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In *Bush v. Gore*: Whatever Happened to the Due Process Ground?

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Laurence Tribe, in his first sentence regarding the Supreme Court's first argument in this unique matter, said he "would want to note at the outset that the alleged due process violation which keeps puffing up and then disappearing . . . is really not before the Court."[1] Whether one agrees or disagrees with the Court's equal protection ground, we all know how much that ground suffers from acute difficulties in terms of precedent and future doctrine. "[T]he Court had several reasons, none of them admirable, for relying on the Equal Protection Clause . . . ."[2] But too many people, in dismissing the equal protection ground, dismiss the weaknesses in Florida's recount process as mere weaknesses, and fail to consider whether the weaknesses violate another constitutional provision.

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* Professor, Georgetown Law Center. Fifteen months after the decision, only academics would hold a two-day conference on *Bush v. Gore*. At the moment this Conference met, my opening seemed obvious: "Have you thought much about the special drama of 5-4 decisions? How do you feel about whether the Canadian ice dancers were denied equal protection? If we could measure the public reaction to that, and compare it to the reaction to *Bush v. Gore*, is there as much contrast as there ought to be between an Olympic Gold and the most powerful office in the world?"

1. Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 587 n.2 (2001) (quoting Tr. of Oral Argument, Dec. 1, 2000, at 44–45, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), *available at* http://election2000.stanford.edu/00-836.pdf (last visited Nov. 23, 2002), 2000 U.S. Trans LEXIS 70). The reply brief for Bush argued that the Florida Supreme Court's decision, which allowed "dimpled" votes to be counted, violated the "Due Process Clause's general concern for fundamental fairness and adequate notice." Reply Br. for Pet'r at 18, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) (No. 00-836), *available at* 2000 WL 1792553. However, Professor Tribe's statement reiterated a point made in a supplemental brief for Gore—that Bush had failed to fully articulate a due process claim in his original petitioner's brief. *See* Supplemental Br. of Resp'ts Al Gore, Jr., & Fla. Democratic Party at 1, *Palm Beach County Canvassing Bd.* (No. 00-836), *available at* 2000 WL 1793147. When parties came before the Court again they pressed their due process arguments fully. *See* Br. for Pet'rs at 31, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* 2000 WL 1810102; Br. of Resp't Albert Gore, Jr. at 32, *Bush v. Gore* (No. 00-949), *available at* 2000 WL 1809151.

2. Karlan, *supra* note 1, at 589. For further analysis of the problems in the case's equal protection treatment, see SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 88–91 (rev. ed. 2001).

I submit that seven Justices were right (or 6.5, depending on how one reads Breyer[3]). Florida's recount system was unconstitutional[4]—*wholly aside from* whether the Court should have remanded or terminated as they did. But the flaw was a violation of "the Great Clause," due process,[5] which was denied by the combination of (a) allowing county canvassing boards such unfettered discretion that they were prone not only to error, but also to partisan manipulation, and (b) failing to provide even a simple safeguard to cabin that discretion (e.g., requiring bi-partisan canvassing boards).

At the outset, contrast the fundamental problems inherent in an equal protection ground and in a due process ground.[6] Equal protection presses toward uniformity, which runs up against our election system's legal structure that has been in place since 1789, and the values underlying that structure:

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3. As many have noted: (a) Breyer joins Souter's opinion, and Souter clearly agreed with the per curiam's holding that the recount process was unconstitutional; (b) Breyer's own opinion (which Souter joined), some view as more "equivocal" than Souter's; and (c) given how the two wrote, one would expect them to file opinions "concurring in part and dissenting in part" rather than simply dissenting. One can only note the all-but-mad (in both senses) pressure to issue the opinions. For instance, note below that the per curiam, having said at the outset that it was upholding only the equal protection claim, later says, "[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection *and due process* without substantial additional work." Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (emphasis added).

4. *Id.* at 110 (per curiam).

5. JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 2 (1985). "If habeas corpus is the 'Great Writ,' due process is the 'Great Clause.'" *Id.* How striking is the contrast between that memorable statement, and Pamela Karlan's: "If the Supreme Court was going to stop the recount, it had to use a constitutional provision with a pedigree. The Equal Protection Clause provided exactly that"? Karlan, *supra* note 1, at 601. If Karlan's statement didn't come from her—as valuable a scholar in Election Law as we have, from whom I and so many have learned so much—I would say that her statement reflects an insufficient sense of history. Magna Carta is not enough pedigree?

6. Put wholly aside (a) whether the Court should have taken the case at all; (b) whether, having taken it, the per curiam was right or wrong in refusing to remand as Souter and Breyer urged; (c) whether (as Justice Breyer put it) "[i]n light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II," *Bush*, 531 U.S. at 145 (Breyer, J., dissenting); and (d) whether a remand to remedy the lack of due process would, given the time pressures, have worked out any differently from the per curiam's "*Finis*!" As for whether the Court should have taken the case at all, I believed from the day after the election that it should have not. See the dispositive treatment by Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002), and Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335 (2001). Karlan sums it up so well: "Ultimately, [the Court] denied all of us due process of law." Karlan, *supra* note 1, at 602. My point in this article is that once the Court did take the case, it should have relied on due process. For the most unforgettable commentary on what the Court did, see the "visual aid" in Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2d 381 (2001).

> Decentralization of election administration reflects important political values, including the opportunities for local participation and decisionmaking concerning contestable political issues, as well as protection from centralized political manipulation and abuse. Decentralization necessarily entails variation . . . . Subjecting all interlocal differences in election rules and procedures to close constitutional scrutiny could eliminate meaningful decentralization of election administration.[7]

In contrast, what does due process run up against? Only our election system's propensity to protect the persons and groups who are already in power—"the self-favoring biases of political insiders," as Richard Briffault puts it[8]—which we see in so many areas of election law. For example, a flood of attention was given to the differences among Florida counties in how they decide, with flawed ballots, "the intent of the voter."[9] Little attention has been given to the sheer vagueness in that loose standard. That vagueness brought a high risk of differences even within counties, between different counting teams.[10] Such a loose standard empowers the people who will do the deciding, making it that much more important to note "the political makeup of the canvassing board[s]."[11] So far as I know, no one has noted the boards' "political makeup" in the inundation of writing about the case, except for Judge Tjoflat in his all-but-invisible Eleventh Circuit dissent.[12]

What should have happened in both the Florida Supreme Court and the United States Supreme Court is what should happen now by statute and, if necessary, by judicial decisions based on the Due Process Clause. To ensure that the deciders will be fair with no erosion of decentralization or its underlying values, two simple steps are needed: (1) improve the broad standard, "intent of the voter," so that that standard will be less susceptible to *either* being applied subjectively and arbitrarily to promote the partisan interests of the deciders *or* being changed mid-stream for the same purpose *or* both; and (2) assure that the recounting is never wholly in the hands of officials from only one

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7. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 326 (2001).

8. *Id.* at 349.

9. *See, e.g.*, Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct"–The Outcome of* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 9, 16–17 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter THE VOTE]; Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE 98, 114 (2001); Richard A. Posner, Bush v. Gore—*Prolegomenon to an Assessment*, *in* THE VOTE 165, 180–81 (2001).

10. *Bush*, 531 U.S. at 110 (per curiam).

11. Touchston v. McDermott, 234 F.3d 1133, 1143 n.32 (11th Cir. 2000) (Tjoflat, J., dissenting), *cert. denied*, 531 U.S. 1061 (2001).

12. *See id.* at 1134 (Tjoflat, J., dissenting).

party. Taking those steps, which are both easy to take and clear enough to minimize later litigation, would promote the values reflected in our consistent development toward more openness, more accountability, and more rule of law.

Part I highlights portions of the *Bush v. Gore*[13] opinions to show that at least seven of the Justices were, if I may put it this way, all puckered up to kiss a holding on due process grounds.[14] Those excerpts are followed by excerpts from the sole opinion examining the full facts of the Florida recount scheme, the Eleventh Circuit dissent.[15] In Part II, I treat the problem with the "intent of the voter" standard and the egregiously ignored potential for abuse in the county canvassing boards' compositions.[16] Part III looks briefly at the few words others have written on due process and this case.[17] Last, I take a brief look at due process precedent and its applicability here.[18]

I. FROM THE OPINIONS

A. *First, From the Per Curiam Opinion:*[19]

> The petition presents the following questions: . . . whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.[20]
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> . . . .
>
> . . . *The recount mechanisms* implemented in response to the decisions of the Florida Supreme Court *do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to equal protection]*. . . .[21]
>
> . . . .
>
> The want of . . . rules here has led to unequal evaluation of ballots in various respects. *See* Gore v. Harris, 772 So.2d 1243, 1267 (Fla. Dist. Ct. App. 2000) (Wells, C.J., dissenting) ("Should a county canvassing board count or not count a 'dimpled chad' where the voter

13. Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

14. *See infra* Parts I.A–C (quoting the per curiam and dissenting opinions in *Bush v. Gore*).

15. *See infra* Part I.D (quoting the dissent in *Touchston v. McDermott*).

16. *See infra* Part II (discussing the "intent of the voter" standard and the makeup of the county canvassing boards).

17. *See infra* Part III (discussing other commentators' approaches to *Bush v. Gore*).

18. *See infra* Part IV (discussing the Due Process Clause and its applicability to *Bush v. Gore*).

19. Bush v. Gore, 531 U.S. 98, 100-11 (2000) (per curiam).

20. *Id.* at 103 (per curiam).

21. *Id.* at 105 (per curiam) (emphasis added).

is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, *the standards for accepting or rejecting contested ballots might vary* not only from county to county but indeed *within a single county from one recount team to another.*[22]

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. 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.*[23]

. . . .

. . . The State Supreme Court ratified this uneven treatment. . . . Yet . . . Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.[24]

. . . The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies *concerns with the remedial processes that were under way.*[25]

. . . .

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. . . .[26]

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where *a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.* When a court orders a statewide remedy, *there must be at least some assurance that*

22. *Id.* at 106–07 (per curiam) (emphasis added).

23. *Id.* (per curiam) (emphasis added).

24. *Id.* at 108 (per curiam).

25. *Id.* (per curiam) (emphasis added).

26. *Id.* at 109 (per curiam) (emphasis added).

the rudimentary requirements of equal treatment and ***fundamental fairness*** *are satisfied.*[27]

. . . The State has not shown that its procedures include the necessary safeguards. . . .[28]

. . . [I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection ***and due process*** *without substantial additional work. . . .*[29]

. . . .

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy.[30]

B. Next, From Justice Souter's Dissent:[31]

Petitioners have raised an equal protection claim *(or, alternatively, a due process claim, see generally* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)),[32] in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that

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27. *Id.* (per curiam) (emphasis added).

28. *Id.* (per curiam) (emphasis added).

29. *Id.* at 110 (per curiam) (emphasis added).

30. *Id.* at 111 (per curiam).

31. *Id.* at 129–35 (Souter, J., dissenting).

32. Justice Souter's citation warrants expansion since (a) both equal protection and due process questions were raised in *Bush v. Gore*; (b) discussion of those questions has not, to say the least, been extensive; and (c) the Justices explicitly found violation of only equal protection. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), Justice Blackmun's opinion for the Court sustained a procedural due process attack on an Illinois agency action; the opinion did not even mention equal protection. But, Justice Blackmun also submitted a separate opinion (joined by Justices Brennan, Marshall, and O'Connor) that said, "I regard the equal protection issue as sufficiently important to require comment on my part, particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim." *Id.* at 438 (Blackmun, J., concurring). As a leading casebook puts it,

> Justice Blackmun . . . then explained why the challenged provision did not satisfy the minimum rationality standards of equal protection. . . . And, in another separate opinion, Justice Powell, joined by Justice Rehnquist, stated that even though he could not join Justice Blackmun's concurring opinion, he, too, agreed that the challenged law could not survive even the "minimum standard" of equal protection review. . . . Logan thus is a rare modern example of a case in which a majority agreed that a state law violated equal protection rationality standards.

GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 659 (13th ed. 1997).

have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.*, Tr. 238-242 (Dec. 2–3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing *varying standards applied to imperfectly punched ballots in Palm Beach County* during precertification manual recount); *id.*, at 497-500 (similarly describing *varying standards applied in Miami-Dade County*); Tr. of Hearing 8-10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). *I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.*[33]

C. Last, From Justice Breyer's Dissent:[34]

The majority's third concern does implicate *principles of fundamental fairness.* The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). . . . However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, *basic principles of fairness should have counseled the adoption of a uniform standard to address the problem.* In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.[35]

D. Several of the Most Egregiously Ignored Aspects of the Florida Recount Process: Excerpts From a Dissent in the Eleventh Circuit's Touchston v. McDermott[36] *Opinion*

In this separate case, rising out of the recount, the Eleventh Circuit affirmed the denial of an injunction sought by Brevard County voters to

33. *Bush*, 531 U.S. at 134 (Souter, J., dissenting) (emphasis added).

34. *Id.* at 144–58 (Breyer, J., dissenting).

35. *Id.* at 145–46 (Breyer, J., dissenting) (emphasis added).

36. Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000) (en banc) (per curiam), *cert. denied*, 531 U.S. 1061 (2001).

stop manual recounts that were about to begin in four other Florida counties.[37] From Judge Tjoflat's dissent:[38]

> I dissent because, in my view, plaintiffs have established a case of serious constitutional deprivation. . . .[39]
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> . . . .
>
> . . . The vote counting model that emerged from [the Florida Supreme Court's first decision, *Harris*,] requires the counting of votes . . . as valid votes if, applying a subjective standard, voter intent can be ascertained by manual inspection of the ballot. . . .[40]
>
> . . . The [state supreme] court left to each county canvassing board that conducts a manual recount the *unfettered discretion to set its own standards*. Under this standardless system, a mark on a punch card ballot that is deemed a sufficient showing of intent to be counted as a vote in one county might be deemed a non-vote by another county.[41]
>
> . . . [T]he court left the candidates or their parties with the option of requesting a count of undervoted ballots by invoking the manual recount statute in any one or more counties.[42]
>
> Accordingly, applying *Harris*[,] . . . indentations on punch card ballots—which I call "dimple votes"—may be counted as valid votes in selected counties. . . .[43]
>
> . . . Under this "selective dimple model," dimple votes cast in a county where no "recount" is requested are simply not counted.[44]
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> . . . .
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> . . . [T]he selective dimple model leaves to the candidates the decision of whether and where dimple votes should be included in the

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37. *Id.* (en banc) (per curiam). The en banc per curiam, in its entirety: "The district court's denial of a preliminary injunction is affirmed for the reasons set forth in *Siegel v. LePore*." *Id.* at 1133 (en banc) (per curiam) (citing Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000)).

38. In a separate dissent, Judge Birch wrote this:

> [T]he post-election debacle that brings these cases to us for resolution may be cynically viewed by some as depicted by Congresswoman Shirley Chisholm:
>
> > "Politics is a beautiful fraud that has been imposed on the people for years, whose practitioners exchange gilded promises for the most valuable thing their victims own: their votes. And who benefits the most? The lawyers."
>
> Shirley Anita Chisholm, Unbought and Unbossed, 1970. To respond in that way would be a mistake.

Id. at 1158–59 (Birch, J., dissenting).

39. *Id.* at 1134 (Tjoflat, J., dissenting).

40. *Id.* at 1142 (Tjoflat, J., dissenting) (discussing Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla.) (per curiam), *rev'd per curiam sub nom.* Bush v. Gore, 531 U.S. 98 (2000)).

41. *Id.* (Tjoflat, J., dissenting) (emphasis added).

42. *Id.* at 1143 (Tjoflat, J., dissenting).

43. *Id.* (Tjoflat, J., dissenting).

44. *Id.* (Tjoflat, J., dissenting).

final vote tally, *the system encourages candidates to cherry-pick*[45]— to carefully select the counties in which to request that ballots be manually examined for dimple votes. Under the selective dimple model, *a candidate will choose the counties based on*: (1) the percentage of the total machine-tabulated vote received; (2) the size of the county, measured by the total number of ballots cast in the election; and *(3) the political makeup of the canvassing board in the county.*[46] A candidate will want dimple votes counted in counties where he captured a greater proportion of the machine tabulated vote than did his opponent, because the candidate can expect that he will likely take a similar proportion of the dimple votes.[47] A candidate will favor counties where the most ballots were cast because those counties will have the most dimple votes. *The political composition of the county canvassing board will be critical to a candidate in making selective manual count requests for two reasons.* First, the election statutes give the canvassing board *unfettered discretion to honor a candidate's request to manually examine ballots.* Second, if the canvassing board grants the request, the election system affords the canvassing board *unfettered discretion to set the standards for determining which markings on a ballot demonstrate voter intent sufficient to constitute a vote.* Thus, a candidate is more likely to have his request for a manual count granted, and to receive favorable interpretations of voter intent, in counties where the candidate shares

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45. Writing later, Bush's counsel, Barry Richard stated: "The chosen counties shared two factors. They each had a relatively high vote total, and the machine total had given Gore a substantial margin of victory in each of them." Barry Richard, *In Defense of Two Supreme Courts*, 13 U. FLA. J.L. & PUB. POL'Y 1, 2 (2001). In the same journal, Gore's counsel W. Dexter Douglass wrote:

> The Florida lawyers with experience applying election laws believed that a protest, which would result in selected counties conducting the counting through their canvassing boards, was not the best and most likely way to obtain a fair count. Instead, this group of lawyers urged that individual protests be abandoned and that an election contest under Florida law be filed after the Secretary of State certified the winning slate on November 14, 2000.

W. Dexter Douglass, *A Look Back—One Lawyer's View*, 13 U. FLA. J.L. & PUB. POL'Y 15, 16 (2001).

46. "In most Florida counties, all members of the canvassing board will be elected officials." *Touchston*, 234 F.3d at 1143 n.32 (Tjoflat, J., dissenting).

47. In reality, the candidate will probably receive a higher proportion of the vote in a manual count because the county canvassing board has unfettered discretion as to what constitutes sufficient voter intent to amount to a vote. Since candidates are most likely to request and be granted manual recounts in counties where the canvassing board is dominated by political allies, the canvassing board will likely lean, when intent is difficult to discern, to finding a voter intended to vote for the candidate who requested the count.

Id. at 1144 n.33 (Tjoflat, J., dissenting).

> a political party affiliation with the majority of the canvassing board . . . .[48]
>
> . . . .
>
> . . . Thus, a candidate would, under the current system, be likely to ask for manual counts in large counties in which his party predominates.[49]
>
> These observations underscore the adversarial structure of the Florida scheme which allows candidates to play games with individual rights. The selective dimple model puts voters in no better a position than children in a schoolyard game yelling, "Pick me, pick me!" The candidates, as team captains, will only choose those who are sure to help them win. Smaller, less populated counties—like frail schoolchildren—have almost no chance of being picked. At the end of choosing teams, those who aren't chosen simply don't get to play. . . .[50]
>
> . . . .
>
> In addition to facilitating discrimination against individuals on a geographical basis, the selective dimple model encourages wily candidates to fence out voters on the basis of their party affiliation. Plaintiffs claim that, as Bush voters, their vote has been diluted by the selective enfranchisement of dimple voters in heavily populated, predominately Democratic counties. Specifically, they allege that . . . Gore . . . requested and received manual counts in Volusia, Palm Beach, Broward, and Miami-Dade counties—all counties in which he received approximately six out of every ten machine-counted votes. . . . *[T]he selective dimple model, as applied, is tailor-made for unconstitutional party-based discrimination* . . . .[51]
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> . . . .
>
> . . . [I]t is clear under federal law and under the facts of this case that plaintiffs have suffered a constitutional injury.[52]

II. THE PROBLEMS WITH THE "INTENT OF THE VOTER" STANDARD AND THE MAKEUP OF THE COUNTY CANVASSING BOARDS

A. First, the Standard Was Changed in Midstream

Recall that the per curiam noted that "Broward County used a more forgiving standard than Palm Beach County," and that Palm Beach

48. *Id.* at 1143–44 (Tjoflat, J., dissenting) (emphasis added).
49. *Id.* at 1150 (Tjoflat, J., dissenting).
50. *Id.* at 1150–51 (Tjoflat, J., dissenting).
51. *Id.* at 1152 (Tjoflat, J., dissenting) (emphasis added).
52. *Id.* at 1155–56 (Tjoflat, J., dissenting).

County went through several changes.[53] Only a strikingly small proportion of the *"scholarly"* writing on the case has noted those changes.[54] In fact, the standard was changed also in Broward County at

53. Bush v. Gore, 531 U.S. 98, 106–07 (2000) (per curiam).

54. "Scholarly" is special here because, as several scholars have decried:

> For those who believe in the rule of law, it is more than disturbing to find that by far the best predictor of one's attitude toward Bush v. Gore is whether one voted for Bush or for Gore. Perhaps this is not so disturbing for ordinary citizens, who are not specialists in constitutional law. But it is extremely disturbing to find that on the highly technical, even esoteric issues involved in the case, the attitudes of so many specialists—including journalists who follow the Court, political scientists, historians, law professors, and even judges—seem determined, almost all of the time, by their political preferences.

Cass Sunstein, *Untitled Comments*, "Bush v. Gore" *and the Conservatives: Gary Rosen & Critics*, 113 COMMENTARY, Mar. 1, 2002, at 21, *available at* 2002 WL 10068961. Similarly, Samuel Issacharoff deplored "the seeming inability of partisans on either side to see in the Supreme Court's decision anything but what their political predilections would have predicted." Samuel Issacharoff, *Untitled Comments*, "Bush v. Gore" *and the Conservatives: Gary Rosen & Critics*, 113 COMMENTARY, Mar. 1, 2002, at 20, *available at* 2002 WL 10068961.

One of the two Election Law casebooks edited out the per curiam's paragraph about Palm Beach and Miami-Dade Counties, although twenty-two pages are given to the opinions. *See* ISSACHAROFF ET AL., *supra* note 2, at 283. Note, however, that Issacharoff wrote this:

> [T]here was serious reason for concern in Palm Beach County where prior county board rules on the counting of the now infamous dimpled chads were fairly clearly abrogated in the rush to accommodate claims of voter error and defective voting machines in Election 2000. Particularly in light of the peculiar claims for selected recounts under shifting procedures, the Florida scenario was ripe for claims that the integrity of the process was being compromised for partisan aims.

Id. at 645. Note too that Karlan and Pildes "have written separate essays that locate [the case] in lines of cases with a less partisan bent . . . ." Michael C. Dorf, *Review of Elections and Democracy: The 2000 Presidential Election: Archetype of Exception?* 99 MICH. L. REV. 1279, 1283 (2001) (citing Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345 (2001); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001)).

One of the plainest examples of scholarship declining into partisanship is the argument by some leading authorities that Bush lacked standing. For example, Erwin Chemerinsky writes this:

> [D]id Bush have standing to raise this claim? . . .
>
> . . . .
>
> . . . [I]t can be argued that Bush had third-party standing to raise the rights of Florida voters. This is [his] strongest claim for standing . . . .
>
> . . . .
>
> A[n] . . . exception to the ban against third-party standing permits an individual to assert the rights of third parties where there is a close relationship between the advocate and the third party. . . .
>
> It is difficult to fit *Bush v. Gore* within this exception. There is no personal relationship between Bush and the Florida voters. . . . In *Craig v. Boren* [429 U.S. 190 (1976)], the Court allowed bartenders to raise the claims of their customers in challenging an Oklahoma law that allowed women, but not men, to buy 3.2% beer at age eighteen. [But that case] involve[d] a very different kind of relationship than that in *Bush v. Gore*. . . .
>
> . . . In *Bush v. Gore*, the Court ignored [the long-standing] limits [on standing].

the request of the Democrats—and there were only four counties recounting.[55]

B. Second, the Standards Played a Central Role From the Start

As explained in one of the best books about this case[56]:

> Gore had the guys who wrote the book on recounts—literally: *The Recount Primer*, by Timothy Downs, Chris Sautter and John Hardin

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Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1097, 1099, 1101–02 (2001). In Chemerinsky's treatise, he describes *Craig v. Boren* as "the most famous example" of third-party standing. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 86 (3d ed. 1999).

I find it literally incredible to say that George W. Bush has less "personal relationships" with Floridians who voted and/or worked for him, than a bartender has with customers.

> [I]t is hardly credible—indeed, it borders on the fantastic—to argue that Bush himself lacked standing to press an equal protection claim. . . .
>
> . . . [H]e surely had third-party standing. His injury was obvious . . . a recount . . . rigged in favor of his opponent. [He had standing] to represent at least those who had voted for him and whose votes stood to be devalued during a recount.

Laurence H. Tribe, eroG .v hsuB *and its Disguises: Freeing* Bush v. Gore *From its Hall of Mirrors*, 115 HARV. L. REV. 170, 229–30 (2001); *see* Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 423 n. 9 (2001).

55. As the *New York Times* reported:

> The Republicans again harshly criticized the [recount] process as unfair, pointing particularly to the decision this morning by the Broward County Canvassing Board to adopt a broader standard when determining what constitutes a vote.
>
> The board, made up of two Democrats and a Republican, voted unanimously to consider dimpled or one-corner chads, the tiny pieces of paper that are normally dislodged from punch cards when a voter makes a choice, as possible votes for either [Gore] or [Bush]. Previously, the board had counted only chads with two or more corners punched through as votes.
>
> The change came at the request of Democrats, who are clearly discouraged that the hand recounts in Broward and Palm Beach Counties have yet to produce the huge surge of additional votes for Mr. Gore that they had hoped to see . . . .
>
> . . . .
>
> Broward County's revised definition, adopted after recounting was completed in nearly half of the county's precincts, enraged Republicans, who accused the Democratic-controlled canvassing board of bowing to political pressure by maneuvering to achieve a result-oriented count.
>
> . . . .
>
> . . . [T]he chairman of the Broward County Republican Party[] said considering dimpled ballots "increases the subjectivity by tenfold" of workers. [Governor Racicot of Montana] argued that eight of the nine members of South Florida's three canvassing boards are Democrats.

Don Van Natta, Jr., *Fatigue in Florida: Bush's Slim Lead Holds as Rules Change and Challenges Pile Up*, N.Y. TIMES, Nov. 20, 2000, at A1, *available at* LEXIS, News Library, The New York Times File.

56. POLITICAL STAFF OF THE WASHINGTON POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION (Leonard Downie, Jr. ed., 2001).

"Jack" Young. The authors—veteran Democratic trench fighters—tore pages from their book and copied them using the two airborne fax machines.[57]

. . . .

. . . The challenge Gore faced was right there in the opening pages of *The Recount Primer.* The maxims of any recount are always the same, Gore's tacticians wrote: "If a candidate is ahead, the scope of the recount should be as narrow as possible, and the rules and procedures . . . should duplicate the procedures of election night." . . .[58]

"If a candidate is behind," the *Primer* continues, "the scope should be as broad as possible, and the rules should be different from those used election night." In other words, Young said, "It's the end of the fourth quarter. When you are behind, a recount is a Hail Mary. The one who is behind has to gather votes."[59]

How? Expand the universe of possible votes. . . .[60]

. . . .

. . . [T]he counting-room battle boiled down to a fight over the standards by which the ballots would be counted—and also whether there was time to recount them at all. These were subjective judgments, to be made by little-known members of the county canvassing boards . . . .[61]

. . . .

. . . They had to get the count going in South Florida, their strongest area, and keep it going until Gore was ahead. Every Republican lawyer believed that, given a chance, the Democratic authorities in South Florida would devise a ballot-reading standard that would lift Gore into the lead . . . .[62]

. . . .

The issue that became the crux of the War of Florida was: What marks would qualify as a vote? . . .[63]

. . . .

. . . In the protest phase, all the power rested with the county canvassing boards. As Gore had learned they had wide discretion. They could count or not count. They could drag their feet. They could set hard standards for counting or set easy ones.[64]

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57. *Id.* at 51.
58. *Id.* at 53.
59. *Id.*
60. *Id.*
61. *Id.* at 86.
62. *Id.* at 108.
63. *Id.* at 117.
64. *Id.* at 157.

> . . . .
>
> [And on December 11, at the Supreme Court oral argument, Justice Breyer asked:]
>
> "If it were to start up again . . . what, in your opinion, would be a fair standard?["] . . . Breyer, with Souter's support, had taken on the job of coaxing Kennedy or O'Connor to the more liberal side. But he knew Kennedy would not permit the examination of ballots to start up again without a consistent standard to define a vote. The question of consistent standards from county to county had been a feature in the Bush complaint from the first weekend after Election Day. Boies, when he argued to the Florida Supreme Court [on] November [20], had asked the justices then to set a standard—he suggested one favorable to Gore, of course—because he knew the issue could grow in significance. Indeed, the latest actions in Florida had given question of standards a new potency.[65]

Boies, in the Supreme Court argument, said that he "think[s] there must be a uniform standard. [He] think[s] there is a uniform standard. The question is whether that standard is too general or not . . . ."[66]

C. Third, Other States' Standards

"Certainly, it would be unconstitutional for a canvassing board to count only those undervote ballots marked for a Democrat while ignoring those marked for a Republican."[67]

How different from that obviously intolerable hypothetical was Florida's system? In my view, Florida allowed an unconstitutional likelihood of county boards tilting their decisions toward one party. Correcting that system would be simple: adopt more defined standards like those in place in other states, *and/or* bar changes during a recount, *and/or* give some assurance that the boards are at least bipartisan.

Florida is like a majority of states that use the "intent of the voter" standard, but a number of states have lower-risk standards. For example, Indiana specifies that "[a] chad that has been pierced but not entirely punched out of the card, shall be counted . . . a chad that has been indented, but not in any way separated from the remainder of the card, may not be counted."[68]

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65. *Id.* at 222.

66. Tr. of Oral Argument, Dec. 11, 2000, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* 2000 WL 1804429, at *49.

67. Briffault, *supra* note 7, at 360.

68. IND. CODE ANN. § 3-12-1-9.5(d) (West 1997). Thus, Indiana does not count "dimpled" and "pregnant" chads. Indiana provides an entire section on determining how to count punch card ballots, including a definition of a chad ("the part of a ballot that indicates a vote on the card when entirely punched out by the vote"), and guidance for instances where the voter punches a

The fact that many States allow subjective decisions in recounts, and that this regime has never been disturbed by the courts, does not insulate this system any more than it insulated malapportionment or segregation or treating welfare benefits as "privileges" not within life, liberty, or property (and so not within the guaranty of due process), until *Goldberg v. Kelly*[69] in 1970.

D. Florida's Standard May Be Viewed in Retrospect

As David Boies highlighted his oral argument at the Florida Supreme Court on November 20, he urged the justices "to act expeditiously to set the standard. . . . [Y]ou find it partly in the Florida law, but . . . you can, also, find it from the laws of other states. . . . [I]t is important to the integrity of the process."[70]

The ease and significance of improving on a standard like Florida's were summed up by a leading authority soon after the election:

> ***Defining a valid vote.*** If there had been either a definition of a valid vote in the election law or, alternatively, a law giving the chief state election official the authority to define by administrative rule . . . then the chaos of election 2000 would have been largely avoided. If, for instance, there had been a definition that stated, "For punch-card voting a valid vote shall be one in which two or more corners of the prescored cardstock are detached at the position assigned to the candidate on the cardstock," we would not have had the spectacle . . . .[71]

In 2001, of course, Florida did set standards for recounts, "which narrow the broader standard of 'intent of the voter' to a more specific standard designated as a 'definite choice.' Specific standards will be

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hole on the number of a candidate instead of punching through the chad. *Id.* § 3-12-1-9.5(c) to (d); *see also In re* Issue 27 Election of Nov. 4, 1997, 693 N.E.2d 1190 (Ohio Ct. Common Pleas, Licking County 1998). Recently, Virginia, revamping its recount procedures for punch card ballots, codified a "two corner rule": machine-rejected ballots are counted only if at least two or more corners of the chad are detached. The statute adds that "[n]o other depression, dimple, or other mark on the ballot shall be counted as a vote." VA. CODE ANN. § 24.2-802 (Michie 2000 & Supp. 2002).

69. Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970).

70. Tr. of Oral Argument, Nov. 20, 2000, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (2000) (No. SC00-2346) (statement of David Boies), *available at* http://news.findlaw.com/cnn/docs/election2000/fsc1120transcript.html (last visited Oct. 20, 2002), http://wfsu.org/gavel2gavel/transcript/00-2346.htm (last visited Oct. 20, 2002).

71. R. Doug Lewis, *Revisiting Florida 2000: Failures of Law*, 12 J. DEMOCRACY 140, 141 (2001) (R. Doug Lewis is the executive director of The Election Center, a nongovernmental organization of United States election officials).

established for each voting system working with the Division of Elections."[72]

The most illuminating retrospective views are the findings from the media consortium's months-long re-run of the recount:

> [In the actual recount, the four counties'] recounting was being conducted by unscreened temporary workers supervised by partisan election officials.... By the end, as Gore's counsel memorably conceded, the standard being applied varied from table to table.[73]
>
> Does it matter? The media recount confirms that it does. The media consortium—the *New York Times*, the *Washington Post*, the *Los Angeles Times*, the *Wall Street Journal*, the Associated Press, CNN, and four Florida newspapers—contracted with the National Opinion Research Center to examine all the uncounted ballots in the states. Yet even when a single standard was specified, the counters hired by NORC frequently disagreed in their ballot interpretation.[74]
>
> Although counters agreed on 96 percent of punch card ballots, that 4 percent error rate greatly exceeded the 0.001 percent margin in the Florida presidential election.... Moreover, this 96 percent figure is misleading because it includes agreements on ballots where there was no marking to dispute. On ballots where at least one counter saw a potential vote for Bush or Gore, the counters disagreed 34 percent of the time, 37 percent for punch card ballots. Most worrisome, even with elaborate efforts to screen for political bias, the political affiliation of the counters affected the results. Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democratic counters were 25 percent more likely to deny a mark was for Bush.[75]
>
> ... If this is the sort of accuracy and bias one gets from an unhurried, professional nonpartisan organization whose counters were screened for bias and bound to the *same* standard, imagine the sort of inaccuracy and bias that would result from a partisan set of counters,

72. Jon Mills, *Reforms in Florida After the 2000 Presidential Election*, 13 U. FLA. J.L. & PUB. POL'Y 69, 78 (2001).

73. Einer Elhauge, *Florida 2000: Bush Wins Again!*, WKLY. STANDARD, Nov. 26, 2001, at 29 [hereinafter Elhauge, *Bush Wins Again*]. Einer Elhauge is a Harvard Law professor who represented the Florida House of Representatives during the election dispute.

74. *Id.*; *see also* Einer Elhauge, *The Lessons of Florida 2000*, 110 POL'Y REV. 15, 18 (Dec. 2001–Jan. 2002) [hereinafter Elhauge, *Lessons*] (discussing the results of the nearly year-long media recount completed in November 2001).

75. Elhauge, *Lessons*, *supra* note 74, at 18; *see also* Elhauge, *Bush Wins Again*, *supra* note 73, at 29 (making a nearly identical statement).

rushing to complete a recount quickly, and free to vary their standards.[76]

E. The Problem with the County Canvassing Boards

Typically, county canvassing boards, usually in one-party control, both chose and applied the standards. Only Judge Tjoflat noted that Florida's boards were composed of three elected officials, serving *ex officio*: the county commission chairperson, a county judge, and the county's Supervisor of Elections.[77] Although Florida's county judges appear on the ballot as non-partisans with six-year terms, naturally, they are all chosen by or acceptable to the local establishment, and many (probably most) have been active partisans.[78] No data is kept on how many of the sixty-seven counties' canvassing board members are Democrats or Republicans, but, in many counties, one party is dominant.[79] Although there may be observers from all parties, in most counties the people responsible for deciding whether to recount (on which, as Judge Tjoflat put it, each board has "unfettered discretion"), and then to supervise a recount, are all of one party. As one Floridian noted in reaction to my inquiry, "Who do you think designed this system? Someone dedicated to balance?"

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76. Elhauge, *Lessons*, *supra* note 74, at 18–19; *see also* Elhauge, *Bush Wins Again*, *supra* note 73, at 29 (making a nearly identical statement).

77. Touchston v. McDermott, 234 F.3d 1133, 1136 n.8 (11th Cir. 2000) (Tjoflat, J., dissenting). Of Florida's sixty-seven counties, only one differs. In Miami-Dade, the Supervisor is a career appointee. *See* Miami-Dade County, Elections, David C. Leahy, Supervisor of Elections, *at* http://www.co.miami-dade.fl.us/info/govorg/bio/elections.htm (last modified May 30, 2002).

In the slip copy of his concurring opinion, Rehnquist indirectly cited, for instructions given to voters, Tjoflat's dissenting opinion from *Touchston v. McDermott* as it appears in *Westlaw*, 2000 WL 1781942, at *6 & n.19. *See* Bush v. Gore, No. 00-949, slip op., 2000 U.S. LEXIS 8430, at *119 (Dec. 12, 2000) (Rehnquist, C.J., dissenting). In the official reporter, a citation to a brief for Respondent Harris replaces the citation to Tjoflat's dissenting opinion. *See* Bush v. Gore, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., dissenting).

78. A telling example: In Broward County (which was one of the four in which Gore secured a recount), as of January 2002, of their seventy-five county judges, sixty-six are registered Democrats. In fact, most Florida judges, like most judges in all of the thirty-nine states with judicial elections, initially reach the bench not by election but by appointment. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.–D.C.L. 849, 853 n.17. Of course, the mere fact that two of three board members are elected officials from one party, and the third a nonpartisan elected judge who, far more often than not, was affiliated and very often active in that same party, does not prove bias. I am indebted to Hans Linde for pointing out that the mere fact that a justice of the peace draws his salary from fines he imposes does not prove bias, but nonetheless is held unconstitutional. *See* Tumey v. Ohio, 273 U.S. 510, 533–34 (1927).

79. As for most counties having one-party boards: no data is available, but all of the Floridians with whom I have discussed this have no doubt about it.

On the boards' composition, academics are not only silent, they err.[80] But, composition of the boards matters so much that in July 2001, the National Task Force on Election Reform (thirty-seven elected and appointed election officials from throughout the nation) made this its third recommendation, in a list of thirty-four:

> That each state examine the make up of canvassing boards and give consideration to restructuring them into bipartisan or nonpartisan bodies. These boards may take any number of forms and replace existing partisan canvassing boards, partisan recount boards or partisan officials.[81]

In fact, at least twenty states already assure against the risk of partisan abuse that is inherent in a system like Florida's.[82] Except for sheer defense of the status quo, there seems to be no argument against that recommendation as a matter of policy. But to say that the risk of partisan abuse—i.e., use of official power to pursue self-serving ends—rises to the level of a due process violation is a separate question. For me, that answer is clear because avoiding one-party control of recounts seems to be a sine qua non to the integrity of recounts. Correction would involve only a one-time judicial intervention to end this classic example of "the dominant parties manag[ing] to lock up political

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80. Bruce Ackerman's error is understandable, as he wrote early. "While the minority party is represented on these boards, the local majority typically calls the tune." Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. OF BOOKS, Feb. 8, 2001, at 3. Typical of most writing is Laurence Tribe's assuming away the key problem with the boards. He writes:

> [T]he election code of Florida attempts to harness rather than to exile partisan motives and political self-interest, while providing safeguards against partisan fervor. The principal safeguard rests in reliance on the integrity of the members of county canvassing boards, with public scrutiny helping keep those board members honest . . . . [The] county canvassing boards can and should be relied upon to apply the "intent of the voter" standard with integrity in manual recounts.

Tribe, *supra* note 54, at 215. Tribe does mention, in one of his two opening "fairy tales" that he then deconstructs, that the Bush supporters' "story" would include the view that the "several county canvassing boards [were] all hand picked by [Gore] with only partisan gains in mind . . . ." *Id.* at 174.

81. NAT'L TASK FORCE ON ELECTION REFORM, THE ELECTION CTR., ELECTION 2000: REVIEW AND RECOMMENDATIONS BY THE NATION'S ELECTION ADMINISTRATORS, EXECUTIVE SUMMARY NATIONAL TASK FORCE RECOMMENDATIONS, GOVERNANCE & ADMINISTRATION RECOMMENDATIONS, ¶ 3 (July 2001), *available at* http://www.electioncenter.org/electionreformreport/COMPLETE%20Final%20Report.htm (last visited Nov. 23, 2002).

82. Sixteen States require local election boards to be multi-party, another four require their state boards to be multi-party, and eight require it at both levels. *See* FEC, THE ADMINISTRATIVE STRUCTURE OF STATE ELECTION OFFICES, *available at* http://www.fec.gov/pages/tech3.htm (last visited Nov. 23, 2002). Some states that should be included are missing from that source, for example, Michigan, where the major parties' state and county committees nominate three persons for each seat that "the major political party is entitled to," and the governor and county boards of supervisors appoint. MICH. COMP. LAWS ANN. §§ 168.22(a) (West 1989), 168.24(c) (West 1989 & Supp. 2002).

institutions."[83] Thus, we need an intervention to "preser[ve a] robustly competitive partisan environment."[84]

III. OTHER COMMENTATORS ON THIS CASE AND DUE PROCESS

The minuscule treatment by even such authorities on due process as Richard Posner and Cass Sunstein can be described as a "brush off." Only Laurence Tribe gives fuller consideration,[85] which, with all respect, is error-ridden as shown below.[86]

Posner wrote only this:

> A [Fourteenth Amendment argument that is better than the equal protection argument] is that an irrational method of determining the outcome of an election is a denial of due process of law . . . . Yet even this would not be an inconsequential doctrinal step—the creation of a federal duty to use uniform *precise* criteria in a recount.[87]

But, the question is not about "precise" criteria. Rather, it is whether, if steps are unburdensome—indeed, easy and already in place in many jurisdictions—to reduce the risk of erroneous, arbitrary action, we must tolerate "unfettered discretion."

Sunstein's brush-off is this:

> Plaintiffs argued that without clear criteria to discipline the exercise of discretion, there was a risk that the similarly situated would not be treated similarly, and that this risk was constitutionally unacceptable. But outside of the most egregious settings, these efforts failed, apparently on the theory that rule-bound decisions produce arbitrariness of their own, and courts are in a poor position to know whether rules are better than discretionary judgments.[88]

Again, the question is not whether to have "rule-bound" decisions, it is whether—given the feasibility of standards or "rules" like Indiana's, as

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83. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998). "The threat to political markets is most direct and palpable when insiders control the instrumentalities of the state to raise barriers to competition." *Id.*

84. *Id.* at 717.

85. Tribe, *supra* note 54, at 233–47.

86. *See infra* notes 96–116 and accompanying text (discussing Tribe's conclusion that due process was not violated by Florida's election procedures).

87. Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 42.

88. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 771–72 (2001).

discussed above[89]—it is constitutional to let subjectivity play freely, especially with such strong incentives for abuse, i.e., partisan bias.[90]

A fuller treatment by Peter Shane is entertaining but unhelpful. He shares my view that "one of the more unfortunate aspects of [the *Bush v. Gore* opinion] is . . . that it focuses on the wrong, or at least the less compelling, thing—[equal protection]—rather than [due process]."[91] But, first he tries an approach based on the Fourteenth Amendment's Reduction-of-Representation Clause;[92] that approach, as Pamela Karlan shows, fails.[93] Then he offers a delightful hypothetical: Gore could have claimed a due process right to recounts if the Florida Supreme Court had upheld Secretary Harris's view that they were available only in very limited circumstances.[94] But, Shane attends so little to what did happen that he does not even consider the feasibility of developing standards that "cabin discretion" and of having canvassing boards that are likely to be fair.[95]

Laurence Tribe gives the fullest treatment of due process, finding it an inappropriate ground.[96] Tribe divides due process into three categories rather than the usual two: in addition to substantive and procedural, he adds what he calls "structural."[97] Let us avoid

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89. *See supra* note 68 and accompanying text (discussing Indiana's comprehensive policy on counting pierced, dimpled, and fully punched chads from ballots).

90. Realism about "rules" was recently put well by Jerold S. Solovy and Robert L. Byman:

> WE CALL THEM rules, but come on. . . . [I]f you have come to believe that the Federal Rules of Evidence and the Federal Rules of Civil Procedure are rules, you should ask for a refund on your law school tuition. We call them Federal Rules, but in large measure they can be interpreted in myriad ways. They often provide no clear-cut answers. They contradict one another. These rules do not rule.

Jerold S. Solovy & Robert L. Byman, *If Rules Only Ruled*, NAT'L L.J., Apr. 1, 2002, at B11.

91. Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 551 (2001).

92. *See id.* at 550–53. The Fourteenth Amendment states that "Representatives shall be appointed among the several States according to their respective numbers . . . . But when the right to vote at any election . . . is denied . . . or in any way abridged . . . the basis of representation therein shall be reduced." U.S. CONST. amend. XIV, § 2. Shane argues that equal protection is not the best lens through which to view the Florida situation. Shane, *supra* note 91, at 550–53. Instead, Shane argues that due process is better because it focuses on the adjudicating system of counting votes and is more closely tied to the democratic principle than equal protection. *Id.*

93. *See* Karlan, *supra* note 1, at 589–93 (arguing that Shane's argument interprets the language of the Reduction-of-Representation Clause too narrowly).

94. Shane, *supra* note 91, at 553–68.

95. *See id.*

96. *See* Tribe, *supra* note 54, at 221–22, 231–47.

97. *Id.* at 231 (drawing upon his own work, Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 300–01 (1975)). The usual approach is stated concisely by Erwin Chemerinsky: "[The] clause has been interpreted as imposing two separate limits on government, usually called 'procedural due process' and 'substantive due process.'" ERWIN CHEMERINSKY,

distraction about just which issues belong in just which cubbyholes, and go directly to the issues.

"Procedural" due process, as amazingly minimized by Tribe, is nothing but "the sense of meaningful notice and a fair hearing before a neutral adjudicator," which he at once dismisses as "a nonstarter."[98] Except for the issue of the canvassing boards' compositions, already noted above,[99] no more need be said about his shrunken version of "procedural" due process. Shrunken and also distorted: incomprehensively, Tribe writes that "no process at all is constitutionally due to an individual unless the state's law first confers some positive entitlement—such as a job held with tenure . . . ."[100] Of course, Tribe knows that such entitlement is true only of "property" interests, like jobs, and is not true of "liberty" interests, like the right to even be *eligible* for jobs or, of course, the right to vote.[101]

According to Tribe, "state regulations of voting can impinge on liberty in a substantive way only when they restrict the ability of some voters to participate . . . for example, a poll tax . . . . [T]here is no way to construe the Florida recount as a restriction of any facet of a citizen's substantive liberty."[102] Would Tribe deny that a "facet of . . . substantive liberty" is restricted in Richard Briffault's hypothetical horror, with "a canvassing board [counting] only those undervote ballots marked for a Democrat while ignoring those marked for a Republican?"[103]

Tribe then addresses

> substantive due process as a possible basis for a holding that giving vote counters the degree of discretion that the Florida Legislature's standard gave them empowers them to act lawlessly and in a manner

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CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419 (Richard A. Epstein et al. eds., 1997). Tribe actually goes from the usual two categories to more than three: he adds a "hybrid," which is "a form of due process that straddles the divide between the substantive and the procedural." Tribe, *supra* note 54, at 239. Here he puts the cases restricting undue discretion. *Id.* at 239–40. Justice Stevens has given us the best rejection of such narrow treatment for those cases. *See infra* note 162 and accompanying text (discussing Justice Stevens' support for neutral principles, a constitutional duty to adhere to objective standards).

98. Tribe, *supra* note 54, at 221.

99. *See supra* notes 78–81 and accompanying text (discussing the partisan nature of Florida's canvassing boards and the National Task Force on Election Reform's recommendations).

100. Tribe, *supra* note 54, at 234 (discussing the Court's analysis in *Bishop v. Wood*, 426 U.S. 341, 344–45 (1976)).

101. *See id.* at 232. Tribe himself notes that when aliens sued for the right to be *eligible* for federal jobs, the Court held that "resident aliens [were deprived] of liberty without due process of law" in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102–03 (1976). *Id.*

102. *Id.* at 238–39.

103. Briffault, *supra* note 7, at 360.

> threatening to the civil liberties of individual voters, much as giving unbridled discretion over speech to state licensing authorities [is unconstitutional].[104]

Finding the objection to excessive discretion "more aesthetic than constitutional in character," he concludes that "the pea isn't hidden under that shell either."[105] Again, put aside whether cabining discretion is in the "substantive" due process cubby-hole; I have stated (above and below) why I find unconstitutional a recount system with inadequate, easily improved upon, safeguards on discretion.[106] The treatment above makes clear, I hope, how strong the argument is against accepting as constitutional what Tribe rightly labels "processes that are necessarily subjective and in which partisan motives might therefore color what each counter 'sees.'"[107] The sole reason Tribe finds such processes "necessarily" subjective—i.e., that we must live with this risk of abuse—is his odd view that the only "antidote" is "mechanistic, formula-driven methods of vote tabulation required by the Court in *Bush v. Gore*."[108] Instead of even trying to show why that is a reasonable characterization of any improvement on the wide-open "intent of the voter" standard, an improvement that David Boies called for in the Florida Supreme Court and that other States have enacted,[109] Tribe chants "mechanistic" into a litany.[110]

Tribe's second straw-man argument is that due process would require "a trial-like evaluation of [a voter's] ballot by an impartial fact-finder applying objective criteria."[111] Posner has given us the best-ever description of the artificially bloated view of due process as "all the . . . procedural hoopla treasured by Anglo-American lawyers."[112] In fact, due process requires not "hoopla," but appropriate procedure, which

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104. Tribe, *supra* note 54, at 221.

105. *Id.*

106. *See supra* Parts II.A–D (discussing Florida's inadequate standard for vote tabulation and the effects that it had on Election 2000); *see also infra* Part IV (discussing the discretion that Florida vote tabulators had and how this allowed for arbitrary determinations of many votes).

107. Tribe, *supra* note 54, at 217.

108. *Id.* at 223.

109. *See supra* note 70 and accompanying text (discussing the need for an improvement on the "intent of the voter" standard).

110. *See* Tribe, *supra* note 54, at 244. Tribe uses the following phrases in a *Harvard Law Review* article about *Bush v. Gore*: "Mechanical formulae or procedures" and "rigid formulae," *id.* at 244; "mechanical formula," *id.* at 245; "mechanical method," *id.* at 246; and "any effort to mechanize, standardize, and ultimately dehumanize," *id.* at 255.

111. *Id.* at 234.

112. Altenheim German Home v. Turnock, 902 F.2d 582, 584 (7th Cir. 1990).

may be as simple as requiring that the Medicare program make available a toll free telephone number for program recipients.[113]

Tribe's last effort to fend off due process is his effort to confine cases dealing with licensing of parades and similar situations involving "overly broad licensing discretion."[114] The constitutional right protected in those decisions, he says,

> does not extend beyond the realm of constitutionally protected activities that might be subjected to well-hidden censorship of political . . . or other views . . . . [T]here is no demonstrable danger that canvassing officials would deliberately (but unprovably) refuse, during a recount, to give ballots their clearly intended meaning because those officials preferred other candidates.[115]

How can Tribe ignore the way "those officials" changed standards during the recount? The artificiality of narrowly confining the parade-permit cases is shown best by Justice Stevens, as noted below.[116]

One would have to be numb to feel no qualms about saying that Posner, Sunstein, and Tribe erred. That feeling is little alleviated by finding "on my side" only one "maybe" from Robert Pushaw and a few sentences from James Gardner:

> [Pushaw:] Indeed, to the extent that the Florida Supreme Court ordered manual recounts but did not ensure fair and consistent standards, that failure may have violated the Due Process Clause.[117]
>
> [Gardner:] [The vagueness in the 'intent of the voter' standard] causes the arbitrary treatment of voters, according to the Court. Yet both . . . arbitrariness and vagueness have historically been treated by the Court as raising questions of due process, not equal protection. Both deal with the direct relationship of the law to individuals, not the relative position under the law of one individual compared to another. The right to nonarbitrary treatment under the law is, after all, the essence of due process rationality review. When arbitrary treatment results

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113. *See* Gray Panthers v. Schweiker, 716 F.2d 23, 37 (D.C. Cir. 1983) (stating that a toll-free telephone would satisfy due process for most of the claims at issue in the case).

114. Tribe, *supra* note 54, at 241. For Justice Stevens' treatment of the parade permit cases and their support for a due process ground in *Bush v. Gore*, see *infra* notes 158–62 and accompanying text.

115. Tribe, *supra* note 54, at 241.

116. *See infra* notes 158–62 and accompanying text (discussing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683–95 (1998) (Stevens, J., dissenting)).

117. Robert J. Pushaw, Jr., *The Presidential Election Dispute, The Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 623 (2001); *see also* Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. LAW. 372, 392 (2002) (the problem "would be *more* true to the constitutional due process obligation to count every vote properly").

> from a law's vagueness, the problem has always been treated as one of due process.[118]

Gardner sums it up precisely. All that need be added is to state the crux of the Due Process Clause, its history and purpose, and a few key points and principles from precedent.

IV. CONCLUSION: THE PURPOSE OF THE DUE PROCESS CLAUSE, RELEVANT PRECEDENTS AND APPLICABILITY TO THIS CASE

The proposition I present is simple and limited: Florida's standard left the recounters' discretion so unfettered as to create an undue risk, even likelihood, of not mere error but arbitrariness in the worst sense. The worst risk was the danger of using official power to pursue personal or partisan ends. That risk was compounded by the lack of safeguards to enhance fairness, such as bipartisan membership of the canvassing boards. The combination of those two features, which are so easily remedied, as seen in the laws of many other jurisdictions, inflicts on the members of the party disfavored by the boards' members an actual or potential dilution of their vote that amounts to a deprivation of their right to vote without due process.[119]

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118. James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 656 (2001). Another article speaks in terms of due process but the author explicitly uses it only as a catch-all for equal protection. *See* Hugh M. Lee, *Oasis or Mirage? Does* Bush v. Gore*'s Promise of Due Process in Federal Presidential Elections Create a Right Without a Remedy?* 13 STAN. L. & POL'Y REV. 53, 54 n.4 (2002). Also touching on due process, but little more than that as to this case is Pamela Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. (forthcoming 2002).

119. The vagueness of the standards alone is, in my view, a clear due process violation. "The risk of error is not at all trivial." *See* Goss v. Lopez, 419 U.S. 565, 580 (1975) (finding a high school discipline process unconstitutional). The risk of arbitrariness is not cured by the other steps that brought transparency, such as bipartisan observers and, in this particular case, the media. One potential safeguard that loomed large for Justice Stevens and a number of commentators was the fact that a single judge would review any disputes over the recounting. Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting). "The Florida . . . process responded to [the] threat [of biased counters] by having all interested parties send observers and by authorizing a neutral magistrate to break any ties." Tribe, *supra* note 54, at 246–47. Of all the reality-denials that surround this case, I deem the rose-colored view of observers and a neutral magistrate the most extreme. First, observers do help but they are incomparably less effective than bipartisan counters, which sixteen States have. *See supra* note 82 (stating that sixteen states require local election boards to be multi-party). Second, tie votes are incomparably less likely without bipartisan counters. Third, as for the potency of a neutral magistrate, one experienced elections lawyer captured the reality: "If time had permitted . . . it is likely that . . . adversarial proceedings would have eventually prevented the disparities . . . . It is because of the extraordinary circumstances . . . that the Florida Supreme Court's majority opinion strayed so far from assuring the fairness required in an election contest." Steve Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 461 (2001). To the same effect, Washington lawyer, Leonard H. Becker states: "To

That proposition rests on an approach to official discretion best articulated a generation ago by a pillar of Administrative Law, Kenneth Culp Davis:

> Engraved in stone on the Department of Justice Building in Washington, on the Pennsylvania Avenue side where swarms of

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accomplish this heroic task [of overseeing the recount] within the time allotted . . . plainly was impossible." Leonard H. Becker, *A Legal Recounting: Did the Supreme Court Save Us from Ourselves, or from the Constitution?*, NATION, Nov. 12, 2001, at 31.

Even if there had been adequate time and an initial process that was less abuse-prone, judicial review is inescapably limited in scope. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 445–48 (2d Cir. 1945).

The facts showed arbitrariness, not merely its likelihood: the changing of standards and, as the per curiam pointed out, the impact of Broward's "more forgiving standard," *Bush*, 531 U.S. at 107 (per curiam). Consider, also, the findings about subjectivity in the media's re-run of the recount. *See supra* notes 74–75 and accompanying text. Palm Beach and Broward Counties' changes in the standards are, in themselves, unconstitutional. *See* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (discussing the Board of Immigration Appeal's failure to exercise its own discretion, which violated the deportee's due process rights); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370, 390 (1932) (discussing the Interstate Commerce Commission's unlawful retrospective imposition of charges stemming from their non-discretionary policy for determining rates); *see also* Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34 (1st Cir. 1989) (holding that the NLRB must explain a decision that significantly departed from its previous decisions, without getting into constitutionality); Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring) (stating, although not getting into constitutionality, that "there may not be a rule for Monday, another for Tuesday"), *rev'd*, 382 U.S. 46 (1965).

And "[c]onsider whether the . . . due process clause justifies courts in requiring [state] agencies to follow their own rules." STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 522 (4th ed. 1999). But put aside the counties' changes. My colleague Louis Michael Seidman writes: "There was no showing in the record that the potential inconsistencies the Court discovered were intended to disfranchise one group of voters or another . . . ." Louis Michael Seidman, *What's So Bad about* Bush v. Gore*? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 980 (2001). But first, can one ignore how far this case was from ordinary litigation and record-building? As it was put by one of the leaders of the Gore-Lieberman legal team in Florida, W. Dexter Douglass: "It should be understood that the legal teams representing the parties, because of the unprecedented speed required in handling the various cases, made television coverage the main source of a record for those preparing pleadings and briefs." Douglass, *supra* note 45, at 18. On this case's unique speed, see Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185 (2002). And second, can Seidman disagree with, as Einer Elhauge put it, "The exercise of standardless discretion *after* an election allows partisan officials to discriminate to their party's advantage." Einer Elhauge, *Untitled Comments*, "Bush v. Gore" *and the Conservatives: Gary Rosen & Critics*, 113 COMMENTARY, Mar. 1, 2002, at 10, 23, *available at* 2002 WL 10068961. One could argue—but I believe this an example of preposterous status-quo-ism—that the standardless discretion was constitutional because "[n]ever before had it been thought to prohibit the sort of partisan manipulation of voting procedures that undoubtedly took place in Florida (and that has long been a part of American politics)." Gary Rosen, *Untitled Comments*, "Bush v. Gore" *and the Conservatives: Gary Rosen & Critics*, 113 COMMENTARY, Mar. 1, 2002, at 23, *available at* 2002 WL 10068961.

> bureaucrats and others pass by, are these five words: "Where law ends tyranny begins."[120]
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> . . . [I]n our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.[121]
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> . . . .
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> Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of all laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of law and of men* . . . .[122]
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> . . . .
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> Elimination of all discretionary power is both impossible and undesirable. The sensible goal is development of a proper balance between rule and discretion. Some circumstances call for rules, some for discretion, some for mixtures of one proportion, and some for mixtures of another proportion. In today's American legal system, the special need is to eliminate *unnecessary* discretionary power, and to discover more successful ways to confine, to structure, and to check necessary discretionary power.[123]
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> . . . .
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> The vast quantities of necessary discretionary power that have grown up in our system should be cut back, and the discretionary power that is found to be necessary should be properly confined, structured, and checked.[124]
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> . . . .
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> By reason of the structuring, the chances of arbitrariness or other abuse, though not eliminated, are substantially reduced. The same sort of structuring can be applied to many functions of many administrators in federal, state, and local governments, with a great gain in the quality of justice.[125]

The crux of the Due Process Clause is captured in these few words from the authoritative *Administrative Law Treatise* by Richard Pierce:

> The purpose of the Due Process Clause is to limit the power of the legislature to authorize arbitrary deprivation of rights of individuals.[126]

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120. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1970).
121. *Id.*
122. *Id.* at 17.
123. *Id.* at 42.
124. *Id.* at 216.
125. *Id.* at 227.
126. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 596 (4th ed. 2002).

> "Liberty" should be defined broadly to encompass a right to freedom from arbitrary government decisionmaking procedures.... [As] Henry Monaghan argues ... the Framers intended "life, liberty and property" to be read as a single term that refers to "all interests valued by sensible men."[127]

To quote Monaghan: "[I]t is an unsettling conception of 'liberty' that protects an individual against state interference with his access to liquor but not with his [right to vote]."[128]

The fullest "inquiry into the meaning of that majestic phrase [due process]"[129] is surprisingly recent—a 1991 concurring opinion by Justice Scalia. Starting with the source in Magna Carta and a statute of 1354, Scalia noted our Court's 1855 declaration that our Due Process Clause conveyed "the same meaning as ... in Magna Charta [sic],"[130] and he also noted an 1884 opinion that "significantly elaborate[d]"[131] that due process is not limited to "settled usages"[132]:

> [T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[133]

Justice Scalia noted that the 1884 opinion did not:

> develop a test for determining *when* a departure from historical practice denies due process .... It merely suggested that due process could be assessed in such cases by reference to "those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions" ....[134]

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127. *Id.* at 579.

128. Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 426 (1977).

129. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24, 28 (1991) (Scalia, J., concurring).

130. *Id.* at 29 (Scalia, J., concurring) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855)).

131. *Id.* at 31 (Scalia, J., concurring) (citing Hurtado v. California, 110 U.S. 516, 528–29 (1884)).

132. *Id.* at 30 (Scalia, J., concurring) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 276–77).

133. *Id.* at 31 (Scalia, J., concurring) (citing *Hurtado*, 110 U.S. at 528–29).

134. *Id.* at 32 (Scalia, J., concurring) (quoting *Hurtado*, 110 U.S. at 535 (citation omitted)). Interestingly, Scalia cut what *Hurtado* added:

> It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations ....

Hurtado, 110 U.S. at 530.

> It necessarily happened ... that as these broad and general maxims of liberty and

Scalia continued:

> The concept of "fundamental justice" thus entered the due process lexicon . . . . As the Court reiterated in *Twining* v. *New Jersey*, [due process] "protect[s] the citizen in his private right, and guard[s] him against the arbitrary action of government."[135]
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> . . . .
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> . . . In the ensuing decades, however, the concept of "fundamental fairness" under the Fourteenth Amendment became increasingly decoupled from the traditional historical approach . . . .[136]
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> . . . [O]ur due process opinions in recent decades have indiscriminately applied balancing analysis to determine "fundamental fairness" . . . .[137]

Since 1976, the watershed case has been *Mathews v. Eldridge*,[138] directing "consideration of three distinct factors": first, whether the interest affected by the official action is within "life, liberty and property"; second,

> the risk of an erroneous deprivation of [the interest that will be affected] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[139]

Does "life, liberty and property" include the right to vote? Surprisingly or not, we have no explicit decision on that, but the answer is clear, given that the Court, in the leading due process decision on the definition of "liberty," stated that the liberty guarantees "'the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' . . . In a Constitution for a free people, there can be no doubt that

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> justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation . . . .

Id. at 532.

135. *Haslip*, 499 U.S. at 32 (Scalia, J., concurring) (quoting Twining v. New Jersey, 211 U.S. 78, 101 (1908)).

136. *Id.* at 34 (Scalia, J., concurring).

137. *Id.* at 36 (Scalia, J., concurring).

138. Mathews v. Eldridge, 424 U.S. 319 (1976).

139. *Id.* at 335.

the meaning of 'liberty' must be broad indeed."[140] The decisions have reasoned that the vote is (to use the formulaic phrase) a "fundamental right," indeed, "the right to vote is too precious, too fundamental, to be so burdened" by a poll tax, a "fundamental matter in a free and democratic society."[141]

Due process is not limited to merely notice and hearing, though. "Mass administrative justice" systems, as for administering parking fines (the subject of an impressive recent Posner application of due process analysis)[142] or for the major programs that have given rise to the modern era's major applications of due process requirements (i.e., our disability and welfare benefit systems, or systems for disciplining students or prisoners or government employees), have shown the flexibility and, where appropriate, simplicity of what due process requires. For example, to reduce the likelihood of error in decisions on Medicare claims, due process requires the program to make available toll-free telephone numbers for claimants.[143] In rejecting claimants' argument for far fuller process, that court said that "we cannot say that the flexible requirements of due process are not satisfied by [these steps]."[144]

In review under the Due Process Clause, the courts do not impose their view of what might be ideal procedures. "[T]he Due Process Clause does not require 'heroic efforts'"[145] and "[a] harsh or unwise

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140. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). *Roth* also stated that:

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

Id. at 571 (quoting Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

141. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (quoting Reynolds v. Sims, 377 U.S. 533, 561–62 (1964)). Again, Pamela Karlan puts it perfectly:

> [T]he Court has [repeatedly] recognized that analysis of liberty interests is deeply informed by tradition, as reflected in the longstanding federal and state practices. . . . [A] court sensitive to our traditions of ordered liberty should [have recognized, unlike the Bush v. Gore per curiam opinion, that 125 years of popular election has created a] substantive liberty interest in voting to elect the President.

Karlan, *supra* note 1, at 597.

142. Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir.), *cert. denied*, 520 U.S. 1241 (1997) (holding that the administrative procedures used by the City of Chicago in adjudicating parking violations did not violate drivers' due process rights).

143. Gray Panthers v. Schweiker, 716 F.2d 23, 37 (D.C. Cir. 1983).

144. *Id.*

145. Dusenbery v. United States, 531 U.S. 161, 181 (2002) (Ginsberg, J., dissenting).

procedure is not necessarily unconstitutional . . . ."[146] Rather, the courts require only procedures that they find necessary and feasible to avoid undue likelihood of decisions that are erroneous, inconsistent, subjective, or arbitrary. The most frequently quoted articulation is Justice Frankfurter's statements in a 1951 separate opinion on whether a particular process was "so devoid of fundamental fairness as to offend the Due Process Clause":

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[147]

From Medicare assistance and striking miners to disability and zoning, due process has required "procedural . . . rules [to be] shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases."[148] "[Officials] must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary [action] . . . . [D]etermination[s] . . . cannot be made on an ad hoc basis . . . ."[149] And for zoning, as a leading scholar has written, there is clear concern:

> that a local government's unrestrained discretion might lead to sweetheart deals . . . .[150]

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146. Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (citing Corn Exch. Bank v. Coler, 280 U.S. 218, 223 (1930)).

147. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161–63 (1951) (Frankfurter, J., concurring).

148. Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (disability benefits).

149. Morton v. Ruiz, 415 U.S. 199, 231–32 (1974) (assistance to strikers).

150. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 851 (1983). I am indebted to Richard Schragger for suggesting the zoning analogy and the Rose article. And in the very different context of prison disciplinary process, Chief Justice Rehnquist recently wrote for the Court that "[we guarantee due process to] confine the authority of [official] personnel in order to avoid widely different treatment of similar

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> . . . The [court in a particular decision showed concern about] the character of the decision making body.[151]
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> . . . .
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> Local governments exhibit a marked talent for evading close examination . . . . A venerable avoidance technique is vagueness . . . .[152]
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> . . . [T]he emergence of [zoning] plan jurisprudence is the work of the courts, as they have sought some way to subject local land decisions to meaningful review in order to ensure carefulness and fairness.[153]

Professor Einer Elhauge sums it up: "The Court has traditionally looked with suspicion on standardless discretion."[154] Judge Friendly has explained that the reason for the Court's suspicion is that "[g]overnment is at its most arbitrary when it treats similarly situated people differently,"[155] violating what he called "the most basic principle of jurisprudence."[156]

One other arena in which the Supreme Court has encountered standardless discretion is a long line of decisions, starting in 1951, about when to issue parade permits or where newsracks may be located. These cases have been cast as if they were about only the First Amendment, but the approach the Court uses is so close to due process that in 1951, Justice Jackson said in his dissent: "If the Court is deciding that the permit system for street meetings is so unreasonable as to deny due process of law, it would seem appropriate to point out respects in which it is unreasonable."[157]

Justice Stevens, in a notable 1998 decision in that line of cases, dissented from what he called "the standardless character of the decision"[158] and the "'unbridled discretion'"[159] when a public television

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incidents." Sandin v. Conner, 515 U.S. 472, 482 (1995). In that case, Justice Breyer stressed the majority opinion's "cabining of discretion" standard, and Breyer repeatedly emphasized the importance of "discretion cabining." *Id.* at 496–502 (Breyer, J., dissenting).

151. Rose, *supra* note 150, at 851.

152. *Id.* at 879.

153. *Id.* at 881.

154. Einer Elhauge, *Untitled Comments*, "Bush v. Gore" *and the Conservatives: Gary Rosen & Critics*, 113 COMMENTARY, Mar. 1, 2002, at 10, 14, *available at* 2002 WL 10068961.

155. Etelson v. Office of Pers. Mgmt., 684 F.2d 918, 926 (D.C. Cir. 1982).

156. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

157. Kunz v. New York, 340 U.S. 290, 310 (1951) (Jackson, J., dissenting).

158. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 684 (1998) (Stevens, J., dissenting).

159. *Id.* at 691 (Stevens, J., dissenting) (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

station excluded an independent candidate from a candidate debate.[160] Stevens's grounds (with which I have agreed enthusiastically since the case came down, I only wish he had recalled this opinion when *Bush v. Gore* was pending) were as follows: "Surely the Constitution demands at least as much from the government when it takes action that necessarily impacts democratic elections as when local officials issue parade permits."[161] As Stevens said, "[a] constitutional duty to use objective standards—*i.e.*, "neutral principles"—for determining whether and when to adjust a debate format would impose only a modest requirement . . . ."[162]

Probably the most notable domain in which due process decisions have converted discretion from utterly standardless to rationally cabined, has been sentencing in capital cases. It is now settled that juries must be given instructions before deciding upon a death sentence, but that was initiated by Justice Brennan, dissenting from a decision that upheld standardless sentencing.[163] The majority opinion was by Justice Harlan, and Brennan began his dissent by quoting from a talk Harlan had given, stating that "[o]ur scheme of ordered liberty is based . . . on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case."[164] Brennan continued:

> The principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution. And this principle has been central to the decisions of this Court giving content to the Due Process Clause.[165]
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> . . . .
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> . . . [Precedent does] not in the slightest way draw into question the power of the States to determine whether or not to impose the death penalty . . . . What [the cases] . . . call upon us to determine is whether the Due Process Clause requires the States . . . "to make certain that men would be governed by *law*, not the arbitrary fiat of the man or men in power . . . ."[166]

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160. *Id.* at 692 (Stevens, J., dissenting).

161. *Id.* at 693 (Stevens, J., dissenting).

162. *Id.* at 694 (Stevens, J., dissenting).

163. McGautha v. California, 402 U.S. 183, 290 (1971) (Brennan, J., dissenting).

164. John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, *in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY 289, 291–92 (David L. Shapiro ed., 1969), *quoted in McGautha*, 402 U.S. at 252 (Brennan, J., dissenting).

165. *McGautha*, 402 U.S. at 252–53 (Brennan, J., dissenting).

166. *Id.* at 310 (Brennan, J., dissenting) (quoting the dissenting opinion in *In re* Winship, 397 U.S. 358, 384 (1970) (Black, J., dissenting)).

The best possible conclusion for why Florida's unfettered discretion deprived voters of due process is found in Justice Brennan's words:

> This is not to say, of course, that there may be no room whatsoever for the exercise of discretion .... But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, in Lord Camden's words, it is "the law of tyrants: It is always unknown: It is different in different men: it is casual, and depends upon constitution, temper, passion.—In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."[167]

167. *Id.* at 285 (Brennan, J., dissenting).