, the Court also issued an order that Gore had not sought.

• The trial court was to conduct a *statewide* recount of some kind. The supreme court strongly suggested that it should be limited to undervote ballots in each county, and the trial court did so limit it.[20] The Florida Supreme Court's decision was decided by a vote of 4-3.[21] The dissenting judges vigorously contended that the majority's decision had "no foundation in the law of Florida"[22] and that its order "would violate other voters' [federal] rights to due process and equal protection of the law."[23] The dissenters predicted that election results based on such a lawless process would eventually be overturned.[24]

III. *BUSH V. GORE*

In *Bush v. Gore*, the United States Supreme Court did exactly what the Florida dissenters foresaw. Relying on well established precedents, the Court held that the recount ordered by the Florida Supreme Court produced vote debasement of a kind that violated the one person, one vote principle of the Equal Protection Clause.[25]

The easiest way to understand the logic of the Court's decision is to begin with the paradigmatic case of vote debasement in the vote-counting context: stuffing the ballot box. When invalid ballots are counted along with valid ballots, the valid ballots are debased or diluted by the invalid ballots. The Supreme Court has repeatedly said that this practice violates the one person, one vote principle because each valid vote is in effect

19. *Gore*, 772 So. 2d at 1253.

20. *Id.* at 1262; Lund, *Unbearable Rightness*, *supra* note 3, at 1237 & n.60. For a discussion of the reasoning in the Florida Supreme Court's opinion, see Lund, *Unbearable Rightness*, *supra* note 3, at 1237–43.

21. *See Gore*, 772 So. 2d at 1262.

22. *Id.* at 1263 (Wells, C.J., dissenting).

23. *Id.* at 1272 (Harding, J., dissenting). Early in the recount controversy, Attorney General Bob Butterworth, a Democrat who had served in Gore's 2000 presidential campaign, had presciently warned that treating voters differently depending on what county they lived in "will incur a legal jeopardy, under both the U.S. and State constitutions." Lund, *Unbearable Rightness*, *supra* note 3, at 1245–46 n.91.

24. *Gore*, 772 So. 2d at 1267 (Wells, C.J., dissenting); *see also id.* at 1272–73 (Harding, J., dissenting).

25. For a discussion of the precedents the Supreme Court relied upon, see Lund, *Unbearable Rightness*, *supra* note 3, at 1244–47; Lund, *Hall of Mirrors*, *supra* note 3, at 548–56.

"weighted" at less than one vote.[26] When valid ballots are *selectively* added during a recount, the same kind of vote debasement occurs.

Suppose, for example, that a manual recount discovered ballots that the machines had mistakenly registered as undervotes or overvotes; assume further that some of these ballots were valid votes for Bush while others were valid votes for Gore. If those conducting the recount added the newly discovered Gore votes to his vote total, but did not do the same for the Bush votes, the effect would be exactly the same as when ballot boxes are "stuffed" with invalid ballots.

The Florida recount contained built-in biases in Gore's favor that indirectly produced the same kind of debasing effect on votes cast for Bush. Confining the initial manual recounts to certain heavily Democratic counties, for example, meant that ballots read by the machines as undervotes or overvotes in these jurisdictions might be changed to valid votes during the recount; identical ballots in other counties, however, would not be counted as valid votes. Even more egregiously, voters who cast such ballots in the more Democratic precincts of Miami-Dade could be changed to valid votes during the uncompleted recount, while similar ballots in the more Republican precincts could not. In an election as close as this one, such geographically unequal treatment of ballots could easily change the outcome.

It should hardly be surprising that Gore asked for a recount that was biased in his favor. The Florida Supreme Court sought to reduce this completely obvious bias by ordering a statewide manual recount. But why limit the statewide recount to undervote ballots? The only apparent reason was that these ballots resembled the 9,000 undervote ballots that Gore wanted to have recounted in Miami-Dade. But why exclude overvote ballots, either in Miami-Dade or elsewhere? Indeed, why exclude the ballots that machines had registered as valid votes, some of which may have proved to be invalid when subjected to human scrutiny? The partial statewide recount only reduced the one-sided geographic discrimination in the initial manual recount, without curing it.

At this point, it is worth pausing to ask why one would ever substitute a manual recount for the automatic tabulations produced by machines. For tasks like counting ballots, machines are generally much more reliable than human beings. Machines don't get tired or distracted, and machines don't have candidates that they favor (either consciously or subconsciously). It

26. *See, e.g.*, Anderson v. United States, 417 U.S. 211, 227 (1974); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964); Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Baker v. Carr, 369 U.S. 186, 208 (1962). *See also* Lund, *Unbearable Rightness*, *supra* note 3, at 1247–1248 & n.98.

does, of course, make sense to perform a manual recount when there is reason to think that it will produce a more accurate count than the one performed by the machine. This sometimes happens. In 2000, for example, some machines in Volusia County malfunctioned and a manual recount was performed without controversy.[27] It might even be defensible to adopt a presumption that manual recounts are generally more reliable than machine counts (dubious though the notion may be), and provide for manual recounts of *all* the ballots in close elections. But that was not done in Florida.

The selective and partial recount demanded by Gore was undertaken simply because he demanded it.[28] The recount ordered by the Florida Supreme Court was only slightly less partial and selective than the one that Gore asked for, and it was never justified as an effort to correct some identified problem, like malfunctioning machines.[29] The Florida Supreme Court noted that a recount of the 9,000 Miami-Dade undervote ballots might conceivably change the outcome of such a close election.[30] That certainly explains why Gore wanted it done. But it does not explain how anyone could have thought that the *partial* recount ordered by the Florida court would make the *overall* count of the election returns more accurate than the machine counts.

The new recount ordered by the Florida Supreme Court had barely begun when Bush asked the United States Supreme Court to declare it unconstitutional.[31] By a vote of 5-4, the Court did so, holding that it failed to satisfy "the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to vote.[32]

• Varying standards for distinguishing between valid and invalid ballots had been employed in the recount. The standards differed not only from county to county, but sometimes within a county from one recount

27. *See* Siegel v. LePort, 234 F.3d 1163, 1195 n.2 (11th Cir. 2000) (Carnes, J., dissenting) (noting that the manual recount performed in Volusia County was due to mechanical defects, and further indicating that the Volusia County recount materially differs from the recounts asked for in the other counties); *see also* Lund, *Unbearable Rightness*, *supra* note 3, at 1228 n.36 (indicating that recounts due to mechanical defects are noncontroversial).

28. *See* Lund, *Unbearable Rightness*, *supra* note 3, at 1228 n.37.

29. *See Gore*, 772 So. 2d at 1247 (2000); Lund, *Unbearable Rightness*, *supra* note 3, at 1242 (noting that the Florida Supreme Court never tried to justify the recount based on "faulty machines").

30. *See Gore*, 772 So. 2d at 1256 (stating "there has been an undisputed showing of the existence of some 9000 'undervotes' in an election contest decided by a margin measured in the hundreds"); *see also* Lund, *Unbearable Rightness, supra* note 3, at 1238–39 & nn.64–66.

31. *See* Bush v. Gore, 531 U.S. 98, 100 (2000).

32. *Id.* at 105.

team to another. One county even changed its standard repeatedly while the recount was being conducted. The Court could see no justification for using different legal standards in different places.[33]

• The initial recounts conducted in the Gore-selected counties covered all ballots, but the statewide recount ordered by the Florida Supreme Court was limited to undervote ballots. Undervote ballots are analytically indistinguishable from overvote ballots. In both cases, the machine registers no vote, and in both cases a human observer might decide that the machine had erred. What's more, some ballots that a human observer would interpret as an overvote (and thus treat as no vote) could have registered as a valid vote in the machine count. The Florida Supreme Court's restriction of the statewide recount to undervote ballots thus arbitrarily treated voters in the counties initially selected by Gore differently than voters in other counties.[34]

• The Florida Supreme Court definitively added votes to Gore's total based on the partial recount in Miami-Dade, and its order contemplated that the vote totals could be changed again on the basis of other partial recounts.[35] The Court could see no justification for using partial recounts to change vote totals.[36]

• The recount was being conducted on an *ad hoc* basis by untrained personnel, and contemporaneous objections by the candidates' representatives were prohibited.[37]

The pervasively arbitrary and patently biased manner in which similar ballots were being treated differently in this recount was so utterly manifest that *not a single member of the Supreme Court* attempted to show that the recount was consistent with the equal protection precedents on which the majority relied. Seven of the Justices agreed that the recount had serious constitutional problems.[38] The other two Justices disagreed, but offered only conclusory rejections of the majority's position.[39]

The inability of any Justice to seriously challenge the majority's equal protection analysis confirms what should be obvious. That analysis was legally correct, and the Florida Supreme Court dissenters had been right to say that their court was "departing from the essential requirements of the

33. *See id.* at 106–07.
34. *See id.* at 107–08; Lund, *Unbearable Rightness*, *supra* note 3, at 1244.
35. *See Bush*, 531 U.S. at 108; Lund, *Unbearable Rightness*, *supra* note 3, at 1237.
36. *See Bush*, 531 U.S. at 108–09.
37. *See id.* at 109.
38. *See* Lund, *Unbearable Rightness*, *supra* note 3, at 1250 & n.104.
39. *See id.* at 1250–51 & nn.105–06.

law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos."[40]

IV. FIVE MYTHS ABOUT *BUSH V. GORE*

Very little of the academic criticism of *Bush v. Gore* makes any serious effort to argue that the Florida recount was consistent with equal protection principles.[41] A number of other plausible sounding critiques have been made, but none of them is legally valid, and most of them are based on demonstrably untrue premises.

A. THE REPUBLICAN/CONSERVATIVE CONSPIRACY THEORY

The five members of the *Bush v. Gore* majority, Republicans all, were the most conservative jurists on the Court, and many critics have alleged that they decided to put Bush in the White House for political reasons.[42] One could just as easily accuse the *Bush v. Gore* dissenters of being Gore partisans, and neither claim can be proved. In any event, the political conspiracy theory cannot explain why three of the seven Florida judges, *all Democrats*, strongly argued that the recount ordered by the Florida Supreme Court was illegal and indefensible.[43] The political conspiracy theory says a lot about the accusers, but nothing about the legal merits of the decision in *Bush v. Gore*.

B. THE FEDERALISM THEORY

A related critique is based on the claim that the majority's intervention in state election processes constituted a hypocritical abandonment of principles that they had persistently adhered to in several prominent 5-4 federalism decisions.[44] Again, if this is plausible, why not make the same charge of hypocrisy against the *Bush v. Gore* dissenters? In fact, such accusations are canards. No one on the Court had ever so much as suggested that any principle of federalism requires the Court to stop enforcing the Equal Protection Clause or to overrule the Court's one person, one vote precedents, and none of the dissenters suggested that

40. Gore v. Harris, 772 So. 2d 1243, 1273 (Fla. 2000) (Harding, J., dissenting).

41. See Lund, *Hall of Mirrors*, *supra* note 3, at 548–56, for a refutation of one such effort. *See also* Lund, *Carnival of Mirrors*, *supra* note 3, at 610–14.

42. For discussion of some prominent examples of this claim, see Lund, *Dawning*, *supra* note 3, at 1001; Lund, *Unbearable Rightness*, *supra* note 3, at 1222 n.7.

43. *See* Lund, *Unbearable Rightness*, *supra* note 3, at 1224, 1251.

44. *See id.* at 1269.

anyone in the majority had ever done so.[45]

A more specific criticism is that the majority should have sent the case back to the Florida courts so that they would have an opportunity to conduct a new recount in a manner that complied with the Equal Protection Clause.[46] Instead, according to this critique, five Justices simply called a halt to the whole process and handed the presidency to Bush.[47] If this were true, it would indeed be pretty alarming. But it is not true. In fact, the Supreme Court *did* remand the case to the Florida Supreme Court, and the Justices did *not* order the case dismissed.[48] Nor did they forbid the Florida courts to conduct a new recount.[49]

Bush v. Gore was decided with lightning speed. On December 12, 2000, only four days after the Florida Supreme Court had ordered the new recount, the U.S. Supreme Court decided that this recount was unconstitutional. On December 11, the day before *Bush v. Gore* was decided, the Florida Supreme Court had interpreted *state law* to create an outside deadline of December 12 for filing late election returns.[50] Because the U.S. Supreme Court had no authority to alter this state law deadline, it would have been legally improper to order the Florida courts to conduct a new recount. The *Bush v. Gore* majority properly declined to do so, over the objections of Justices Souter and Breyer.[51]

Instead, the Court remanded the case, and left the Florida courts free to initiate a new recount.[52] On remand, the Florida Supreme Court could have rejected or reinterpreted what it had said about state law in its December 11 opinion, and ordered a new recount. Nothing in *Bush v. Gore* forbade them to do so, as Gore's lawyers recognized.[53]

As a *practical* matter, it would have been pointless for the Florida courts to undertake a new recount. Federal law required the Electoral College to meet on December 18, and it would have been impossible to devise and implement constitutionally adequate procedures within this six-day period, let alone to provide the meaningful appellate review required

45. *See id.* at 1243–44, 1270.
46. *See id.* at 1270, 1276.
47. *See id.* at 1243; Lund, *Hall of Mirrors*, *supra* note 3, at 545.
48. Bush v. Gore, 531 U.S. 98, 111 (2000); Lund, *Unbearable Rightness*, *supra* note 3, at 1269.
49. *See Bush*, 531 U.S. at 111.
50. *See id.* at 110.
51. *See id.* at 110–11.
52. *See id.* at 111.
53. *See* Lund, *Dawning*, *supra* note 3, at 1007; Lund, *Carnival of Mirrors*, *supra* note 3, at 615 & n.32; Lund, *Unbearable Rightness*, *supra* note 3, at 1277 & n.185.

by due process. The dissenting judges on the Florida Supreme Court had understood this quite clearly, and so apparently did Vice President Gore, who prudently conceded the election rather than ask the Florida courts to attempt the impossible.[54]

C. THE DEPARTURE FROM PRECEDENT THEORY

Some commentators have said that settled precedent required a finding of intentional discrimination, which was absent in this case.[55] This is true *only* with respect to the "suspect classification" branch of equal protection doctrine. *Bush v. Gore* was decided under the "fundamental rights" branch of that doctrine, where there is not and never has been any requirement that intentional discrimination be identified. Lawyers who are unfamiliar with this elementary doctrinal distinction should not be commenting on the case.[56]

D. THE NONJUSTIABILITY THEORY

At least one prominent critic has contended that the Supreme Court should have dismissed Bush's challenge to the recount because it was nonjusticiable under the political question doctrine.[57] None of the litigants so much as mentioned this argument, and none of the *Bush v. Gore* dissenters adopted it. For good reason. The Court's leading decision on the political question doctrine upheld justiciability in a vote debasement case.[58] In addition, the Court had long held that Fourteenth Amendment challenges in presidential elections are justiciable.[59] As if that were not enough, a few days before *Bush v. Gore*, the Supreme Court had *unanimously* relied on this presidential election decision in a separate case arising from the Florida election dispute.[60] All of the Justices were familiar with these precedents, even if some commentators are not.[61]

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54. See Lund, *Unbearable Rightness*, *supra* note 3, at 1269–78, for a more detailed discussion of the points in this subsection. *See also* Lund, *Carnival of Mirrors*, *supra* note 3, at 613–16.

55. None of the Justices accused the Florida judges or election officials of engaging in intentional discrimination. Neither do I.

56. *See* Lund, *Hall of Mirrors*, *supra* note 3, at 548–56; *see also* Lund, *Dawning*, *supra* note 3, at 1007.

57. *See* Lund, *Carnival of Mirrors*, *supra* note 3, at 616–18.

58. *See* Baker v. Carr, 369 U.S. 186 (1962).

59. *See* McPherson v. Blacker, 146 U.S. 1 (1892).

60. *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000).

61. *See* Lund, *Carnival of Mirrors*, *supra* note 3 at 616–18; Lund, *Hall of Mirrors*, *supra* note 3, at 562–67; Lund, *Unbearable Rightness*, *supra* note 3, at 1252–61.

E. THE *AD HOC* DECISION THEORY

It has frequently been claimed that one sign of bad faith in the *Bush v. Gore* majority opinion is that the Court limited its holding to this one specific case.[62] It does seem fair to wonder why any appellate court would fail to articulate a principle that can be applied in other cases. Once again, however, the premise of the accusation is false. The *Bush v. Gore* majority simply applied a well established equal protection principle to invalidate an unusually egregious violation of that principle.

The Court did say, quite prudently, that its decision applied only to the "special instance of a statewide recount under the authority of a single state judicial officer [because] the problem of equal protection in election processes presents many complexities."[63] There may, for example, be legally significant differences in the issues raised by rules established before an election and issues that arise when new rules are invented after the presumptive winner of an election is already known. Similarly, there may be legally significant differences in the issues raised by the uncoordinated actions of multiple officials in different jurisdictions and a chaotically arbitrary process created by a court and supervised by a judge.

Equal protection law is inherently context sensitive, and it would have been highly irresponsible for the *Bush v. Gore* Court to opine on issues that might arise in significantly different contexts. It is typical, not anomalous, for equal protection decisions to leave a myriad of related issues open for resolution in future cases. *Brown v. Board of Education*,[64] for example, was carefully confined to the context of racially segregated schools. *Reynolds v. Sims*[65] considered only the issue of vote debasement in elections for state legislatures. The limited holdings in these cases did not imply that their *principles* were inapplicable in other cases, and neither does the holding in *Bush v. Gore*.[66]

Variants of the *ad hoc* decision critique are based on claims that (1) *Bush v. Gore* subjected the Florida recount to standards of perfectly precise uniformity that are virtually impossible to meet, and (2) the Court disregarded much more serious examples of non-uniformity in the vote

62. *See* Bush, 531 U.S. at 109; *see also* Lund, *Unbearable Rightness*, *supra* note 3, at 1267–69.

63. *Bush*, 531 U.S. at 109.

64. 347 U.S. 483 (1954).

65. 377 U.S. 533 (1964).

66. See Lund, *Dawning*, *supra* note 3, at 1006, and Lund, *Unbearable Rightness*, *supra* note 3, at 1267–69, for further discussion of the points in the preceding paragraphs of this subsection.

tabulations initially produced by the machines.[67] The first claim is unadulterated fiction. Nothing in the Court's opinion so much as suggests that perfect uniformity is required by the Constitution. The second claim assumes that the Court should have engaged in pure speculation. Gore never claimed or argued that the machine counts were infected with constitutionally impermissible non-uniformity. The courts were never presented with evidence of such non-uniformity. This critique of *Bush v. Gore* is based on the outlandish proposition that the Supreme Court should have taken judicial notice of facts that the Justices could not have known, and which they certainly could not have verified.[68]

V. CONCLUSION

Bush v. Gore was a straightforward and legally correct decision. Every effort to paint it as some kind of bizarre or partisan outrage has depended on wild distortions of what the Court said, on unfounded speculations about the motives of the Justices, or on outright untruths. A decade later, the attacks continue.[69] Perhaps that will someday change, when the current generation of legal commentators is succeeded by scholars who were not caught up in the frenzy of the 2000 election controversy.

67. *See* Lund, *Dawning*, *supra* note 3 at 1003–04; Lund, *Hall of Mirrors*, *supra* note 3, at 552–55.

68. For further discussion of the points in this paragraph, see Lund, *Carnival of Mirrors*, *supra* note 3, at 611–14; Lund, *Dawning*, *supra* note 3, at 1003–1005; Lund, *Hall of Mirrors*, *supra* note 3, at 552–53.

69. *See generally, e.g.*, Lund, *Dawning*, *supra* note 3.