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# 'Bush' v. 'Gore': What Was the Supreme Court Thinking?

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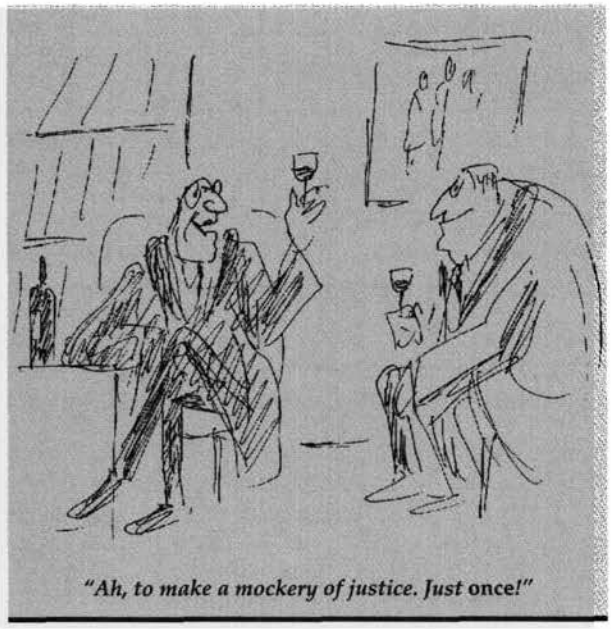
## What was the Supreme Court thinking?

One of the most astonishing episodes in American political history ended last month with perhaps the most imperial decision ever by the United States Supreme Court. In one stroke, the Court exercised power that belonged to Congress, the legislature of Florida, Florida's courts and administrators, and, most importantly, the people of the state.

The Florida fiasco will probably result in a more equitable manner of voting throughout Florida and the nation. But if indeed it marks the virtual end of punch-card balloting, that will be because of initiatives by county officials, state legislatures, or Congress, not because the U.S. Supreme Court orders it as a matter of federal constitutional law.

In its December 12 decision, *Bush* v. *Gore*, the Court ruled that the recount of November's presidential election as ordered by the Florida Supreme Court violated constitutional requirements. The decision emphasized the variance, not only from one county to another but also from one recount team to another, of the standard used to determine the "intent of the voter." Most significantly, an incomplete perforation of a ballot was more likely to be counted as a vote in some times and places than in others.

The recount certainly wouldn't have been perfect. But perfection is often unattainable, and lack of perfection, as judges who pronounce the importance of judicial restraint frequently remind us, does not make a constitutional violation. The Florida Supreme Court had attempted to resolve a very difficult situation and in a very short amount of time. Punch ballots, as we all know now, are much less accurate than other forms of ballot. It was at least plausible to conclude that even a hastily arranged and loosely supervised statewide recount would come closer to ascertaining the intent of voters overall than simply ignoring all those ballots that the machines had spit out uncounted. Consequently, the recount ordered by the Florida court may be seen as an attempt to limit this larger disparity.



*"Ah, to make a mockery of justice. Just* once!"

Yes, the "intent of the voter" standard established by the Florida legislature is open-ended and leaves room for variation, but so are many other standards—begin with the "reasonable doubt" standard for juries—that courts have declined, for good reason, to define more precisely. Reality is complex. No simply articulated rule will apply perfectly, and the more intricate the rules, the harder not only to articulate but to administer consistently. Perform any recurrent task involving any complexity and you will recognize that, even if you are the sole actor, your standards will vary.

And that fact points to a huge irony. For all the U.S. Supreme Court majority's insistence on standards, it is hard to know what the Court's standard was in this case. It is not unusual for a court to caution that in a particular decision it is not articulating a broad rule of law but is only deciding the case before it, leaving other cases to the future. That is what the majority did here. Sometimes such opinions represent tentative openings onto new vistas of law. And indeed some observers have suggested that the decision in *Bush* v. *Gore* heralds a new era of constitutional doctrine assuring the fairness of voting. But for two reasons a large dollop of cynicism is warranted on this score.

First there is the identity of the five justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) who anchored the majority. (Justices Ginsburg and Breyer agreed rather ambiguously that the recount raised constitutional difficulties, but they disagreed on the ultimate result.) These so-called "strict constructionists" are not the ones we would expect to perceive the necessity of federal judicial intervention into an administrative procedure supervised by the state courts.

The second reason is that the majority opinion is Procrustean; it articulates rationales just broad enough to cover this case. No, says the Court, we're not saying that counties can't use different voting systems; what we are saying is that when a court orders a statewide remedy, then we're really going to worry about uniformity. That's a conclusion, not a standard. If the legislature can delegate broad authority to local officials, why can't a court leave it to local officials to implement on a case-by-case basis a legislatively prescribed standard for determining the validity of a vote?

In short, trying to determine fairly who won the election in Florida was for the state itself to work out in the first instance; ultimately it was for Congress to judge in exercising its constitutional function of counting the electoral votes. The U.S. Supreme Court should have stayed out of the matter altogether.

Though the holding that the recounts violated the Constitution was overly aggressive, it was not particularly egregious. What was egregious was the Court's decision on remedy. Given the majority's determination that the recounts did not satisfy constitutional requirements, one would have expected a remand so that the Florida court could order recounts that did meet those requirements. Instead, the five justices played what amounts to a sleight-of-hand trick.

A federal statute of 1887, anticipating another episode like the disputed election of 1876, provides a "safe harbor" to a state: If a state sets up a procedure before the election for resolving a dispute over who won, and that procedure results in a final determination by a certain date (December 12 in this instance), then the determination is binding on Congress when it counts the electoral votes. The Florida Supreme Court had indicated that the state's desire to take advantage of the safe harbor "circumscribed" the determination of what a "reasonable" deadline for recounts was under Florida law. The nation's highest court seized on this vaguely stated expression of desire and used it to shut the process down. It was clear Florida couldn't have a constitutional recount by December 12. And, said the five justices, Florida didn't want recounts after December 12; therefore, it couldn't have recounts at all. That's a leap too far. The Florida court had never indicated that state law demanded finality by the safe harbor date (which the state statutes do not even mention), even if the only constitutional way to complete manual recounts (which the state statutes certainly do provide for) would be to miss that date. But the Supremes, in contrast to what they had done the first time the election fight had reached them, did not give the Florida court a chance to clarify its meaning. Instead, they effectively declared: Game over.

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Why did they do it? The easy answer, that they simply wanted to see a Republican in the White House and were willing to do whatever it took to get that result, seems too crude, though a rooting interest for that outcome surely affected their thinking. They may have lost faith in the Florida Supreme Court, which had been somewhat overly aggressive in response to the blatant partisanship of Secretary of State Katherine Harris. And they may have thought their intervention was necessary to yield an orderly resolution.

If so, the justices misread the situation and the Court's own role. Play out what would have happened if the Supreme Court allowed a statewide recount to continue, subject to whatever safeguard it deemed necessary, and had then withdrawn from the scene. First, the easy case: Bush may have won the recount. How much more satisfying as a result that would have been than the one we have now!

Now the harder case—Gore wins the recount. Even if the recount were incomplete by the date the Electoral College met (December 18), the Gore electors could have voted then and been certified later (in this case by the courts), as occurred with their Hawaii counterparts in 1960–61. So there would have been two or perhaps three competing slates presented to Congress; remember that the legislature was getting into the act, with its legally unsupportable contention that it was entitled to appoint electors if the election were not resolved quickly enough.

And then what? Federal law provides that, if multiple slates are presented and none qualifies for the safe harbor, a slate accepted by both Houses of Congress prevails. But if the two Houses do not agree, then the slate certified by the executive of the state should be accepted.

This whole process would have been messy. It almost certainly would have been highly partisan. In the end, though, our president would have been chosen as always by politics. Members of Congress perceived to have acted unfairly would have had to answer at the polls.

In a way, then, the most discouraging aspect of the whole affair is not that the Court acted improperly but that we, and it, seem to have lost confidence that any other institution but the Court is capable of acting properly. Under the Constitution, the electoral votes are opened in Congress, not before the Supreme Court. And in 1876–77 there was no thought that the power to resolve controversies concerning the choice of electors resided anywhere else. But now we have come to expect the Court to decide great issues of our national life. *Dred Scott* and *Roe* v. *Wade* should have persuaded the Court that its decisions cannot quell political controversy. *Bush* v. *Gore* is more stunning than those cases in one sense, because it steps on the central function of democracy. But it is a one-time intrusion, not an attempt to resolve a continuing issue like slavery in the territories or abortion. It will not guide future doctrine, and the circumstances that allowed the Supreme Court in effect to pick our president are unlikely to be repeated. So we just have to move on, with the hope that expressions of disgust will shape the way history views this debacle. □

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