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Democracy Rescued

In the case of *George W. Bush et al. v. Albert Gore Jr. et al.*, the Supreme Court of the United States has done democracy, and the republic that rises from democracy, a great and historic service. Many millions of people do not see it that way; they see the court's divided ruling as a partisan and ideological assault on democracy. But the heart of the court's decision is not found in the fact that five conservative justices ruled to reverse the split decision rendered by four liberal justices on the Florida Supreme Court. The heart is found in two sentences from the majority decision: "Seven justices of the court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court. . . . The only disagreement is as to the remedy."

Justice David H. Souter acknowledged in his dissent that the equal protection clause did allow for "a variety of voting mechanisms within a jurisdiction," and then pointedly continued: "But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics." Souter added: "I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary." Souter disagreed with the majority only, as stated, in remedy; he would have given the Florida court one last chance to devise a fair and coherent standard for counting the votes, consistent with the Constitution.

Judge Stephen G. Breyer also agreed with the conservative majority that "basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem." He noted, without disagreeing, that "the majority concludes that the equal protection clause requires that a manual recount be governed not only by the uniform general standard of the 'clear intent of the voter,' but also by uniform subsidiary standards." He also noted, again without disagreeing, that the majority opinion had found that the Florida court had counted as "legal votes" ballots from two different counties employing two

contrasting standards, an obvious violation of this principle. Like Souter, Breyer disagreed as to remedy, and with some other aspects of the decision.

The high court's decision went to the actual nature of what Gore and his lawyers attempted in Florida. They did not attempt, beyond empty rhetorical gesture, "to count every vote." With the help of the Florida Supreme Court, they attempted to recount votes in Democratic counties, in processes controlled by Democratic canvassing boards and employing standards as to what constituted a "legal vote" that shifted from place to place and from time to time, as necessary to maximize Gore votes.

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

In oral arguments, Gore attorney David Boies told the Supreme Court that this sort of thing was perfectly fine, that standards for a "legal vote" could properly vary, not only from county to county but "from individual to individual." Seven of the nine justices said, in essence: Not under my Constitution, you don't. "The right to vote is protected in more than the initial allocation of the franchise," wrote the majority. "Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

In every national election, there are millions of "uncounted" votes—votes that are rejected for various reasons. In an achingly close election, Al Gore and his lawyers sought to take advantage of this fact of electoral life, and to manipulate the system into "finding" in selected areas, using shifting standards of what constituted a vote, enough votes for him to eke out victory. That, said a strong majority of the Supreme Court, amounts to valuing one vote over another, and you can't do that.

With this, the Supreme Court rescued democracy—not by stopping Gore but by stopping the example of Gore. Had Gore gotten away with gaming the system, the next loser in a close presidential election would have tried the same stunt, and the next, and the next. The dangerous door had been opened. Now it is shut.