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TEACHING *BUSH v. GORE* AS HISTORY

RICHARD L. HASEN*

INTRODUCTION

In my Remedies course, I assign the stay order¹ in *Bush v. Gore*,² the controversial December 2000 case ending the presidential election litigation between Al Gore and George W. Bush. The order, which stopped the statewide recount of “undervoted” ballots ordered by the Florida Supreme Court,³ is part of a unit on temporary restraining orders and other forms of preliminary relief. In the years right after the Florida debacle, I would begin my introduction to this material with a joke: “There was an election dispute in Florida. You may have heard about it.” I now begin my discussion of the stay order on a serious note: “There was an election dispute in Florida. You may have heard about it.”

I recently guest-lectured on *Bush v. Gore* in a seminar on the Supreme Court in Historical Perspective. My first Powerpoint slide was the iconic picture from the Associated Press of Broward County canvassing board member Judge Robert Rosenberg examining a punch card ballot to see if it had recorded a valid vote for president or merely counted as a “dimpled chad.”⁴ The magnifying glass made the judge look like Cyclops, a giant eye staring intently at the card in his hand. I asked the students if anyone was familiar with the picture. No one was.

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1. 531 U.S. 1046 (2000).

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

3. *Id.* at 102 (describing undervoted ballots as those ballots on which the voting machines detected no vote for President).

4. The photo below is reprinted with permission from the Associated Press. As all who lived through the election know, the “chad” is the part of the punch card ballot that voters are supposed to pierce to indicate their vote. Ford Fessenden & Christopher Drew, *Chads Have Their Place in Annals of the Law*, N.Y. TIMES, Nov. 16, 2000, at A32. During the Palm Beach County recount, election judges looked for “hanging chads” that were “detached enough to swing out” and “dimpled chads” that were indented, but not perforated. *Id.*



FIGURE 1. (Credit: Associated Press).

What a difference a decade makes.

For those of us who lived as adults through the thirty-six days at the end of 2000 when it was unclear who the next president would be, the intensity of the conflict remains vivid. Democrats and Republicans each were convinced that their candidate was the “real” winner in the election, and the other side would stop at nothing to manipulate the results to change the outcome. CNN kept a tally of the vote difference in the corner of its screen, the number changing as the result of various recounts, administrative decisions, and court challenges.⁵ The country was riveted by the most mind-numbing election law minutiae, such as the meaning of the phrase “error in the vote tabulation,”⁶ the unintended consequences of Palm Beach County’s “butterfly ballot” which was intended to help elderly voters more easily find their presidential choices through larger font,⁷ or Texas’s standard for judging the “intent of the voter” on a punch card ballot.⁸

5. See 2000: U.S. Presidential Election Recount, CNN, <http://www.cnn.com/video/#/video/us/2010/10/06/cnn30.2000.florida.recount.cnn> (last visited Oct. 13, 2011).

6. See, e.g., William Glaberson, *Judgment Exercised by Official in Florida at Core of Court Case*, N.Y. TIMES, Nov. 17, 2000, at A26.

7. See, e.g., Don Van Natta Jr., *Gore Set to Fight Palm Beach Vote: Complaints of Recount Flaws and Confusion Over Ballot*, N.Y. TIMES, Nov. 25, 2000, at A1.

8. See, e.g., Ford Fessenden & Christopher Drew, *For Texas and Other States, a Bump Is Sometimes a Vote*, N.Y. TIMES, Nov. 23, 2000, at A1.

In the period right after the dispute, students hung onto every detail of the story, and I regularly spent an entire class period in my Election Law course simply walking the students through the legal proceedings over the thirty-six days, and letting them get their hands on a real Florida punch card voting machine with a 2000 ballot (an anniversary gift from my wife, purchased on eBay).

These days, when I teach the material on *Bush v. Gore*, the students' reaction is noticeably different. Many of the students experienced the Florida dispute as adolescents—aware of the controversy (and likely influenced by their parents' views of its proper outcome) but of none of the particulars. They have no passion for the details the way students did five or ten years ago. Within a decade, most law students will have no contemporaneous memories of the dispute and eventually they will have been born after December 12, 2000, the date of the *Bush v. Gore* decision. I think back to when I was nine years old on a hot summer night in August 1974, watching a small black and white television on the porch of the cottage my family rented for the summer as Richard Nixon resigned the presidency. I knew then that Nixon's speech was a monumental event and I knew Nixon had done wrong, but it was not until college that I learned deeply about Watergate, as history. Today's and tomorrow's law students will experience *Bush v. Gore* as history, too.

My brief reflection for this symposium considers what it means to teach *Bush v. Gore* as history to Election Law students when most teachers of Election Law experienced it as a seminal life event. Indeed, *Bush v. Gore* brought the field of Election Law to national prominence and launched at least a decade of disputes—which I have termed “The Voting Wars”⁹—about the nuts-and-bolts of elections. While many Florida veterans resist Justice Scalia's frequent exhortations for opponents of the Supreme Court's *Bush v. Gore* decision to “Get over it,”¹⁰ time has been on Justice Scalia's side. The public hardly noticed the tenth anniversary of the decision.¹¹

The following discussion provides three ways for teachers of Election Law to teach *Bush v. Gore* as history to the new generation of students.

9. RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (forthcoming 2012).

10. Charles Lane, *Once Again, Scalia's the Talk of the Town*, WASH. POST, Apr. 15, 2006, at A2 (“Scalia had similar advice to a student in Switzerland who asked last month about the Supreme Court's ruling for George W. Bush during the 2000 election. ‘Oh, God. Get over it,’ he said.”).

11. My reflections on that tenth anniversary appear in Richard L. Hasen, *Election Hangover: The Real Legacy of Bush v. Gore*, SLATE (Dec. 3, 2010, 4:39 PM), <http://www.slate.com/id/2276710/>.

I. THE FLORIDA DEBACLE AS RASHOMON

Soon after the Court decided *Bush v. Gore*, I predicted lower courts would read the majority's opinion in "Rashomonic fashion," with some viewing its equal protection holding broadly and others more narrowly.¹² What I did not realize at the time was that trying to teach the Florida controversy through a textual exegesis of *Bush v. Gore*'s holding was itself a very narrow lens to view the broader conflict. Teaching Florida through *Bush v. Gore* invites students to focus upon the propriety of the United States Supreme Court's involvement: Was the stay order justified? Did the Court properly apply equal protection principles to resolve the case? Was the Article II rationale a stronger or weaker alternative basis for the Court's decision?

Imagine instead teaching the controversy through the Florida Supreme Court's 4-3 opinion (reviewed in *Bush v. Gore*) mandating a statewide recount of the undervotes in the presidential race.¹³ Was the Florida court's order justified given the scope of Florida statutes and earlier Florida caselaw on disputed elections? Why did the Florida court not respond directly to the United States Supreme Court's warnings in its first opinion in the controversy, *Bush v. Palm Beach County Canvassing Board*?¹⁴ Was the Florida court actually usurping the power of the state legislature to pick the rules for choosing presidential electors, or was this a justified act of statutory interpretation?

Both of these approaches alone create a danger of stacking the deck (and student opinion) against the decision of the court whose opinion is under the microscope. There is plenty to criticize in *both* sets of opinions, and focusing on one court's decision to the exclusion of the other presents a necessarily skewed view of the case. In addition, focusing class discussion on either set of court opinions narrowly conflates the broad Florida conflict into a dispute over the correctness of ending the final recount.

Instead, I learned in retelling the thirty-six days of controversy in Florida for my forthcoming book, *The Voting Wars*, that the only way to fairly teach about the debacle in any detail is to tell the story in full *Rashomon* style, presenting the same series of events from different vantage points.¹⁵ Across the thirty-six days of controversy, Republicans and Democrats each had ample grounds to complain about the unfairness of various aspects of the process and

12. See Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1497 (2002). In the famous Japanese movie *Rashomon*, director Akira Kurosawa presents the same events through the testimony of four different people. Their accounts do not match. See Roger Ebert, *Kurosawa Keeps His Stories Straight*, CHICAGO SUN-TIMES, May 26, 2002, at 4D.

13. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000).

14. 531 U.S. 70, 77-78 (2000).

15. HASEN, *supra* note 9.

about the actions taken by various actors—both supreme courts, Florida Secretary of State Katherine Harris, Florida Attorney General Bob Butterworth, the county canvassing boards, and others.¹⁶ When looked at through one pair of eyes, certain actions seem unfair. When examined through another pair of eyes, those actions seem more justified. For a nice contrast, compare the decisions of Republican Katherine Harris on reporting deadlines to the Democratic county canvassing boards' shifting standards for counting punch card ballots in Palm Beach and Broward counties.¹⁷

Teaching the Florida controversy more broadly from multiple points of view raises different sets of questions which are more interesting than the doctrinal points emerging from a case-centered approach. How could both Democrats and Republicans agree with the idea that disputed elections must be governed by a lawlessness principle,¹⁸ yet reach diametrically-opposed conclusions about how the Florida dispute should have been resolved? What does the nature of the dispute show about the comparative institutional competence of courts, election administrators, the media, and others to ferret out the truth and resolve election disputes? Have the steps taken since 2000—including the phasing out of unreliable punch card voting machines¹⁹ and Congress's passage of the Help America Vote Act²⁰—been sufficient to minimize the risks of meltdown that are evident from a full telling of the Florida story?

II. *BUSH V. GORE* AND EQUAL PROTECTION LAW IN THE SUPREME COURT

Not every instructor will want to take, or will have the luxury of taking, the time to teach the Florida controversy fully. Yet one cannot teach a modern course in Election Law without teaching something of *Bush v. Gore*, which remains one of the most controversial Supreme Court decisions of all time.²¹

16. *Id.*

17. See Lynne H. Rambo, *The Lawyers' Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. 105, 157–71 (2002) (providing an in-depth history of the actions taken by Katherine Harris and the Democratic county canvassing boards following the election).

18. Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979, 980 (2009) (“Professor Amar shows that everyone agrees elections should be decided as nearly as possible under the ‘rules of the game’ put in place on election day, and that it is illegitimate to change (or ‘twist’) the rules after the election ends.”).

19. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 15–16 (2007).

20. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301–15545 (2006)).

21. Cass R. Sunstein, *Introduction*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 1, 1 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

An alternative approach to the case is one that looks closely at the Supreme Court's equal protection holding in historical perspective. Not only did the five Justices in the *Bush v. Gore* majority find an equal protection violation in the way in which the Florida Supreme Court handled ballot counts from earlier recounts and the plans for additional recounts of undervoted ballots,²² but two additional Justices, Souter and Breyer, expressed similar concerns.²³ (These Justices differed on the remedy for the violation, and would have remanded the case to the Florida courts for a recount which would comport with constitutional standards.) How does this Court's judgment about the applicability of the equal protection issue fare when compared to how the Court historically had handled other equal protection claims?

There is no question that the *Bush* Court's invocation of the Equal Protection Clause of the Fourteenth Amendment to apply to an issue involving the "nuts and bolts" of elections was unprecedented.²⁴ Many liberals criticized the conservative members in the majority of *Bush v. Gore* for embracing a wide view of the Equal Protection Clause inconsistent with their usual approach to such cases.²⁵ But many of the Supreme Court's most important election law cases relying on equal protection principles were similarly unprecedented,²⁶ from the creation of the one person, one vote rule,²⁷ to the striking down of the poll tax,²⁸ to the creation of a cause of action for an unconstitutional racial gerrymander.²⁹

A comparison of the Court's equal protection cases in the elections area is a useful exercise for students, especially because the array of cases is likely to both include cases with which the student strongly agrees and strongly disagrees. It allows for consideration of a number of questions: Where does the Court's equal protection jurisprudence in election law come from? Does the set of cases reveal that law is mere politics, or do the cases demonstrate application of an unspoken political theory about the scope of court intervention in the law of the political process? Normatively, how should such cases be decided? And more generally, what should be the role of courts in policing the rules for democratic governance?³⁰

22. *Bush v. Gore*, 531 U.S. 98, 105–10 (2000) (per curiam).

23. *Id.* at 134 (Souter, J., dissenting); *Id.* at 145–46 (Breyer, J., dissenting).

24. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378, 386–88 (2001).

25. *See, e.g., id.*

26. *See* Hasen, *supra* note 24, at 387–88, 390.

27. *Reynolds v. Sims*, 377 U.S. 533, 583–84 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

28. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

29. *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

30. I explore these issues more fully in RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

III. *BUSH V. GORE* AS THE BEGINNING OF HISTORY

The second approach just outlined takes *Bush v. Gore* and looks *backward* to other Supreme Court election cases invoking the Equal Protection Clause. The final approach is to take *Bush v. Gore* and look *forward* to tease out the effects of the case on the later development of election law doctrine.

Much has been made of statements in *Bush v. Gore* suggesting the case was of limited precedential value.³¹ Indeed, in the more than one decade since its December 2000 decision date, *Bush v. Gore* has not been cited by any Supreme Court Justice even once in any opinion for any proposition.³²

Bush v. Gore has been cited in lower courts, however. As I predicted back in 2002,³³ courts have interpreted the reach of its holding in various ways,³⁴ as have learned commentators.³⁵ The trend, however, has been toward reading the case's equal protection reach narrowly,³⁶ to apply solely to a requirement of uniformity in the treatment of ballots in jurisdiction-wide recounts.³⁷ Despite the sparse doctrinal development, *Bush v. Gore*'s equal protection holding nonetheless may have influenced how courts and election administrators have crafted orders and recount procedures so as not to run afoul of basic uniformity requirements.

This approach to teaching *Bush v. Gore* through its subsequent history raises its own set of interesting questions to explore with students: Aside from the creation of Court holdings, how do Supreme Court opinions influence conduct in lower courts and among agencies and administrators? Can the

31. Chad Flanders, Comment, *Bush v. Gore and the Uses of 'Limiting'*, 116 YALE L.J. 1159, 1160 (2007).

32. Chad Flanders, Please Don't Cite This Case! The Precedential Value of *Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 144 (2006), <http://www.yalelawjournal.org/images/pdfs/75.pdf> (noting that the Supreme Court had not cited *Bush v. Gore* for any proposition). As of July 2011, the only almost-exception is Chief Justice Roberts's concurring opinion in *Citizens United v. Federal Election Commission*, in which the Chief Justice cited my book, *supra* note 30, which has the words "*Bush v. Gore*" in the title. 130 S. Ct. 876, 922 n.2 (2010) (Roberts, C.J., concurring).

33. See Hasen, *supra* note 12 at 1497.

34. Compare *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (holding that plaintiffs did not establish a clear probability of success on their equal protection claim regarding the use of punch card machines in some California counties), with *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (finding a potential equal protection violation regarding the use of punch card machines in some Illinois counties).

35. E.g., Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925 (2007); Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035 (2007); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007).

36. See Hasen, *supra* note 19, at 9.

37. *Id.* at 15.

Court really limit the precedential reach of a case even if it wishes to do so? Why has a narrow reading of *Bush v. Gore* emerged as the favored reading of the case?

Election Law teachers may best explore these issues not through *Bush v. Gore* itself, but through a recent Sixth Circuit case, *Hunter v. Hamilton County Board of Elections*.³⁸ The stakes in the case are exceedingly low, at least compared to *Bush v. Gore*, but the legal questions are fascinating.

The case involves a contested judicial election between candidates for Hamilton County Court Judge, Democrat Tracie Hunter and Republican John Williams.³⁹ The Hamilton County Board of Elections (the “Board”) declared Williams the winner by twenty-three votes.⁴⁰ Hunter complained about what she claimed was the Board’s unconstitutional inconsistent treatment of provisional ballots cast in the “wrong precinct” by Hamilton County voters.⁴¹ The Board accepted for counting twenty-seven provisional ballots which were cast at the Board’s offices in downtown Cincinnati prior to election day but for which voters received ballots from the wrong precinct.⁴² The Board accepted those ballots because it determined that voters received the wrong precinct ballots because of “clear pollworker error.”⁴³ However the Board refused to investigate whether any of 859 provisional ballots cast on election day in the wrong precinct also should be counted because of clear pollworker error.⁴⁴ Some of those wrong precinct votes were cast in the right physical polling place because a number of Hamilton County polling places consisted of numerous “precincts” within the same polling place at different tables.⁴⁵

Hunter sued, leading to cases in federal district court, the Sixth Circuit, the Ohio Supreme Court, and even briefly in the U.S. Supreme Court.⁴⁶ Along the way, the Democratic Secretary of State Jennifer Brunner issued directives which would cause the Board to count some of these provisional ballots,⁴⁷ the Republican Ohio Supreme Court issued an order compelling the Secretary to rescind her orders,⁴⁸ and Jon Husted, the Republican Secretary of State who replaced Brunner, filed briefs opposing the federal courts’ intervention in the

38. 635 F.3d 219 (6th Cir. 2011), *stay denied*, 131 S. Ct. 2149 (2011).

39. *Id.* at 222.

40. *Id.*

41. *Id.*

42. *Id.* at 224.

43. *Hunter*, 635 F.3d at 224.

44. *Id.* at 225.

45. *Id.* at 223, 225.

46. *See id.* at 227–28; *supra* note 38.

47. *Id.* at 227.

48. *Hunter*, 635 F.3d at 228.

cases.⁴⁹ Husted also broke a partisan tie-vote on the Board over whether to seek an emergency stay of the Sixth Circuit's decision with the U.S. Supreme Court.⁵⁰ At the time of this writing, the case remains unresolved. The Supreme Court denied the Board's motion to stay.⁵¹ The case is back in the lower courts to determine which ballots should be counted and the winner of the election.

Hunter not only provides an occasion for thinking through the meaning of the holding of *Bush v. Gore*. It also provides a vehicle for exploring partisanship and localism in election administration, the role of the courts in resolving election disputes, and the complex interactions of state and federal law and courts.

Bush v. Gore may not be what it once was (and still is to some Election Law teachers): a hot dispute bound to stir up emotions about whether the 2000 presidential election was (nearly) stolen from the rightful winner. But it remains one of the most important election law cases of the twentieth century, with ramifications for how we continue to run our elections. Thinking of *Bush v. Gore* as history opens up new ways to teach the case and new ways for students and their instructors to learn from it.

49. Amicus Brief of Ohio Secretary of State Jon Husted In Support of the Hamilton County Board of Elections Urging Reversal of the District Court And Granting A Stay, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011) (No. 11-3060).

50. Letter from John Husted, Ohio Sec'y of State, to Sally J. Krisel, Dir. of the Hamilton Cnty. Bd. of Elections (Feb. 2, 2011), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Hunter-SofSLetter-2-2-11.pdf>.

51. *Hamilton Cnty. Bd. of Elections v. Hunter*, 131 S. Ct. 2149 (2011).

