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The Supreme Court majority in *Bush v. Gore*[1] has taken a lot of flak for its ruling that the Florida count of undervotes violated the Equal Protection Clause of the Fourteenth Amendment. Commentators, and not only those on the left, have labeled the Court's reasoning as without basis in precedent, weak in its logic, and breathtakingly sweeping in its implications.[2] For those inclined to suspect the justices of naked partisanship, the equal protection argument did nothing to allay those suspicions.

It is argued in this Essay, however, that the case for an equal protection violation is supported both by precedent and logic and is not particularly sweeping in its implications. Here is the basic point. The Equal Protection Clause instructs the state to treat its citizens equally.[3] That means that when Florida is distributing some benefit or burden on a statewide basis, it may not distribute more of that benefit or burden to people in one part of the state than it does to people in other parts of the state unless it has a legitimate reason for doing so. Thus, if Florida is distributing welfare checks as part of a statewide program, it may not

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1. 531 U.S. 98 (2000).

2. *See* Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, 68 U. CHI. L. REV. 657 (2001); Lawrence H. Tribe, Comment, eroG v. hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001).

3. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

give a recipient in northern Florida more money than a recipient in southern Florida without a good reason for the difference in treatment—that the cost of living is higher in northern Florida than in southern Florida for example.

This basic equal protection principle is applicable when the benefit to be distributed is the vote in a statewide election. Florida cannot give northern Floridians two votes for governor or for U.S. senator while giving southern Floridians only one vote, or weight the vote of northern Floridians in such a way as to produce a comparable effect.[4] The same principle applies to the vote for President of the United States. Presidential electors are selected, after all, not on a county-by-county basis, but on a statewide, winner-take-all basis.

This equal protection principle is well established in Supreme Court precedents, particularly those involving reapportionment (the "one man, one vote" cases).[5] But it is also acknowledged in Supreme Court cases that found the principle not to have been violated. For example, in *San Antonio Independent School District v. Rodriguez*,[6] the Court held that intrastate disparities among school districts in tax rates and expenditures did not violate the Equal Protection Clause, despite the fact that similarly situated taxpayers and students faced different tax rates and received different amounts of educational resources depending upon the Texas school district in which they lived. The Court held that intrastate differences such as these were justified by the value of "local control."[7] After all, if one lives in San Antonio, one lives under different laws, faces different tax burdens, and receives different levels of public services than if one lives in Amarillo. If all of these differences were unconstitutional, city, county, and other local governmental entities would have no reason to exist. Real local control means that similarly situated people within the same state will be treated differently depending upon the political subdivision of the state in which they live.

The value of local control, and its ability to constitutionally legitimate differences in treatment, is why the Court's holding in *Bush v. Gore* does not mean that having punch card voting machines in some Florida counties but not in others is unconstitutional. Most elections are local and are locally funded, and thus it is perfectly legitimate for Florida to allow county governments to choose their voting machines.

The question then is: does the value of local control support letting each county election canvassing board count its county's undervotes in a

4. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964); Wesberry v. Sanders, 376 U.S. 1, 8 (1964).
5. *See Reynolds*, 377 U.S. at 562–64 & n.40; *Wesberry*, 376 U.S. at 18.
6. 411 U.S. 1 (1973).
7. *Id.* at 49–53.

different manner? And here, the answer seems to be that there is no value in having local control of this matter. Remember, we are dealing here only with those counties that used identical punch card machines. And we are dealing with a statewide election.

There are two possible arguments supporting local control over the standard for what counts as a vote in a statewide election where the same voting machines are used in the localities in question. One argument is that even though the machines are the same, the different counties may maintain the machines differently, resulting in different meanings of "dimpled" chads from county to county. It does not appear that there was enough support in the record of this case for this basis for local control to substantiate it, much less to justify the actual differences among the canvassing boards in deciding which undervotes were actually votes.

The other argument for local control rests on an analogy to criminal cases in which different juries decide in different cases such matters as whether the defendant had "criminal intent." If we let different juries decide whether criminal intent exists without constraining them by rules to ensure that their decisions are consistent, why should we not let different canvassing boards decide on the existence of "voter intent" without constraining them by rules to ensure their uniformity?

Decisions about criminal intent, however, are disanalogous to decisions about voter intent in two material ways. First, at stake in the former is making sure beyond a reasonable doubt that the defendant really did have the required intent. Uniformity of results is far less important than their correctness. In gauging voter intent, however, what is important for the voter is not that his vote will be correctly counted but rather that the candidate who received his vote wins the election if that candidate did indeed receive the most votes. A uniform rule for determining voter intent, while it will lead to incorrect determinations in particular cases, is unlikely to have a skewing effect in favor of one candidate over another. The errors should be evenly dispersed in the proportions in which the voters preferred the various candidates. Thus, the important value—that the candidate that most voters intended to vote for win—will be preserved under uniform rules for gauging voter intent, even if particular ballots are judged incorrectly.

The second way that determinations of criminal intent are different from determinations of voter intent in the circumstances of Florida is that there are an indefinite number of factors and therefore types of

evidence that bear on the former, whereas the latter is made based only on the marks on a mute ballot. Indeed, the Court itself mentioned this difference between the two types of determinations.[8] The relevance of the difference is that a uniform rule or rules for assessing voter intent is feasible, whereas the indefinite number of multifarious factors that go into determining criminal intent could never be captured in a determinate, uniformly administrable rule or set of rules.

Moreover, even where more factors are relevant to the determination than are relevant to assessing voter intent, the Court has held that uniformly administrable standards are constitutionally required to protect against unequal allocations of important rights. For example, the Court has held that governmental permissions to engage in expressive activities such as parades and charitable solicitations must be allocated under determinate rules to ensure evenhanded treatment of proponents of different viewpoints.[9] Those cases directly support the Court's holding in *Bush v. Gore*.

Thus, there are no good arguments for local control over determining voter intent that trump the constitutional value of intrastate equal treatment of voters. The seven justices who came to this conclusion were firmly on the side of constitutional precedent and policy. The stay ordered by the five justice majority may have been questionable,[10] but the constitutional right on which it was based was not.

8. Bush v. Gore, 531 U.S. 98, 106 (2000).

9. *See, e.g.*, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636–37 (1980); Cox v. Louisiana, 379 U.S. 536, 557–58 (1965).

10. *Bush*, 531 U.S. at 110–11.