Comment on Bush vs. Gore and the Clemens-Piazza Broken-Bat Incident

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Introduction

In the wake of *Bush v. Gore*[1] and the troubling questions surrounding the outcome of last year's presidential election,[2] our Law School celebrated an afternoon conference on the state of U.S. and Puerto Rico election law.[3] It was a spirited and worthwhile conference, for many questions of the utmost importance were freely discussed. What went wrong in Florida? Could a Florida-style mishap happen in Puerto Rico?[4]

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[1] 531 U.S. __; 121 S.Ct. 525 (2000) (per curiam). I am compelled to say that the majority's use of the 'per curiam' term of art was a high-handed abuse of judicial discretion—a judicial sleight of hand, I dare say—given the immense complexity of this case. For what it is worth, the Florida Supreme Court also employed this same deceptive artifice. *See* Gore v. Harris, 772 So.2d 1243 (2000) (per curiam). In my view, neither of these cases was really so simple and straightforward as to deserve the 'per curiam' label.

[2] It has since been reported that President Bush would have still won Florida by a close margin even if the U.S. Supreme Court had allowed the contested manual recount to proceed. *See, e.g.*, Martin Merzer, "Review Shows Ballots Say Bush," MIAMI HERALD, Apr. 4, 2001, at A-1; *see also* Amy Driscoll, "Dade Undervotes Support Bush Win," MIAMI HERALD, Feb. 26, 2001, at A-1. These articles are also available online at <http://www.miami.com/herald/special/news/flacount/docs>). The findings reported in these articles are based on an audit commissioned by a consortium of media companies. It has been noted, however, that the media's private survey examined only the disputed undervotes and, as of this writing, has yet to complete its review of about 110,000 so-called overvotes—ballots for which voting machines recorded more than one presidential candidate. *See, e.g.*, Jacob Weisberg, "A Road Map to the Recount," (posted Apr. 5, 2001) <http://www.slate.com>. Nevertheless, the results of the overvote review are, legally speaking, immaterial because the overvotes were not in dispute in the Bush v. Gore litigation, for the Florida Supreme Court had included only undervotes in its recount order. *See* Gore v. Harris, 772 So.2d at 1262.

[3] The conference was held on February 6, 2001. The official title of the conference was "*Congreso sobre derecho electoral*."

[4] This last-mentioned question is no academic trifle in Puerto Rico. Most Puerto Ricans over the age of 40 will never forget the controversial gubernatorial election of 1980. Due to the close margin of that election and reports of election irregularities, the results were contested and a long manual recount ensued. The final tally was not officially certified until the end of the year—a full two months after the election. According to the official recount, the gubernatorial candidate for

Was the U.S. Supreme Court's controversial decision in *Bush v. Gore* the equivalent of a judicial *coup d'etat*? Since I was in the process of forming my own views on these momentous questions, I was eager to hear the expert opinions of the panel.

Several illustrious jurists participated in the conference. I use the word 'jurist' in its original Roman sense, for all four of the panel members are not only exceedingly knowledgeable on matters of electoral law, they have also served in high government office and have made great efforts to improve the electoral process at home and abroad. The first speaker was Robert E. Henderson, a member of the Washington Center, a leading think-tank on politics and electoral affairs. Mr. Henderson was a high-ranking official in the U.S. Department of State and the United Nations during the Reagan-Bush years and has monitored elections in more than two dozen developing nations.[5] The second speaker was César Vázquez Díaz, who was chairman of the Puerto Rico Elections Commission during the critical years of 1983 to 1985, when a number of sweeping electoral reforms were put into practice in Puerto Rico. Mr. Vázquez Díaz was also a U.S. Army commander in the Persian Gulf War.[6] Like a modern-day Cincinnatus, he returned to family life and private practice after the Allies liberated Kuwait in early 1991. The last two speakers were law professors Héctor Luis Acevedo, the former mayor of San Juan and candidate for Puerto Rico governor, and Pedro Ortiz Alvarez, the former head of the Puerto Rico Department of Consumer Affairs.[7] In short, this was a first-rate and politically-balanced panel.[8]

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the New Progressive Party, Carlos Romero Barceló, won the disputed contest by a mere 3,037 votes.

[5] Indeed, I dare say that next to former president Jimmy Carter, Mr. Henderson's first-hand knowledge of foreign elections is second to none.

[6] For lack of a better term, I refer to the Allied military campaign against Iraq as a 'war', though as a matter of constitutional law, I strongly believe that Congress's 'conditional' declaration of war against Iraq did not satisfy the basic requirements of Article I of the U.S. Constitution. In my view, declarations of war cannot be conditional or made contingent on future events. The war declaration against Iraq, however, required the President to exhaust "all appropriate diplomatic and other peaceful means" to secure the liberation of Kuwait. *See* Authorization for Use of Military Forces Against Iraq Resolution, H.J. Res. 77 (1991).

[7] It would be thoughtless of me if I did not also mention that both Professors Acevedo and Ortiz Alvarez teach at our Law School. Though this is only my personal opinion, I consider Mssrs. Acevedo and Ortiz Alvarez two of the leading experts on election law matters in Puerto Rico.

[8] For the benefit of the non-Puerto Rican reader, my introduction would not be complete without a brief reference to Island politics. Our two major political parties are the Popular Democratic Party (PDP), which favors Puerto Rico's current 'Commonwealth' status, and the New

I have decided to write a short and informal comment on the views presented by each one of the panel members as well as a very succinct summary of my own views on *Bush v. Gore*. My purpose in doing so is threefold. First, I want to summarize the ideas presented by each speaker for the benefit of those who were unable to attend this worthy conference.[9] Secondly, I wish to provide an outline of my own views to further develop my insights on these weighty questions. Last and most important, I hope to start a dialogue with the reader and the panel members. Perhaps some of them will want to reply in an upcoming issue of this law journal.

A. Robert Henderson

The first man to speak was Robert Henderson.[10] His presentation was thoughtful and his ideas were quite original. I enjoyed it all the more because he at once took a contrarian view of the 2000 presidential election, stating up front that the "fiasco in Florida" actually worked to strengthen American political culture and the democratic process overall. This is certainly a hard position to defend. The result of the U.S. presidential election was tarnished because of the messy events in Florida. For some Americans President Bush's legitimacy will remain under a cloud of suspicion forever, in spite of the post-election recount efforts by the Miami Herald and others. Some Americans sincerely believe that George W. Bush stole the election with the sinister aiding and abetting of five archconservative Supreme Court justices. That, at least, was the other three speakers' view of the matter. I was therefore quite anxious to hear Mr. Henderson out. How would he defend what was seemingly indefensible?

Progressive Party (NPP), which favors statehood. (Though it once was a formidable political party, today the Puerto Rican Independence Party (PIP) has a negligible and paltry following at best. A mere 4% of the electorate voted for the PIP's gubernatorial candidate in the 2000 election.) I think that it is fair to say that Professors Acevedo and Ortiz Alvarez are loyal supporters of the PDP, while Mr. Vázquez Díaz is an unrepentant statehooder. For his part, Mr. Henderson, who lives in the Washington, D.C. area, described himself as a "card-carrying member of the Republican Party."

[9] To this end, I shall make my comments in the same order in which each speaker spoke, starting with Mr. Henderson.

[10] For the record, Mr. Henderson freely admitted in his opening remarks that he was not a trained lawyer. Nevertheless, I see no reason to hold this fact against him.

Mr. Henderson began his remarks with the case of Poland. In 1990, two short years after the fall of the Berlin Wall, the pro-Soviet puppet government in Warsaw collapsed, creating an unexpected political vacuum.[11] Despite this dramatic and unforeseeable development, the Poles did not take to the streets; Poland did not suffer a violent political convulsion. According to Mr. Henderson, the reason Poland's transition to democracy was so peaceful was that the Poles were already loyal to a number of competing private institutions, such as the trade unions and the Catholic Church. In this respect the socialist puppet government was just, in Henderson's words, a 'shell.' Polish private institutions promptly filled the vacuum left by the collapse of the hollow socialist system, and the Poles were able to fill this political void without bloodshed.

I must state at the outset that, though I enjoyed this history lesson and agree with Mr. Henderson's conclusions, I fail to see its immediate relevancy to U.S. politics. What does the Poland of 1990 have to do with the U.S. presidential election of 2000? Does Mr. Henderson want us believe that U.S. political institutions, such as the U.S. Supreme Court, are just a 'shell' as well? I certainly agree that in many areas of life legal rules and legal institutions are, in fact, a mere shell, especially in those ordinary situations in which private parties turn to informal social norms to guide their conduct and resolve minor disputes.[12] But it would seem that the election process, which is highly formal and run and administered exclusively by the state, is not one those areas where informal social norms have displaced law.

After discussing the case of Poland, Mr. Henderson noted that U.S. politics are governed by what he called 'the Deal.' By this he meant not only the federalist government structure set forth in the U.S. Constitution, but also "the practices and procedures developed over generations."[13]

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[11] It is worth noting that in many respects Poland's return to democracy marks the true culmination of the Second World War. After all, Britain and France originally declared war on Nazi Germany over Poland's fate. Poland, however, was never truly liberated even after Nazi Germany's defeat, for the Soviet Union immediately and unlawfully installed a puppet government in Poland in contravention of the U.S.S.R.'s solemn agreements with the Allies. *See, e.g.*, Winston S. Churchill, MEMOIRS OF THE SECOND WORLD WAR 918-29 (1959). This book is an abridged version of Churchill's original memoirs. In my view, Winston Churchill's memoirs provide the most meticulous and engaging history of the war.

[12] *See generally*, Robert C. Ellickson, ORDER WITHOUT LAW (1991); Donald Black, THE BEHAVIOR OF LAW (1976).

[13] This broad definition of the Deal leaves plenty of room for informal social norms and the like.

Though Mr. Henderson did not draw an explicit analogy between the role of the Deal in U.S. politics and the role that private institutions played in Poland during the collapse of socialism, the analogy is certainly a good one. Just as the Deal holds the disparate elements of U.S. politics together, private institutions in Poland, such as the trade unions and the Church, were able to hold the Poles together even when the pro-Soviet puppet government had utterly collapsed. This notion of 'the Deal' is insightful, but Mr. Henderson did not bother to outline what informal practices and procedures make up the substance of the Deal in U.S. politics. Arguably, the respect for state autonomy in electoral matters is one of these informal practices. If so, did not the U.S. Supreme Court's total disregard for the Florida Supreme Court's interpretation of state law defy one of the central tenets of the Deal? Yet Mr. Henderson most emphatically did not make this argument. On the contrary, he defended the Court's decision on pure utilitarian grounds. He argued that the Court's unprecedented intervention, though "politically tainted," was a necessary evil. In his view, to have allowed the recount to proceed would have only created greater confusion and less respect for the final outcome. As he put it, "elections must have an end." This is a fair point, but the problem with this purely utilitarian view is twofold. First, however wise and necessary the Supreme Court's time-sensitive decision may have been from a pragmatic or political point of view, the 'ends' do not always justify the 'means' from a moral point of view. This is the great lesson of Kantian ethics, and is no doubt one of the informal ideals that form the heart of the Hendersonian Deal.[14]

Second, and most important, is that the U.S. Supreme Court had to violate another central tenet of the Deal (in addition to the values of state sovereignty and federalism) to put the election to an end. Though elections must have a definite end, I have always thought that Congress (and not the judiciary) is the exclusive and proper institution for putting to an end a contested presidential election. Actors (including federal judges) are supposed to play by the rules of the Deal, and in this case, the rules are quite clear and explicit. The rules of the game, which can be

[14] This is also one of the great lessons of many widely-read American short stories, such as "The Lottery" by Shirley Jackson and "The Ones Who Walk Away from Omelas" by Ursula K. Le Guin. These short stories can be found in THE NORTON ANTHOLOGY OF SHORT FICTION 668-75, 870-75 (R.V. Cassill ed., 3d ed. 1986).

found in Article II of the U.S. Constitution if anyone cares to look there, confer exclusive power on the Congress to break ties in the Electoral College and to select the winner when no single presidential candidate has garnered a majority of the electoral votes.[15] The great statesman Alexander Hamilton emphasized the role of Congress and the centrality of the political process generally in his classic explanation of the workings of the Electoral College:

> Their votes, thus given, [referring to the votes of the Electoral College] are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.[16]

Let us assume a worst-case scenario to illustrate this basic and fundamental constitutional principle. Suppose Al Gore would have won the popular vote in Florida by a slim margin had the recount been allowed to proceed, and further suppose that the Florida legislature would have elected a pro-Bush slate of electors in defiance of the recount results. This is a worst-case scenario because the lawful winner of Florida would have been in doubt. In this scenario the election appears to lack a definite end since, without Florida's electoral votes, neither of the candidates would have won a simple majority of the electoral votes cast. But even in this worst-case scenario, Congress would have had the final say in the matter under Article II, and for me it is far easier to believe that a decision by Congress, however unfair or arbitrary, would have had more general acceptance than the dubious injunction and judicially-imposed fiat in *Bush v. Gore*. In short, it is the political process (and not the federal courts) that is supposed to put an end to disputed presidential elections.

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[15] The relevant language of Article II is: "The Congress may determine the Time of chusing the Electors, and the Day on which they which they shall give their Votes . . . ." U.S. CONST., art. II, § 1, cl. 3. Under 'expressio unius' principles of interpretation, if Congress can determine the date on which the states must choose their respective electors, Congress likewise has the final power to resolve any disputes involving the choice of a particular state's electors.

[16] *See* THE FEDERALIST NO. 68, at 442 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

The Supreme Court's grave sin, in my humble estimation, was to prevent the political process from running its natural course.[17]

Mr. Henderson went on to analyze the Supreme Court's equal protection analysis. Since this issue has received plenty of attention by many commentators, including the other panel members, and since Mr. Henderson's views on this issue were hardly original,[18] I shall omit his discussion of this aspect of the case. Nevertheless, Mr. Henderson did us a great service. By taking a contrarian view, he challenged us to rethink our views on the merits of *Bush v. Gore*. In the final analysis, however, I strongly believe that Supreme Court was wrong to take this case in the first place. The Court should have waited until after the political process had played itself out.

B. César Vázquez Díaz

Next to speak was César Vázquez Díaz. He began his remarks by providing an excellent history of the contested 1980 gubernatorial election in Puerto Rico (which helped put the recent U.S. presidential election into historical perspective for many young law students in the audience). But in my view, the rest of his presentation was not up to the occasion. For example, at one point he argued that the U.S. Supreme Court ruled in favor of George W. Bush simply because no less than seven of the nine Justices were appointed by Republican presidents.[19] Yet he did not bother to explain why two of the Republican-appointed Justices, the enigmatic David Souter and the venerable John Paul

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[17] Of course, Bush v. Gore is not the first time that a controversial decision by the Supreme Court has trumped the political process. The U.S. Reports abound with examples of questionable judicial intermeddling in the political process. *See, e.g.*, United States v. Nixon, 418 U.S. 904 (1974) (defining scope of executive privilege); Roe v. Wade, 410 U.S. 113 (1973); (striking down on due process grounds state-law restrictions on abortion); Lochner v. New York, 198 U.S. 45 (1905) (striking down on due process grounds state-law regulations of private economic activity); Dred Scott v. Sandford, 60 U.S. 393 (1857) (declaring the Missouri Compromise unconstitutional). The Nixon case is a particularly eggregious example of judicial intermeddling, for the Court speedily ruled against President Nixon's executive privilege claim *before* the full House of Representatives had the opportunity to vote on the articles of impeachment against President Nixon.

[18] Mr. Henderson's comments on equal protection mirrored almost verbatim the Supreme Court's analysis in its per curiam opinion in Bush v. Gore, 121 S.Ct. at 529-33.

[19] Mr. Vázquez Díaz, however, conveniently neglected to mention the fact that all seven members of the Florida Supreme Court were appointed by Democratic governors.

Stevens, not only voted against the majority, but also wrote two of the most passionate and strongly-worded dissents in recent Supreme Court history.[20] In addition, Mr. Vázquez Díaz placed an undue amount of emphasis on the fact that Vice-President Al Gore won 500,000 more popular votes nation-wide than Governor George W. Bush.[21] The same, however, could be said of the 1996 World Series. The Atlanta Braves outscored the New York Yankees in the aggregate but still lost the series. So what? And could not the same type of argument be made in reverse on behalf of George W. Bush. After all, Mr. Bush won twice as many states as Mr. Gore but almost lost the election by the narrowest of margins.

The central theme of Mr. Vázquez Díaz's presentation was the superiority of Puerto Rico's centralized election system in which every single vote is counted by hand. So enamored was Mr. Vázquez Díaz of our local electoral system that he proposed nothing less than the complete and immediate abolition of the Electoral College and its replacement with a Puerto Rico-style popular-vote system.[22] Now, I do not take issue with Puerto Rico's electoral laws; on the contrary, I would proudly say that Puerto Rico could serve as a shining model for many small countries in the world. But to compare our tiny system, which only has to process a mere two million votes, with the vastness and myriad diversity of a polyglot nation such as the United States, where over one hundred million citizens voted in fifty states spanning four time zones, borders on the ludicrous.

In fairness to Mr. Vázquez Díaz, however, I am perfectly willing to concede that the Electoral College system is undemocratic and obsolete.[23] Nevertheless, I would reply that a good many devices found in various corners of the U.S. Constitution are just as archaic and undemocratic as the Electoral College is, if not more so. The unqualified presidential

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[20] Justice Stevens's dissent is at 121 S.Ct. at 539-42. Justice Souter's dissent follows at 121 S.Ct. at 542-46.

[21] As soon as Mr. Vázquez Díaz made this point, I jotted the following remark down in my notes: "so what if G. got more votes? those are the rules."

[22] Mr. Vázquez Díaz proposed the adoption of a uniform voting system for federal elections, but I was sorely disappointed that no details were provided as to what such a system would look like in its particulars. Nor did Mr. Vázquez Díaz address the serious federalism questions involved in such a massive undertaking.

[23] I still recall one of my college professors, Alan J. Wyner (who teaches politics at U.C. Santa Barbara), refer to the Electoral College system a "political dinosaur" in his lectures.

pardon power,[24] the rigorous requirements for amending the Constitution,[25] and the generous bestowal of life tenure on unelected federal judges[26] are just but a few examples. So I would ask: why single out the Electoral College? Why not do away with all of these inconvenient impediments to democracy? The answer, of course, is that the Electoral College system—like the equal-representation rule in the Senate—is a classic constitutional 'trade-off' designed to increase the clout of small states in the political process at the expense of the one man, one vote principle.[27]

To round out his remarks, Mr. Vázquez Díaz called for vigorous campaign-finance reform laws (again, without going into details) and urged the United States to test and adopt new voting technology to replace the detestable punch-card system. He also reiterated (as Professors Acevedo and Ortiz Alvarez would later do) that Puerto Rico's traditional system of paper-and-pencil ballots and manual counting is the most trustworthy ('*más confiable*') election system of all. But to all three gentlemen I would simply reply as follows. Why should the states and federal government be required to spend tens of millions of dollars in sophisticated voting technology if the old-fashioned pencil-and-paper system will do just fine?

C. Héctor Luis Acevedo

Though I am in total and unequivocal disagreement with most of his conclusions, I found Héctor Luis Acevedo's presentation to be not only thought-provoking, but also full of passion and humanity. His ideas were cogently presented, his thoughts were well organized, and above all, his words were heartfelt. He was genuinely and sincerely shocked that Americans had by and large accepted the events in Florida with "a surprising lack of indignation."[28] At one point, he poignantly and rightly

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[24] *See* U.S. CONST., art. II, § 2.
[25] *Id.* art. V.
[26] *Id.* art. III, § 1.
[27] There is an extensive literature on the topic of constitutional trade-offs. *See generally*, David A.J. Richards, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989). For his part, I imagine that Robert Henderson would say that the Electoral College framework is part of the original and informal 'Deal' in U.S. politics, in this case, the deal made between small and large states during the drafting and ratification of the U.S. Constitution.
[28] Professor Acevedo attributed this phrase ("a surprising lack of indignation") to a column by

noted the bitter irony of the whole affair. What would have happened, he asked, if the sordid events of Florida had taken place in the Dominican Republic or Haiti or even Puerto Rico? The U.S. Marines have invaded our Caribbean neighbors for lesser forms of election irregularities in the past.[29] But after the debacle in Florida, how can the United States retain its moral leadership in Latin America and around the world when the votes of so many American citizens—mainly blacks, Hispanics, and the poor—were all but cast out by the highest court of the land?

I found Professor Acevedo's passionate discourse to be refreshing and his analysis of *Bush v. Gore* to be insightful, though ultimately misguided. To him, the most outrageous, cunning, and morally offensive aspect of the Court's per curiam opinion is its misplaced and selective reliance on equal protection. Professor Acevedo did not mince words. He called the majority's use of the equal protection doctrine a cruel deception ('*una burla*', in his words). He argued that the equal protection principles of the U.S. Constitution are, at the very least, supposed to protect those who need it the most: minority groups and the poor. But in his view, the result in *Bush v. Gore* turns the ideal of equality on its head, for it uses equal protection principles to disenfranchise the very people it is designed to protect.[30] Professor Acevedo also noted that equal protection principles should apply not just to the recount process but also to the actual election process itself. Recounts must no doubt satisfy certain minimum equal protection standards, he said, but so must the electoral event in the first place. Everyone who votes must have the assurance that his vote will eventually be counted. How, then, could a majority of the Court stop the

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historian Arthur Schlesinger, Jr. *See* "It's a Mess, But We've Been Through It Before," TIME, Nov. 20, 2000, at 46 (this concise article is also available on the Internet at <http://www.time.com/time/nation/article/1,8599,87749,00.html>). Though Professor Acevedo's point is well taken, he in fact took Schlesinger's words totally out of context. When Schlesinger spoke of the populace's lack of indignation, he was not referring to the events in Florida but rather to the Compromise of 1877. Schlesinger himself displayed a complete lack of indignation over the results of the 2000 presidential election: "The Republic has faced succession crises before . . . . There is no need to get too excited over this one." *Id.*

[29] As a logical matter, I might add, the reverse would also be true. If U.S. military intervention in Latin America is justified in certain situations, such as election controversies, one could argue that the Marines (or would it be the National Guard?) should have been sent into Florida to restore the legitimacy of the Floridian electoral process.

[30] Professor Akhil Amar of Yale Law School also made this point last December in an articulate op-ed piece published in the Los Angeles Times. *See* Akhil Reed Amar, "Should We Trust the Judges?," L.A. TIMES, Dec. 17, 2000 (Metro section).

statewide recount on equal protection grounds while at the same time ignore the lack of equality on election day, since it was predominantly minority and poor districts in Florida that used the unreliable punch-card system? As Professor Acevedo put it, to avoid a lesser evil (the risk of recount teams using different and unequal standards in the recount stage) the majority of the Court was willing to tolerate a greater evil (allowing the votes of many persons to go uncounted altogether).

Furthermore, Professor Acevedo noted that the equal protection doctrine was not germane to the facts of the Florida recount by any measure. What does the Supreme Court mean by equal protection, he asked, in a state such as Florida where each county has its own ballot and election procedures? How may a judge, in the name of equality, call for the application of identical standards to different counties in these unique circumstances? "*¿De qué estamos hablando?*," he asked.[31] As he saw it, the Supreme Court's reliance on equal protection principles to ratify its shabby result was nothing less than a horrendous defilement of the noble ideal of equality.[32] These are legitimate and fair concerns, but there was one critical question that Professor Acevedo did not even raise, let alone try to answer: why did the Florida Supreme Court extend the election deadlines in the first place? On what authority? Perhaps the U.S. Supreme Court's equal protection analysis was flawed, but so was the Florida Supreme Court's as well. After a generation of judicial activism that has produced such questionable decisions as Roe v. Wade,[33] perhaps the judicial activists are now getting a small taste of their own medicine.

In the course of lamenting the Supreme Court's supposed mishandling of the equal protection doctrine, Professor Acevedo also touched upon a critical policy concern, which I should like to discuss at

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[31] Literally, this phrase means: "What are we talking about?"

[32] Of course, this argument assumes that the notion of equality has an objective and readily-ascertainable meaning. Yet it has been persuasively argued that the equality principle—the notion that people who are alike should be treated alike—is circular, for this principle by itself does not tell us how to determine whether persons are alike or not in any given situation. *See, e.g.*, Peter Westen, "The Empty Idea of Equality," 95 HARV. L. REV. 537, 543-48 (1982). Professor Westen has even gone as far as to say that the concept of equality is "a simple tautology" and "an empty vessel with no substantive moral content of its own." *Id.* at 547.

[33] 410 U.S. 113 (1973). In my view, Roe is the worst miscarriage of justice in the history of the Supreme Court, for I shall never accept the principle that unborn children can be killed at will. As of this writing, the House of Representatives approved the Unborn Victims of Violence Act. *See* H.R. 503, 107th Cong., 1st Sess. (2001). I do hope that this is the first step in Roe's eventual demise.

length. He maintained that new voting technology often works to the direct disadvantage of minorities and the poor. The more sophisticated and complex the manner of voting is, he said, the more minorities and the poor are at risk of casting defective ballots, for they are the ones who are most likely to make mistakes when using new voting technology—whether punch-card systems, optical scanning systems, or newer ATM-style voting machines.[34] In an effort to achieve electoral efficiency, he pleaded, many states have lost sight of the basic purpose of holding an election in the first place: to count every single vote cast. After all, what is the point of holding a free and fair election, he asked, if some of the voters are unable to vote correctly? His main point, then, was that ballots should be as simple and 'user-friendly' as possible, and on this note, he extolled the simple paper-and-pencil ballot used in Puerto Rico.

To his credit, Professor Acevedo did not just argue this point in the abstract (as some professors are wont to do); he supported his assertions with some empirical evidence. In Puerto Rico, for example, where voters employ a simple and easy-to-use pencil-and-paper ballot, only a miniscule percentage (0.43% on average) of all ballots cast is found invalid.[35] In the United States, by comparison, more than twice as many votes—1.43% of all ballots cast—are found invalid in those jurisdictions using the 'optical scanning' process, which is considered one of the most advanced voting technologies today. The infamous punch-card, however, is by far the most problematic ballot. In those U.S. jurisdictions using the

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[34] Some empirical evidence tends to support Professor Acevedo's argument. For example, the Caltech/MIT Voting Project recently issued a study on voting behavior in electoral precincts with large concentrations of minority voters. The results of this study apparently showed that new forms of voting technology such as optical scanning were "just as bad" (in terms of defective ballots) as punch-card voting systems. This preliminary study is on file with the author and is also available online at <http://www.vote.caltech.edu/Reports/report1.pdf>. Similarly, the Secretary of State of Georgia, Cathy Cox, recently testified before a U.S. Senate committee studying election reforms that precincts in Georgia with the largest minority populations had a higher rate of uncounted votes regardless of the type of voting technology used. *See* Testimony of the Honorable Cathy Cox, Georgia Secretary of State, submitted to the U.S. Senate Committee on Commerce, Science and Transportation on March 7, 2001. A complete text of Ms. Cox's testimony before the Senate is available online at <http://www.sos.state.ga.us/pressrel/testimony.pdf>.

[35] Interestingly, Professor Acevedo noted that only 2% of all electoral precincts in the United States use the traditional pencil-and-paper ballot. This figure was also cited in TIME, Nov. 27, 2000, at 55. Perhaps the main reason why paper-and-pencil ballots are so rarely used in stateside elections is the panoply of logistical problems surrounding the hand counting of such ballots. *See supra* notes 37-39 and accompanying text.

punch-card system, the percentage of invalid ballots is a whopping 3.9%.[36] That is, more than twice as many punch-card ballots are found defective than optical scanning ballots. If true, this is an extraordinary figure. As Professor Acevedo eloquently and passionately argued, something has gone horribly wrong when a large number of ballots go uncounted due to human error.

Professor Acevedo drew a startling (and I think, unfounded) conclusion out of these voting statistics: that there is a built-in bias against minorities and the poor in jurisdictions using punch-cards and other complex types of ballots. According to him, it is the poor, the downtrodden, and the disadvantaged who are most likely to be confused and miss-mark their ballots, because punch-card and optical-scanning ballots are simply too hard for persons with little formal education to use. There are no symbols next to the names of the candidates, and oftentimes the voting procedure is not entirely obvious even to a sophisticated voter. For Professor Acevedo this situation is fundamentally wrong and intolerable.

Here is where I part company with Professor Acevedo in the strongest possible terms. Though his policy arguments were plausible, at the end of the day he failed to persuade me that new voting technologies are inherently suspect, or conversely that paper-and-pencil ballots are inherently superior. He painted too bleak a picture and failed to address a number of subtleties. I do agree in principle with Professor Acevedo that voting should be made as simple as possible and that Puerto Rico's simple paper ballot is superior to punch-cards and optical scanning ballots in many respects. But Professor Acevedo, I believe, lost sight of the fact that paper-and-pencil ballots are not error-free.[37] Like most things in life, there are significant trade-offs involved in any system of voting, and the proper balancing of these trade-offs is not entirely obvious.[38] I accept the proposition that paper-and-pencil ballots may reduce the

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[36] These statistics on optical scanning ballots and punch-cards were also cited in Justice John Paul Stevens's dissent in Bush v. Gore, 121 S.Ct. at 541 n. 4.

[37] For example, paper-and-pencil ballots are easier to forge and tamper with than other types of specialized ballots. Also, the mark made by a standard No. 2 pencil can easily be erased.

[38] Though the notion of trade-offs comes from the economic literature (where it is often referred to as 'opportunity costs'), this concept has many useful applications in law. I am greatly indebted to scholars such as Guido Calabresi and Robert C. Ellickson for getting me interested in the economic approach to law.

possibility of voter error at the moment when the voter casts his vote. But at the same time, this type of ballot involves a greater increase in the possibility of human error by poll workers at the moment when the votes are actually counted. For poll workers are under a severe amount of pressure to count thousands of ballots in a short period of time. The Puerto Rico electoral system provides a perfect example of this point. Yes, voter error in Puerto Rico is a mere 0.43%, but this figure does not take into account the extent of unavoidable errors by poll workers, who must count thousands of paper ballots by hand in a short period of time. In Puerto Rico, the polls close at three o'clock in the afternoon. By four-thirty, some precincts are already reporting results. It is hard to believe that a quick hand-count of thousands of paper ballots by a group of untrained volunteers is not fraught with errors and mistakes in computation. In short, poll workers are likely to add up the ballots wrong when paper ballots are counted by hand under the severe time pressure of an election.[39]

Aside from the question of trade-offs, Professor Acevedo (and Mr. Vázquez Díaz, for that matter) also failed to address the serious logistical problems of using paper-and-pencil ballots outside of Puerto Rico.[40] In Puerto Rico elections, voters elect a limited number of office holders—governor, resident commissioner, town mayor, municipal assemblymen, and legislators. Three simple ballots suffice for this purpose. But the use of paper-and-pencil ballots in stateside elections could present serious logistical problems. In a presidential election year, stateside voters typically have many more candidates and issues to choose from. They must not only elect the president, members of Congress, and one-third of the Senate; they must also fill myriad state and local offices and decide a considerable number of referenda questions. That is why stateside election ballots are often very lengthy in a presidential election year. Imagine if these ballots were in the paper-and-pencil format and thus had to be counted by hand. It is hard to imagine, for the time and resources required to count millions of such monster ballots by hand would require a gargantuan effort indeed.

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[39] Another related point is that hand counting does not eliminate the possibility of stolen or stuffed ballots or other election irregularities. The contested 1980 election in Puerto Rico provides an excellent demonstration of this point.

[40] I thank my assistant Mario Torres for bringing this point to my attention.

Neither did Professor Acevedo address the possibility that a significant number of voters actually leave their votes blank on purpose as a form of protest. According to one report, blank votes comprise 2% of the votes in U.S. presidential elections, which is far more than the difference that separated Al Gore from George W. Bush in the popular vote.[41] The Gore-Bush election itself provides a textbook illustration of why some voters might intentionally choose to leave their presidential vote blank. As the Green Party candidate Ralph Nader noted in his campaign speeches, the positions of the two major party candidates were remarkably similar on a variety of major issues of the day.[42] For example, both Mssrs. Gore and Bush supported the United States' membership in the international World Trade Organization and the deployment of American soldiers in Kosovo.[43] Given this unappealing 'choice' between two lackluster candidates, one can begin to understand why a rational voter might not vote at all or choose to leave his vote blank.

My most serious disagreement with Professor Acevedo, however, has to do with his assumptions regarding the lack of intelligence of the average minority voter. His arguments ultimately rest on the hidden and totally offensive assumption that minorities and the poor are basically too stupid to follow instructions and vote properly, and I for one am simply unable to accept this position. Though I agree in principle that voting should be made as simple as possible to reduce the incidence of defective ballots, I do not think that punch-card and optical scanning systems are so inherently difficult that minorities and poor people somehow lack the intelligence to use these systems correctly. It is true that 3.9% of punch-card ballots are found invalid due to voter error, but there is no nation-wide evidence to suggest that minorities and the poor are the primary victims of punch-card errors. Indeed, if the media reports out of West

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[41] *See, e.g.*, "Remember Recount, and Weep," THE ECONOMIST, Apr. 28, 2001, at 33; Robert Tanner, "Studies Confuse Search for Better Voting Machines," Associated Press Newswire, reprinted in THE SAN JUAN STAR, Mar. 19, 2001, at 17.

[42] In one memorable phrase, Nader described the choice between Bush and Gore as the choice between Tweedle-Dee and Tweedle-Dum.

[43] I should also note that the Kosovo campaign raises an interesting and, unfortunately, recurring constitutional law issue. Though American military forces were used in NATO's air campaign against the former Yugoslavia, at no point did Congress even bother to declare war against the Belgrade Government. Either NATO's military actions did not constitute a 'war' in the ordinary sense of the word, or the President violated Congress's exclusive power to declare war when he unilaterally ordered the air strikes.

Palm Beach in the days immediately after the 2000 election are any indication, it was wealthy and middle-income voters, mostly Jewish retirees, who marked their punch-card ballots incorrectly by voting for Patrick J. Buchanan instead of Al Gore.

The statistics cited by Professor Acevedo do not impress me.[44] The totality of the empirical evidence is ambiguous. If anything, the initial findings of the post-recount audit commissioned by the Miami Herald and others refute Professor Acevedo's assertions (at least as far as punch-cards, the most dubious of ballots, are concerned).[45] While it is true that the total number of problem ballots was far higher in Florida counties using punch-card voting systems, the fact is that in all punch-card counties as a whole more Bush voters made mistakes when voting for their candidate than Gore voters did:

> Contrary to popular belief, mismarks for Gore were less than mismarks for Bush in punch-card counties. Marks of some type were found in the Bush position on one ballot for every 172 valid Bush punch-card votes; marks in the Gore position were found on one ballot for every 181 valid Gore punch-card votes.[46]

This is smoking-gun evidence. Unless we are to believe that minorities voted in equal numbers for Bush and Gore, which they did not, the findings of the Florida auditors appear to refute Professor Acevedo's assumptions about minority voters being more likely than other voters to cast defective ballots.

To sum up, the main reason why I ultimately disagree with Professor Acevedo's critique is that I do not think that the Constitution requires voting to be made so simple that even a fourth-grader could vote. Voting is one of highest civic duties of citizenship.[47] This civic duty implies a tremendous responsibility on the part of the citizen, and I do not think that it is too much to ask of voters to learn how to vote properly and to exercise due care in the voting booth.

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[44] As Mark Twain is reported to have said: "There are lies, damned lies, and statistics."
[45] *See* Merzer, *supra* note 2.
[46] *Id.*
[47] As Professor Amar notes in his excellent history of the U.S. Bill of Rights, the right to vote was historically considered by American jurists as one of the four core political rights of citizenship, along with the rights to hold office, sit on juries and serve in militias. Akhil R. Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258-61, 271-74 (1998).

D. Professor Ortiz Alvarez

I have a profound respect for Professor Ortiz Alvarez, who I consider one of our faculty's best law professors, but I must take issue with one of the statements he made during the conference, and I want to do this up front. In the course of his presentation, Professor Ortiz Alvarez commented on the viability of allowing Puerto Rican residents to vote in U.S. presidential elections. To my utter shock and dismay, Professor Ortiz Alvarez casually said that such an aspiration was sheer "lunacy" (*locura*) and an utter "*disparate*." The word *disparate* is hard to translate, but like the word *locura*, it refers more or less to something that is foolish or senseless or just plain crazy. A softer, less offensive translation might be the word quixotic. On a literal level, I concede that his analysis was perfectly sound. Under the current, muddled state of Puerto Rico-federal relations, Puerto Ricans who live on the Island may not vote in U.S. presidential elections.[48] Professor Ortiz Alvarez correctly noted a constitutional amendment was required to enfranchise U.S. citizens living in the District of Columbia.[49] He also noted that under Article II of the U.S. Constitution, the right to appoint electors (who, in turn, elect the president and vice-president) is a 'state right' and not a right of individuals. This is precisely the holding of the First Circuit in the recent case of Igartúa de la Rosa v. U.S.[50] This comment is not the time nor place to discuss the intricate details of this very interesting federal litigation,[51] but I do wish to comment on Professor Ortiz Alvarez's unfair remarks on the presidential vote issue.

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[48] This anomalous situation is due to two factors: Puerto Rico's 'unique' Commonwealth status and the federal Uniformed and Overseas Citizens Absentee Voting Act, 24 U.S.C. §§ 1973dd to 1973dd-6 (1987). Under the Commonwealth status, Puerto Rico's sole elected representative to the federal government is the Resident Commissioner. *See* 48 U.S.C. § 891 (1987). The Resident Commissioner sits in the U.S. House of Representatives but has no voting rights. Under the above-referenced Voting Act, U.S. citizens residing on foreign soil may vote in federal elections as absentee voters of their last state of residence. A U.S. citizen who moves to Puerto Rico, however, loses by default his right to vote in federal elections.

[49] *See* U.S. CONST., amend. XXIII (1961).

[50] 229 F.3d 80 (1st Cir. 2000) (per curiam). This interesting case may still have some life in it. As of this writing, a petition for certiorari is pending before the U.S. Supreme Court.

[51] I am in the process of writing a separate article on the Igartúa case.

First of all, regardless of the political or legal merits of this complicated issue, I think that it is entirely right and fair to say that the desire of a good many Island residents to vote in U.S. presidential elections is a legitimate aspiration.[52] After all, all persons born in Puerto Rico are U.S. citizens by law,[53] and many Puerto Ricans have answered the call of duty and have served in the U.S. Armed Forces in times of war and peace with great distinction. Yet to call this aspiration—a legitimate aspiration held by more than half of all Puerto Ricans—a *disparate* and a *locura* betrayed a great lack of sensitivity and a shabby double-standard. I am compelled to cry out and explain why. But first, a simple analogy is in order. A small and diminishing cadre of Puerto Ricans still believe in independence. For this group of hard-core partisans, the ideal of independence is a moral question of the highest significance. To call such an ideal a *disparate*, no matter how unrealistic or quixotic the ideal of independence is, would rightly be taken as a great offense by any good-faith supporter of the independence cause. Likewise, the arguments in favor of the presidential vote in Puerto Rico, though unsound under a literal reading of Article II and no doubt quixotic, are also undeserving of the *disparate* label. I would like to believe that my good friend was momentarily carried away when he said this. Perhaps he feels, like I do, that a constitutional amendment would be a worthy, though quixotic, enterprise.[54]

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[52] In fact, a Gallup poll published on November 4, 1998 in the now defunct newspaper El Mundo reported that 70% of Puerto Ricans on the Island wanted to vote in the 2000 presidential elections. *See* David C. Indiano, "The Advocate's Corner: Why Would a U.S. Citizen Residing in Puerto Rico Not Want to Vote for the President of the United States" (Newsletter of Puerto Rico Federal Bar Association), Winter 2000-2001, issue 29, at 10.

[53] Congress granted the people of Puerto Rico U.S. citizenship for the first time in 1917 with the enactment of the Organic Act of 1917. *See* 39 Stat. 951 (1917). The 1917 Organic Act is commonly called the Jones Act to distinguish it from the Organic Act of 1900, or the Foraker Act. For a complete history of U.S. citizenship and Puerto Rico, see José Cabranes, CITIZENSHIP AND THE AMERICAN EMPIRE (1979). Another good history of Puerto Rico-U.S. relations is José Trías Monge, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997). These are excellent books and a must-read for anyone interested Puerto Rico's history.

[54] Among the benefits of allowing Puerto Rico into the Electoral College would be an increase in the Island's political clout in presidential politics. As private lawyer David C. Indiano noted in a recent article, Puerto Rico's eight potential electoral votes could have been decisive in the 2000 presidential election. Had the First Circuit affirmed Judge Pieras's judgement in Igartúa and had Al Gore then carried the Island, Mr. Gore would have won the presidency. *See* Indiano, *supra* note 44, at 8.

Putting the Article II question to one side (and I am not so sure that Article II is dispositive, as I shall explain below), Professor Ortiz Alvarez's view of the presidential vote issue also reflects an ugly double standard. On one hand, all of us believe in the democratic process and want every eligible voter to exercise his civic duty. "Every vote counts" is our universal mantra. But at the same time, some of us apparently do not want Puerto Rico to participate in presidential elections in the absence of a constitutional amendment. Why not? Is Article II such a formidable barrier given the fact that Puerto Rico is considered a 'State' for other constitutional purposes?[55] In any case, is not a D.C.-style amendment a laudable goal? Is such an amendment even necessary? Given the 'one man, one vote' standard endorsed by the U.S. Supreme Court after the D.C. amendment was approved, one could plausibly argue that an amendment is not necessary in Puerto Rico's case.[56] Professor Ortiz Alvarez did not take the time to answer these most critical questions. I invite him to do so, for these are constitutional law questions of the first order.

Specifically, I would want to know whether Professor Ortiz Alvarez favors, as a normative matter, Puerto Rico's admission into the Electoral College on an equal footing with the states. If he is, then our only disagreement is in the method chosen to make this happen. If not, he should explain his reasons why. Perhaps participation in a federal election is inconsistent with greater insular autonomy. I certainly respect that point of view. Perhaps there are other reasons. I should like to know what they are. But whatever his reasons, the pure irony of Professor Ortiz Alvarez's position is unavoidable. It is no secret that he is supporter of the Popular Democratic Party (PDP) and that the PDP favors the improvement or enhancement ('*desarrollo*') of the current Commonwealth status. I am thus compelled to ask him in advance some rhetorical questions. Is not the presidential vote for Puerto Rico an excellent way of enhancing the Commonwealth status? What is so wrong with a measure that would make the current U.S.-Puerto Rico relationship more democratic in fact?

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[55] *See, e.g.*, Calero-Toledo v. Pearson Yatch Leasing Co., 416 U.S. 663 (1974) (holding that search and seizure provisions of the Fourth Amendment apply to Puerto Rico).

[56] *See* Reynolds v. Simms, 377 U.S. 533 (1964). This leading case, which established the one-man, one-vote principle, was decided three years after the passage of the Twenty-Third Amendment.

Currently, I am in the process of writing a paper on the presidential vote question with an emphasis on the history of Article II, but I would nevertheless like to sketch a few points here, if only to show the utter complexity of the issues involved. First of all, the Electoral College system, as it is put into practice today, in no way, not even remotely, comports with the 'original understanding' of the framers (and ratifiers) of Article II.[57] Today, each state selects at least two slates of electors, one for each major presidential candidate. If the Republican candidate wins the popular vote of a given state, then all of the pre-selected Republican electors are appointed for that state. Conversely, if the Democratic candidate wins the state's popular vote, the entire slate of Democratic electors is chosen. This party-slate system, however, is totally inconsistent with the original understanding of Article II. Under the original Article II system, each state chose just one set of electors, and each individual elector was free to follow his conscience in choosing the candidate of his choice independent of party affiliation. That each member of the Electoral College was not only free to follow his conscience in voting but also obligated to, is made perfectly clear in various parts of the Federalist Papers.[58] The candidate with the most electoral votes would win the presidency, and the runner-up, independent of his party affiliation, would become vice-president.[59] This may sound strange, but what is stranger is the fact that the framers did not contemplate a party system at all. What has happened is this: Article II has been unofficially amended to take into account the unique two-party system that emerged in American politics. My tentative argument regarding Puerto Rico and Article II, then, is as follows: if Article II can be unofficially amended to allow each party to elect its own slate of

[57] For the view that the intent of the ratifiers at the state ratifying conventions, as opposed to the framers at Philadelphia, is what truly counts in constitutional interpretation, see Akhil Reed Amar, "Our Forgotten Constitution," 97 YALE L.J. 281 (1987).

[58] *See* THE FEDERALIST NO. 64, at 421 (John Jay) ("an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters"), and NO. 68, at 441 (Alexander Hamilton) (electors "will be much less apt to convulse the community with any extraordinary or violent movements") (Benjamin Fletcher Wright ed., 1961).

[59] This scenario is precisely what occurred in the presidential election of 1796, in which John Adams, a Federalist, was elected president and Thomas Jefferson, an Anti-Federalist, vice-president. The presidential election of 1796 was the only time the U.S. had elected a president and vice-president from different political parties. For a good overview of the election of 1796, see Joseph Charles, THE ORIGINS OF THE AMERICAN PARTY SYSTEM (1956).

electors, what is wrong with amending it (unofficially or by judicial decision) to allow Puerto Rico into the electoral college club? Either we interpret Article II strictly for all purposes as the framers intended, or we allow exceptions to be made. That is my point, pure and simple.

At this point, I should like to briefly review the other points made by Professor Ortiz Alvarez. First, he summarized the momentous electoral reforms enacted in Puerto Rico in 1982. I shall not repeat this portion of his presentation,[60] but I do wish to say that his simple and straightforward defense of Puerto Rico's old-fashioned and cumbersome pencil-and-paper system was the best one I have heard to date. According to Professor Ortiz Alvarez, no technology—no matter how fail-proof or easy to use—could ever replace the innate satisfaction the typical Puerto Rican voter feels when he presses his pencil to his ballot and marks a simple 'X' next to the candidates of his choice. When all is said and done, I think this is still the best argument in favor of the old-fashioned ballot, despite its many drawbacks. There is, in other words, a substantial intangible or psychic benefit to actually marking one's ballot with a pencil.[61]

Though I do not agree with Professor Ortiz Alvarez's analysis of *Bush v. Gore*, I must say that his description of the circumstances surrounding the case was poignant and perceptive. In the spirit and tradition of legal realism, he astutely noted that both the stock market and Bush's margin of victory were plummeting as the Florida litigation was progressing on various fronts. If the U.S. Supreme Court had not intervened when it did, he noted, Gore was likely to overtake Bush and the markets might drop even further due to the commotion and uncertainty that a Gore lead, however thin, would create. In his view, then, the Court put a stop to the

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[60] According to Ortiz Alvarez, the three most important reforms of 1982 were the promotion of consensus by making the governor's appointment of the chairman of the Puerto Rico Elections Commission subject to supermajority confirmation by the legislature; the prevention of fraud by forcing every voter to stick one of his fingers in a jar of indelible ink after voting; and the use of three separate ballots for gubernatorial, legislative, and municipal offices. For a succinct but thorough review (in Spanish) of the history of Puerto Rican election reforms, see Héctor Luis Acevedo, "Cinco principios de Derecho Electoral producto de la experiencia," 39 REV. DER. P.R. 1 (2000).

[61] A good analogy might be the difference between an e-mail or a fax and a handwritten letter. The texture of the stationery, the design of the stamp, the feel and smell of the envelope: all these elements make the act of opening and reading a letter a far more pleasurable experience than receiving an impersonal electronic correspondence.

Florida recount and ruled in favor of Bush to prevent this messy and contentious situation from spiraling dangerously out of control.

But Professor Ortiz Alvarez was by no means defending the Supreme Court's intervention in the Florida recount, only putting it in its proper historical and social context. Indeed, he noted that under the majority's perverse analysis, for the first time in judicial history "equal protection was obtained by *not* counting votes."[62] This memorable phrase captures the sheer absurdity and Orwellian nature of the majority's logic, for true equality implies that the votes of all persons, rich and poor, black and white, be counted. In Professor Ortiz Alvarez's view, the majority of the Court stopped the recount in Florida in a dogged attempt to protect a perverted and distorted form of 'equality.' At one point he went as far as to compare the Supreme Court's per curiam opinion in *Bush v. Gore* to the infamous *Dred Scott* case.[63] This comparison, however, is far too preposterous to be taken seriously or to merit comment, though I recognize that one could argue that in form, if not substance, what the majority did in *Bush v. Gore* is no different from what the majority of the Court did in *Dred Scott*: in both cases the majority imposed its own political views to reach an inequitable and questionable result. This is no doubt the view of Professor Ortiz Alvarez and many Americans as well. In my view, however, the true evil committed by the Court in *Bush v. Gore* is not that it effectively disenfranchised minorities and the poor, which in any case it did not do.[64] The Court's grave sin was to interfere with the political process.[65] This is for me the real reason why the Supreme Court's decision is indefensible: the Court should simply not have trumped Congress's ultimate power under Article II to decide contested presidential elections.

Conclusion

Bush v. Gore will no doubt provide scholars as well as pundits plenty to write about for years to come.[66] God knows how many professors (in

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[62] In Spanish, Professor Ortiz Alvarez actually said that under the Court's perverse analysis "*la igualdad se consigna no contando los votos*."
[63] Dred Scott v. Sandford, 19 How. (60 U.S.) 393 (1857).
[64] *See infra* text accompanying notes 44-46.
[65] *See infra* text accompanying notes 15-17.
[66] The most recent book to published on the subject was written a by journalist. *See* Bill Sammon,

addition to my modest contribution in these pages) are in the process of writing lengthy academic articles on this historic case.[67] But when all is said and done and the ink turns dry, a fair and reasonable observer will still have to concede that the legal and moral arguments on both sides are more or less plausible.[68] The Supreme Court's 5-4 split bears this view out. After all, reasonable men can differ as to the true meaning of equality and the wisdom or soundness of the majority's per curiam opinion. In fact, the way I see it, the real controversy in *Bush v. Gore* is more mundane and prosaic than most commentators are willing to admit. At the center of this legal storm is not a technical or philosophical dispute about the true meaning of the Constitution, but rather a good faith and garden-variety struggle between two competing (and equally plausible) views of the underlying facts of the case. Let me explain.

In my view, the result in *Bush v. Gore* turns less on arcane doctrines of constitutional law and more on one's answer to the following factual question: were the infamous 'undervotes' in fact ever counted?[69] As we shall see, there is no 'right' answer to this question. The basic facts of the case are relatively simple and not in dispute. A substantial number of ballots were reported as undervotes by the vote-tabulating machines.[70] The crux of the problem, then, is that this simple fact can be interpreted in two radically different ways. On one hand, one can plausibly argue that the disputed undervotes were never really counted on the ground that a ballot marked as an undervote is not truly counted until it is inspected by hand in some sort of manual recount procedure. But on the other hand,

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AT ANY COST: HOW AL GORE TRIED TO STEAL THE ELECTION (2001). *See also* Samuel Issacharoff, *et al.*, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001).

[67] Dean Kathleen M. Sullivan of Stanford Law School and Professor Laurence H. Tribe of Harvard Law School, in particular, could offer an inside perspective on the events leading up to Bush v. Gore, since they were part of Vice-President Al Gore's legal team.

[68] Even a case as venerable as Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), offers a fitting example of what I am trying to say here. On the most basic level, the controversy in Marbury ultimately hinges on the answer to a relatively mundane property law question: is the act of physical delivery necessary for a signed and sealed commission to become effective? Reasonable jurists can differ on this point. It is also worth noting that had Chief Justice John Marshall ruled in the negative, that would have been the end of the matter.

[69] Recall that an undervote is a ballot in which no vote for president is recorded by the vote-counting machine.

[70] In all, a total of 67,248 ballots were reported as undervotes in all 67 Florida counties. *See* Merzer, *supra* note 2, at A-1.

one could very well argue that the so-called undervotes were in fact counted because they were processed through the vote-tabulating machines. On this view, a ballot is considered 'counted' so long as it inserted into a vote-counting machine (and so long as the machine is working properly, I might add). In short, the real controversy in *Bush v. Gore* is ultimately over the facts of the case. Herein, then, lies the critical and fatal flaw in the analyses of Professors Acevedo and Ortiz Alvarez.[71] They both assumed that the Florida undervotes were never counted, and as a result, they concluded that the majority's mistake in *Bush v. Gore* was to halt the manual recount of the undervotes. But as I shall further explain in this section, the opposing view (that the undervotes *were* counted) is equally plausible, and either way, there is no principled or objective way of determining which view is 'right.'

The infamous Roger Clemens-Mike Piazza broken-bat incident during game two of the 2000 World Series provides an instructional illustration of this point.[72] Again, the facts are simple. In the top half of the first inning, Mike Piazza, the catcher and clean-up hitter for the New York Mets, was batting against Roger Clemens, one of baseball's greatest pitchers.[73] On the fourth pitch Piazza took a swing and hit a foul ball and broke his bat on the pitch. The top half of the bat went flying towards the pitcher's mound. What happened next, though, depends on whom you ask. After the game, Clemens said he picked up the broken bat and reflexively "tossed" it "in the direction" of Piazza, who just happened to be running down the first-base line. He said that he had only meant to toss the broken bat to the batter's boy. Mike Piazza, however, understandably took a far less sanguine view of these events. He told reporters after the game that it appeared to him that Clemens had intentionally thrown the bat towards him in an undisguised effort to intimidate him.[74] To the extent that both views are equally plausible and consistent with the facts, we shall never know which version is the truth.

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[71] *See infra* text accompanying notes 29-30, 63-64.

[72] The game in question was played on Monday, October 23, 2000, at Yankee Stadium. An extensive compilation of news reports and commentaries on the Clemens-Piazza broken-bat incident is available online at <http://www.espn.go.com/mlb/playoffs2000>.

[73] In tribute to Roger Clemens's great prowess as a pitcher, his nickname is The Rocket. As of this writing, Clemens was sixth on the all-time strike-out list. A profile and scouting report on Roger Clemens is available online at <http://espn.go.com/mlb/profiles/profile/3340.htm>.

[74] This view is all the more plausible if one recalls that the last time the two players had squared off (during an inter-league game at Yankee Stadium on July 8, 2000), Clemens had decked Piazza

This sort of situation—in which there are two (or more) ways of looking at the same set of facts—occurs frequently enough in life to merit a descriptive label. To make use of a baseball analogy, I shall call this phenomenon the 'umpire's curse.' In baseball the umpire is required to make all manner of fastidious factual determinations on the spot. Was a ball hit towards the foul line foul or fair? Was a 90 mile-per-hour fastball on the outside corner of the plate a strike or a ball? Did the baserunner reach first base in time? The umpire must decide in a fraction of a second. Invariably, though, a player, the team manager or the fans themselves will be in total disagreement with the umpire's call. The affected player or team manager may at times even declare his objection by arguing with the umpire or (in the case of fans) booing him.[75] This is why I call this phenomenon the umpire's curse, for the fact-finder—no matter how great his level of authority or how unreviewable his decision-making power—is frequently second-guessed by players and coaches who happen to see the same set of facts differently.[76]

In the final analysis, the crux of the controversy in *Bush v. Gore* bears a striking resemblance to the Clemens-Piazza incident: in both cases there are two plausible but different ways of interpreting the same set of facts, independent of whatever the operative rules are and independent of the fact-finder's decision-making authority. Of course, it is no accident that both sides in *Bush v. Gore* adopted self-serving positions as to the facts—just as it is no surprise that Yankee fans tended to accept Clemens's version, while Mets fans on the whole supported Piazza's. The Bush position was that the Florida undervotes were fully counted, since a ballot is 'counted' in the Bush view once it is run through the vote-counting

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with a pitch that hit the beak of his helmet. Piazza suffered a mild concussion and had to miss the All-Star Game as a result of Clemens's wild pitch.

[75] Perhaps the most peculiar aspect of this situation is the utter hopelessness of getting an umpire to change a call. I have been an avid baseball fan since the age of 8 and have watched countless major league games in my lifetime, and yet I know of not a single instance in which an argument with an umpire has actually resulted in the umpire changing his call. Despite the futility of arguing with umpires as well as the grave risk of being ejected from the game, players and coaches will perhaps always persist in arguing with umpires.

[76] For example, Rule 9 of the Official Rules of Major League Baseball confers on umpires final authority to make calls. Similarly, the U.S. Supreme Court has declared (wrongly, in my view) that its pronouncements are "supreme in the exposition of the law of the Constitution." *See* Cooper v. Aaron, 358 U.S. 1, 8 (1958). It is worth noting the obvious: that despite their authority and stature, neither umpires nor federal judges are immune from criticism after they have rendered their decisions. Herein lies the umpire's curse.

machine. In contrast, the Gore camp took the position that the disputed undervotes were never really counted precisely because the vote counting machines failed to record a valid vote on those ballots. Notice that there is really no scientific or objective way of discovering which of these positions is the 'truth.'[77] Both views are equally plausible in the abstract. My main point, then, is that in these types of situations there is no principled way of choosing between these competing premises. In my view, this fact alone—the fact that both the Bush and Gore views of the undervotes are equally plausible—was in itself a good reason for the Supreme Court to have declined jurisdiction, so as to avoid the appearance of engaging in partisan politics.[78]

There is an additional similarity between *Bush v. Gore* and the Clemens-Piazza incident as well, having to do with the perennial problem of intent. The 'truth' in the Clemens-Piazza incident turns on the question of subjective intent, namely, what was Roger Clemens's intent when he tossed or threw the bat towards Mike Piazza? Likewise, the manual recount of the Florida undervotes required a determination of what the intent of the voter was. Was a 'dimpled chad', for example, sufficient evidence of the voter's intent to vote for 'X' candidate? In the course of their separate presentations, Professors Acevedo and Ortiz Alvarez blithely said that the intent of the voter must always be put above legal technicalities. For them, the intent-of-the-voter standard is the Holy Grail of any electoral dispute. Yet both scholars fell victim to the umpire's curse in this regard, for they failed to recognize the total open-endedness and utter vagueness of the intent-of-the-voter standard. The intent standard is simply too broad and not precise enough to provide consistent results. Two people can interpret the same ambiguous ballot differently, just as two people can differ as to what Clemens's true intent was during the broken-bat incident.

Bush v. Gore, then, is the quintessential hard case because there are two equally plausible and diametrically opposing views of the underlying facts of the case. Since courts will go on taking these types of cases, we must be willing to admit that rhetoric and other non-objective factors can play a decisive role in shaping the outcome. For at the end of the day hard

[77] As noted earlier, Professors Acevedo and Ortiz Alvarez (and most others who have denounced the result in Bush v. Gore) have missed this key point.
[78] *See infra* text accompanying notes 15-17 and 36-38.

cases are often decided by good rhetoric. Perhaps law professors (and lawyers, for that matter) should begin dusting off the ancient texts of Cicero and Aristotle on rhetoric.[79] With all the emphasis on legal writing and research at most law schools these days, surely a solitary, old-fashioned course on the art of oratory and rhetoric is not too much to ask.

[79] *See, e.g.*, Cicero, DE ORATORE, 2 vols. (E.W. Sutton & H. Rackham trans., 1942); Aristotle, THE ART OF RHETORIC (J.H. Freese trans., 1982).