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***Bush* v. *Gore* and the Equal Protection Clause**

This afternoon I shall make a brief comment on *Bush* v. *Gore*.[1] Because there has been so much discussion of the remedy issue in that case—in which a majority of the United States Supreme Court issued a stay that halted the recount of Florida votes in the Presidential election of 2000[2]—the significance of the Court's *per curiam* opinion's reliance on the Equal Protection Clause of the Fourteenth Amendment has been generally overlooked.

As you may recall, in the 2000 election Florida used voting machines to count ballots on which voters had used a stylus to punch a hole in the small circle opposite the preferred candidate's name. Voters who

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[1] 531 U. S. 98 (2000) *(per curiam)*.
[2] *Bush*, 531 U. S., at 110-111.

successfully followed the written instructions punched a complete hole in the ballots and their votes were accurately counted by the machines. The voters whose votes were not counted by the machines fell into two categories, so-called "overvotes" and "undervotes." The overvote category included ballots on which the voter had tried to vote for two candidates for the same office. The undervote category included ballots on which the voter had designated just one candidate, but had failed to make a complete hole in the ballot. There were two sub-categories of undervotes—"hanging chads" and "dimpled chads". In the "hanging chad" subcategory, the punched-out piece of the ballot remained only partially attached whereas a ballot with a dimpled chad contained an indentation but no hole.

The Florida Supreme Court ordered a manual recount to be conducted according to the "intent of the voter" standard established by Florida law.[3] That court did not require a recount of overvotes, presumably because

[3] *Gore* v. *Harris*, 772 So. 2d 1243, 1247, 1254 (Fla. 2000) *(per curiam).*

a reexamination of those ballots would seldom reveal the identity of the voter's preferred candidate. The question with respect to undervotes, however, was not whom the voter intended to support, but whether the voter intended to vote for any Presidential candidate at all. In the typical case, either a hanging chad or a dimpled chad opposite the name of one candidate would both identify the voter's preferred candidate and indicate his or her intent to cast a vote.

During the recount, election officials differed on the question whether to count both dimpled chads and hanging chads, or just the latter—in other words, those for which light could be seen through the edge of the chad. In Palm Beach County, for example, the officials began to follow a 1990 guideline that drew a distinction between hanging and dimpled chads, but they ultimately ended up counting both subcategories of undervotes.[4] In its *per curiam* opinion, the United States Supreme Court described that change in a way

[4]See Don Van Natta Jr., The Dimples; Trying to Interpret a Ballot's Goosebumps, N. Y. Times, Nov. 26, 2000.

that gave the reader the impression that the officials had engaged in a standardless endeavor. The opinion states:

> "Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal."[5]

The paragraph is misleading in two respects. First, what it describes as switching to a new rule was in fact only a clarification of the original rule that considered only hanging chads as valid votes. The "new" rule clarified that a hanging chad was one through which any light could be seen, since that evidenced that the chad was not completely attached.

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[5] *Bush*, 531 U. S., at 106-107.

Second, what the paragraph describes as changing back to the 1990 rule was just a continuation of the practice of not counting dimpled chads. Of most significance, however, is the fact that the county ended up treating dimpled chads as valid votes before the United States Supreme Court ruled.

While the Court's *per curiam* opinion is misleading in other respects—for example, its implicit suggestion that the failure to order a recount of the estimated 110,000 overvotes was error despite the lack of evidence or argument suggesting how one could tell which candidate the voter intended to support—the principal point I want to make this morning concerns the absence of any coherent rationale supporting the opinion's reliance on the Equal Protection Clause.

The Equal Protection Clause requires states to govern impartially, and has particular force in protecting the right to vote.[6] There must be a neutral justification for rules or practices that discriminate

[6]See *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

for or against individuals on the basis of identifiable characteristics—including groups of individuals that are defined by race, by political affiliation, or by their residence in a particular location. The One-Person-One-Vote Rule, for example, prohibits States from giving greater weight to votes in rural areas than to votes in densely populated cities.[7] If residents of Palm Beach County, or perhaps members of the Democratic Party, were more likely than other voters to produce dimpled chads rather than hanging chads, there might be reason to hold that counting the two subcategories of undervotes differently would violate the Equal Protection Clause. But there was no claim by anyone in the case that variations in the methods of counting undervotes had any systemic significance. The mere possibility that accidental and random errors might occur during the voting and recount processes would not establish intentional discrimination against any pre-identified group of voters, and would not even establish any unintended disparate impact on either

[7] See *Reynolds*, 377 U. S., at 560-561.

candidate. And surely there would be nothing even arguably discriminatory in applying a rule that counted dimpled chads just like hanging chads.

Perhaps the Florida Supreme Court's opinion ordering a state-wide recount of undervotes was flawed because it failed to state expressly that dimpled chads as well as hanging chads should be counted as valid votes. If that omission was a flaw, it could have been remedied on remand by quoting the following two sentences from an Illinois case, *Pullen* v. *Mulligan*, decided a decade earlier:

> "The objection . . . that to be counted the chad should be fully punched out or that at least there should be a hanging chad on the back side of the ballot would set too rigid a standard for determining whether the voter intended to vote for the particular candidate. Many voters could be disenfranchised without their fault if, for example, ballots with only

perforations on the chad could not be regarded as indicating the voter's intent to vote."[8]

I have never thought the Florida Supreme Court's opinion was flawed, however, because it seems obvious to me—as it did to the unanimous Illinois Supreme Court in *Pullen*—that the "intent of the voter" standard, on which the Florida Supreme Court relied, was sufficiently clear to encompass dimpled chads.

My principal purpose in calling your attention to the Court's reliance on the Equal Protection Clause in *Bush* v. *Gore* is to emphasize how that provision of our Constitution, properly construed, would invalidate an invidious form of political behavior that remains popular today. If a mere defect in the standards governing voting recount practices can violate the States' duty to govern impartially, surely it must follow that the intentional practice of drawing bizarre boundaries of electoral districts in order to enhance the political power of the dominant party is

[8] *Pullen* v. *Mulligan*, 561 N. E. 2d 585, 614 (Ill. 1990).

unconstitutional. In recent cases, however, members of the majority of the Supreme Court have written opinions concluding that the absence of judicially manageable standards precludes judicial review of even the most obvious political gerrymanders.[9] Several separate opinions of members of the Court, including one written by Justice Lewis Powell in *Davis* v. *Bandemer* in 1986, as well as several of my own, have identified such standards for reviewing partisan gerrymanders;[10] and even a majority of the Court has applied manageable standards in cases involving racial gerrymandering.[11]

The unwillingness of the Supreme Court majority to recognize these standards has left a category of intentional discrimination against voters unchecked, so long as the discrimination is predicated on the basis of political party and not race. For example, just

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[9] See, *e.g.*, *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004); *LULAC* v. *Perry*, 548 U. S. 399, 420-423 (2006); see also *Bartlett* v. *Strickland*, 556 U. S. 1, 22 (2009).

[10] See, *e.g.*, *Davis* v. *Bandemer*, 478 U. S. 109, 161-185 (1986) (Powell, J., concurring in part and dissenting in part); *Vieth*, 541 U. S., at 317-341 (Stevens, J., dissenting); *id.*, at 342-354 (Souter, J., dissenting); *id.*, at 354-368 (Breyer, J., dissenting); *Karcher* v. *Daggett*, 462 U. S. 725, 744-765 (1983) (Stevens, J., concurring); *LULAC*, 548 U. S., at 447-483 (Stevens, J., concurring in part and dissenting in part).

[11] See, *e.g.*, *Shaw* v. *Reno*, 509 U. S. 630, 646-647 (1993); *Miller* v. *Johnson*, 515 U. S. 900 (1995); see also *Gomillion* v. *Lightfoot*, 364 U. S. 339, 349 (1960) (Whittaker, J., concurring).

last year a three-judge district court rejected a challenge to Maryland's redistricting plan because the plaintiffs "ha[d] not shown that the State moved African-American voters from one district to another because they were African-Americans and not simply because they were Democrats."[12] Even though the plaintiffs' claim that Democratic politicians had drawn district lines to reduce the number of Republican-held congressional seats was, in the words of the court, "the easiest [claim] to accept factually," the court declared it the "weakest claim legally" because the Supreme Court has declared partisan gerrymandering non-justiciable.[13] I will refrain from repeating the arguments that I have made in my opinions on this topic, but it seems appropriate to remind the members of this distinguished audience that both legislatures and courts have adequate power, and should recognize their responsibility, to curtail this insidious practice. The tools for doing so as a judicial matter

[12] *Fletcher* v. *Lamone*, __ F. Supp. 2d __, No. 11-cv-3220, 2011 WL 6740169, at *12 (D. Md. Dec. 23, 2011).
[13] *Id.* at *14.

have already been developed in the Supreme Court's racial gerrymandering jurisprudence, and in a number of separate opinions by members of the Court discussing political gerrymandering.

Thank you for your attention and for your continuing efforts to improve the law.