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Reflections on *Bush v. Gore*: The Role of the United States Supreme Court

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In our democracy, we give the most final decision-making authority, over our most controversial issues, to our least democratic institution. Justices of the United States Supreme Court are never elected, appointed for life, and free from the danger of recall. Once appointed, they are as insulated from political pressures as our tradition and Constitution can accomplish.[1] More than two centuries after the ratification of the Constitution and its construction in *Marbury v. Madison*,[2] we tend to take for granted both the political insulation that the Constitution provides and the preeminent role for the Court that *Marbury* asserted.[3] Although neither protection was inevitable,[4] both have stood the test of time. Indeed, it has been the power of the Court to override the decisions of democratically elected executives and legislatures,[5] coupled with the justices' freedom from political sanction or recall, that have made it possible for the Court to play the central role it did in the Twentieth Century's expansion of human and civil rights.

It would have been possible to limit the doctrine of judicial supremacy to issues of the balance of powers between branches of government and access to the political process,[6] and to leave to elected officials the resolution of other substantive rights. Preservation of the

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1. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

4. Most democracies, and most of our states, have rejected the U.S. Federal model of lifetime judicial appointments; the breadth of *Marbury's* asserted role for the judiciary was, at the time, unique among modern nations.

5. *See Marbury*, *supra* note 3, at 176-77.

6. Issues that relate to insuring the political process is fair and open, for example, and that the system of checks and balances devised by the founders is preserved.

right to vote,[7] and to have those votes counted,[8] is essential to having a democratic process in which confidence can be reposed. But, if we assume confidence in the openness and fairness with which the popular will is expressed, what is the basis for substituting the judgment of nine nonelected justices as to the scope and interpretation of the other substantive rights guaranteed by the Constitution for the judgment of elected legislators or an elected executive? It may be true, as a unanimous Court held in *Cooper v. Aaron*, that since *Marbury*, "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . [had] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[9] But what is the rationale for this principle?

There is a partial answer and a complete answer. The partial answer is that the free and effective exercise of political rights, including the right to participate in elections as both a voter and candidate, will be affected by whether other substantive rights are enforced. The Supreme Court, throughout the era of *de jure* segregation, forbade direct interference with the right of blacks to vote.[10] However, the combined effect of segregated schools, assemblies, accommodations, and other aspects of society and politics precluded the meaningful participation of blacks in elections. Only by opening up schools and other institutions and activities, and by scrutinizing voter qualifications other than age for disproportionate effects, did the Court give practical force to blacks' theoretical access to the political process. A division of the ultimate power to interpret and enforce Constitutional guarantees could stymie the Court's effort to assure the openness and fairness of the democratic process.

The more complete answer is that the extent of the Court's isolation from political influence is a condition of the Court's ability to perform its Constitutional function. The provision of certain basic rights in the Constitution is *intended* to override the will of the majority. Entrusting the enforcement of those rights to persons who serve

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7. *See* U.S. CONST. art. I, § 4, cl. 1, amends. XIV, § 2, XIV, § 1, XIX, XXIII, § 1, XXIV, § 1, XXVI, § 1 (deriving conventions for voting and admonishing any preclusion of the right to vote based on race, sex, age of majority, or paying your taxes, *et alia*). *But see Bush*, *supra* note 3, at 103, (emphasis added), "The *individual citizen has no federal constitutional right to vote* for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."

8. *See, e.g.*, Count Every Vote Act of 2005, S. 450, 109th Cong. (2005).

9. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (en banc).

10. *See, e.g.*, U.S. v. Mississippi, 380 U.S. 128 (1965), Louisiana v. U.S., 380 U.S. 145 (1965).

subject to that will, risks reducing Constitutional commands to precatory advice. We would have waited a long time for *Brown v. Board of Education*'s prohibition of segregation[11] if we had been dependent on democratically elected state or federal legislatures to enforce the Constitutional mandate of Equal Protection.

Although important to the Court's role of guaranteeing minority rights in a society based on majority rule, the justices' unique freedom from political sanction carries the danger that power unconstrained by free elections always carries: the danger that the person wielding that power will use it to impose a personal agenda, or that the experience of unconstrained power will lead the person to confuse his or her own interests with those of the country.

There are three basic constraints on a justice's power. First, the Court's power ultimately rests on the willingness of the people and their elected legislators and executives to defer to the Court's decisions. But today this is a limited constraint, particularly with respect to any individual decision or even series of decisions. President Andrew Jackson might ignore a Court ruling,[12] but a modern President would be unlikely to try. And while President Franklin Roosevelt's "court-packing plan" probably could have been adopted if the Court itself had not "switched in time,"[13] the combination of circumstances that led to it (a country in crisis; one party with large legislative majorities, control of the executive branch, and strong popular support; a series of court decisions that were widely regarded as preventing a solution) are unusual. The tradition of deference to judicial supremacy can be eroded over time, but such danger is a limited constraint in the short run.

Second, the Court is a collegial institution - both in the sense that it has multiple members who must reach a majority decision and

11. Brown v. Board of Education of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954).

12. "John Marshall has made his decision. Now let him enforce it." Bush v. Gore, 531 U.S. 98, 158 (2002) (Breyer, J., dissenting) (quoting President Jackson's response to *Worcester v. Georgia* and the Court's efforts to protect the Cherokee Indians). *See also* Robert W. Langran, *From the Yearbook 1977 Supreme Court Historical Society* (1976), *available at* http://www.supremecourthistory.org/myweb/77journal/langran77.htm.

13. "The switch in time that saved nine" is the name given by the press to the apparent sudden shift by Justice Owen J. Roberts from the conservative wing of the Supreme Court to the liberal wing in the case West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), upholding a Washington State minimum wage law. The decision was handed down less than two months after President Franklin Delano Roosevelt announced his Court-packing Bill and it was widely seen as a reaction to that Bill. The switch, together with the resignation of Justice Willis Van Devanter are often credited as contributing to the defeat of the Bill, preserving the size of the Supreme Court.

in the sense that the Court's procedures enforce interaction and discussion. No single justice has power except as a participant in the process. The constraint of the Court's collegiality is enhanced by the historical absence of party-voting blocs.

The third, and perhaps the most important constraint, is an individual Justice's character, independence, and commitment to the rule of law and principled decision-making qualities to be evaluated at the time of appointment and confirmation. Judicial candidates are often classified along two axes: a "conservative-liberal" axis and a "judicial activism-judicial restraint" axis. The first axis evaluates the candidate's views, while the second axis evaluates the extent to which the candidate believes it is appropriate for the judiciary to impose its views on states and on other branches of the federal government. A liberal judge can be an advocate of judicial activism, such as Earl Warren, or judicial restraint, such as Felix Frankfurter. The same is true for a conservative judge. However, a third axis could be used to classify a judicial candidate as well: the extent to which the candidate is committed to the rule of law and principled decision-making. Is the person, for example, equally committed to judicial restraint (or judicial activism) regardless of whether the result of such restraint (or activism) will be to advance a conservative or a liberal agenda?

The rule of law means, first, that what a court will do must be reasonably predictable, and second, that what a court does must be independent of the identity of the parties. A court's predictability comes in part through adherence to precedent and principled decision-making. This means that a decision ordinarily should be derived from the principles of past decisions. It also means that the Court must be willing to decide future cases according to the principles it uses to decide today's case. Justice Scalia has been a particularly vocal advocate of principled decision-making and has been an outspoken critic of justices he believes are unwilling to articulate, and abide by, consistent principles. "[W]hen," he has said, "in writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle."[14]

14. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

We believe that whether or not we agree with a decision of the Court, that decision reflects the justices' best principled judgment as to how that case, and every case, should be decided under the law– that the justices are not seeking a particular result in a particular case for personal or political reasons. Judges, unlike legislators, are limited in the extent to which they can pursue what they personally conclude is in the country's interest. Elected legislators can, and are supposed to, enact whatever laws they believe serve the public interest; voters choose legislators who they believe will act in a way consistent with what the voters want, and they can replace legislators who do not. That is the way a representative democracy works.

However, precisely because the Court is neither elected nor subject to recall, its legitimacy, and our long-term willingness to accept its pronouncements, is based on the faith that it will interpret the country's laws (including the Constitution) based on consistent legal principles. The interpretation of our laws, and particularly our Constitution, will necessarily be influenced by justices' personal conclusions as to what principles best serve our society. However, we trust that that influence will be constrained by the requirement that each interpretation be grounded in principles that are generally applicable—principles derived from past opinions, and principles that the judges are prepared to apply in the future. Legislators are not required to be consistent; judges are.

Accordingly, when a judge decides a case inconsistently with his or her prior opinions, when an opinion ignores undisputed facts inconsistent with its result, when a judge decides a case based on principles he or she is not prepared to apply to future cases, or decides a case to achieve a result rather than confirm or extend settled principles of law, the judge impairs the trust that is the source of the court's power. The judge also forces legislators increasingly to politicize the process of judicial selection; if judges' act as political agents, their successors will inevitably be required to pass political tests at the time of their selection.

The Supreme Court's worst opinions in the first two hundred years were decisions like *Dred Scott*,[15] *Plessey v. Ferguson*,[16] and the Japanese internment cases,[17] where the Court abandoned principled decision-making to reach a politically palatable result. In *Dred Scott*, the 1857 Court decided that slaves were property and slaves who es-

15. Dred Scott v. Sandford, 60 U.S. (19 Howard) 393 (1856).

16. Plessey v. Ferguson , 163 U.S. 537 (1896).

17. *See e.g.*, Toyosaburo Korematsu v. U.S., 323 U.S. 214 (1944).

caped to the North could not become citizens because they remained the property of their "owners."[18] In 1896, the *Plessy* Court upheld the right of states to segregate citizens based on race and (in dicta that was widely applied) to require black and white children to go to different schools.[19] In 1944, the Court in *Korematsu* upheld the right of the government during World War II to force all citizens of Japanese ancestry into concentration camps without any evidence of disloyalty or any evidence of misconduct.[20] To some extent each of these decisions was based on racism that at least certain justices shared with society at large.[21] However, to an even greater extent, the decisions reflected the Court's perceived need to reach a politically acceptable result. Each of the opinions drew vigorous dissents that would later be vindicated.

One recent case in which the Court arguably abandoned principled decision-making and used its position as the final arbiter of constitutional issues for partisan political purposes was *Bush v. Gore*.[22] The case arose out of Florida's attempt to recount punch-card ballots in the 2000 presidential election. Bush, whose few hundred vote lead in Florida was diminishing as the recount progressed, asked the courts to stop the recount on the ground that individual county canvassing boards were in some but not all counties counting ballots which had not been punched through completely, but where the voter's intent could be determined by the pattern of indentations or partial punches. The problem was created by the fact that Florida law for at least 80 years had said Canvassing Boards should examine ballots to determine the "intent of the voters" regardless of whether the voters had marked their ballots properly,[23] but did not specify *how* the Boards should ascertain that intent. The result was that different boards exercised their discretion somewhat differently, just as government officials and juries routinely do in matters from whether a driver's license should be revoked to whether a defendant should be put to death.

There were sensible arguments for why machine counts should be preferred to human recounts - machines would, the evidence showed, fail to count a number of votes where the voter's intent was clear, but the machines were at least neutral. There were not Republi-

18. *Dred Scott*, 60 U.S at 452.

19. *Plessey*, 163 U.S. at 551-52 (1896).

20. Korematsu v. U.S., 323 U.S. at 225.

21. Justice McReynolds, in his dissent in *Missouri v. Canada*, 305 U.S. 337, 353 (1938), argued against weakening segregation on the ground that integration would "as indicated by experience, damnify both races."

22. Bush v. Gore, 531 U.S. 98 (2002).

23. *See* Fla. Stat. § 102.166.

can machines or Democrat machines, while a person's political preference might influence his or her subjective decision as to a voter's "intent." Nevertheless, Florida (and thirty-three other states) had long provided for human recounts. The question was not what the Florida rule was; it was not even what the Florida rule should be as a matter of policy. The question was whether the rule Florida had adopted was Constitutional.

Bush's arguments to stop the recount before it was completed were rejected by the Florida Supreme Court,[24] the federal District Court in Florida,[25] and the Court of Appeals for the Eleventh Circuit.[26] However, on December 9, 2000, a five-justice majority of the Supreme Court issued an order enjoining the recount until the Court had an opportunity to consider the merits of Bush's claim.[27] On December 13, the same five-justice majority upheld Bush's claim on Equal Protection grounds and declared an end to the recount effort.[28]

The majority opinion conceded that punch-card machines produced "an unfortunate number of ballots" where voters tried to vote but their ballots could not be counted by machines; but it held that there was now no remedy for this "unfortunate" forfeiture of the right of citizens to have their votes counted because the Florida recount involved human discretion which different counters applied differently.[29] The majority opinion tried to limit the applicability of its Equal Protection Clause ruling to this case alone.[30]

The four dissenting justices all emphasized their view that the majority opinion abandoned principled decision-making. A dissent by Justices Stevens, Ginsburg, and Breyer declared

> [w]hen questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion. The federal questions that ultimately emerged in this case are not substantial.[31]

This dissent went on to observe,

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24. Gore v. Harris, 772 So. 2d 1243 (2000).
25. Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000).
26. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000).
27. Bush v. Gore, 531 U.S. 1046 (2000).
28. Bush v. Gore, 531 U.S. 98 (2000).
29. *Id.* at 110-112.
30. *Id.* ("Our consideration is limited to the present circumstances.").
31. *Id.* at 123.

> [n]or are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the 'intent of the voter,' Fla. Stat. §101.5614(5) (Supp.2001), is to be determined rises to the level of a constitutional violation.[32]

The dissent noted that the majority of states approached the issue of determining the intent of the voter the way Florida did and pointed out that:

> [w]e have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient – or will lead to results any less uniform – than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country.[33]

The dissenters also emphasized the fact (ignored by the majority opinion despite its emphasis in briefs and oral argument) that "a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."[34] The dissenters concluded,

> [a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[35]

Justice Souter filed his own dissenting opinion. He began, "[t]he court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.* (per curiam), or this case, and should not have stopped Florida's attempt to recount all undervote ballots. . . ."[36] He went on to describe the majority opinion as "another erroneous decision."[37] He noted that if the majority had not stopped the recount, the entire issue might well have already been satisfactorily resolved.[38]

Justice Ginsburg, who had joined in Justice Stevens' dissent, filed an additional dissent in which she carefully analyzed how the cases cited in the majority's opinion failed to support their conclusions.[39] She gently noted the inconsistency between the majority's opinion and the traditional advocacy of federalism and deference to

32. *Id.* at 124.
33. *Bush*, 531 U.S. at 125.
34. *Id.* at 126.
35. *Id.* at 128-29.
36. *Id.* at 129.
37. *Id.*
38. *Bush*, 531 U.S. at 135.
39. *Id.* at 139-40.

state courts by the five justices who constituted that majority, "[w]ere the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."[40] The Justice went on to observe that the petitioners had "not presented a substantial equal protection claim" and that, even if they had, there was no justification for the majority not permitting the recount to proceed.[41]

Justice Breyer, who had also joined in Justice Stevens' dissent, filed a separate opinion as well. "The Court was wrong," he began, "to take this case. It was wrong to grant a stay."[42] The Justice noted "the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court."[43] He also emphasized that

> in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair.[44]

As the dissents emphasized, the majority abandoned virtually every rule the Court ordinarily follows in deciding cases. It did so by:

- disregarding a state Supreme Court's interpretation of state law;
- intervening before the Florida process had been completed and a record fully developed;
- prohibiting Florida from recounting ballots prior to a decision on the merits;
- deciding issues that had not been fully and fairly litigated in the court from which the appeal was taken;
- allowing an appellant not only to raise arguments on appeal not made below but to rely on arguments contrary to positions taken below;
- ignoring normal requirements for record evidence and findings to support factual determinations;
- ignoring admissions and concessions in the court below; and
- presuming that the procedures established in Florida to assure uniformity, including judicial supervision and a review of disputed interpretations by a single judge, would not work (without waiting to see whether they in fact worked).

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40. *Id.* at 142-43.

41. *Id.* at 143.

42. *Id.* at 144.

43. *Bush*, 531 U.S at 146 (emphasis in original).

44. *Id.* at 147.

Yet, that was not all, or even the most important thing, that was wrong. The majority's equal protection decision was contrary to principles used to construe the Equal Protection Clause in prior cases, particularly in opinions in which the Chief Justice Rehnquist and Justices Scalia and Thomas joined. Moreover, all five Justices in the majority explicitly recognized that they would be unwilling to apply the principles of *Bush v. Gore* to other cases, and declared that this was a decision for this case only.[45]

In addition, the undisputed fact was that the different types of voting machines used in different counties had a much greater effect on whether a vote would be recorded than any difference in the interpretation of what represented the intent of the voter. If it was, as the majority ruled, a violation of equal protection to give voters in one county a greater chance to have their ballots counted than to voters in another county, then it was a violation of equal protection for Florida to have different voting machines in different counties. The majority opinion never dealt with this inconsistency.

The majority also ignored the fact that the procedure established in Florida provided each side an opportunity to object to any ballot that it thought was improperly counted (or not counted) and provided that all unresolved disputes would be decided by a single judge. This procedure went to the heart of the majority's conclusion that the Florida process would inevitably result in unacceptably large differences in how ballots were treated from county to county.[46] If Bush failed to file a contest, or failed to object to the way certain ballots were counted on December 9th, there was no case to decide; if Bush did file a contest, or make an objection, Florida had established a procedure to resolve the issue. In addition, the majority's opinion depended on the assumption that the ultimate treatment of ballots during the recount would vary materially from county to county. It was hard to reconcile that assumption with the procedures established by Judge Lewis. The majority simply ignored those procedures.

Finally, if there has been one guiding principle of the jurisprudence of Justices Rehnquist, Scalia, and Thomas, and to a lesser extent O'Connor and Kennedy, it has been the overriding importance of federalism and states' rights. The need to defer to state courts has been used to justify case after case limiting the protection that federal law, including the Equal Protection and Due Process clauses, was earlier thought to provide. They are not deciding, and are not supposed to

45. *Id.* at 109.

46. *Id* at 106-07.

decide, what the best rule might be, the justices have argued—they must defer to the state courts in the name of federalism. The justices have argued, among other things, that federalism requires deference to a state's decision regarding everything from gay rights and abortion. to how prisoners are treated and whether guns should be permitted in the vicinity of public schools. If federalism means anything, it must mean that the states have the right to make decisions the U.S. Supreme Court would not make if it were sitting as a state court. In *Bush v. Gore*, the majority was unwilling to defer to the Florida court unless that court ruled the way the majority wanted it to rule.

It is also doubtful whether the majority's opinion met the rule-of-law requirement that decision-making be independent of the identity of the parties. Even conservative constitutional scholars have conceded that they doubt the result would have been the same if the case had been *Gore v. Bush*, with Gore leading in the vote count and trying to get the Supreme Court to stop manual recounts requested by the Republicans and ordered by a state supreme court.

Justices may, and sometimes do, come to the Court from partisan political backgrounds, but we as a nation hope and expect that partisanship ends with their appointment. During the more than two hundred years of our Republic, that hope and expectation has been fulfilled to a surprising extent. In particular, the Court has avoided using the unique power it has been given to influence elections for the President that will appoint their successors, leaving to the states and ultimately Congress the resolution of any disputes. Indeed, it is because the Congress is a political body whose members *are* responsible to the voters that both Article II of the Constitution and 3 U.S.C. § 5 provide that it shall be the institution to resolve controversies concerning a state's presidential electors. If no candidate received a majority of electoral votes and the contest had to be decided by Congress, each member of Congress would have been free to vote for the candidate he or she personally favored. That freedom, however, is not afforded to the nonelected and unrecallable justices of the Supreme Court, whose power rests on the presumption that they will decide cases not upon their preferences, but upon legal principles applied consistently. It is the perception that *Bush v. Gore* was decided to achieve a political result rather than as the result of the neutral application of legal principles that has led to its widespread criticism.

Bush v. Gore now appears more likely to become "an isolated deviation from the strong current of precedents — a derelict on the

waters of the law,"[47] than either a serious expansion of Equal Protection law or the beginning of a pattern of federal judicial intervention in deciding elections. But, however it is viewed, *Bush v. Gore* underscores the Court's enormous power and the importance of the criteria used to select and confirm justices.

47. Lambert v. California, 355 U.S. 225, 232 (1957) (J. Frankfurter dissenting).