

## What's Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure it Never Happens Again

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# WHAT'S WRONG WITH *BUSH V. GORE* AND WHY WE NEED TO AMEND THE CONSTITUTION TO ENSURE IT NEVER HAPPENS AGAIN

JAMIN B. RASKIN\*

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## I. DISENFRANCHISEMENT AS REMEDY, VOTE-COUNTING AS HARM

If anyone needed proof that constitutional law is a form of politics rather than a scientific discipline, the Supreme Court's 5-4 deci-

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sion in *Bush v. Gore*<sup>1</sup> should have settled the matter. The majority's tendentious and fallacious decision was profoundly unconvincing to anyone but those theologically certain that George W. Bush had to win the election and that any alternative development would reflect fraud. From this perspective, it made sense for the Supreme Court to do everything in its power to freeze the election results and prevent any further vote-counting.<sup>2</sup> From any other perspective, the Court's actions looked like a naked power grab.

We can mobilize fairly devastating precedent and logical analysis to show why the decision was wrong. But what does it mean to show that a Supreme Court decision was "wrong"? It is not like showing that a scientific theory or mathematical calculation is wrong. Rather, it is like showing a political position or moral choice to be wrong. It is not wrong in the sense that it misdescribes a natural phenomenon or violates a formal rule of logic. It is wrong in the sense that it cannot accord with our sense of justice. But this just forces us to define who "we" are, and American society is divided among different tendencies and currents of political, philosophical, and moral thought, belief, and feeling. Everyone understands that conservatives will rally to the defense of the majority decision in *Bush v. Gore*, while liberals will oppose it.

Yet, if philosophical disagreement is to be expected with respect to the interpretation of large and abstract constitutional concepts like due process or equal protection, we have also depended on a greater sense of agreement with respect to the structural provisions of the Constitution by which we govern ourselves. If we cannot agree to the basic rules of the game, then we are in trouble. This Article argues that the Supreme Court's majority was free to discard basic democratic principles in *Bush v. Gore* because of the lack of a textually rooted right to vote and because of the undemocratic character of the electoral college. I argue here for the people to undertake the task of constitutional politics in order to amend the Constitution to establish the citizen's right to vote and direct popular election of the President.

#### A. *A Political Question Raised By a Candidate Without Standing*

In *Bush v. Gore*, five Justices nullified the Florida Supreme Court's order of a statewide manual recount of thousands of "undervote" bal-

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1. 531 U.S. 98 (2000) [hereinafter *Bush II*].

2. *Id.* at 110-11 (per curiam).

lots in the closely contested 2000 presidential election.<sup>3</sup> These were mostly punch-card ballots that for various reasons—including mechanical error and lack of manual strength in the voter—failed to register a presidential choice in the mechanical vote-tabulation process.<sup>4</sup> The Florida Supreme Court had acted under state law to order a statewide recount by hand of all such “pregnant,” “dimpled,” or “swinging chad” ballots.<sup>5</sup> This statewide order answered Republican complaints that it would be unfair—even if perfectly lawful in the state—to manually recount only in a few counties where Vice President Gore had asked for it.<sup>6</sup> But the Supreme Court majority determined that the Florida Supreme Court’s command to the state’s election officials and judges to follow the state statutory standard of discerning “the will of the voter” in counting ballots was insufficiently precise.<sup>7</sup> The conservative majority worried that “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.”<sup>8</sup> Thus, it found that the Florida Supreme Court’s order violated the Equal Protection Clause.<sup>9</sup>

The proper remedy for this equal protection violation, according to the majority, would have been for the Florida Supreme Court to engage in the “substantial additional work” of specifying the sub-standards governing different kinds of ballots.<sup>10</sup> The problem, according to the majority, and the reason why it had to blow the whistle on the vote-counting, was that the Florida Supreme Court said that the legislature intended the state’s electors to be chosen by December 12, and

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3. *Id.* at 111 (per curiam). The Justices supporting the per curiam opinion included Chief Justice Rehnquist, Justice Thomas, Justice O’Connor, Justice Scalia, and Justice Kennedy (hereinafter the *Bush* 5).

4. *See id.* at 105 (noting that the ballots “either through error or deliberate omission, have not been perforated with sufficient provision for a machine to count them”).

5. *See Gore v. Harris*, 772 So. 2d 1243, 1261-62 (Fla. 2000), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98 (2000). The Florida Supreme Court remanded the case for “the circuit court to immediately tabulate by hand the approximate 9000 Miami-Dade Ballots, which the counting machine registered as non-votes” and authorized the circuit court to order a manual recount in all Florida counties that had not conducted a recount of the undervotes. *Id.* at 1262.

6. *See id.* at 1252 (rejecting Governor Bush’s contention that “even if a count of the undervotes in Miami-Dade were appropriate, [the Florida election code] requires a count of all votes in Miami-Dade County and the entire state as opposed to a selected number of votes challenged”).

7. *Bush II*, 531 U.S. at 109-10 (per curiam).

8. *Id.* at 106.

9. *Id.* at 103.

10. *Id.* at 110.

[t]hat date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.<sup>11</sup>

On this reasoning, the Supreme Court terminated all further vote-counting and became the first Court in our history to determine the outcome of a presidential election.<sup>12</sup>

The majority decision was utterly tendentious. It makes sense only as a kind of judicial 100-yard dash. Five sprinting Justices raced past every familiar principle of constitutional law to reach a political finish line. Out of the gate, the majority disregarded several of its most cherished tenets.

At the beginning, the majority never paused to consider whether the whole case was a nonjusticiable "political question" constitutionally assigned to Congress. This is a serious problem because the initial justification for judicial intervention was that the Florida Supreme Court, in interpreting state law, was somehow disrespecting the state legislature's primary control over the electoral process under Article II.<sup>13</sup> But if this was the case, there is a powerful argument that the Court should have stayed out and allowed Congress to resolve the issue.<sup>14</sup> After all, Article II and the Twelfth Amendment give Congress the central structural role in the counting and consideration of electoral college votes. The Twelfth Amendment tells us that the presidential electors

shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the

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11. *Id.*

12. *But see id.* at 156 (Breyer, J., dissenting). After the 1876 presidential election, Florida, South Carolina, and Louisiana each sent two separate slates of electors to Washington. Congress appointed an electoral commission to choose between the two sets of slates. That commission was composed of Senators, Representatives, and Supreme Court Justices. In 1877, Justice Joseph P. Bradley cast the deciding vote on that commission, which resulted in the pro-Hayes slates being appointed, and Hayes winning the Presidency. *Id.* However, in *Bush II*, the Supreme Court, acting as a judicial body, essentially decided the presidential election for the first time in our history. *See id.* at 110-11 (*per curiam*).

13. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000) (*per curiam*) [hereinafter *Bush I*].

14. *See, e.g.,* Elizabeth Garrett, *Leaving the Decision to Congress*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 38 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted . . . .<sup>15</sup>

If no candidate collects a majority in the electoral college, the President is elected by the House of Representatives.<sup>16</sup> Nowhere is the Supreme Court given any formal role at all in choosing the President or resolving competing interpretations of the electoral college provisions.

The textual absence from the electoral college provisions of any mention of the Supreme Court makes the Court's failure even to consider the "political question" doctrine profoundly troubling. In *Nixon v. United States*,<sup>17</sup> the Court unanimously dismissed, on political question grounds, a complaint by an impeached and convicted federal judge who claimed that he was not properly tried by the Senate, as called for by Article I, Section 3, because the full Senate delegated the preliminary evidence-gathering function to a Senate committee before receiving a report and hearing final arguments in the case.<sup>18</sup> Chief Justice Rehnquist found for the Court that the impeachment process is exclusively for the Senate to work out because there is a "textually demonstrable commitment of the issue"<sup>19</sup> to the upper chamber.<sup>20</sup> Significantly, the Chief Justice noted that the Court had not been offered "evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of impeachment powers."<sup>21</sup> This is true also of judicial review over the electoral college. Chief Justice Rehnquist also noted the crucial checks and balances concerns present where the judiciary was invited to overturn the impeachment and conviction of one of its own judges.<sup>22</sup> The same kind of structural conflict of interest concern looms where the Court helps put into office a President who will have the power to appoint new Justices.

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15. U.S. CONST. amend. XII.

16. *Id.*

17. 506 U.S. 224 (1993).

18. *Id.* at 238.

19. *Id.* at 228 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

20. *Id.* at 238.

21. *Id.* at 233.

22. *Id.* at 234-35.

The "political question" character of the electoral college issue is reinforced by the "prudential" political question considerations.<sup>23</sup> For nothing could be more perilous to the Court's legitimacy than to decide a razor-close presidential election on novel and controversial grounds.

Even if we help ourselves over the political questions hurdle, the majority never even bothered to ask whether Governor Bush had constitutional *standing* to raise his ultimately triumphant equal protection claim against Florida on behalf of certain unidentified Florida voters.<sup>24</sup> In equal protection cases involving racial minorities, the Court has been adamant that plaintiffs seeking a hearing may assert neither the rights of others nor abstract principles of fairness, but rather must establish their own standing to bring a claim by showing that they have suffered a concrete personal *injury* that is traceable to the government and redressable by the courts.<sup>25</sup> Thus, in *Allen v. Wright*, the Court denied standing to African-American parents who wanted to compel the Internal Revenue Service to deny tax exemptions to private schools that discriminate on the basis of race.<sup>26</sup> Justice O'Connor stated that citizens have no general right to make the government comply with the law and found that the African-American plaintiffs were not personally injured by the "abstract stigmatic injury" associated with white flight allegedly facilitated by the IRS policy.<sup>27</sup>

But in *Bush v. Gore*, the majority did not question whether (much less explain how) Governor Bush was personally injured by the order of a manual recount. Assuming that there was a threatened injury to a certain subclass of pregnant chad voters, it would have been an injury visited on *them*, not on Governor Bush, Vice President Gore, or anyone else with standing to raise their claims for them.<sup>28</sup> If Bush's claim was that he would have been personally injured as a candidate if all

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23. Use of the political question doctrine "is prudential if it reflects the Court's concerns about preserving judicial credibility and limiting the role of an unelected judiciary in a democratic society." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 133 (2d ed. 2002).

24. See *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (discussing the constitutional foundations for, and importance of, the standing doctrine).

25. See *id.* at 751.

26. *Id.* at 739-40.

27. *Id.* at 754-56.

28. Making Governor Bush's assumed injury all the more absurd, we do not even know who the handful of hypothetically injured voters actually voted for, and one must assume that the potential difference in treatment of pregnant chad ballots would have affected people of different presidential choices equally. In truth, of course, the "injured" voters were far more likely to be minorities and therefore Gore supporters because the more heavily minority counties had the worst punch-card machinery and the highest rates of ballot spoilation.

ballots were not in fact *counted*, this might have been a plausible, if speculative, argument on the theory that the winning candidate acts as a proxy for the right of the majority to govern. The problem is that the relief Governor Bush was seeking, and the relief that was ordered, was not the counting of *all* the pregnant and dimpled chad ballots but the counting of *none* of them.<sup>29</sup> Thus, he would have had to allege a hypothetical injury arising out of the *counting* of a class of ballots that the Court ultimately determined *should* have been counted.<sup>30</sup> And even if we assume, bizarrely, that Governor Bush was going to be prospectively injured by the hypothetical possibility that anonymous third party citizens not in the case might have their pregnant chad ballots counted differently in one part of Florida than in another, how could stopping the vote-counting sufficiently redress these third party injuries? If your vote is in danger of not being counted, how does it help you for the Supreme Court to make sure that someone else's vote is not counted along with it? But the Court slipped merrily over these insoluble contradictions and instead just assumed Bush's standing.

The standing problem mirrors the outrageous character of the Court's emergency stay of the manual recount on December 7, 2000.<sup>31</sup> The dissenters, Justices Stevens, Souter, Ginsburg, and Breyer, pointed out that the majority's extraordinary injunction against the counting of legal votes trampled on principles of federalism, separation of powers, and judicial restraint.<sup>32</sup> The dissenters hit the nail on the head when they wrote: "Counting every legally cast vote cannot constitute irreparable harm."<sup>33</sup> Although we do not know precisely what the majority had in mind at this point—other than freezing the result—Justice Scalia offered his own spirited defense of the stay: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."<sup>34</sup>

This is an amazing claim. First of all, Justice Scalia's suggestion that the pregnant chad ballots were of "questionable legality" was the opposite of how the Court ended up ruling.<sup>35</sup> The ultimate decision found not that the ballots were suspect, but that the people who cast

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29. See *Bush II*, 531 U.S. 98, 110 (2000) (per curiam).

30. See *id.* at 104-05.

31. *Bush v. Gore*, 531 U.S. 1046 (2000).

32. *Id.* at 1047 (Stevens, J., dissenting).

33. *Id.*

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

35. *Bush II*, 531 U.S. at 103 (per curiam).



them had an equal protection right to get them counted in a fair process.<sup>36</sup> The majority thus *temporarily* halted vote-counting because the ballots were of “questionable legality,” as Justice Scalia put it, and then *permanently* halted vote-counting because these same ballots deserved a system of perfect standards, and it was too late to craft one because of the prior *temporary* halt in vote-counting!

Leaving that deeply suspicious “heads we win, tails you lose” cleverness aside, can “casting a cloud” on an election by means of vote-counting constitute “irreparable harm”?<sup>37</sup> The Court has held that purely reputational or stigmatic harms are not sufficient to give rise to constitutional standing,<sup>38</sup> and that public officials can bring defamation actions only if defamatory lies about them are told with “actual malice.”<sup>39</sup> Justice Scalia voted with the majority in *Clinton v. Jones*<sup>40</sup> to allow civil suits against the President to proceed while he is in office,<sup>41</sup> which would seem to establish that incidentally “casting a cloud” on a President is not an “irreparable harm,” but, from a citizen’s perspective, a constitutional right.<sup>42</sup> Under our First Amendment, we can rain criticism and calumny down on our Presidents at will.<sup>43</sup>

Even if we agree to treat condensation gathering over the heads of elected officials as actionable harm, can such a precious interest actually outweigh the interest that Vice President Gore and the people had in seeing all of the votes counted (in the event that the Florida Supreme Court acted properly). Consider the equities. If the moving party (Bush) was right but vote-counting proceeded, the worst that could happen is that some people would say he was not really elected. But this was something that was bound to—and did—happen anyway. However, if the moving party was wrong, and the vote-counting was wrongly terminated, the worst that could happen would be that the winner of the presidential election would be denied his office! In weighing the harms, the two sides of the scale are not even close. In any event, the majority, if it had been serious about both the reputational harm and democracy interests, could have simply ordered that

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36. *Id.*

37. *Bush*, 531 U.S. at 1047 (Scalia, J., concurring).

38. *Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

39. *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

40. 520 U.S. 681 (1997).

41. *Id.* at 705.

42. *See id.*

43. *Cf. Sullivan*, 376 U.S. at 270 (stating that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

the vote-counting proceed in all counties and the results be embargoed until the Court could reach a decision.

The stay actually decided the case on the merits because it was the Court's final judgment that there simply was not enough time to proceed with constitutionally required manual recounts.<sup>44</sup> But the reason there was (allegedly) not enough time to count ballots that all agreed should have been counted was that the Court had itself halted the vote-counting without any remotely plausible justification.<sup>45</sup>

### *B. And If It Had Been Gore v. Bush?*

Had the shoe been on the other foot and Vice President Gore had sought the Court's intervention to overturn the Florida Supreme Court's decision to order a statewide manual recount at the request of Bush, the *Bush 5* would have voted to decline jurisdiction on federalism, political question, standing, and separation of powers grounds. If somehow, miraculously, jurisdiction had been granted, they would have scoffed at the substantive claim that there was some kind of anticipatory equal protection violation afoot in Florida threatening the rights of *pregnant chads* to be treated equally across county lines. If by some fluke they found that equal protection was even implicated by the manual recount order, they would not have dreamed of usurping the Florida Supreme Court by deciding the state law question of whether there was sufficient time and statutory authority to develop a new sub-standard and complete the statewide recount.

Indeed, if Gore had made these almost unimaginably daring claims, the majority would have fallen back on its ordinary lethargic indifference to denial of the right to vote. There is no shortage of illustrations. The conservative majority has steadfastly maintained that, as a categorical matter, it will find no equal protection violations against minorities in the arrangement of voting processes unless the plaintiff can demonstrate a governmental *purpose* to discriminate. In *City of Mobile v. Bolden*,<sup>46</sup> for example, the Court rejected both Equal Protection Clause and Fifteenth Amendment attacks on an at-large system of municipal elections in a majority-white city that for decades produced an all-white City Council.<sup>47</sup> The Court emphasized that such at-large elections only "violate the Fourteenth Amendment if

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44. *Bush II*, 531 U.S. 98, 110 (2000) (per curiam).

45. *Id.*

46. 446 U.S. 55 (1980).

47. *Id.* at 65, 73-74.

their *purpose* were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.”<sup>48</sup>

Yet, in *Bush*, the purpose test vanished. The plaintiffs never argued—and the Court never found—that the Florida legislature’s purpose in not specifying a vote-counting sub-standard was to minimize or cancel out anyone’s vote. Indeed, the Court never found that minimizing or canceling out votes was even the *effect* of the standard. The Court simply discovered to its *horror* that there were actually different legal substandards potentially being used for vote-counting in different counties in Florida.<sup>49</sup> Why this relatively trivial and banal run-of-the-mill possibility suddenly troubled a Court that has no problem, for example, with radically different rates in administration of the death penalty for murderers of whites than murderers of minorities is puzzling.<sup>50</sup> Moreover, the Court accepts radically different levels of spending on public school students in rich and poor counties and school districts.<sup>51</sup> In the Supreme Court, dimpled chads have more rights now than dimpled children.

On the merits of the equal protection claim, there can be no doubt that had Vice President Gore and Governor Bush been in each other’s places, the conservative Justices in the majority would never have embraced the equal protection argument. Governor Bush’s lawyers presented an equal protection argument so pathetic in the terms of traditional doctrinal understandings that the Court itself refused to certify it for consideration when Governor Bush first raised it on November 22, 2000 in his first petition to the Court.<sup>52</sup> Only later when they realized this was the only available hook to hang their hat on did three Justices in the majority find new life in this approach.<sup>53</sup> What was a throwaway argument became the foundation of the Court’s opinion.

If Gore had brought such a claim and we assume (suspending all disbelief) that the Court had entertained it, the conservative Justices would have responded in an icy way. They would have first observed that strict scrutiny does not apply because there is no suspect class

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48. *Id.* at 66 (emphasis added).

49. *Bush II*, 531 U.S. at 106 (per curiam).

50. See *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (finding Georgia’s death penalty statute constitutional even though a statistical study indicated a disparity in the imposition of the death penalty based on the defendant’s race).

51. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (finding a Texas school-funding system constitutional even though its reliance on local property taxes resulted in increased funding for more affluent districts).

52. See *Bush I*, 531 U.S. 70, 78 (2000) (per curiam).

53. *Bush II*, 531 U.S. at 103 (per curiam).

targeted for adverse treatment based on race or ethnicity.<sup>54</sup> Florida's system thus would have only had to pass the lowest level of rational basis scrutiny.<sup>55</sup> That would have been no problem because almost every state in the union uses the identical "intent of the voter" standard for manual recounts.<sup>56</sup> No state had ever specified a more precise pregnant chad substandard. If Vice President Gore had been the petitioner, the Court never would have dreamed of nationalizing vote-count standards in this way. Even if there were some minor problem foreseen in varying methods of vote-counting, the Court would have seen it as perfectly rational to have election judges make a front-line determination as to whether a ballot reflects an intention to cast a vote and, if substantially different standards emerged requiring more specific resolution, to have the high court of the state reconcile the different standards and pass upon the handful of close calls.

The Court in a hypothetical *Gore v. Bush* case would have recognized how silly the equal protection claim really was. The potential variation in treatment of pregnant chad or hanging chad ballots among or within counties is, if anything, a due process issue. As an equal protection issue, it is almost laughable, certainly trivial compared to the actual sweeping disparities that exist among and within counties as to different voting machines and vote-counting procedures.<sup>57</sup> Indeed, in Florida itself, the number of discredited "undercount" ballots varied widely depending on the state and quality of the machinery being used in the county, a kind of variation that corresponded closely to race and wealth.<sup>58</sup> Justice Breyer remarked that "the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems," which translates into a situation in which voters already arrive at the polls with an unequal chance that their votes will be counted.<sup>59</sup>

Even if one imagines, in a reverse *Gore v. Bush* scenario, the Rehnquist Court finding an equal protection violation arising from the fail-

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54. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978) ("Racial and ethnic classifications . . . are subject to stringent examination . . .").

55. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (describing the three levels of scrutiny in cases involving equal protection challenges).

56. See *Bush II*, 531 U.S. at 124 n.2 (Stevens, J., dissenting) (listing the fourteen states that follow the "intent of the voter" standard and the twenty-two states that follow the "impossible to determine the elector's choice" standard for ballot recounts).

57. See PHILIP GARNER & ENRICO SPOLAORE, WHY CHADS? DETERMINANTS OF VOTING EQUIPMENT USE IN THE UNITED STATES 4-6 (Brown Univ. Dep't of Econ., Working Paper No. 2001-26, 2001) (listing the various ways that Americans vote).

58. See JOHN NICHOLS, JEWS FOR BUCHANAN 48-49 (2001).

59. *Bush II*, 531 U.S. at 147 (Breyer, J., dissenting).

ure of Florida to adopt a specific vote-count substandard, it is impossible to see how the Court's remedy would have ever been the disenfranchisement of voters by halting the recount. If voters are threatened with constitutional injury by potentially not having their votes counted in an election when similarly situated votes in other counties are being counted, that injury becomes absolutely certain when the Court's relief is to *order* that the votes not be counted. How are the rights of pregnant chad voters vindicated by judicial relief compelling their automatic exclusion from the election? This paradox reflects the fact that there were no actually injured plaintiffs as parties in *Bush v. Gore* available to complain about the absurdity of disenfranchisement as the remedy for voting rights violations. Rather, the plaintiff was a candidate desperately looking for ways to *prevent* the counting of votes.<sup>60</sup>

The majority not only ordered disenfranchisement as the remedy for possible disenfranchisement, but mobilized voting rights cases to nullify the right to vote.<sup>61</sup> Ironically, the Court called on *Harper v. Virginia Board of Elections*,<sup>62</sup> which struck down the poll tax in state elections in 1966 because the poll tax discriminated against the poor.<sup>63</sup> But in a state like Florida, where the poor have the worst voting machines and the highest rates of ballot spoiling,<sup>64</sup> a statewide manual recount would have given poor voters *more* equal treatment, not less. If there was an equal protection violation in *Bush v. Gore*, it is found not in anything Florida did, but in the bizarre "relief" that the Court ordered.

The pretext for the decision to shut down the manual vote recount on December 12 was that there was no time left for the Florida Supreme Court to articulate an acceptable and uniform vote-counting substandard.<sup>65</sup> But why not? The state electors were not meeting until December 18, six days later.<sup>66</sup> Surely the hand counts of several thousand "undercount" ballots could be completed in that time. So why not remand the case to the Florida Supreme Court with the instruction to get the job done? This was the position taken quite sensibly by Justice Breyer, who wrote that "there is no justification for the

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60. *See id.* at 100 (per curiam).

61. *See id.* at 104-11.

62. 383 U.S. 663 (1966).

63. *Id.* at 670.

64. *See* NICHOLS, *supra* note 58, at 48-49.

65. *Bush II*, 531 U.S. at 110 (per curiam) (terminating the manual recount of ballots because "it is evident that any recount seeking to meet the December 12 date will be unconstitutional").

66. *Id.* at 146 (Breyer, J., dissenting).

majority's remedy . . . ."<sup>67</sup> The majority took the position that, under the Electoral Count Act of 1887, 3 U.S.C. § 5, controversies over the electors need to be resolved "six days before the time fixed for the meeting of the electors"<sup>68</sup> and—what do you know—that very day, December 12, "is upon us."<sup>69</sup> Indeed, with the decision being released by the Court at 10:00 PM, this day, alas, would actually be over in two hours. How melancholy!

In reality, as the majority clearly understood, 3 U.S.C. § 5 simply extends a statutory "safe harbor" to states appointing their electoral college votes.<sup>70</sup> It imposes no absolute requirement or deadline, and many states have appointed their electors long after this date without any problem in getting Congress to accept them.<sup>71</sup> Justice Stevens pointed out in his dissent that, in the 1960 presidential election, Congress accepted Hawaii's electoral votes appointed on January 4, 1961, *several weeks* after the safe harbor period was over.<sup>72</sup>

In any event, the question of when Florida had to complete the counting of its ballots is a paradigmatic state law issue.<sup>73</sup> Indeed, in a federal law sense, as the majority itself observed, a state could constitutionally decide not to appoint any electors at all.<sup>74</sup> Thus, whether Florida law actually converts the federal "safe harbor" timetable into an absolute statutory requirement or whether it favors the "will of the people" above this other value is a quintessential state law question that only the Florida Supreme Court can answer by interpreting the Florida state constitution and relevant statutes. Yet the Court's majority, without analysis or explanation, not only raised but decided this fundamental state law issue, calling off a state's counting of ballots in a presidential election for the first time in the nation's history.<sup>75</sup> And, while it disregarded and disrespected almost everything else that the Florida high court did, the Supreme Court magnified and distorted a passing statement by the Florida Court about December 12 to determine the state's own law, the award of its presidential electors, and the

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67. *Id.*

68. 3 U.S.C. § 5 (2000).

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

70. *See* 3 U.S.C. § 5.

71. *See Low Moment for High Court*, DAILY NEWS, Dec. 14, 2000, at 16 (stating that twenty-one states "outside of Florida didn't meet the December 12 deadline for finalizing their slates of presidential electors").

72. *Bush II*, 531 U.S. at 127 (Stevens, J., dissenting).

73. *See id.* at 147-48 (Breyer, J., dissenting) (explaining that the fundamental principle of federalism compels the Court to typically defer to state court decisions on questions of state law).

74. *See id.* at 104 (per curiam).

75. *Id.* at 110.

nation's political destiny.<sup>76</sup> Yet, nowhere did Florida law mention December 12, much less as some kind of compulsory statutory deadline.

Of course, had the majority been serious about creating exact equality and parity across America's different voting districts, it could have caused something like a revolution in our decentralized system, where thousands of jurisdictions use widely different kinds of machines, ballots, counting procedures, registration rules, redistricting processes, and voting systems. The Court obviously saw the danger and hurried to stuff the genie back in the bottle. "Our consideration is limited to the present circumstances," the majority wrote without a trace of shame, "for the problem of equal protection in election processes generally presents many complexities."<sup>77</sup> The Court took a case that was not ripe and gave us a decision that was a dead letter on arrival.

The conservatives thus upended five foundational relationships in our constitutional system: (1) They usurped the role of the Florida Supreme Court in interpreting state law. (2) They nullified the putative role of the American people by halting the counting of ballots in a presidential election and effectively choosing the President for them. (3) They preempted Congress's powers under Article II to accept or reject the states' electoral college votes.<sup>78</sup> (4) They reversed the proper distribution of powers in national government by having Supreme Court Justices appoint the President rather than the other way around.<sup>79</sup> (5) They exploded the central principle of the rule of law by finding that the Court can declare its own constitutional decisions to have no precedential effect.

Now, isn't the obverse also true, that the liberals who dissented in *Bush* would have voted in favor of vacating the Florida Supreme Court and preventing a recount if Gore had been the narrow victor? I do not believe so. The majority decision in *Bush* was so brazen a departure for the conservatives and so ferocious an assault on both conventional conservative and liberal doctrinal understandings that the liberals—who on this Court are far more timid and measured than the conservatives—would not have dared to invent a new equal protection right in those circumstances to favor a Democratic candidate. They would have almost certainly never taken the case and, if they had, would almost certainly have left the case to the Florida Supreme Court to resolve.

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76. *Id.*

77. *Id.* at 109.

78. U.S. CONST. art. II, § 1, cl. 3.

79. *See id.* § 2, cl. 2.

Liberals have an abstract commitment to principles of fairness and freedom that makes them the best upholders of the rule of law in times of crisis. In fact, this is historically the famous conservative complaint about liberals: their minds are filled with hopelessly abstract and universal principles that they would impose on social institutions without proper deference to the time-honored habits and working mechanisms of society and authority.<sup>80</sup> Conservative theorist Jerry Muller observes:

Whether termed "the abuse of reason" (by Burke), "rationalism in politics" (by Oakeshott), or "constructivism" (by Hayek), the conservative accusation against liberal and radical thought is fundamentally the same: liberals and radicals are said to depend upon a systematic, deductivist, universalistic form of reasoning which fails to account for the complexity and peculiarity of the actual institutions they seek to transform.<sup>81</sup>

Conservatives are more politically astute—more alert to the concrete political effects of legal arguments and constitutional propositions. How will deployment of this or that principle affect the people whom I care about most? Their heads are not in the clouds of high principle. Edmund Burke stated this disposition succinctly, in what could be the very motto of the conservative majority in *Bush v. Gore*:

The practical consequences of any political tenet go a great way in deciding upon its value. Political problems do not primarily concern truth or falsehood. They relate to good or evil. What in the result is likely to produce evil, is politically false: that which is productive of good, politically is true.<sup>82</sup>

Did the conservatives reason backward, consciously or subconsciously, from the result they wanted to reach (the political good)? To answer the question with a question, how *else* do conservatives reason?

There is, of course, no way to prove this to be the case—history not being falsifiable—and the point is not a crucial one. I am not invested in demonstrating the superior moral virtue of the more liberal Justices. But it is certainly worth noting that, in the bewildering maze of litigation that took place in the 2000 election, every judge described in the press as conservative decided in favor of Bush while a number of liberal Democratic appointees decided against the Gore

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80. CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT 14-15 (Jerry Z. Muller ed., 1997).

81. *Id.* at 14.

82. EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE 73, 163 (Daniel E. Ritchie ed., 1992).



campaign. Perhaps the best example is Judge Nikki Clarke, who presided over the case of *Jacobs v. Seminole County Canvassing Board*,<sup>83</sup> which concerned the Republican voter registrar in Seminole County inviting a Republican party official to work in her office to add missing voter identification numbers to Republican voters' requests for absentee ballots.<sup>84</sup> Despite the fact that there was convincing proof that this was unlawful and a lopsided partisan tampering with the electoral process, Judge Clarke nonetheless found that disqualifying hundreds of absentee ballots would not be a fair remedy for the statutory violation.<sup>85</sup> Amazingly, in an act of characteristic psychological projection, the Republicans had sought to have Judge Clarke, a liberal Democrat, removed from the case on grounds of partisan bias.<sup>86</sup> Yet the value system that Judge Clarke actually brought to the case was one of favoring democracy and vindicating, come what may, the will of the people; this outlook, born of the hard-won twentieth century struggle for the right to vote in the Deep South, required not the invalidation of ballots, whatever may have been the shenanigans of county and party officials, but the counting of all ballots. Too bad she wasn't the Chief Justice of the United States Supreme Court.

In *Bush v. Gore*, America received a sharp, unforgettable lesson about constitutional law. However much we would like it to be the case that the Supreme Court stands apart from the social contest over political and moral values, it is inevitably, inescapably, and irretrievably right there in the center of it. And the fact of the matter is that the Supreme Court has almost always been a profoundly conservative institution in American life, protecting the traditional privileges of race, class, gender, and property.<sup>87</sup> It was during a brief period of liberal judicial activism on behalf of civil rights and civil liberties dur-

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83. 773 So. 2d 519 (Fla. 2000).

84. *Id.* at 521.

85. *Id.* at 523.

86. HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* 109 (2001).

87. From the 1856 decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856) (upholding the rights of slaveholders and ruling that African-Americans could not be citizens within the meaning of the Constitution), to *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) and *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (upholding the exclusion of women from the bar and their disenfranchisement in elections), to *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding official race segregation even after the Fourteenth Amendment), *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the relocation and internment of Japanese Americans), *Milliken v. Bradley*, 418 U.S. 717 (1974) (denying district courts the power to order inter-school district relief in school segregation cases), *Shaw v. Reno*, 509 U.S. 630 (1993) (finding "bizarrely drawn" majority African-American congressional districts inherently suspect under equal protection), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (imposing strict scrutiny on affirmative action set-aside pro-

ing the Warren Court era that the Court gained its reputation as a champion of minorities.<sup>88</sup> But it has completed its return to the old juridical baseline of adjudication in the interests of conservative white majorities.

C. *Bush v. Gore: Hypocrisy and Reaction; Moral Expressivism and Legal Realism*

Many critics of the *Bush v. Gore* decision have assailed the five Justices in the majority for acting in bad faith—hypocritically, with the knowledge that they were betraying their own principles for partisan purposes. Harvard Professor Alan Dershowitz took pains to describe his argument in his book *Supreme Injustice* as “*ad hominem*”: “I am accusing them of partisan favoritism—bias—toward one litigant and against another. I am also accusing them of dishonesty, of trying to hide their bias behind plausible legal arguments that they never would have put forward had the shoe been on the other foot.”<sup>89</sup> Former prosecutor Vincent Bugliosi denounced the “brazen, shameless majority” for its “fraudulent” jurisprudence and called the five Justices “criminals in the very truest sense of the word.”<sup>90</sup> George Washington Law Professor Jeffrey Rosen titled his essay in *The New Republic*, “Disgrace: The Supreme Court Commits Suicide,”<sup>91</sup> and *The New Republic* referred to the “Republican larcenists, in and out of robes, who arranged to suppress the truth about the vote in Florida and thereby to make off with the election of 2000.”<sup>92</sup> New York University Law Professor Anthony Amsterdam charged them with “sickening hypocrisy,”<sup>93</sup> and Harvard Professor Randall Kennedy said that they “acted in bad faith and with partisan prejudice.”<sup>94</sup>

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grams), the Court has consistently endorsed conservative and authoritarian power arrangements in society.

88. See Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 63 (1993) (“The singular achievement of the Warren Court is that it sought to reconcile the supposed conflict between majority rule and minority rights by assuming that a greater social inclusiveness and empowerment of minorities was an extension of democratic values.”).

89. ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 110 (2001).

90. Vincent Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11, 13.

91. Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC, Dec. 25, 2000, at 18.

92. *Unsafe Harbor*, NEW REPUBLIC, Dec. 25, 2000, at 9.

93. Anthony G. Amsterdam, *The Law is Left Twisting Slowly in the Wind*, L.A. TIMES, Dec. 17, 2000, at M5.

94. Randall Kennedy, *Contempt of Court*, AM. PROSPECT, Jan. 1, 2001, at 15, 16.

It is, no doubt, comforting to think that the Justices acted hypocritically. For if they knew that there was no valid basis for stopping the vote-counting but chose to do it anyway, we would at least preserve the consoling comfort that there is a natural and agreed-upon moral order in the legal universe. But doesn't it seem more likely, after Legal Realism and Critical Legal Studies, that there is no such order and the five Justices actually believed, in their heart of hearts, that theirs was the right decision? We resist this conclusion because we then face the disturbing possibility that constitutional law is not ultimately an empirical science but a kind of political rhetoric by other means. We would have nothing solid to fall back upon other than our own values. But this is indeed the human condition.

All of us are partisans. We may be partisans, dismally, to an existing political party or candidate. We may be partisans, more fruitfully, to certain values and principles. The call to "objectivity" is an effort to pull us back from a particular set of partisan commitments to a broader view of the situation. But hitting the *Bush 5* over the head with the bludgeon of "objectivity" only works if they secretly admit to themselves or their loved ones that they were swayed by narrow partisan passions and would have decided the case differently had it been brought by Vice President Gore instead of Governor Bush. But do the conservative Justices actually acknowledge or embrace their personal hypocrisy and the historic bad faith of their decision? Do they consciously justify to themselves the partisanship that seems so obvious to others?

Here is where we learn something profound about the symbiotic relationship among emotional desire, rational analysis, and moral choice. The answer is, of course, no: the *Bush 5* would never concede that they would have decided the case differently had Gore been the one appealing. Indeed, they insist on the contrary proposition. It was only a matter of days before Justice Thomas and Chief Justice Rehnquist were insisting that partisanship never enters into the Justices' reasoning.<sup>95</sup> They would never concede the radical novelty, illogic, or bad faith of the decision.

The conviction by the *Bush* Justices that they were right teaches us a lot about the extraordinary and distinctively human powers of self-delusion and self-rationalization. The belief by conservative Justices (and their supporters) in the complete innocence of their decision is held sincerely and passionately. And here is where I think American

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95. Neil A. Lewis, *The 43rd President: Justice Thomas Speaks Out on a Timely Topic, Several of Them in Fact*, N.Y. TIMES, Dec. 14, 2000, at A23.

jurisprudence, which has wavered between a naive belief that the law is a neutral, deductive, and apolitical field of inquiry (classical legalism) and a belief that law is sometimes inevitably political and partisan in nature (legal realism), could benefit from a much richer integration of moral epistemology and cognitive psychology.

Judicial decision-making is a kind of human decision-making. Judges and Justices are humans, part of the genus mammal; the Rehnquist bloc is part of the same species as the signers of the *New York Times* ad.<sup>96</sup> We all think and act as human beings. In human beings, "emotion is integral to the processes of reasoning and decision making, for worse and for better."<sup>97</sup> Legal consciousness is just one form of human consciousness, and, "in the end, consciousness begins as a feeling . . . ."<sup>98</sup> The *Bush* 5 departed radically from almost every known legal principle or convention, not out of conscious bad faith, but out of the passionate conservative feelings they have about America, the Constitution, and the kind of society to which they want to belong.

1. *Moral Realism and Moral Expressivism.*—We can elaborate the point through reference to moral philosophy. The central debate in moral philosophy, as I see it, is between *moral realists* and *moral expressivists*.<sup>99</sup> Moral realists believe that ethical properties exist independently and objectively in the world.<sup>100</sup> On this theory, the task of ethics is to describe the moral properties of things, qualities, and events.

The moral realists are opposed most significantly and persuasively by the *moral expressivists*.<sup>101</sup> Expressivists believe that moral statements are not empirical observations about objective natural phenomena in the world but the expression of the subjective judgments, beliefs, attitudes, and values of the person making the statement.<sup>102</sup> Thus, ethics is not the scientific process of people *discovering* objective values that exist in things, but rather the social process of people creating values, the activity of people "*valuing* things."<sup>103</sup> Moreover, while the process

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96. 554 *Law Professors Say*, N.Y. TIMES, Jan. 13, 2001 (paid advertisement), at A7.

97. ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 41 (1999).

98. *Id.* at 312.

99. See generally SIMON BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASONING* (1998) (providing a lucid and authoritative treatment of the difference between moral realism and expressivism).

100. See *id.* at 84-121.

101. See generally *id.*

102. *Id.* at 50.

103. *Id.* at 49 (emphasis added).

of moral analysis necessarily deploys reason to understand the facts of a situation and make arguments about the likely effects of this or that course of action, ultimately moral choices themselves are based on the values, attitudes, and beliefs—the *feelings*—that motivate all human decision and action.<sup>104</sup>

Moral expressivism, closely following the work of David Hume, opposes the claim pressed by moral realists that moral duty requires the subordination of desire to reason.<sup>105</sup> More to the point, moral expressivism denies that such a thing is possible. Indeed, Hume argued the very opposite of the Platonic position: “Reason is and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”<sup>106</sup>

Hume gave a dramatic example to make his case. There was nothing *unreasonable* or *irrational*, he argued, about his “prefer[ring] the destruction of the whole world to the scratching of my finger.”<sup>107</sup> Nothing in logic or reason can explain why such a choice is wrong. It is only subjectively formed feelings, beliefs, values, experiences, and attitudes that can convince someone not to prefer the loss of the world to the loss of his fingernail.<sup>108</sup> He argued, similarly, that it is not “contrary to reason to prefer even my own acknowledged lesser good to my greater, and have a more ardent affection for the former than the latter.”<sup>109</sup>

The great contemporary philosopher Simon Blackburn, a professor at Cambridge University, follows Hume and explains the general point, telling us: “Reason can inform us of the facts of the case . . . [and] which actions are likely to cause which upshots. But beyond that, it is silent.”<sup>110</sup> All human decisions are motivated finally by what Blackburn calls our “concerns,” which are supplied not by the calculations of objective reason and logic, but by our beliefs, passions, feelings, and desires.<sup>111</sup>

At first blush, this is an arresting claim for those of us who want to believe that law, like other cognitive disciplines, is and should be an exercise of pure reason and logic. We want law to have, at its bottom, foundations in pure reason and to think of ourselves as *thinking* ani-

104. *Id.* at 240.

105. *Id.* at 238-39.

106. *Id.* at 238 (quoting DAVID HUME, *TREATISE OF HUMAN NATURE* 415 (L.A. Shelby Bigge ed., 1888)).

107. *Id.* at 239 (quoting HUME, *supra* note 106, at 418).

108. *See id.*

109. *Id.* (quoting HUME, *supra* note 106, at 418).

110. *Id.*

111. *Id.*

mals. And that we are: thinking *animals*, to shift the emphasis. That is, we are animal sentient beings motivated by particular passions, desires, needs, concerns, priorities, values, and wants. We use our minds to interpret, analyze, and advance these passions, desires, and concerns. All of the world—everything that is the case, as Wittgenstein defined it—is frozen, impervious, and inscrutable to us without the intervention of human perception and motivation.<sup>112</sup> We will have little power to understand what actually takes place in constitutional adjudication and analysis unless we grasp that beliefs, values, and attitudes establish the lens through which legal meanings are understood, interpreted, refracted, debated, created, and determined.

There is no doubt that the expressivist position must travel uphill against accumulated centuries of belief in the independent powers of sovereign reason. Since the time of the ancient Greeks, philosophy imagined a world in which rationality governed desire and appetite.<sup>113</sup> In the *Phaedrus*, Plato championed the supremacy of the intellect and likened reason to a chariot-driver who whipped the wild horses of emotion and passion into line in order to move the chariot forward.<sup>114</sup> Many conservative scholars today believe that if reason is dethroned and does not master and govern our passions and concerns we will be drawn to immorality and darkness.<sup>115</sup> Consider the closing lines of Professor Stephen L. Carter's book, *Integrity*:

This approach provides the foundation of integrity as I have discussed it in this book: we must make the effort to learn what is right (rather than what we desire) and then to do it. Aristotle placed the intellect above the appetites, Rousseau placed reason above inclination, and the theologians placed God's will above our own. What one sees in every case is the refusal to accept as the measure of morality our choice to do the things that most attract us. To make satisfaction of our desires the only morality is to choose the path away from civil society—away from *civilization*—and back to the state of nature. Valuing the appetites above reason is the path, in fact, toward evil.<sup>116</sup>

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112. LUDWIG WITTGENSTEIN, NOTEBOOKS, 1914-1916, at 82e-84e (G.H. von Wright & G.E.M. Anscombe eds., G.E.M. Anscombe trans., 1969) ("What others in the world have told me about the world is a very small and incidental part of my experience of the world. I have to judge the world, to measure things.").

113. PLATO, PHAEDRUS 455-57 (Harold North Fowler trans., Harvard Univ. Press 1977).

114. *Id.* at 471-73.

115. STEPHEN L. CARTER, INTEGRITY 241-42 (1996).

116. *Id.*

This claim captures beautifully the central myth and conceit of American jurisprudence. Professor Carter compresses into one paragraph all of the classical dualisms of Western thought: "what is right" versus "what we desire"; "the intellect" versus "the appetites"; "reason" versus "inclination"; "God's will" versus "our own"; "civilization" versus "nature." On the left side of each contrast lie the demands of the rational mind, which are the "foundation of integrity"; on the right side lie the heart and the sensual will, a wholly separate path, "the path, in fact, toward evil."<sup>117</sup>

Carter's argument about law places him squarely in the camp of moral realism (not to be confused with "Legal Realism," which comes very close to being its opposite).<sup>118</sup> Moral realists believe that the ethical properties of goodness and badness, right and wrong, actually exist as properties in the world.<sup>119</sup> Thus, the moral claim that "the death penalty is wrong (or right)" is an empirical statement that can be confirmed or refuted. The task of ethics is to observe and record those objective moral properties inhering in different problems, choices, and events and then to choose to do the right thing by bringing our actions into accord with these objective requirements.<sup>120</sup>

Legal thinkers who follow in this tradition of ethical realism, whether they are conservatives like Professor Carter or liberals like Professor Ronald Dworkin, correspondingly believe that there are definitive and objective "right answers" in law.<sup>121</sup> If we can just keep our unruly private passions and preferences in check, we will know which answers are right and which ones wrong.<sup>122</sup> If we "make the effort to learn what is right (rather than what we desire)," as Professor Carter urges, then it is only a matter of will to choose to do it.<sup>123</sup> Similarly, Professor Dworkin supposes that if we only had a perfectly omniscient judge, whom he calls Hercules, we could arrive at all of the right answers in legal jurisprudence, even in the hardest cases.<sup>124</sup>

2. *Moral Realism and Legal Realism at Odds.*—Moral realism thus provides the philosophical frame for *natural law* theory, the doctrine

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117. *Id.*

118. For a detailed review of Legal Realism, see generally AMERICAN LEGAL REALISM (William E. Fisher, III et al. eds., 1993).

119. See BLACKBURN, *supra* note 99, at 119-21.

120. See *id.*

121. See, e.g., RONALD DWORKIN, LAW'S EMPIRE (1986); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

122. CARTER, *supra* note 115, at 242.

123. *Id.*

124. Dworkin, *supra* note 121, at 1083-87.

that "there is a certain order in nature that provides norms for human conduct."<sup>125</sup> On this theory, as rendered by St. Thomas Aquinas, "natural law was humanity's 'participation' in the comprehensive eternal law."<sup>126</sup> In a system of constitutional law, natural law theory either uses natural law concepts to supplement written constitutional provisions, an idea suggested by Justice Samuel Chase in *Calder v. Bull*,<sup>127</sup> or reads open concepts like "due process" or "liberty" through the prism of some understanding of natural law and natural justice.<sup>128</sup> Although moral realism has a hold on the modern philosophical imagination, American constitutional law has long since abandoned natural law theories, at least as a self-conscious justifying ideology for extra-textual decision-making.<sup>129</sup> Only Justice Clarence Thomas, in a handful of speeches and articles before joining the Court, has overtly flirted with natural law theory.<sup>130</sup> But he has essentially disavowed it since joining the Court and now considers himself a textualist and an originalist.

If moral realism is the philosophical structure for natural law theory, moral expressivism furnishes the best ethical metatheory for making *legal realism* sensible, compelling and, I will argue, noncynical. As a formal matter, legal interpretation takes place through the screen of organizing principles, conventions, and rules. One might assume, then, with Christopher Columbus Langdell, that law is a rational system of knowledge in which all legal truths are deducible and discoverable through reason.<sup>131</sup> But Legal Realism proved at the beginning of the twentieth century—and Critical Legal Studies showed again at its

125. Christopher Wolfe, *Natural Law*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 581, 581 (Kermit L. Hall et al. eds., 1992).

126. *Id.*

127. 3 U.S. (3 Dall.) 386, 388 (1798).

128. See Wolfe, *supra* note 125, at 581 (explaining natural law theory).

129. See Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 797-98 (1993) (discussing an on-going reluctance to connect issues of constitutional interpretation with natural law theory).

130. See, e.g., SUSAN LOW BLOCK & THOMAS G. KRATTENMAKER, SUPREME COURT POLITICS 219-20 (1994) (quoting a speech of Justice Thomas in which he said that the "higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for a just, wise, and constitutional decision").

131. See Robert W. Gordon, *The Case For (And Against) Harvard*, 93 MICH. L. REV. 1231, 1245 (1995) (reviewing WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994)) (stating that according to Lapiana, Langdell attempted to create a "legal science" which would be autonomous from all other social norms); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 12 (1999) ("The formalists clearly believed that the law was comprised of principles—including definitions, concepts, and doctrines—broad in their generality, few in their number, and clear enough to permit answers to the questions of law to be more or less directly deduced.").



close—that there are almost always available different and competing sources of authority and rules of interpretation to allow courts to resolve the same case in different and opposite ways.<sup>132</sup>

Thus, underlying value choices must guide large systems of doctrinal constitutional development in the law. In a democratic society where everyone cares about rights and popular culture is transfixed by law, these value choices are inescapably *political* choices as well because everyone cares about them. Does substantive due process forbid interference with the right to contract? Does it forbid interference with a woman's right to choose an abortion in consultation with her physician? Whole bodies of case doctrine and legal principles are built on these initial underlying value choices. Moreover, "indeterminacy" presents itself again in the form of "gaps, conflicts, or ambiguities" in the interstices of developing and even well-developed legal doctrine.<sup>133</sup> Here again, value choices surface—for example, does the right to choose an abortion extend to minors in the face of a state parental consent law? A doctrinal consensus around large principles will crack open and revive interpretive controversy—with whatever legal principles may be at hand—whenever later subsidiary conflicts reincarnate the original clash of values. Thus, at both macro- and micro-junctures, underlying moral and political visions, or their hardened doctrinal sediment, will motivate judges to choose particular lines of development and results.

This is not to say that there will be no cases where it is perfectly obvious that a particular rule or form of reasoning dictates a particular kind of answer.<sup>134</sup> Sometimes ideological and epistemological consensus on the Court is sufficiently broad, clear, and definite that no plausible alternative can present itself.<sup>135</sup> But whenever it deals with an issue of profound moral and political controversy, as the Court did in *Bush v. Gore*, distinct and polarizing legal norms will quickly emerge to reproduce in legal form the underlying moral and political value conflict. Law becomes politics by other means.

The theory of moral expressivism, like Legal Realism, explains why we find so many 5-4 Supreme Court decisions, not just in *Bush v.*

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132. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

133. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 107 n.33 (2000).

134. Even Duncan Kennedy, the brilliant expositor of legal indeterminacy, accepts the fact that existing rules will sometimes dictate an obviously and intuitively correct answer in some cases. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

135. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

*Gore*, but running throughout our constitutional jurisprudence and dealing with weighty issues like abortion, the death penalty, civil rights, and freedom of speech. The same pattern often obtains in less dramatic statutory confrontations on the Court relating to the environment, access to the courts, housing, and so on. It cannot be the case that these sharp divisions appear on the Court because certain Justices are smart enough to perceive ethical and constitutional facts and others are too stupid or some are lazy and others are hard-working or that some have access to better information than others. What determines the differences in outcomes is the filter of attitudes, values, and beliefs that the Justices bring to the task of analyzing the relevant legal materials and the task of judging.

3. *Hypocrites or Reactionaries?*—If it is tempting for liberals to call the conservative Justices hypocrites and judge their souls, we might resist the temptation and focus instead on what they indisputably are: reactionary judicial activists. Hypocrisy is a moral charge that indirectly flatters our own integrity and objectivity. Reaction is a political charge that forces us to think and act politically to change the balance of power in favor of the values we champion.

Intriguingly, most of the Court's harshest critics never called for the impeachment of the offending Justices for knowingly subverting the Constitution. Why not? The Republicans brought impeachment charges against President Clinton for acts far *less* damaging to American democracy and the rule of law.<sup>136</sup> Perhaps it is because they regard *Bush v. Gore* as a freakish moral lapse rather than a logical entry in an ongoing political project.

Progressives certainly can understand the appeal of a political analysis that "put[s] hypocrisy first,"<sup>137</sup> in the words of Judith N. Shklar. But we have special reason to reject excessive reliance on that approach to understanding law. As Thomas Paine wrote in his preface to *Common Sense*, "the Object for Attention" must be "the *Doctrine itself*, not the *Man*."<sup>138</sup> However, Paine also later remarked that

the political characters, political dependencies, and political connections of men, being of a public nature, differ exceedingly from the circumstances of private life; and are in many

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136. See generally Symposium, *Bidding Adieu to the Clinton Administration: Assessing the Ramifications of the Clinton "Scandals" on the Office of the President and on Executive Branch Investigations*, 60 MD. L. REV. 1 (2001).

137. JUDITH N. SHKLAR, *ORDINARY VICES* 86 (1984).

138. THOMAS PAINE, *COMMON SENSE* (1776), reprinted in 1 *THE WRITINGS OF THOMAS PAINE*, at 67, 68 (Moncure Daniel Conway ed., 1967).

instances so nearly related to the measures they propose, that to prevent our being deceived by the last, we *must* be acquainted with the first.<sup>139</sup>

In this sense, it is fair for critics of *Bush v. Gore*, such as Professor Dershowitz, to point out the dense network of political connections and conflicts that entangled the Justices with the parties and lawyers before the Court. The five Justices in the majority were appointed by Presidents Nixon, Reagan, and the first Bush. Justice Scalia's son worked for Gibson Dunn, one of the law firms representing Bush in the case. Justice Thomas' wife was collecting resumes at the time to staff the prospective Bush administration from her perch at the Heritage Foundation. Chief Justice Rehnquist allegedly had a desire to retire and a corresponding strong preference to be replaced by a Republican appointee. Reportedly, he also had a personal history of challenging African-American and Hispanic Democratic voters at Arizona polling places in 1962.<sup>140</sup> As the Republican nominee, Governor George W. Bush hailed Justices Thomas and Scalia as his ideal jurists. One could spend pages on these kinds of connections and overlaps.<sup>141</sup>

But these apparent conflicts of interest (*confluence* of interests is actually more like it) only take us so far in our juridical analysis. In reality, we all are compromised and defined by partisan beliefs and values, not necessarily in the narrow sense of attachment to a political party, we hope, but certainly in the larger sense of commitments to ideas and values. The particular entanglements that catch public attention—Justice Scalia's son, Justice Thomas' wife—reflect life circumstances and associations that simply open a little window into the underlying structures of feeling and belief that motivate us. But does anyone really think that the case would have come out any differently had Justice Scalia's son not been working at Gibson Dunn or had Virginia Thomas not been preparing for the presidential transition at the Heritage Foundation? Even without these charged personal associa-

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139. THOMAS PAINE, *THE FORESTER'S LETTERS* (1776), *reprinted in* 1 *THE WRITINGS OF THOMAS PAINE*, *supra* note 138, at 127, 134.

140. *Democracy Now: As Supreme Court Decides Presidency, Chief Justice Rehnquist is Accused of Past Harassment of Black Voters at the Polls* (Pacific Radio radio broadcast Dec. 12, 2000), available at <http://www.webactive.com/pacifica/demnow/dn20001212.html> (discussing how, at his 1986 Senate confirmation hearings on his promotion to Chief Justice, numerous witnesses testified that, in 1962, Rehnquist aggressively questioned minority voters on their way to vote in Arizona about their suffrage qualifications).

141. For the various connections and conflicts between the Justices and the parties and lawyers in the case, see generally Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002).

tions, the conservatives on the Court would have been motivated sufficiently to secure a halt in the vote-counting and Bush victory.

To shift the discussion from hypocrisy to reaction is not to rehabilitate the majority. On the contrary, I yield nothing to Dershowitz, Kennedy, Bugliosi, Rosen, and Amsterdam (each of whom I admire) in my contempt for that egregious decision. To charge bad faith, however, requires us to assume that the Justices in the majority knew that what they were doing was wrong and acted in conscious disregard of its unfairness. This is questionable psychological speculation that distracts us from the *ideological and jurisprudential system* that produced and excused this outrageous assault on democracy.

In fact, although no doctrinal foundation existed for what the conservative Justices did in *Bush v. Gore*, their unprincipled treatment of the issues is perfectly congruent with their reactionary approach to other key cases structuring the dynamics of political democracy. *Bush v. Gore* was the natural successor to nakedly activist and political Court decisions dismantling majority African-American and Hispanic legislative districts and replacing them with majority-white districts,<sup>142</sup> Court decisions upholding discriminatory ballot access laws and establishing the "two-party system,"<sup>143</sup> and the Court's outrageous decision upholding the exclusion of third party candidates from government-sponsored or corporate-sponsored candidate debates.<sup>144</sup> If we can have a closed two-party system based on a white-majority norm, why not just a one-majority-white-party system?

Judges should try to be fairminded. But, when push comes to shove, there are no "neutral principles of constitutional law,"<sup>145</sup> as Herbert Wechsler famously promised. There are principles that advance particular norms and values in history, but there is nothing neutral about their content.

In *Bush v. Gore*, five conservative Republican-appointed Justices examined the same facts and the same body of law as four moderate-to-liberal Justices—two Republican appointees and two Democratic appointees—but came up with, for the most part, completely different judgments about how to analyze, resolve and dispose of the case. This

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142. See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). See generally Jamin B. Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J.L. & POL. 591 (1998).

143. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Jenness v. Fortson*, 403 U.S. 431 (1971).

144. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). See generally Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943 (1999).

145. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

division reflected not the stupidity, venality, conscious hypocrisy, or moral obtuseness of one group or the other, but the fact that adjudication requires, above all, interpretive judgment. Legal interpretation occurs through the filter of political attitudes, beliefs, perceptions, and values that inevitably shapes all human perception and judgment. Judges and Justices are human beings, part of the genus mammal, and in humans, "emotion is integral to the processes of reasoning and decision making, for worse and for better."<sup>146</sup>

The crucially important question for Americans is: why was the constitutional language so pliable that the *Bush* majority could arrive at such an astonishing resolution? Why is democracy so unsettled a constitutional value? What characteristics of our constitutional structure permitted such an extraordinary turn of events to take place? The answer lies in the curious absence of a constitutional right to vote and the strange institution of the presidential electoral college.

## II. THE PEOPLE'S MISSING RIGHT TO VOTE

"[T]he individual citizen has no federal constitutional right to vote for electors for the President of the United States . . . ."<sup>147</sup>

You have read this correctly: we, the people, have no constitutional right to vote for President or for the electors who choose the President. This declaration creates the karma—the logical sequence of cause and effect—that leads to the Court's dazzling disenfranchisement of thousands of people as a remedy for hypothetical due process problems in the counting of a few ballots.

Now the Court's vision of there being no right to vote for President is not logically or historically compelled. True, the Constitution nowhere explicitly states that all citizens have a right to vote. But there is a powerful argument that the evolution of the "one person, one vote" decisions in the 1960s established the states' duty to include citizens in all elections.<sup>148</sup> Certainly the textual silence around the right to vote in presidential elections should be no more controlling than the textual silence around other rights or powers implied in the Constitution, such as the right to choose an abortion,<sup>149</sup> the right to

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146. DAMASIO, *supra* note 97, at 41.

147. *Bush II*, 531 U.S. 98, 104 (2000) (per curiam).

148. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

149. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (concluding that the right to privacy includes the right to choose to have an abortion).

marry,<sup>150</sup> the power of states to criminalize sodomy,<sup>151</sup> or the power of government to disregard normal search warrant and probable cause requirements in public schools<sup>152</sup> or at the border.<sup>153</sup>

More to the point, other parts of the Constitution heavily favor voting, including amendments specifically protecting “the right of citizens of the United States to vote” against discrimination on the basis of race,<sup>154</sup> sex,<sup>155</sup> residency in the District of Columbia (in presidential elections),<sup>156</sup> failure to pay poll taxes,<sup>157</sup> or age once a citizen is eighteen years old.<sup>158</sup> If you combine this overwhelming constitutional preference for suffrage with the Ninth Amendment, which states that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”<sup>159</sup> it seems almost irresistible that the democratic right to vote exists.

But the current Court reads the Constitution as establishing the state legislatures’ absolute power to choose presidential electors without public participation if they so desire. Although the states presently hold popular elections to choose the electors, the Court was clear that any legislature could decide to bypass the voters and appoint electors of its choosing: “the state legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself . . . .”<sup>160</sup> There is, therefore, no durable safety for popular voting rights not anchored in the visible text of the Constitution.

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150. *Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978) (categorizing the decision to marry as among the personal decisions protected by the right to privacy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia’s miscegenation statute and stating that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”).

151. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding a state statute against sodomy constitutional because the Due Process Clause of the Fourteenth Amendment does not create a fundamental right for homosexuals to engage in consensual sodomy, even in the privacy of their own homes).

152. *New Jersey v. T.L.O.*, 469 U.S. 809 (1984) (holding that school searches need only meet a reasonable suspicion standard and do not require warrants).

153. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that border searches require only reasonable suspicion).

154. U.S. CONST. amend. XV, § 1.

155. *Id.* amend. XIX, § 1.

156. *Id.* amend. XXIII, § 1.

157. *Id.* amend. XXIV, § 1.

158. *Id.* amend. XXVI, § 1.

159. *Id.* amend. IX.

160. *Bush II*, 531 U.S. 98, 104 (2000).

The constitutional silence as to where the right to vote should be explains an awful lot about the chaotic 2000 election. Because we have not grounded voting in the constitutional architecture, it becomes a political plaything vulnerable to the ploys and whims of local elites. The NAACP's hearings into what went wrong in Florida found time-honored tricks: poll workers illegally insisting that African-Americans produce two forms of identification, including one photo ID; mysteriously changed polling places and painfully incompetent poll attendants; 8000 Floridians being *wrongly* purged as ex-felons by a state-hired private consultant who did not even give them notice; punch card ballots being marred and thrown away; and misleading ballot designs, such as the infamous "butterfly ballot," which produced the anomaly of Jewish Holocaust survivors voting *en masse* for Patrick Buchanan.<sup>161</sup>

Without a national constitutional structure supporting the act of voting, the bottom falls out easily on democratic participation. The 2000 election was ultimately decided not by the people, a majority of whom clearly opposed the victor,<sup>162</sup> but by a sequence of deliberate and accidental disenfranchising events, last-minute absentee balloting by overseas military personnel, a hellbent five-Justice bloc on the Supreme Court, and the state legislative-controlled and party-dominated electoral college.

The strategic machinations and negligence of our election managers are predictable where suffrage is not a bedrock constitutional right enforceable in federal court, but instead a political right struggling to stay afloat in the sea of contest. Local manipulators of public consent (of whichever party) calculate that they will suffer little adverse consequence for their gamesmanship if their favorites win. There was nothing terribly special about Florida other than the sudden burst of sunshine on the process. A joint study by the California Institute for Technology and Massachusetts Institute of Technology determined that, out of 100 million votes cast in the 2000 presidential contest, between four and six million were simply never counted.<sup>163</sup> This is the reserve army of the disenfranchised that reappears in every election to help the official managers of our politics maintain local

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161. *NAACP Public Hearings on the Florida Vote* (CSPAN television broadcast, Nov. 11, 2000).

162. *Election 2000 National Results*, available at <http://www.cnn.com/ELECTION/2000/results/national.html> (last visited Apr. 24, 2002).

163. CALTECH/MIT VOTING TECHNOLOGY PROJECT, *VOTING: WHAT IS, WHAT COULD BE* 3 (2001).

equilibrium. And so it goes where the "citizen has no federal constitutional right to vote."

A. *The Missing Right to Vote in House and Senate Elections:  
Disenfranchisement in the District*

The shaky foundations of political democracy are not just a threat to our participation in presidential elections. The "individual citizen" of the United States also has no federal constitutional right to vote for Senators and Representatives.<sup>164</sup> Just a few months before *Bush v. Gore*, a majority on the Supreme Court made this point by affirming a 2-1 decision by the United States District Court for the District of Columbia that rejected a claim that American citizens have a right to vote in congressional elections.<sup>165</sup> Although not nearly as famous as *Bush v. Gore*, this case even more directly presented the question of whether American citizens have a democratic right to vote under the Constitution. The answer is no.

The case, *Adams v. Clinton*, was brought by then-District of Columbia Corporation Counsel, John Ferren, a former D.C. Court of Appeals judge and a passionate advocate of the rights of Washingtonians.<sup>166</sup> Ferren sued the Secretary of Commerce on behalf of 570,000 American citizens living in the District of Columbia who are denied the right to vote for U.S. Senators and House Members (and must rely solely on a single non-voting Delegate in the House, a post occupied today by the extraordinarily able Eleanor Holmes Norton).<sup>167</sup> The fifty-six named plaintiffs were a rainbow spectrum of American life from all the District's vibrant eight wards, including teachers, firefighters, doctors, veterans, professional athletes, university presidents, writers, artists, and the lead plaintiff Clifford Alexander, a former Secretary of the Army under President Jimmy Carter who had run for mayor in 1976.<sup>168</sup>

Ferren asked the court to order the Secretary of Commerce to include Washingtonians in the decennial reapportionment letter that he would be sending to the Speaker of the House of Representatives in 2000 to report where Americans live for the purposes of congres-

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164. *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.), *aff'd*, 531 U.S. 941 (2000).

165. *Adams v. Clinton*, 531 U.S. 941 (2000).

166. *Id.* at 37-38. I acted as co-counsel on the case, originally titled *Alexander v. Daley*, along with Assistant D.C. Corporation Counsel Walter Smith, and Covington & Burling attorneys Tom Williamson, Evan Schultz, and Charles Miller.

167. *Id.*

168. *Id.* at 35-37.



sional redistricting.<sup>169</sup> The plaintiffs also sought declaratory and injunctive relief compelling Congress to provide for their representation in both houses of Congress, either directly, by seating the District's own representatives, or by some indirect mechanism, such as participating in the election of members of Congress from Maryland or another state.<sup>170</sup>

The plaintiffs maintained that their disenfranchisement from congressional elections violates equal protection and the privileges and immunities of national citizenship.<sup>171</sup> Brick by brick, they rebuilt a wall of equal protection precedent invalidating grandfather clauses, exclusionary white primaries, state poll taxes, restrictions on voting by soldiers away from home, unnecessarily long residency requirements, disenfranchisement of citizens living on federal enclaves, prohibitively high candidate filing fees, and malapportioned legislative districts.<sup>172</sup>

This line of authority, they argued, creates a constitutional imperative of universal suffrage. Indeed, the malapportionment cases specifically established the foundational "one person, one vote" principle. The plaintiffs cited Justice Black's powerful statement in *Wesberry v. Sanders*, a decision that struck down congressional districts with widely disparate populations:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.<sup>173</sup>

In the same year, in *Reynolds v. Sims*, Chief Justice Warren wrote:

[T]he weight of a citizen's vote cannot be made to depend on where he lives. . . . This is the clear and strong command of our Constitution's Equal Protection Clause . . . . This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races.<sup>174</sup>

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169. *Id.* at 38.

170. *Id.*

171. *Id.*

172. *See id.* at 100-07 (Oberdorfer, J., dissenting in part and concurring in part) (articulating plaintiffs' arguments).

173. *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

174. *Reynolds v. Sims*, 377 U.S. 533, 567-68 (1964).

The D.C. plaintiffs argued that equal protection must extend universal suffrage to people living in the federal city, who share all the essential characteristics of citizens of the states: they pay federal taxes, indeed more per capita than any state but Connecticut; fight and die in foreign wars and are conscripted into the military whenever there is a draft; vote for President and Vice President under the Twenty-Third Amendment; are governed by federal laws and enjoy all other constitutional rights, such as the freedoms of speech, press and assembly.<sup>175</sup> They showed that the selective denial of federal representation to the citizens of Washington is doubly unjust. Not only is Congress their national legislature but their local legislative sovereign as well. It has power to make laws for the District and veto those passed locally by the Council of the District of Columbia.

In *Alexander v. Mineta*, the plaintiffs pointed out that the Supreme Court determined in 1970 that Maryland could not disenfranchise citizens living at the National Institutes of Health (NIH) federal campus in Rockville.<sup>176</sup> In *Evans v. Cornman*, the Court rejected Maryland's argument that these people were the direct subjects of Congress under Article I, Section 8, Clause 17, and therefore had no right to vote in Maryland's federal and state elections.<sup>177</sup> By the same token, the plaintiffs argued, Congress, which exercises the same "exclusive Legislation"<sup>178</sup> over District residents as it did over the residents of the NIH campus, could not disregard its obligation to give District citizens the right to vote and be represented in Congress.

The often-heard claim that the District is "too federal" for its citizens to vote in congressional elections was proven illogical. Neither federal employees nor their family members or neighbors are disenfranchised anywhere else in the country, and the vast majority federal employees live outside Washington, D.C.<sup>179</sup> So it is hard to see the compelling reason for disenfranchising Washingtonians, only a small percentage of whom work for the federal government. Just as Congress could not segregate public schools in the District of Columbia (any more than states could segregate their own),<sup>180</sup> just as Congress could not shut down the *Washington Post* or establish a church (any more than a state could violate the First Amendment),<sup>181</sup> so Congress

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175. See Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 55-56 (1999).

176. See *Evans v. Cornman*, 398 U.S. 419 (1970).

177. *Id.* at 426.

178. U.S. CONST. art. I, § 8, cl. 17.

179. Raskin, *supra* note 175, at 72.

180. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

181. U.S. CONST. amend. I.

cannot deny the basic political rights of voting and representation. That was the plaintiffs' argument.

But all of the Warren Court's old-fashioned rhetoric about the fundamental importance of voting went for naught. The District Court found there *were* no basic political rights that applied to all of us. The majority stated: "The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right 'of all *qualified* citizens to vote.'"<sup>182</sup> To be qualified, you must belong to a "state" within the meaning of Article I<sup>183</sup> and the Seventeenth Amendment<sup>184</sup> and must be granted the right to vote by the state.<sup>185</sup> The court was not moved by the fact that the District of Columbia is treated like a state for more than 500 statutory purposes, from highway and education funds to Selective Service and Internal Revenue provisions, as well as for every other major constitutional purpose, including the Full Faith and Credit Clause and the Diversity Jurisdiction Clause. Thus, two judges in *Alexander v. Mineta* overruled the senior judge on the panel, Louis Oberdorfer, to find that, however "undemocratic" the condition of residents of the nation's capital may be, simply being United States citizens subject to federal taxation and military conscription does not confer on Washingtonians a right to vote or to be represented in the Senate and House.<sup>186</sup>

We could hardly have it clearer: there is no affirmative universal *constitutional* right to vote. This is no longer an eccentric conservative gloss on the document. It is black-letter law based on a haunting textual silence: if you go searching for an explicit popular right to vote in the Constitution, you come up empty-handed. The hard-won language in the Fifteenth, Nineteenth, and Twenty-Fourth Amendments forbidding discrimination in voting establishes no mandatory universal right to vote. Those amendments were *ad hoc* efforts to prevent discrimination against specific populations. They worked pretty well. Thus, the Florida legislature cannot selectively disenfranchise African-Americans in its selection of presidential electors today (well, theoretically at least), but it can disenfranchise *everyone*, as the Rehnquist Court kindly reminded us.<sup>187</sup> Similarly, while the Nineteenth Amendment means Congress cannot selectively disenfranchise women in the

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182. *Adams v. Clinton*, 90 F. Supp. 2d 35, 66 (D.D.C. 2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)) (emphasis added).

183. *Harper v. Virginia Bd. of Elections*, 383 U.S. 633, 665 (1966).

184. *Adams*, 90 F. Supp. 2d at 50.

185. *McPherson v. Blacker*, 146 U.S. 1, 39 (1892).

186. *Adams*, 90 F. Supp. 2d at 72.

187. *Bush II*, 531 U.S. 98, 104 (2000) (per curiam).

District of Columbia, it can disenfranchise all women *and* men living in Washington by denying them a place in Congress. Anti-discrimination amendments simply do not help when government may legitimately disenfranchise *everyone* in a textually unprotected class.

*B. Territorial Subjects: The People of Puerto Rico, American Samoa, Virgin Islands, Guam*

The good people of Washington, D.C. who face taxation without voting representation in Congress have at least been able to participate in presidential elections since 1964 because of the enactment of the Twenty-Third Amendment three years prior.<sup>188</sup> But there are millions of American citizens living in the American territories<sup>189</sup>—Puerto Rico, American Samoa, Virgin Islands and Guam—who cannot even vote for the President who is their national leader and commander-in-chief in times of war.<sup>190</sup> The American flag waves, but there is no voting for President on Election Day.

To be sure, the residents of the territories are exempt from federal individual income taxes,<sup>191</sup> but otherwise possess all of the rights and responsibilities of American citizenship, including military conscription and service,<sup>192</sup> the duty to obey federal laws and policies,<sup>193</sup> local legislative and budgetary autonomy,<sup>194</sup> and so on. The lack of

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188. U.S. CONST. amend. XXIII, § 1. The Amendment states:

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of Electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of the amendment.

189. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 810 tbl.1327 (1998).

190. *Iguarta de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994).

191. See U.S. CONST. art. I, § 8, cl. 1; David M. Helfeld, *The Constitutional and Legal Feasibility of the Presidential Vote for Puerto Rico*, in SIX SPECIAL STUDIES REQUESTED FOR THE AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO 87, 102-04 (1971).

192. See *United States v. Valentine*, 288 F. Supp. 957, 979 (D.P.R. 1968) (holding that the Selective Service Act, which makes every male citizen of the United States liable for service in the armed forces, applies to territory residents who are United States citizens).

193. See *Simms v. Simms*, 175 U.S. 162, 168 (1899) ("In the territories of the United States, Congress has the entire dominion and sovereignty . . . and has full legislative power over all subjects upon which the legislature of a State might legislate within that state . . .").

194. See Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 315-17.

federal personal income taxation may roughly excuse the need for territorial voting representation in the Congress that raises and spends tax dollars, but disenfranchisement in presidential elections is a purely gratuitous insult that makes the relationship between the United States and the people of these territories a gratingly neo-colonial and obsolescent one. The people of the territories overwhelmingly desire the right to vote for their President. By what logic do we deny it to them?

According to the United States Court of Appeals for the Second Circuit, the "exclusion of U.S. citizens residing in the territories from participating in the vote for the President of the United States is the cause of immense resentment in those territories—resentment that has been especially vocal in Puerto Rico."<sup>195</sup> There are 3.8 million residents of Puerto Rico and another 2.7 million Puerto Ricans living on the mainland.<sup>196</sup> According to Judge Leval, the political exclusion of Puerto Ricans "fuels annual attacks on the United States in hearings in the United Nations, at which the United States is described as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home."<sup>197</sup>

"These problems of fairness, resentment, and impaired reputation are serious ones,"<sup>198</sup> Judge Leval wrote in the second of two cases that recently reached the United States Court of Appeals for the Second Circuit in New York essentially challenging the disenfranchisement of citizens living in Puerto Rico. In a world where one person-one vote is the gold standard for democratic society, the current regime is untenable. Each of the territories has a unique history interacting with the United States where the dynamics of colonialism, exploitation, dependence, and interdependence have all played a part. But, in the new century, wherever U.S. citizens live under the U.S. flag, everyone should minimally have the right to vote for President. If the territories leave the American Union, their residents will no longer be U.S. citizens, but as long as they are with us, and we have every reason to believe this will be forever, they should have a right to cast a vote in national elections for President.

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195. *Romeu v. Cohen*, 265 F.3d 118, 127 (2d Cir. 2001).

196. Rafael E. Delet, Jr., *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico's Political Status, and the Right of U.S.-Resident Puerto Ricans to Participate*, 28 SYRACUSE J. INT'L L. & COM. 19, 41 (2001).

197. *Romeu*, 265 F.3d at 127-28.

198. *Id.* at 128.

*C. Former Felons*

Consider another important example of a suffrage-vulnerable population. Today, eight states permanently disenfranchise all persons who have committed felonies even after they have finished their criminal sentences, and another four states disenfranchise some such ex-offenders based on offense.<sup>199</sup> A handful of ex-felons in these states win their suffrage back through gubernatorial pardons or legislative action, but this is extremely rare.<sup>200</sup>

Although most states restore voting rights to people who have done good time, the disenfranchised ex-felon population in the others is substantial. All told, more than 1.4 million Americans who did good time and repaid their debt to society are disenfranchised today and most of them will remain voteless for life.<sup>201</sup>

Disenfranchised ex-offender communities are disproportionately made up of racial minorities. This pattern follows from well-documented racial dynamics in the ceaseless and hopeless War on Drugs. The American inmate population is approximately seventy percent African-American and Latino today. In 1999 "close to 800,000 black men were in custody in federal penitentiaries, state prisons, and county jails. . . ." <sup>202</sup> According to the Sentencing Project, in two of the states that deny the vote to ex-offenders, "one in three black men is disenfranchised" and in eight others, "one in four black men is disenfranchised. If current trends in criminal arrests, prosecution, and conviction continue, the rate of disenfranchisement for black men could reach 40 percent in the states that disenfranchise ex-offenders." <sup>203</sup>

The practice of stripping people of the franchise for life based on felony convictions has dramatic political consequences. In Florida's 2000 election, where George W. Bush captured the state's 25 electoral

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199. HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES*, at pt. I (1998), available at <http://www.hrw.org/reports98/vote> [hereinafter *FELONY DISENFRANCHISEMENT*].

200. *Id.* In Maryland and Virginia, for example, ex-felons must convince the Governor through the Parole Board to remove their political disabilities, although as of this writing a bill is making its way through the Maryland legislature to enfranchise ex-felons. According to the Sentencing Project and Human Rights Watch, which issued an excellent report on the subject, while there are more than 200,000 ex-convicts in Virginia, only 404—far less than 1%—won their right to vote back in 1996 and 1997. *Id.* at pt. II. In Mississippi, an ex-con needs a gubernatorial executive order or a bill passed by two-thirds of members in each house and a gubernatorial signature. See *id.* Good luck.

201. *Id.* at pt. I.

202. Loic Wacquant, *Deadly Symbiosis*, BOSTON REV., Apr./May 2002, available at <http://bostonreview.mit.edu/BR27.2/wacquant.html>.

203. *FELONY DISENFRANCHISEMENT*, *supra* note 199, at pt. I.

college votes on the basis of fewer than 500 individual votes cast, there were more than 200,000 ex-felons disenfranchised.<sup>204</sup> Thus, for every single voter in George Bush's margin of victory, there were 400 American citizens in Florida disenfranchised in the election and for life based on a policy the vast majority of states have rejected.

The 1.4 million voteless ex-offenders nationwide are part of a population of 3.9 million Americans who have lost their voting rights because of a felony conviction.<sup>205</sup> Of this number, 2.5 million are still in prison, on probation, or on parole.<sup>206</sup> Although incarcerated felons can vote in many countries, they are denied the right to vote in forty-eight states and the District of Columbia and retain the right to vote only in Maine and Vermont.<sup>207</sup>

The broader policy of felon disenfranchisement has remarkable effects of its own. Today's prisoners are usually shipped from heavily minority and pro-Democratic urban areas to overwhelmingly white and conservative rural areas where prison construction has increasingly taken place. The prisoners count for census and reapportionment purposes in these rural areas because it is where they live, but they cannot vote there. They thus swell the power of conservative white politicians committed generally to punitive justice policies. Jonathan Tilove writes that the inmates at the famous Attica prison in western New York state "are represented in Albany by state Sen. Dale Volker, a conservative Republican who says it's a good thing his captive constituents can't vote, because if they could, 'They would never vote for me.'"<sup>208</sup> Tilove notes that this phenomenon "raises fundamental questions of fairness: Is it right that America's prison population, now mostly black and brown, should be counted in a manner that augments the power of communities with which they have no real connection or common interests?"<sup>209</sup>

Of course, most Americans see the logic of disenfranchising people actually serving time for felonies. Losing the right to vote is part of a general loss of civil liberty arising out of conviction for a serious criminal offense. It might make more sense to have such a depriva-

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204. THE SENTENCING PROJECT, *Felony Disenfranchisement Laws in the United States 1*, available at <http://www.sentencingproject.org/brief/pub1046.pdf> (last visited June 17, 2002).

205. FELONY DISENFRANCHISEMENT, *supra* note 199, at pt. I.

206. *Id.*

207. *Id.*

208. Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, NEWHOUSE NEWS SERVICE, Mar. 12, 2002, available at <http://www.newhousenews.com/archive/story1a031202.html>.

209. *Id.*

tion of liberty determined at sentencing by a judge who weighs the nature and gravity of the offense. Nonetheless, it seems reasonable enough that people denied the rights of free movement, intimate association, and free speech should also suffer loss of voting rights during the course of their punishment.

The question is whether the loss of voting rights *during* the course of a criminal sentence should become a permanent mark and brand of second-class citizenship *after* the sentence is served. The Supreme Court has found that felon disenfranchisement laws do not violate the Fourteenth Amendment's Equal Protection Clause because Section 2 of that Amendment authorizes states to strip citizens of their voting rights "for participation in rebellion, or other crime"<sup>210</sup> without fear of losing population basis for representation in the House of Representatives.<sup>211</sup> In its 1974 decision in *Richardson v. Ramirez*, Justice Rehnquist found for the Court that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . ."<sup>212</sup> Ironically, this provision, which was designed to empower states to disenfranchise ex-Confederate rebels,<sup>213</sup> has come to further erode and undermine the political power of African-Americans. The right to vote is not only an emblem of social standing, as Judith Shklar argued, but also quite clearly a unit of instrumental collective power.<sup>214</sup> When large portions of communities are peeled away from the electorate, the groups to which they belong lose political clout. Prisoners are at the bottom of society and have almost no way to express their needs.

Disenfranchising people who have already served all their time, including probation and parole, serves no criminal justice purpose. It has no deterrent value. It punishes only in the most gratuitous and silently sadistic way. It does not rehabilitate. On the contrary, it becomes a statement of permanent political estrangement and civic incorrigibility. The criminal sentence becomes a scarlet letter tattoo, the kind of indelible "Corruption of Blood" that is condemned in Article III, Section 3 of the Constitution relating to treason.<sup>215</sup>

This lifetime branding cuts against everything we believe in about citizens having the power to overcome the errors of the past. To the

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210. U.S. CONST. amend. XIV, § 2.

211. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

212. *Id.*

213. See *id.* at 43-52; see also William E. Nelson, *Fourteenth Amendment*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 757, 758 (Leonard W. Levy et al. eds., 1986).

214. JUDITH N. SHKLAR, REDEEMING AMERICAN POLITICAL THEORY 186 (Stanley Hoffman & Dennis F. Thomson eds., 1998).

215. U.S. CONST. art. III, § 3, cl. 2.



extent that slaves were denied the right to vote (among even more basic liberties), and to the extent that prisoners today have fallen to a level just a cut or two above that of slaves, the official lifetime denial of voting rights to former felons acts as a kind of "badge and incident" of slavery.<sup>216</sup> It is time to get rid of this humiliation and restore a sense of belonging and membership to our fellow citizens returning from prison.

*D. From Visionary to Laggard: America's Missing Right to Vote in International Context*

The worldwide movement toward democracy owes more to the United States than to any other nation. In the eighteenth century, the American Declaration of Independence and our Bill of Rights (along with the French Declaration of the Rights of Man and of the Citizen) spread revolutionary democratic notions of popular consent and equality around the globe.<sup>217</sup>

In the last century, democratic nations embraced the concept of "one person-one vote" that was worked out in the struggle of the modern American civil rights movement. As Bob Moses and Charles Cobb tell us in their important book, *Radical Equations*, the organizing slogan of "one person-one vote" was born in the Deep South in the early 1960s. It gave "Mississippi sharecroppers and their allies" in the Civil Rights Movement a principle of "common conceptual cohesion."<sup>218</sup> The moral and mathematical clarity of the concept created solidarities of belief and understanding among disenfranchised tenant farmers, northern college students, civil rights organizers, and other opponents nationwide of political tyranny and terror. The doctrine of "one person, one vote" was soon picked up by the Justice Department and then articulated by the Warren Court in the redistricting cases.<sup>219</sup>

In *Gray v. Sanders*, which struck down a Georgia election system, Justice Douglas wrote:

The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . . The conception of political equality from the Declaration of Independence, to

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216. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

217. See generally Richard A. Easterlin, *The Globalization of Human Development*, ANNALS AM. ACAD. POL. & SOC. SCI., July 2000, at 32, 33.

218. ROBERT P. MOSES & CHARLES E. COBB, JR., *RADICAL EQUATIONS: MATH LITERACY AND CIVIL RIGHTS* 91 (2001).

219. See generally Robert McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968).

Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote.<sup>220</sup>

The one person-one vote concept, which has since traveled the world from Poland to South Africa to Chile, could have led our Supreme Court to spell out a robust doctrine of universal suffrage under equal protection.

But it was not to be. When the Court took a hard right turn in the 1990s, voting and political participation were treated, once again, a lot more like state-issued privileges than fundamental rights.<sup>221</sup> In the 1990s, the Rehnquist Court repeatedly dismantled majority African-American and Hispanic congressional districts brought into being under the Voting Rights Act, inscribing into law a presumption that whites shall be in the majority.<sup>222</sup> In *Burdick v. Takushi*, it allowed states to deny voters the right to "write in" the candidates of their choice, a fundamental democratic liberty where the ballot really belongs to the people.<sup>223</sup> In 1997, in *Timmons v. Twin Cities Area New Party*, the Court upheld state laws that ban the practice of electoral "fusion" and thus suppress the capacity of new political parties to grow by "cross-nominating" candidates of their choice and creating multi-party political coalitions.<sup>224</sup> And in 2000 the Court not only openly declared that there is no individual right to vote for President but blithely upheld in a single sentence the disenfranchisement of hundreds of thousands of Americans living in the nation's capital.<sup>225</sup>

In the twenty-first century, America's tolerance for disenfranchisement of large communities in the population is unusual. "One person, one vote" is now the gold standard for political democracy on earth. The constitutions of at least 125 nations, from Angola and Argentina to Yugoslavia, Zambia, and Zimbabwe, explicitly guarantee all citizens the right to vote and to be represented at all levels of government.<sup>226</sup> Canada and Mexico guarantee it.<sup>227</sup> Every new Con-

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220. 372 U.S. 368, 379-80, 381 (1963).

221. See generally Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (describing the conservative shift of the Supreme Court that began in the 1980s).

222. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 295-98 (2000).

223. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

224. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997).

225. *Bush II*, 531 U.S. 98, 104 (2000) (per curiam); *Adams v. Clinton*, 531 U.S. 941 (2000).

226. See generally Churchill Bowles et al., *Constitution Finder*, available at <http://www.urich.edu/~jpjones/confinder/const.htm> (last modified Apr. 24, 2001) (providing an index to all the constitutions of the world).

stitution adopted over the last decade makes the right to vote the very foundation of government.

The new Republic of South Africa, for example, defines itself as a "sovereign democratic state" that has "universal adult suffrage" and a "multi-party system of democratic government."<sup>228</sup> Its Constitution provides: "Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution."<sup>229</sup> These words do not appear in our Constitution and they are not true as a statement about our political life. While most of us get to vote and feel strongly that it *is* a right, the constitutional underpinnings are feeble.

Our constitutional silence on voting leaves us in fairly dreadful backward company. By my count, sixteen countries have refused in their constitutions to commit to suffrage for their people and thus leave voting to the whims of state officials. These are: Azerbaijan, the Bahamas, Barbados, Chechnya, Dominica, Indonesia, Iraq, Jordan, Libya, Pakistan, Palestine, Russia, Saudi Arabia, Singapore, and of course the United Kingdom, whose phony doctrine of "virtual representation" we rebelled against centuries of ago.<sup>230</sup> Ironically, we have appointed ourselves the task of lecturing to the rest of the world on the construction of democracy by way of the National Democratic Institute, which channels tens of millions of dollars a year to the Democratic and Republican Parties to spread the gospel of our political process, which lacks the right to vote.

This sin of constitutional omission is an affront to international law. Article 21 of the Universal Declaration of Human Rights,<sup>231</sup> inspired by triumph over totalitarianism in World War II, provides that: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."<sup>232</sup> Article 25(b) of the International Covenant on Civil and Political Rights proclaims the right "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the elec-

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227. MEX. CONST. tit. I, ch. IV, art. 35; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 3.

228. S. AFR. CONST. ch. I, § 1.

229. *Id.* ch. II, § 19, cl. 3(a).

230. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 34-36 (2001).

231. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

232. *Id.* art. 21.

tors . . . ."<sup>233</sup> The American Declaration on the Rights and Duties of Man, adopted in 1948 and the authoritative interpretation of the OAS charter, to which the United States is a signatory, also secures the right to participate in free elections.<sup>234</sup>

The principle of universal suffrage now lies in tatters. It is time to catch up with new democratic constitutions abroad where the citizenries have been more faithful to the spirit of our civilizing movements than we have been ourselves. We need the National Democratic Institute to spend some of the public's money campaigning for the right to vote here in America.

### *E. A Right-to-Vote Amendment*

To bring in the disenfranchised, to assure that runaway state legislatures and courts do not bypass the presidential votes of the people and the will of the majority, to prevent the kinds of dramatic departures from democratic norms we experienced in 2000, and to redeem the chaos of the 2000 presidential election, we need to amend the Constitution. Try on for size the following proposed Twenty-Eighth Amendment, the Right-to-Vote Amendment:

Section 1. Citizens of the United States of at least eighteen years of age have the right to cast an effective vote in primary and general elections for President and Vice President, for electors for President and Vice President, for their State or District Representatives and Senators, and for executive and legislative officers of their state and local legislatures. Such right shall not be denied or abridged by the United States or by any State.

Section 2. The right of the citizens to vote, participate and run for office on an equal basis shall not be denied or abridged by the United States or by any State on account of political party affiliation, wealth, or prior condition of incarceration.

Section 3. The District constituting the Seat of Government of the United States shall elect Senators and Representatives in such number and such manner as to which it would be entitled if it were a State.

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233. International Covenant on Civil and Political Rights, art. 25(b), adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

234. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L V/II.82 doc.6 rev. 1, at 17 (1992).

Section 4. The Congress shall have power to enforce this Article by appropriate legislation. Nothing in this Article shall be construed to deny the power of States to expand further the electorate.

The campaign for this Amendment will galvanize Americans for a basic proposition that most of us wrongly assume is already contained in the Constitution: the right of the people to vote. Such a campaign will give national coherence to the scattered, lonely, and woefully incomplete efforts that sprung up across the country after the 2000 election to reform anachronistic and manipulable electoral structures in literally thousands of self-regulating jurisdictions. This amendment, and the movement behind it, could quickly sweep away partisan and sectional opposition to the following democratic reforms:

- The push to abolish punch-cards and upgrade and equalize voting technology and machinery across county and municipal lines.
- The effort to require equal and adequate funding of voting systems across county and municipal lines.
- The movement to end the scandalous disenfranchisement of nearly 600,000 taxpaying, draftable Americans living in Washington, D.C., who presently have no voting representation in Congress.
- The call to give millions of territorial residents the right to vote for President and Vice President.
- The movement to restore the vote to disenfranchised ex-felons, hundreds of thousands of citizens who have done their time and are attempting to reintegrate into society.
- Unsung efforts by third parties and independents to end discriminatory practices against candidates and voters based on party identification.

Instead of viewing these seemingly disparate causes as a patchwork of local grievances, the Voting Rights Amendment will lift the agenda of electoral reform to a matter of national self-definition and fundamental constitutional values. The reason why *Bush v. Gore*, that unthinkable radical statement about the urgent need for absolute equality of voting procedures and standards across county lines, simply won't work in these other cases is because of the charmingly candid disclaimer appended to the end of the opinion: "Our consideration is limited to the present circumstances, for the problem of Equal Protection in election processes generally presents many complexities."<sup>235</sup> Like Cinderella's dress, the conservatives' gallant

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235. *Bush II*, 531 U.S. 98, 109 (2000) (per curiam).

defense of voting rights in 2000 turned to rags at midnight on December 12, 2000.

So it is left to *the people* to bring the American Constitution in line with the fundamental creed of American political thought that cohered in the aftermath of the modern civil rights movement. It is time to amend the Constitution to provide for what was missing when it was first drafted and the "revolution's most democratic leaders"<sup>236</sup> (Thomas Jefferson, Thomas Paine, Samuel Adams, and Patrick Henry) were absent from the floor of the constitutional convention: the right of the people to vote and, therefore, the right of the people to govern.

### III. THE MAJORITY'S MISSING RIGHT TO RULE

The case for a right-to-vote amendment is so irresistible that it is tempting to end the voting rights analysis here. But when it comes to our democracy deficit, a second step needs to be taken. The problem is that even if we give millions of disenfranchised people the right to vote and upgrade state voting systems to count every ballot fairly, we still face a most demoralizing structural problem made plain by the 2000 presidential election. Because presidential elections are controlled by the electoral college, the majority does not rule. Al Gore won better than 500,000 votes more than George W. Bush in the national popular election but was defeated in the electoral college by six votes. The popular vote winner lost; the popular vote loser won.<sup>237</sup> This kind of inversion of democracy has occurred three times before—in 1824, 1876, and 1888<sup>238</sup>—but in the twenty-first century, when people around the world have rejected every form of tyranny, these numbers do not add up to democratic legitimacy.

Therefore, after we inscribe the right of each person to vote, we should amend the Constitution to abolish the electoral college. This change is necessary for one overriding reason: the electoral college directly contradicts the sovereignty of the people. Indeed, what good is it to achieve one vote per person if each person's vote does not ultimately count equally? It is sometimes hard for us to see this point because we instinctively identify what is democratic with whatever happens to be in our Constitution. But a constitutional feature that func-

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236. KEYSSAR, *supra* note 222, at 23.

237. *Election 2000 National Results*, *supra* note 162.

238. See JUDITH A. BEST, *THE CHOICE OF THE PEOPLE?: DEBATING THE ELECTORAL COLLEGE* 74 app. B (1996).

tions quite naturally to defeat the will of the national majority is sharply at odds with democracy.

The electoral college has the magical power to frustrate majorities at the national level and roll over minorities at the state level, giving us the worst of all worlds from the standpoint of democracy. The winner-take-all "unit voting" character of the electoral college in forty-eight states depresses and deters participation in most of them.<sup>239</sup> In lopsided Democratic presidential states like Massachusetts or New York, Republicans have no incentive to compete and get out the vote; in clear Republican states like Texas or Georgia, the Democrats similarly give up the ghost long before Election day.<sup>240</sup> Acting in a perfectly rational way, Governor Bush never challenged Vice President Gore's presumptive victory in Democratic heartland states in the Northeast like New York, Connecticut, Massachusetts, Maryland, and Rhode Island or other slam-dunks like Hawaii. Similarly, Vice President Gore, also acting within his best interests, spent little time or money competing for votes in Republican heartland states in the Deep South or the Great Plains, such as Mississippi, Alabama, Georgia, Virginia, Texas, South Carolina, North Dakota, Montana, and Utah or Republican-bedrock Alaska.<sup>241</sup> These dynamics in the 2000 presidential election would actually have been much *worse* had Ralph Nader's surprisingly vibrant candidacy not thrown up for grabs several ordinarily safe Democratic states like Wisconsin, New Mexico, and West Virginia.<sup>242</sup>

The white flag of surrender hoisted by this or that major party in a majority of states not only thwarts turnout among that party's faithful but, in turn, drags down participation by the dominant party's sup-

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239. See JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT* 28 (1975).

240. See generally *Statement of Lawrence D. Longley Before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution*, in BEST, *supra* note 238, at 85, 87. Maine and Nebraska each award one elector per congressional district to the presidential candidate who carries it and two electors to the statewide winner. Michael Steele, *As Maine and Nebraska Go . . .*, 32 NAT'L J. 3654, 3654 (2000). Some have suggested that this system would be a fine and more politically plausible alternative to abolition. But there is nothing in this system that guarantees ultimate majority rule at the national level, and it is likely to reproduce the political effects of Republican-tilting legislative gerrymanders in the states. At any rate, it is doubtful that heavily Democratic or Republican presidential states with corresponding state legislative majorities would consent to abandon their winner-take-all dominance in presidential elections.

241. See Alexis Simendinger et al., *Pondering a Popular Vote*, 32 NAT'L J. 3650, 3655 (2000).

242. See Jackie Calmes & Jeanne Cummings, *Bush Still Leads, But Key States Buoy Gore*, WALL. ST. J., Nov. 3, 2000, at A22 (listing Wisconsin, West Virginia, and New Mexico as "too close to call," and noting that Mr. Nader's candidacy was forcing Gore strategists to "consider new ways of building an electoral majority").

porters, who correctly see no need to rally the troops to counter a threat. In 2000, the voting rate in Florida soared to 70.1% because the state was a fiercely contested battleground.<sup>243</sup> The candidates and their running mates practically bought condos in Miami. But most states were consigned to the safe Democratic or Republican column long before election day and therefore saw no campaign—no ads, no mobilization, no competition. Despite surges in voting in swing states, the overall turnout sat at the dismal fifty percent level, which put the United States behind every major democracy on earth.<sup>244</sup> Thus, the electoral college system helps create dynamics in which half of Americans do not vote. In 2000, *less than half* of the half which *did* vote—or less than a quarter of the nation—determined the victor.

The major-party candidates have no incentive to spend their scarce time or massive campaign money getting out the vote nationwide because the vast majority of voters—all those in safe states—are structurally rendered superfluous to victory. Campaign resources go instead to persuade “swing voters” in “swing states,” which means that the politics of the major party candidates blur as they compete for voters in the middle, leaving the public without a clear choice between different political programs. When a third party presidential candidate emerges with some energy, as Ralph Nader did in 2000, all of the pressure in the system is to drive him out of the race as a “spoiler.” Or, as Christopher Hitchens parodied the *New York Times*’s editorial position on the Nader campaign, “I agree with everything you say, but I will oppose your right to say it.”<sup>245</sup>

It is hard to see why the votes of Democrats in Texas or Republicans in Massachusetts should be worthless in presidential elections. It is also hard to see why so many “surplus” Republican votes in Texas or Democratic votes in Massachusetts should also have no meaning. If we want people to participate in presidential elections, we should get rid of the state-based electoral college selections and actually have an election. If we have to keep the electoral college, we should at least get rid of all of the pretense that the nation’s leaders are troubled by lack of participation, all of the expensive national conferences on why

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243. See FEDERAL ELECTION COMM’N, VOTER REGISTRATION AND TURNOUT 2000, available at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (reporting that 68.1% of Florida’s registered voters voted for the President and estimating that another 2% voted without casting a vote for President).

244. Our presidential voting rate for 2000 was lower than presidential turnout in dozens of nations, from Algeria, Argentina, Armenia, and Australia to Finland, Iceland, India, and Italy through Venezuela and Zambia. See *id.*

245. Christopher Hitchens, *View From the Left: Don’t Blame Nader for Democrats’ Problems*, WALL ST. J., Nov. 15, 2000, at A26.



people do not vote, and all of the high-minded sermons by our leaders about the importance of showing up at the polls. The sheer irrationality of the winner-take-all arrangement and the mounting frustrations of lesser-evil politics gave rise in 2000 to presidential "vote-swapping" Websites on the Internet where citizens created high-tech inter-party political coalitions across state and political party lines.<sup>246</sup>

#### A. *The Electoral College and Political White Supremacy*

Because the argument for the electoral college hinges on the presumptive weight we should attach to history, it is important to see how the history of the electoral college is intertwined with the institutions and movements of political white supremacy. The southern slave states championed the electoral college because it had several clearly advantageous features for them when compared with a majority national vote for President.<sup>247</sup> Awarding a number of state electors "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress" reproduced a number of significant pro-slave state biases already sewn into the constitutional fabric.<sup>248</sup>

The trick was that, by counting slaves as part of the census for the purpose of reapportioning U.S. House seats, the Constitution would vastly inflate southern white representation in the House. Thus the slaves, who obviously could not vote, would swell the congressional delegation of the slave masters.<sup>249</sup> The slave states brazenly argued that slaves should be counted as full persons in the census while the northern states argued they should not be counted at all.<sup>250</sup> The two sides settled on the infamous "Three-Fifths" provision—a clear victory for the slave power (though a historical irony because most people do

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246. This is a phenomenon I am familiar with because I introduced the idea of vote-trading, which I actually first called "vote pairing," to America in *Slate Magazine* on October 24, 2000, several weeks before election day. See Jamin Raskin, *How to Save Al Gore's Bacon: Gore and Nader Can Both Win*, SLATE, Oct. 25, 2000, available at <http://slate.msn.com/?id=91933>.

247. There is very little scholarly literature on this point, but Professor Akhil Reed Amar made the point cogently in a *New York Times* op-ed during the heat of controversy over the 2000 presidential election when he wrote, "the college was designed at the founding of the country to help one group—white Southern males—and this year, it has apparently done just that." Akhil Reed Amar, *The Electoral College, Unfair From Day One*, N.Y. TIMES, Nov. 9, 2000, at A23.

248. See U.S. CONST. art. II, § 1, cl. 2.

249. See Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 433-37 (1999).

250. *Id.* at 434-36.

not realize that, had the slave states had their way, slaves would have been counted as full persons).<sup>251</sup>

Article II then reproduced this effect in presidential elections by awarding states presidential electors in a number "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>252</sup> The two "add on" electors for each state's Senators gave further disproportionate power to the less populous states, especially those with fewer eligible voters—the slave states.<sup>253</sup>

The pro-slavery, pro-small state tilt reappeared in the provision for a so-called "contingent election" in the House of Representatives upon the failure of any presidential candidate to collect a majority in the electoral college. In such case, "the House of Representatives shall immediately choose by Ballot the President," but "the votes shall be taken by states, the representation from each state having one vote . . . ."<sup>254</sup> In such an event, the smaller slave states like South Carolina or Alabama would receive a major boost up to a level of parity with more populous northern states like New York, Massachusetts, or New Jersey. Everywhere you look in the intricate electoral college provisions, the South has dug in its heels.

The subsequent history of the electoral college illuminates its racial character as the slave power proved adept at winning and manipulating presidential elections. Four of the first five United States Presidents were slave masters who brought their slaves with them into the presidency or the White House: George Washington, Thomas Jefferson, James Madison, and James Monroe (with only the second President, Massachusetts's John Adams, interrupting the reign of slave masters).<sup>255</sup> The failure of the pro-slavery forces to defeat Abraham Lincoln in the election of 1860 immediately precipitated Southern secession and the Civil War. The 1876 election was thrown into turmoil because of the failure of any candidate to assemble an electoral college majority, and then Southern forces, operating in a chaotic post-election environment not unlike that of 2000, traded the presidency for a commitment from Republican Rutherford B. Hayes to withdraw federal troops from the Reconstruction South.<sup>256</sup>

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251. U.S. CONST. art. I, § 2, cl. 3.

252. *Id.* art. II, § 1, cl. 2.

253. *Id.*

254. *Id.* amend. XII.

255. See Rob Lopresti, *Which U.S. Presidents Owned Slaves*, available at <http://www.nas.com/~lopresti/ps.htm> (last modified Feb. 13, 2002).

256. *Seminole Tribe v. Florida*, 517 U.S. 44, 120 (1996) (Souter, J., dissenting).

In the second half of the twentieth century, when the modern civil rights movement became a critical political force, "white Southern politicians . . . repeatedly and deliberately attempted to manipulate the machinery of the electoral college to influence national policy on race and civil rights."<sup>257</sup> In the 1948 presidential campaign, J. Strom Thurmond, the then-Democratic Governor of South Carolina, ran for President on a fiercely segregationist "states' rights" platform.<sup>258</sup> Following through on a brilliant electoral college strategy suggested by racist theorist Charles Wallace Collins, an Alabama lawyer and public servant who had served as law librarian of Congress and librarian of the Supreme Court, Thurmond convinced four state Democratic parties, those of Alabama, Louisiana, Mississippi, and South Carolina, to nominate slates of electors pledged to vote for him.<sup>259</sup> The national Democratic nominee, Harry Truman, found a way onto the ballot to compete against Thurmond in three of those four states, but Thurmond still won in all four states and captured thirty-nine electoral college votes. Truman carried the national election only by the skin of his teeth, but the Democratic Party received Thurmond's message loud and clear.<sup>260</sup>

In 1960, ardent foes of the civil rights movement played the electoral college card again when Alabama and Mississippi selected fourteen unpledged "free electors" in the presidential contest.<sup>261</sup> These electors ended up voting for Virginia Senator Harry F. Byrd, an architect of "massive resistance" to *Brown v. Board of Education* in the South, and declared their overriding opposition to attempts to "integrate our schools, do away with literacy tests as a qualification for voting [and] otherwise undermining everything we hold dear in the South."<sup>262</sup>

In 1968, Alabama Governor George C. Wallace, who had famously declared "segregation now, segregation tomorrow, segregation forever," perfected and nationalized the strategy of appealing to race prejudice to move the whole political spectrum rightward.<sup>263</sup> Wallace's racially inflected blue-collar campaign helped move large numbers of white southerners out of their traditional home in the

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257. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 942 (1996).

258. *Id.* at 950.

259. For a fascinating discussion of Collins's strategy for Thurmond's presidential campaign, see *id.* at 950-51.

260. *Id.* at 954.

261. *Id.* at 954-56. The "free elector" plan was designed to allow Southern Democrats to nominate electors who would not support the national Democratic candidate. *Id.*

262. *Id.* at 956 (quoting *Six Electors Bar Kennedy Support*, N.Y. TIMES, Dec. 11, 1960, at 56).

263. *Id.* at 957.

Democratic Party and created fertile terrain for the new Republican "southern strategy."<sup>264</sup> Wallace won in Alabama, Arkansas, Georgia, Louisiana, and Mississippi, and Richard Nixon, campaigning on a similar socially authoritarian platform, took Florida, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia.<sup>265</sup> Racist southerners had successfully used race as a lever to move presidential electors out of the Democratic column.

In 1980, Ronald Reagan launched his presidential campaign in the Mississippi town where civil rights activists Schwerner, Chaney, and Goodman had been murdered in 1965. Reagan turned the solid Democratic South into the solid Republican South. Although Bill Clinton cut into this Republican hold on the South, these underlying dynamics remain powerful.<sup>266</sup> In the 2000 election, George W. Bush launched his southern campaign at fundamentalist Bob Jones University, which banned interracial dating. Bush swept the South: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Tennessee, and Virginia.<sup>267</sup> These 13 southern states control 163 electoral votes, which is more than half of the 270 needed to win the election.<sup>268</sup> The Deep South is the beating heart of the Republican presidential electoral college coalition.

Because of the nation's racial demography and geography, the winner-take-all electoral college in the states means that most of the votes cast by African-Americans in presidential elections will count literally for nothing. In 2000, more than ninety percent of African-Americans voted for Democratic nominee Al Gore for President, something as close to a unanimous endorsement from a community as one might find.<sup>269</sup> Yet fifty-eight percent of voting African-Americans, or 20,202,137 people, live in states that gave 100% of their electoral college votes to the Republican nominee, George W. Bush. Thus, most African-Americans voted in states where their votes ended up having no effect on the ultimate outcome of the election. African-Americans voted overwhelmingly for the popular vote winner, but it

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264. *Id.* at 959.

265. *Id.*

266. *See id.* at 959-61.

267. *Presidential Results Summary for All States*, available at <http://www.cnn.com/ELECTION/2000/results/president> (last visited Apr. 25, 2002).

268. *See* FEDERAL ELECTION COMM'N, DISTRIBUTION OF ELECTORAL VOTES, available at <http://www.fec.gov/pages/elevote.htm> (last visited Apr. 16, 2002).

269. *See* DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, THE BLACK VOTE IN 2000: A PRELIMINARY ANALYSIS 2 (2000).

made no difference.<sup>270</sup> The one southern state where the African-American vote clearly might have made a difference was Florida.<sup>271</sup> This fact makes the strategies deployed to cancel out African-American voting power in Florida all the more appalling and the Supreme Court's tying of a little bow on the whole process all the more cynical.

Florida aside, the structural cancellation of African-American votes in presidential elections in the South simply reflects the general operation of the winner-take-all electoral college system. This is the basic reason to get rid of the electoral college today: each person's vote should count equally in a presidential election, regardless of geography, and the winner should actually *win*. But the electoral college has grown up with America's sordid racial history, and it continues in its underground fashion to embolden the minority voice of white racial conservatism.

### B. *The "Faithless Elector"*

A common argument against the electoral college which I do *not* make refers to the danger that a presidential elector, having been elected pledged to this or that candidate, may later betray that candidate by voting for someone else.<sup>272</sup> This is silly because the Framers designed the electoral college as a deliberative political institution. It cuts against this purpose to try to hem the elector in. For example, because we have this institution, what would be wrong with an elector who had originally pledged to Bush saying, "because the Supreme Court decision is flawed, the Florida result is in grave doubt, and Gore won a robust popular majority, I plan to cast my vote for Gore"? This did not happen, but wouldn't it have reflected the kind of political wisdom and deliberative judgment the Framers desired and we expect from our elected leaders?

Moving from a hypothetical example to a real one, didn't we see a profile in courage in Barbara Lett-Simmons, a Democratic elector from the District of Columbia who cast a blank ballot to protest the Democratic nominee's seeming indifference to disenfranchisement in the District of Columbia?<sup>273</sup> Why should we have an electoral college if the electors are not supposed to use their minds between election day and the day they cast their ballots?

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270. *Id.*

271. *Id.* at 5 tbl.2.

272. See generally BEST, *supra* note 239, at 166-90.

273. See Spencer S. Hsu, *D.C. Activists Join to Demand Congressional Voting Rights*, WASH. POST, Apr. 19, 2001, at T12.

C. *The Obsolete and Empty Arguments for the Electoral College*

1. *History*.—Arguments in defense of the electoral college turn inevitably to history: this was the way the Framers *intended* to have us elect Presidents, we are told, so this is the way we should do it.<sup>274</sup> But the electoral college was a kind of awkward compromise between advocates of direct popular election and advocates of congressional election within a context suffused with political arguments favoring the slave power. If we summon up the imagination to discard this obsolete and undemocratic plan for electing Presidents—if we become constitutional framers ourselves—we will be doing nothing uncharacteristic in American history. We have often replaced the handiwork of the Framers when their ambivalence towards democracy recurrently thwarted popular control over government.<sup>275</sup> The Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War wiped out the original exclusionary assumptions of white supremacy in politics and government.<sup>276</sup> We replaced the indirect method of electing United States Senators by state legislatures in 1913 with direct election “by the people” as provided for in the Seventeenth Amendment.<sup>277</sup> The Nineteenth Amendment rejected the sexism of our Framers by writing women into the body politic.<sup>278</sup> And we have repeatedly modified the electoral college itself to bring it closer in line to our values.

Changing the mode of presidential election actually honors the democratic values of the Framers far more than an unthinking adherence to the electoral college. Many Founders voiced hopes that future generations would not become mindless slaves to antiquated and mystified constitutional traditions. Judith Shklar has reminded us that, in his time, Thomas Jefferson “detested the ‘sanctimonious reverence’ with which some men looked at the Constitution. Ancestor worship was an irrationality no democracy could afford; on the contrary, we should, he wrote, ‘avail ourselves of our reason and experience to correct the crude essays of our first and inexperienced councils.’”<sup>279</sup> Following Thomas Paine, Jefferson insisted that: “The earth belongs

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274. See BEST, *supra* note 239, at 205-18; *Statement by Senator Daniel Patrick Moynihan on the Electoral College*, in BEST, *supra* note 238, at 151, 151-59; MARTIN DIAMOND, AMERICAN ENTERPRISE FOR PUBLIC POLICY RESEARCH, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 1-6 (1977).

275. See AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 3-19 (1998).

276. See U.S. CONST. amends. XIII, XIV, XV.

277. *Id.* amend. XVII.

278. *Id.* amend. XIX.

279. SHKLAR, *supra* note 214, at 175.

in usufruct to the living. The dead have no rights, the earth belongs to the living.”<sup>280</sup>

2. *Federalism*.—The energy for the pro-electoral college argument comes now from small states, which have in recent years fallen hook, line, and sinker for the claim that they benefit politically from the two-electoral “add-on” for Senators. The myth is that presidential candidates spend more time in smaller states than they otherwise would because their electors are more of a prize in the current regime than their people-votes would be in a popular election.<sup>281</sup> Ask any smallish-state senator and you get the same answer: take away the electoral college and you take away the extra leverage we have to get candidates to pay attention to our interests.

This claim, however, is factually wrong. Presidential candidates go disproportionately to *swing* states, not *small* states, and even within the swing states, they go disproportionately to the larger ones, not the smaller, because of the winner-take-all effect. In 2000, the candidates bypassed and took for granted small states that were safely in one column or the other, for example Republican-controlled North Dakota or Idaho or Democratic-controlled Rhode Island or the District of Columbia. To the extent that a jurisdiction’s political interests are deemed to be taken seriously when candidates visit them (a most dubious assumption in any event), none of these places picked up any influence by virtue of being small. The states that profited from the electoral college were large swing states like Florida, Pennsylvania, Michigan, Missouri, Ohio, and then, and only to a much lesser extent, small swing states like New Mexico, West Virginia, and New Hampshire.<sup>282</sup>

The mathematical rationale for the intuitively predictable candidate behavior of favoring large swing states to small ones was explained in a superb law review article in 1968 by John F. Banzhaf III, who proved that, under the electoral college system, individual voters in large states enjoy much greater voting power than those in small states.<sup>283</sup> Through a meticulous examination of the chance that voters have to “affect the outcome in a given situation,”<sup>284</sup> Banzhaf found that a voter in New York in 1968 had more than three times the “vot-

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280. *Id.* at 138.

281. See BEST, *supra* note 238, at 34-35.

282. Calmes & Cummings, *supra* note 242.

283. See John F. Banzhaf III, *One Man, 3,312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968).

284. *Id.* at 307.

ing power" of a voter in Washington, D.C.<sup>285</sup> Many scholars have since corroborated and elaborated the Banzhaf thesis that, all other things being equal, it makes more sense in the electoral college regime for candidates to invest resources in larger states than in smaller ones.<sup>286</sup>

It is important to see why there is so much confusion over this point. The Framers undoubtedly intended the smaller states to have a disproportionate share of the power in selecting a President, and indeed it worked like this when electors were chosen by state legislatures and acted deliberatively, as individuals, to decide who should be President. In that system, the two-electoral add-on really helped this or that small-state electoral-politico to broker a deal that would somehow benefit his state.<sup>287</sup>

But when states moved from this process of appointing free-wheeling electors to the winner-take-all unit system of pledged electors, all that mattered in political terms was moving majorities of voters in the largest swing states to vote for the right slate of electors. In other words, the Banzhaf factor took over.<sup>288</sup> Senators from smaller states swear by the electoral college today because they know in their bones that the Framers' compromise was *designed* to help them and that the electoral college is structurally linked to the composition of the Senate. But today the joke is on them because in reality the electoral college no longer works in their favor.

The shrewder small states recognized this fact long ago. In 1966, in the aptly named *Delaware v. New York*, Delaware and a group of other small states tried unsuccessfully to sue New York and other large states on equal protection grounds for awarding their electors in the unit bloc fashion.<sup>289</sup> The Court refused to entertain the filing of an original jurisdiction action, but the political logic of the new regime was clarified.<sup>290</sup> The smaller states saw that the traditional pro-small

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285. *Id.* at 313.

286. See, e.g., *The Electoral College's Biases in the 1992 Election—and Beyond in the Electoral College and Direct Election of the President: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary on S.J. Res. 297, S.J. Res. 302, and S.J. Res. 312*, 102nd Cong. 38, 42-44 (1992) (testimony of Lawrence D. Longley & James D. Dana, Jr.); George Rabinowitz & Stuart Elaine McDonald, *The Power of the States in U.S. Presidential Elections*, 80 AM. POL. SCI. REV. 65, 75-78 (1986).

287. See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2528-29 (2001).

288. Banzhaf, *supra* note 283, at 306-08.

289. *Delaware v. New York*, 385 U.S. 895 (1966).

290. See *id.*



state bias in the electoral college had been defeated and reversed by the big states' winner-take-all method of distributing electors.<sup>291</sup>

Even if it were true that the electoral college regime differentially helps jurisdictions like Delaware, North Dakota, and the District of Columbia (and it seems demonstrably false), such a disproportion would be indefensible as a matter of democratic principle (as opposed to raw political assertion). The President is presumably the leader of the nation, not the patchwork of electoral majorities in particular states that gave him all their electors. This principle is all the more important in a time of war when the President should speak for the people of the whole nation. But the electoral college can only encourage Presidents to think of the country in the red and blue terms of a CNN election-night map: friendly regions, where the base needs constant watering and replenishment, and unfriendly regions that should be generally avoided and gently disregarded. If we move to a direct popular vote where every vote counts, Presidents will have effective voting constituents *everywhere*, even in the most "hostile" areas, and will be motivated to represent the full breadth of the nation. Presidents elected by the people will govern mindful of the whole nation, not just 270 electors.

#### *D. The Popular Election of the President Amendment*

Consider the following amendment to adopt direct popular election of the President, which includes a built-in "instant run-off" provision to guarantee that the winner actually has majority support of the voters:

The President and Vice President shall be elected by direct popular vote of all U.S. citizens eighteen years of age and older, but no person shall be elected President who has not attained at least 50 percent support among the votes cast. Whenever there are three or more candidates listed on the ballot, the ballot shall ask voters to rank their choices in order of preference. If no candidate receives at least 50 percent of the first-place votes cast, the last-place candidate's ballots shall be redistributed to the second-choice candidates of these voters. This instant run-off method continues until a candidate has achieved a majority of all votes cast.

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291. See *id.*; see also Note, *supra* note 287, at 2531 ("The emergence of the popular-vote, winner-take-all system for state selection of electors, which the Framers did not anticipate, has rendered the notion of any consistent small state, regional, or federalist protection in the electoral college highly tenuous.").

Of the several important changes embodied in this Popular Election of the President Amendment, the enactment of majority rule is only the most obvious. The development of direct election by the people means that all Americans will, for the first time in history, participate together as citizens in a single and truly national election. Our first direct election of the President will mark an important political emancipation for American civil society, which has been artificially segmented and divided into fifty-one separate voting jurisdictions with different rules, procedures, and ballots. State lines are meaningful and defensible in congressional elections, but puzzlingly irrational and out of place when choosing a President, a unitary executive who acts for the entire nation. Americans should vote as one nation with *a single presidential ballot* that looks the same in Maine and Hawaii, California and Florida. Furthermore, by granting all citizens the right to vote for President, the amendment would for the first time allow American citizens living in the territories of Guam, American Samoa, Puerto Rico, and the Virgin Islands to vote for President. Because they do not belong to states and do not pay federal taxes, territorial residents would continue to have only nonvoting representation in Congress, but their existing place in the American regime would be properly recognized by giving them a role in presidential elections.

The shift to popular election of the President will also redistribute political power. A similar transformation took place in 1913 when the Seventeenth Amendment shifted the mode of election of U.S. Senators from state legislative selection to direct election by the people.<sup>292</sup> The new method ended the practice of out-of-state businesses purchasing the friendship of so-called "corporation Senators" through well-placed bribes and covert campaign contributions in state legislatures. A progressive reform pushed by the Populists, direct election of the Senators removed multiple levels of political filtering that blocked real democratic accountability and responsiveness.<sup>293</sup> Today, when presidential elections are influenced by hundreds of millions of dollars in corporate soft money, closed corporate-sponsored debates, and the taking for granted of most of the population with fine-tuned pollster-driven manipulation of the rest, a changeover to popular election will break the current top-down dynamics of the system.

The Popular Election of the President Amendment replaces the bizarre Rube Goldberg-type contraptions of the electoral college—the two-vote add-on, the lengthy delays between popular voting and the

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292. U.S. CONST. amend. XVII.

293. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1352-55 (1996).

casting of the electoral college votes, the contingent House election based on state-by-state voting, the recurring possibilities of popular vote losers winning the election—with clean and simple majority rule. A majority is guaranteed by virtue of the “instant run-off” mechanism, which assures that the winner will achieve a popular mandate without requiring that an expensive second (or third) run-off election be held. This method of voting not only guarantees that candidates will take office with majority support but dampens partisan invective and rancor during the campaign. Candidates have no interest in polarizing things because they want to become a group of voters’ second favored choice even if they cannot not be their first. This instant run-off mechanism is gaining increasing support around the country. On March 5, 2002, the people of San Francisco voted fifty-six percent-forty-four percent to adopt instant run-off voting for their most important leaders. Rob Richie and the Center for Voting and Democracy in Takoma Park, Maryland, have made a signal contribution to public discourse by putting the instant run-off on the democracy agenda.

Popular election of the President advances the one person-one vote principle far more effectively than the electoral college ever could. Because all the tools of the electoral college are blunt and rusty instruments, even with a Right-To-Vote-Amendment in place we will remain a long way from each person’s vote counting equally. The Banzhaf principle, which measures the chances of a vote affecting the outcome of the presidential election, tells us that individual votes in large states are worth much more than individual votes in small states.<sup>294</sup> If we disregard that dynamic analysis and just consider abstractly what percentage of a single electoral college vote each voter controls, then the effect reverses and voters in small states have a clear advantage. Each voter in Vermont or Idaho thus has more say in the electoral college than each voter in New York or California. Moreover, the vagaries of voter turnout also create distortions in the electoral college: other things being equal, a single vote in a high turnout state is worth less than a single vote in a low turnout state. In sum, if we really want each citizen’s vote to count equally in presidential elections, we need to move to direct popular election of the President.

Amazingly, the government of the United States conducts and provides no official count of the vote for President. Thus, we never know in any reliable sense who actually won the most votes. This is a dramatic problem. In 2000 the people were completely dependent

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294. Banzhaf, *supra* note 283, at 307, 313.

upon private corporate media to report vote totals from thousands of jurisdictions around the country based on some hazy combination of precinct returns, polling, and exit interviews. The public was utterly helpless before the ever-changing projections and declarations of victory issued by broadcast entities. It now looks as if that process may have been contaminated by strategic partisan manipulation.<sup>295</sup>

The vagaries of vote-counting put the icing on the cake that is baked behind the scenes by state secretaries of state, electors, party bosses, state legislatures and Supreme Court Justices—almost everybody but the people. We need to establish a constitutional right to vote and then replace the electoral college with direct national majority rule in presidential elections. We need a national ballot for President based on a national election with a national system of reporting the tally. It is time for the people to claim America's presidential elections as our own and fulfill the lost promise of becoming a democratic nation.

#### CONCLUSION

It is easy enough to show that the Supreme Court majority in *Bush v. Gore* departed drastically from well-accepted norms of constitutional interpretation. Ultimately, however, the critical point for the American people is to prevent a repetition of these events, which constituted a serious assault on political democracy. *Bush v. Gore* exposed the weak constitutional status of the citizen's right to vote and the majority's right to win and rule. We need to amend the Constitution to inscribe and protect what most Americans erroneously thought was already there.

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295. See NICHOLS, *supra* note 58, at 1-26.