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**Equal Protection or Exclusion?: The Voting Rights Jurisprudence of *Bush v Gore***

Richard Briffault (Columbia)

For most commentators, the most, if not the only attractive, aspect of the *Bush v Gore* decision was its determination that the federal equal protection clause invalidated intrastate variations in recount rules and procedures. In earlier voting rights cases, the Supreme Court had emphasized that the legitimacy of representative institutions requires strict judicial scrutiny of limitations on the franchise, and the Court's application of the equal protection clause typically led to an expansion of the right to vote. *Bush v Gore* is the rare voting rights case in which equal protection analysis was used to narrow rather than enlarge the ability to cast an effective ballot.

This paper will suggest that although *Bush v Gore* is correct in recognizing that intrastate variations in the mechanisms for the casting and counting votes raise equal protection issues -- and that variations that have the effect of excluding voters should be subject to more searching review -- but the Court may have been mistaken in its application of its analysis to rules that liberalize the determination of the validity of a vote. The appropriate standard of review of rules that make more ballots count ought to be not strict scrutiny but the rational basis test. Given the lack of a clear standard for balancing the multiple factors that go into the assessment of whether a particular ballot was validly cast, it may be rational for a state to adhere to the traditional approach of permitting varying local standards. As in all cases of local decision-making, this allows different localities to set their own standards based on particular local preferences. In addition, it allows the state to compare different results from different localities so that the state may be fully informed before setting a state-wide rule. Finally, it is not clear that a more liberal vote-counting rule in one locality denies any rights to any voters in any other locality.

# HANGING CHAD IN THE SAFE HARBOR: SHOULD EQUAL PROTECTION LAW APPLY TO THE “NUTS AND BOLTS” OF ELECTIONS?

RICHARD L. HASEN\*

## ABSTRACT

Co-authors of both election law casebooks have drawn a distinction between the “big picture” issues of election law---representation, the nature of political equality, the role of money in politics--- and the “nuts and bolts” of election law. Before the recent Florida controversy, the conventional wisdom was that the former was more important (and no doubt more interesting) to study than the latter.

The Florida controversy challenged that conventional wisdom. Although the dispute depended upon the resolution of essentially two “nuts and bolts” questions---how does one determine the intent of the voter from examining a paper ballot and what are the mechanics of contesting a statewide election---the controversy illustrated in numerous ways that the line between “big picture” questions and “nuts and bolts” is fuzzy. Indeed, most of those big picture questions regarding the nature of representation, the meaning of political equality, and the role of money in politics all played a role in this nuts and bolts dispute.

The Supreme Court’s opinion in *Bush v. Gore* essentially brought a nuts and bolts dispute into the big picture by stating that Florida violated the Equal Protection Clause of the Fourteenth Amendment by failing to have uniform standards for the recounting of votes during an election contest. The opinion is potentially far-reaching, translating just about any disparity regarding the means of voting into a justiciable question. Indeed, we can go back and ask how, say, the butterfly ballot controversy, should have been handled if *Bush v. Gore* were already on the books.

There are good reasons for doubting that the Supreme Court intended us to take their equal protection holding seriously. Language in the per curiam opinion limits it to the facts of the case, or to cases where statewide recounts are ordered. Moreover, given the fact that a “fundamental right” was involved, the court appeared to apply less than strict scrutiny in holding that adherence to the Dec. 12 “safe harbor” deadline trumped the right to count all votes. Time will tell whether the Court backs away from its ambitious new equal protection jurisprudence.

But the more interesting question is not *whether* the Court meant what it said, but rather what would be the *consequences* if the Court indeed meant what it said. On the one hand, a precedent requiring scrupulous equality in the holding of elections is all for the good. It will increase resources used to conduct elections, so that at least 20th century technology will be applied as we enter the 21<sup>st</sup> century. It will provide a means for those in poor, urban areas like Miami-Dade County to have just as accurate of a voting system as those wealthier areas.

But such a holding would be a mixed blessing. I see at least three concerns raised by extending

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equal protection to the nuts-and-bolts of elections. First, such a holding could provide a rationale or a pretext for courts to nullify election results. That is, it forces courts further into the political thicket, with potentially dangerous consequences for both democracy and the legitimacy of the courts. Second, such a holding undermines federalism. The holding would create a disincentive for jurisdictions to experiment with new methods of voting. Oregon has adopted vote-by-mail. Jurisdictions are considering internet voting. How do these get adopted in one jurisdiction alone as an experiment without there being a successful challenge? The idea of “states as laboratories” is undermined. Third, the holding may have unintended consequences in other election law areas, such as a jurisdiction’s decision to use cumulative voting methods. It even could call into question the holding of *Buckley v. Valeo* rejecting an equality rationale for campaign finance reform. For some of us, that is a good development, but it is certainly not one intended by these five Justices in *Bush v. Gore*.

## **Re-thinking Bush v. Gore As If the Fourteenth Amendment Mattered (To the Supreme Court, That Is)**

Peter M. Shane (Pittsburgh)

Bush v. Gore will long be remembered for bringing the 2000 presidential election to a hasty and ill-considered end of dubious legitimacy. It also marked a missed opportunity to inquire seriously into the implications of the Fourteenth Amendment for modern presidential elections. The Court's plurality opinion accepted as a matter of first principle that an "individual citizen has no federal constitutional right to vote for electors for the President of the United States," citing section 1 of Article II. It failed to probe, however, whether the Fourteenth Amendment should be read as modifying Article II in this respect. Both the Privileges and Immunities Clause and the text of section 2 of the Fourteenth Amendment suggest that the right of individuals to participate in the selection of presidential electors is now constitutionally grounded. Indeed, read in light of the plain constitutional trajectory towards more robust democracy in the United States, these clauses should now be deemed to establish presidential elections as a constitutionally protected vehicle - perhaps the single most important vehicle - for Americans to exercise their rights of political association and expression both within and across state lines.

Based on this pro-democracy reading of the Fourteenth Amendment, a statewide hand recount should have been deemed constitutionally compelled in Florida, a result that could have easily been accomplished by deferring to the Florida Supreme Court's interpretation of Florida law. Compared to this matter, the equal protection issue raised by the majority and accepted as non-trivial by Justices Souter and Breyer pales in significance - and, in any event, there was in fact no legal or practical impediment to conducting a statewide recount consistent with any reasonable equal protection standard. The pro-democracy reading of the Fourteenth Amendment also explains why any attempt by the Florida legislature to substitute a post-Election Day electoral slate should have been regarded as plainly unconstitutional.

It may be that the Court did not find itself confronting a pro-democracy reading of the Fourteenth Amendment because of an early strategic decision by the Gore campaign not to press federal grounds for achieving a recount. If that is so, it might now seem a strategic error on the part of the campaign not to advance such a theory -- unless, of course, sitting at the end of the process were five Justices determined to ordain a Bush victory, regardless of the legal merits. It is a measure of the Court's imprudence in deciding Bush v. Gore as it did that such a possibility cannot be dismissed out of hand.

## SECONDGUESSING STATE COURT CONSTRUCTION OF STATE LAW

Harold Krent (Chicago-Kent) Intro (Draft)

That the election for President in 2000 was decided by a court surprised everyone. That the election was decided by a federal court was even more surprising. And, the fact that three Justices supported that decision based on secondguessing a state court's construction of state law was possibly more astonishing still.

Prior to the 2000 presidential election, no one could have foreseen the pivotal role played by the United States Supreme Court. Never had an election of that magnitude hinged on court intervention. The Supreme Court's dramatic decision, Bush v. Gore,<sup>1</sup> doomed the hopes of Vice-President Gore, and precipitated his concession. But, perhaps almost as importantly, the decision immediately cast a pall upon the institution of the Court itself, for the decision appeared to many as a crass political move designed to ensure the election of the Justices' personal choice for office. The reasoning of the Justices was labeled conclusory, unintelligible, and worse.<sup>2</sup>

Of particular note, conservative members of the Court who champion federalism appeared willing in Bush v. Gore to ignore years of precedent in secondguessing Florida Supreme Court's construction of state law. The U.S. Supreme Court on countless prior occasions has held that state supreme courts are the final expositors of the meaning of state law.<sup>3</sup> Under our system of governance, federal courts have no role in overseeing or participating in evolution of state law.

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<sup>1</sup>69 U.S.L.W. 4029 (2000).

<sup>2</sup>For a sampling of the editorials, see

<sup>3</sup>Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (holding that Congress had not authorized U.S. Supreme Court review of state law issues); Mullaney v. Wilbur, 421 U.S. 684 (1975). Despite those precedents, the Court's earlier decision in Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471 (2000), signaled its intent to review the Florida court's interpretation of its own state's law, and the question of whether the Florida court had acted properly in construing state law occupied the headlines leading to the second U.S. Supreme Court decision.

Interestingly enough, however, the Supreme Court prior to 1863 deferred to state court construction of state law but had not ruled out its own role as a categorical matter. Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291, 297-98 (1832) (finding that state tribunals had no "power to bind this Court."). The Court signaled change in Leffinwell v. Warren, 67 U.S. (2 Black) 599, 603 (1863).

Nonetheless, three United States Supreme Court Justices in Bush v. Gore would have held that the Florida Supreme Court's decision ordering a recount violated Article II's requirement that "each State shall appoint, in such Manner as the Legislature thereof may direct" electors for President and Vice-President.<sup>4</sup> They reasoned that the Florida state court's "interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required" and thereby violated Article II of the Constitution.<sup>5</sup> Indeed, that was the Bush team's principal argument in its brief: the Florida Court in effect made new law in interpreting the contest provisions and thus trampled upon the state legislature's federal constitutional right to select the manner in which electors are selected. The three Justices, therefore, would have second-guessed the Florida Supreme Court's interpretation of Florida law to protect a federal constitutional guarantee. That conclusion seems to turn federalism principles on their head,<sup>6</sup> and foretells an increased role for the Supreme Court in subsequent presidential elections.

Despite the seeming affront to federalism, however, the three Justices are on firm ground in holding that the U.S. Court can review a state court's construction of state law in order to protect a federal right.<sup>7</sup> In a variety of circumstances, the U.S. Court has scrutinized state court decisionmaking to ensure that state judges were not altering state law so as to defeat federal rights. For instance, in Bouie v. City of Columbia<sup>8</sup> – as the concurrence notes – the Court held that South Carolina's interpretation of a state trespass statute violated federal due process guarantees by changing the law in effect at the time of the defendant's offense. Similarly, the Court in Indiana ex rel. Anderson v. Brand<sup>9</sup> reviewed the Indiana Supreme Court's determination that a public school teacher did not enjoy any contract rights under Indiana law in order to determine whether subsequent legislation had impaired her rights under the Contracts Clause. The Court has similarly reviewed state court construction of state laws in treaty cases whenever the federally protected right may be lost by a state court's overly creative interpretation of state law.<sup>10</sup> The three Justices thus had ample precedent for reviewing state judges'

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<sup>4</sup>See McPherson v. Blacker, 146 U.S. 1, 35 (1892) (stating that Article II confers "plenary power to the state legislatures in the matter of the appointment of electors").

<sup>5</sup>This Article assumes the correctness of the Court's exposition of Article II, which the dissenting Justices did not dispute.

<sup>6</sup>As has been noted, the Court in general has pushed for federalism at the political level but nationalism in the judicial sphere. See Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 Wash & Lee L. Rev. 1149, 1198 (1998).

<sup>7</sup>This is not to suggest, however, that the Court should have intervened in the dispute in the first instance. Rather, I contend that the three Justices' consideration of whether the Florida Supreme Court impermissibly changed state law is neither novel nor unwarranted.

<sup>8</sup> 378 U.S. 347 (1964).

<sup>9</sup> 303 U.S. 95 (1938).

<sup>10</sup>See Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (concluding that state court erred in determining whether 1789 ejectment order constituted a confiscation under a 1783

interpretation of state law to ensure protection for federal rights.<sup>11</sup>

Moreover, the Court in both the Bouie and Contracts Clause contexts has inquired whether state judicial decisions have so changed state law as to deprive an individual or firm of the settled expectations protected under the Constitution. In order to protect the federal right, the Court therefore has not only second-guessed determinations by the state's highest court on state law, but asked whether state judicial pronouncements changed prior law.

Irrespective of the theoretical pedigree, the Rehnquist concurrence is extraordinary in applying the above principles. When the Court has reviewed state law decisionmaking in other contexts, it has afforded wide latitude to state court decisionmaking. It has only disputed state court construction of state law on rare occasions, and it has concluded that state court decisions made "new" law even more rarely. The Justices' willingness in Bush v. Gore to hold that the state court interpretation of state law changed Florida's law flies in the face of the Court's reticence to examine state court decisions closely even in the contexts in which federal rights undeniably are at stake. Indeed, the Court has taken great pains in other cases not to substitute its own view of state law for that of state courts. In Bush v. Gore, the instrument of last resort became a weapon of attack.

Part I of this Article examines the state law issues in Bush v. Gore and the Rehnquist concurrence's willingness to substitute its own interpretation for that of the Florida Supreme Court. As in Bouie and the Contracts Clause contexts, the U.S. Supreme Court's exercise of review over the state court interpretation may protect the Article II interest at stake. In the absence of review, state courts through interpreting state law adventurously could nullify the directive in Article II that it is the province of state legislatures to determine the manner in which electors to the presidential election are to be chosen.

Part II of this Article sketches two contexts in which the U.S. Supreme Court has reviewed judicial interpretations to determine whether the interpretations "changed" or "altered" preexisting law. Under the Bouie doctrine, federal courts have assessed state court construction of state law to determine whether any change in doctrine violated the defendant's Due Process rights. Similarly, under the Contracts Clause, federal courts in the past questioned state court articulation of state contract law in order to protect the federal right that the state not impair the obligation of contracts.

Underlying decisions in the two contexts swirl notions of fair notice, predictability, and mistrust for lower court judicial power. To some extent the Article II setting shares these concerns. State court judges, because of their politically greater susceptibility to majoritarian pressures, might alter state law in a way that favors their own political leanings or futures. Furthermore, stability and predictability are particularly important values when elections are at stake.

Yet, with limited exceptions, the Supreme Court in practice has upheld state court interpretation of state law in the Bouie and Contracts Clause settings. This part sketches some of the means by which

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peace treaty with Great Britain).

<sup>11</sup>An interesting exception is posed in takings cases, where – despite the concurrence's implication to the contrary, 69 U.S.L.W. at 4033 n.1 – the Court has steadfastly refused to hold that judicial changes in the law can effect takings of property. See, e.g., Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930).

federal courts avoided concluding that state law had “changed.” Through a mixture of fictions and judicial legerdemain, federal judges have concluded that state judicial interpretations in both the Bouie and Contracts Clause contexts were foreshadowed in some way. Indeed, in the Contracts Clause setting, the federal courts subsequently withdrew from the field altogether. The Court is now willing to rely upon state judicial construction of the state law determinants of the federally protected right.

Part III then returns to Bush v. Gore through the prism of these precedents. Although the principle underlying the Rehnquist concurrence is sound, the application is bewildering. The Florida Supreme Court’s construction of Florida law, while in no way dictated by precedent of the plain language of the statutory scheme, was at a minimum, plausible. The U.S. Supreme Court has consistently failed to disturb far more questionable state court decisions in the Bouie and Contracts Clause contexts. There is nothing in the Article II context that demands a more searching inquiry than in the Bouie or Contracts Clause contexts.

Sound policy reasons support the Court’s prior reluctance to secondguess state court interpretations of state law. First, as a matter of judicial administration, permitting challenges to judicial decisions that “change” the law is highly problematic because many losing parties will have the incentive to challenge state court judgments in the Article II, Contracts Clause, and Bouie contexts in federal court. Second, given that judges always have made law interstitially through decisions, distinguishing which interpretations change the law more dramatically than others is quite daunting. Finally, federalism concerns plainly counsel against exacting scrutiny of state court interpretations of state law, even where federal interests are at stake. Thus, in comparison to decisions in related fields, the three Justices’ conclusion that the Florida Court’s decision was so unforeseeable that it changed law is nothing short of startling.

Jim Gardner (Western New England)  
Paper for FSU Conference on the presidential election  
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ABSTRACT

## **THE REGULATORY ROLE OF STATE CONSTITUTIONAL STRUCTURAL CONSTRAINTS IN PRESIDENTIAL ELECTIONS**

State officials are normally understood to draw their legitimate authority from affirmative grants of power under their state's constitution. Just as it grants official power, however, a state constitution is normally understood to limit and condition it as well in ways that conclusively bind state actors. In the *Bush* cases, the U.S. Supreme Court unjustifiably departed from this model, a model drawn from salutary principles of federalism that play a significant role in the protection of popular liberty.

State constitutions serve three main functions: they authorize and empower the state government to achieve the public good; they grant the state power sufficient to resist abuses of national authority by the national government; and they control the state power thus granted by establishing institutions of governmental self-restraint so that the state government does not become an undue threat to its own people. Any state constitution thus strikes a balance between empowerment and restraint of state government. The way any state polity chooses to strike this balance will depend upon its trust in government generally, and its relative trust of state and national power in particular. The U.S. Constitution has virtually nothing to say about how a state may strike this balance. Although it protects a state's citizens from their own state government by establishing a minimal level of individual rights, the U.S. Constitution leaves to state constitutions any decisions about additional structural limitations on state power.

In the *Bush* cases, the Supreme Court interpreted Article II, § 1 and the Equal Protection Clause of the U.S. Constitution to create a different system in presidential elections. These rulings unjustifiably disable state constitutions from serving in presidential elections the significant, liberty-protective regulatory function they serve on every other occasion in which state power is exercised: restraining the organs of state government from abusing important state powers.

Article II authorizes state legislatures to appoint presidential electors, but it by no means follows that in so doing Article II unmoors state legislatures from the state constitutional restraints upon legislative power that attend its use in every other circumstance. It is not unusual for the national Constitution to grant authority which state constitutions then limit or revoke, and there is no reason to suspect a different arrangement here. If state constitutions do not permit state legislatures to exercise legislative power in a way that comports with the requirements of Article II, then Article II provides an obvious remedy: exclusion of the state's electors from the presidential selection process. The Court's decisions construing the Qualifications Clauses and Article V are consistent with this analysis. Those provisions grant directly to national citizens the authority to perform national functions, which are by

definition beyond the authority of states to regulate. In contrast, Article II, § 1 grants the authority to perform a national function to an organ of state power under state control.

Although couched in the language of equal protection, the Court's ruling in *Bush II* responds to similarly misplaced concerns about autonomous state decisions regarding the internal structure of state government. The Court's equal protection analysis is entirely unsatisfactory. The Court's main concern seems more like a due process objection to the vagueness of the "intent of the voter" standard, but vagueness is a concern under the Due Process Clause only with respect to laws addressed to individuals, not government officials. When laws are too vague for government officials reliably to follow, the problem is one better cast in terms of nondelegation, a separation of powers doctrine. Yet the U.S. Constitution has nothing to say about the way a state chooses to divide power on the state level, including its choice not to observe a strict nondelegation doctrine. Moreover, a state's decision to decentralize the administration of elections is also a legitimate internal structural decision. To the extent it is based on a distrust of state as compared to local power, such a vertical dispersion of state power serves as a mechanism by which the state polity may protect itself from centralized state abuses of power during statewide elections. The Court's misguided equal protection analysis unjustifiably invades this essential area of state autonomy.

## ***BUSH v. GORE* AND THE THREAT OF STATE CONSTITUTIONAL LAW**

Robert Schapiro (Emory)

Several basic interpretive queries suffuse the study of state constitutional law. What is a state constitution? How is a state constitution different from other forms of state law? In the *Bush* election cases, the United States Supreme Court provided federal answers to these questions of state constitutional theory. The initial per curiam opinion, the questions of the Justices during the oral arguments, and the three-Justice concurrence in *Bush II*, in particular, set forth a distinctive vision of the role of state constitutions in the state governmental process and of the place of federal courts in overseeing that role. By providing valuable insight into the Rehnquist Court's understanding of state constitutions, the *Bush* cases illuminate this Court's perspective on the New Judicial Federalism. That perspective appears to be quite negative.

Implicit in the *Bush* cases is a federal definition of state constitutional law. A state constitution, the Court suggested, is that on which a state court may not rely in interpreting the state law governing presidential elections. Indeed, in the eyes of at least three members of the Court, the state constitution is a kind of placeholder for attempts by state courts to thwart the will of the state legislature. It is clearly invalid, these Justices concluded, for the state courts to rely on the state constitution in construing the legislative scheme. Moreover, even when reliance on the state constitution is not explicit, the federal courts must review state court interpretation of state law to prevent the state court from rewriting legislation under the guise of statutory construction. The *Bush* cases thus provided a definition of state constitutions that was negative in both a doctrinal and a normative sense. From the perspective of the Federal Constitution, what is distinctive about a state constitution is that it cannot be considered in certain cases, and the reason that this cordon sanitaire must be enforced is to protect the legislative scheme from judicial distortion. Apparently, without this federal vigilance, the state constitution will become a ready mechanism for judicial usurpation. The proponents of this vision understand Article II, § 1 of the United States Constitution as a grant of exclusive authority to the state legislatures for matters related to the selection of presidential electors. Less apparent is the source of the insight that reference to state constitutions will subvert, rather than promote the legislative will.

The effect of this conception of state governmental organization is to constitute the federal courts as bulwarks of state legislative authority over presidential elections, shielding the state legislature from the interpretive assaults of state courts. To fulfill this function, the federal courts must review state court interpretations of state law. The Justices bolstered this supervisory conception of federal courts by noting a few instances in which the Court has protected federal interests by refusing to credit state courts' constructions of state law. The style of interpretation employed by the Justices, however, had a much closer resemblance to a different body of cases that hark back to a time when the Court commonly insisted on providing an independent interpretation of nonfederal law. The key precedent for the concurrence in *Bush II* was not *Martin v. Hunter's Lessee*, but *Swift v. Tyson*. Such *Swift*-era expressions as "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice" would have found a comfortable home in the opinion.

Even the *Swift*-era cases, though, do not fully capture the character of the Court's opinions. The nature of the federal interest that the Court is protecting remains obscure. The concurrence in *Bush II* vindicated a claimed federal interest in the internal organization of state government. The interest at stake was not the uniformity of first-order principles of federal law or even nonfederal general law. Instead, the federal principle apparently at stake was the freedom of each state legislature to establish technical election procedures free from state judicial interference. The structural goal underlying this federal interest is not immediately apparent. Nor could the Justices base their action on some principle of institutional competence. Perhaps the United States Supreme Court could claim some comparative advantage in divining general principles of law. Indeed, the United States Supreme Court may even have valuable contributions to make in understanding broad principles embodied in state constitutions. The Court's special competence in harmonizing an individual state's election protest and contest provisions seems, at a minimum, less clear—unless one has strong doubts about state judicial competence.

The image of the New Judicial Federalism that emerges from the *Bush* opinions is thus a decidedly unfavorable one. Rather than an organic part of the state legal structure, the state constitution appears as a kind of unwanted intruder, a cover for unprincipled state judicial activism. Although presidential election cases may be relatively rare, this understanding of state constitutions and of state courts may bleed over into other areas of federal jurisprudence. The *Bush* cases suggest that for at least some members of the Court, state court decisions interpreting the state constitution may carry a presumption of illegitimacy. For these Justices, the New Judicial Federalism apparently bears the indelible taint of its strongest proponent on the United States Supreme Court, former Justice William Brennan.

## SHOULD WE RETHINK THE ELECTORAL COLLEGE?

Luis Fuentes-Rohwer (Georgetown) & Guy-Uriel Charles (Minnesota)

### Abstract

“Close presidential elections,” Polsby and Wildavsky write, “those in which the new president has only a narrow margin in the total popular vote, always lead to renewed public discussion of the merits of the electoral college, since close elections remind people of the mathematical possibility that the candidate with a plurality of all the votes will not necessarily become president.”<sup>12</sup> The 2000 Presidential election offers a poignant illustration of this view. This was one of the closest presidential contests in the history of our republic. Not only that, but it also brought us a President who failed to garner the support of a majority of voters.

Thus, unsurprisingly, the calls for reform have poured in since the recent election debacle. Yet none of the recent proposals for reform is new. Calls for reform—including abolition of the Electoral College—have been made loudly and often since the implementation of the College over two centuries ago.<sup>13</sup> In light of the steady proposals for reforming the Electoral College, the fact that the College remains the mechanism by which we select our Chief Executive is nothing short of remarkable. If history is any guide, current proposals for reforming the College will soon fall by the wayside until, as Polsby and Wildavsky noted, the passage of yet another close election.

In light of this history, we have a very particular goal in mind. To be sure, the Electoral College has been subjected to close examination from a number of different angles. It is also true that many proposals have been made calling for its reformation if not abolishment. In this vein, precious little may be said or written that might break new ground. This paper looks instead to one aspect of the debate that has received scant attention through the years: the effect of electoral reform from the perspective of voters of color. More specifically, this paper examines proposals to reform the Electoral College from the perspective of the impact that these proposals would have on voters of color.

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12 NELSON W. POLSBY AND AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* 244 (10<sup>th</sup> ed., 2000).

13 *See* ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 141 (1994) (“There is no exact account of the number of proposals and alternatives for electoral reform that have been introduced in Congress since the time of the Constitutional Convention. Estimates range from no less than 500 to over 700.”). For the text of the various reform proposals, see ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 97-116 (1971).

## Is the Twelfth Amendment Relevant?

Sandy Levinson and Ernest Young (University of Texas)

The Twelfth Amendment is the Rodney Dangerfield of the Constitution: It gets no discernible respect. It is rarely the subject of scholarly analysis--though one of us has labeled one of its features the "stupidest" aspect of the Constitution--and is certainly never the subject of classroom discussion. Only professors of constitutional law--and probably not all of them--could even identify the Amendment, at least prior to the recent unpleasantness.

To some extent, of course, the Amendment simply duplicates the original Constitution of 1787, particularly with regard to establishing the Electoral College as the basic mechanism of presidential selection and requiring that electors vote for at least one person who is not an "inhabitant" of the elector's own state. The Amendment *did* change the original Constitution with regard to the basic structure of the election insofar as it established formally separate races for the presidency and vice-presidency. Moreover, it changed the procedures by which deadlocks in the College would be resolved by Congress. To some extent, then, our discussion below, as well as our title question, refers to aspects of the original Constitution as well as the specific changes instituted by the Amendment.

We view our project less as an exercise in normative jurisprudence--i.e., what does the Constitution, correctly interpreted, require with regard to certain issues?--than as an inquiry about the circumstances in which the community of trained constitutional analysts and the surrounding community of commentators and pundits do (or do not) pay attention to one or another constitutional argument. One can, of course, view the "marketplace of ideas" as a perfectly functioning market, in which only meritorious ideas will gain credence; as Holmes (or Richard Posner) might have put it, the best way of identifying ideas worthy of respect is to determine which in fact dominate the marketplace. Less happy, though, we suspect, more true, is the possibility that the marketplace of ideas, like all markets, has its own distortions and blind spots, so that the ignoring of certain arguments by opinionmakers within the market says more about the sociology of the market than it does about the quality of the ideas.

In any event, we want to discuss two sections of the Twelfth Amendment that are thought by some to be relevant to the recent election. The first--and for most people, the more fanciful--is the possibility that the casting by Texas electors of their votes for both George W. Bush and Richard Cheney violated the constitutional command that they must "vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves." It is not clear, that is, that Cheney and Bush were indeed "inhabitant[s]" of different states. We believe, though, that there are plausible--i.e., non-frivolous, well within Rule 11--arguments that Cheney, like Mr. Bush, was a Texan and, therefore, that the bar of the Twelfth Amendment meant that Mr. Bush did not in fact gain a majority of the electoral vote. As already suggested, we are aware that most constitutional analysts find this almost literally incredible and some, no doubt, would find it covered by Rule 11. We want to explore whether this disdain is justified and, indeed, to take this section of the amendment seriously enough to explore what meanings might be given the term "inhabitant" under different modal approaches to the Constitution. (The use of the term "modal," of course, is a giveaway that we will be applying some of the approach to constitutional analysis identified with our colleague Philip Bobbitt.)

The other section we want to discuss involves congressional resolution of electoral college deadlocks. The question here is whether one can legitimately read that section as a "textual

commitment" of electoral-vote controversies to Congress, leaving courts with literally nothing to say about such matters. If that reading is possible, then an obvious question is to speculate on why the Supreme Court apparently did not take it seriously when resolving the issues presented in *Bush v. Gore*. Given the fact that the two of us have rather different views about the merits of that decision, we want to emphasize once more that our contribution, such as it is, is analytic rather than normative, whatever problems might obviously be raised by that distinction.