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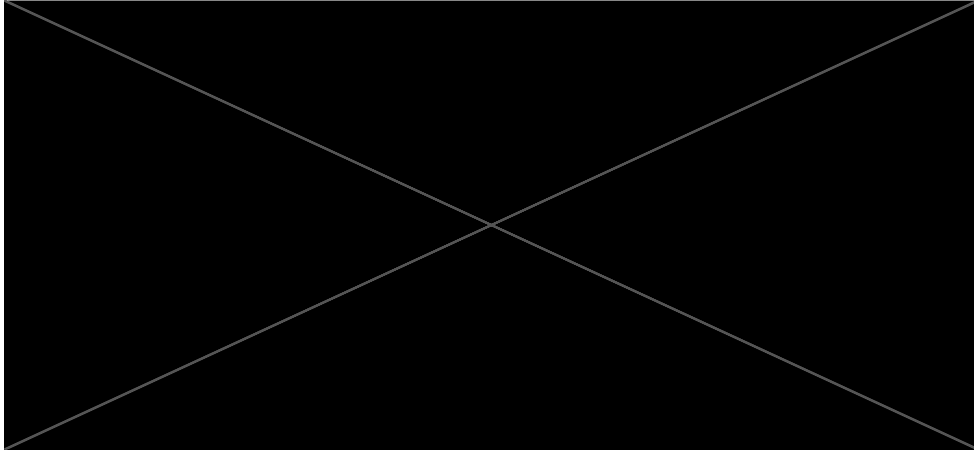

Should We Trust Judges?

BY AKHIL REED AMAR

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NEW HAVEN, CONN. — What will I tell my law students in the aftermath of Bush vs. Gore, in which five Republican judges handed the presidency to Republican George W. Bush? It will be my painful duty to say, “Put not your trust in judges.”

Don’t misunderstand me. I am a true

believer in the rule of law. I have devoted my professional life to the study of the U.S. Constitution. I consider myself a friend of the U.S. Supreme Court and of many of its current justices.

The court, in its long history, has made many mistakes. I do not hide these from my students. We read large chunks of the Dred Scott and Plessy vs. Ferguson decisions, which promoted slavery and racism. We discuss the court's Gilded Age transformation of amendments drafted to promote freedom and equality into doctrines protecting the rich and powerful, while ignoring the rights of others. We debate the various failures of legal analysis in Roe vs. Wade and its progeny. We critique the court's perverse criminal-procedure doctrines, which often help guilty defendants at the expense of innocent defendants and innocent victims.

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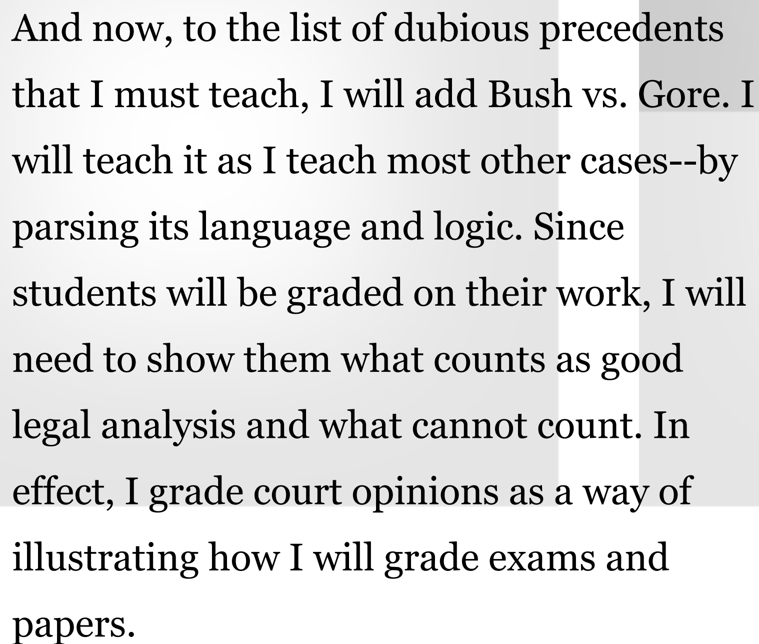

And now, to the list of dubious precedents that I must teach, I will add Bush vs. Gore. I will teach it as I teach most other cases--by parsing its language and logic. Since students will be graded on their work, I will need to show them what counts as good legal analysis and what cannot count. In effect, I grade court opinions as a way of illustrating how I will grade exams and papers.

Judged by ordinary standards of legal analysis, Bush vs. Gore gets low marks. The core idea is that because the Florida recount was proceeding under somewhat uneven standards, it violated constitutional principles of equal protection. In some counties, dimpled chads might be counted; in other counties, not. And so on.

At first, this argument sounds plausible. But let’s test it by traditional legal tools. As a matter of logic: If the Florida recount was

constitutionally flawed, why wasn't the initial Florida count equally, if not more, flawed? It, too, featured uneven standards from county to county. Different counties used different ballots (including the infamous butterfly ballot); and even counties using the same ballot used different interpretive standards in counting them. This happened not just in Florida, but across the country. Are all these elections unconstitutional?

Now think about history and tradition. The idea that the Constitution requires absolute perfection and uniformity of standards in counting ballots is novel, to put it gently. Americans have always been asked to put their "X" marks in boxes, and human umpires have had to judge if the "X" is close enough to the box to count. On election day, different umpires in different precincts have always called slightly different strike zones. If these judgments are made in good faith and within a small zone of "close calls," why are they unconstitutional? If they are unconstitutional, then every election America has ever had is unconstitutional. And the Bush court nowhere claimed or showed any special bad

faith that might render the recount more suspicious than, say, the initial count (which occurred without judicial oversight).

Now think about precedent. The Bush court failed to cite a single case that, on its facts, comes close to supporting the majority's analysis and result. There is forceful voting-equality language in Supreme Court case law--but, on their facts, these are cases about citizens simply being denied the right to vote (typically on race or class lines); or being assigned formally unequal voting power, with some (typically white) districts being overrepresented at the expense of other (typically black) districts. As a precedent for future cases, the Bush court majority tries to limit its ruling to its unique facts--recounts presided over by judges--but fails to support this ad hoc limitation with any neutral principle: The justices might as well have said, "We promise to follow this case in all future cases captioned Bush vs. Gore, but not elsewhere." Indeed, the fact that the Bush case involved recounts monitored by judges cuts precisely against the court majority: Less cheating in tabulation is likely when judges and special masters--and the eyes of the world--are

watching.

As a matter of constitutional text and history, the equal protection clause was, first and foremost, designed to remedy the inequalities heaped upon blacks in America. The 15th Amendment extended this idea by prohibiting race discrimination with respect to the vote. Yet, governments in the South mocked these rules for most of the 20th century--and with the court's blessing. For decades, most American blacks were simply not allowed to vote. When Congress finally acted to even things up in the 1960s, inequality persisted as a practical matter.

In Florida, for example, black precincts typically have much glitchier voting machines, which generate undercounts many times the rate of wealthier (white) precincts with sleek voting technology. Undermaintenance of voting machines, chad build-up and long voting lines in poor precincts--these are the real ballot inequalities today. If we are serious about real equality, as envisioned by the architects of Reconstruction, we should not ignore the voting-machine skew. Rather, we should do our best to correct for it, albeit imperfectly,

via manual recounts. Even if such recounts are not required by equality, surely they are not prohibited by equality. In fixating on the small glitches of the recount rather than on the large and systemic glitches of the machines, the justices turned a blind eye to the real inequality staring them in the face, piously attributing the problem to “voter error” and inviting “legislative bodies” to fix the mess for future elections.

As a matter of consistency, the justices score slightly higher. Indeed, the court, by the same 5-4 bottom-line vote in Bush vs. Gore, has similarly inverted constitutional equality in a series of cases involving redistricting. In these cases, governments have drawn district lines to increase the likelihood that legislatures will be racially integrated. These lines are not formally race-based: Anyone can move into any house and vote in that district. No government agency enforces a color code (as under Jim Crow), and each citizen is free to vote however she likes--to consider race or not, to vote for a member of her race or some other race. Yet, the court has called these efforts to integrate legislatures “apartheid” and has held that they violate

principles of equal protection. Why? Because the district lines look odd to some justices. Perhaps the recount in Florida similarly looked odd: dimples look weird.

But this is not the rule of law: It is the rule of subjective sensibility. Weirdness is in the eye of the beholder; and the Constitution tells judges to be on the lookout for something else, something akin to the subjugation of blacks that led to the adoption of the equal protection clause.

Finally, consider issues of constitutional statecraft. The Florida courts, the Florida Legislature and Congress are all electorally accountable. The U.S. Supreme Court is not, yet it snatched the case away from these alternative decision-makers. The biggest electoral check on the court is the ability of presidents to appoint new justices, yet the five justices who Al Gore directly criticized during his campaign handed the presidency over to his opponent by preventing a recount that might have proved that he was indeed the choice of Florida's voters, as well as the nation's. The court majority reached this result by a single vote. By refusing to consider equality

issues in its first review of the Florida fiasco several weeks ago, the court denied itself the benefits of amicus briefs from scholars and experts who might have helped clarify the real issues at stake.

Ironies abound. Justices who claim to respect states savage state judges. Jurists who purport to condemn new rules make up rules of breathtaking novelty in application. A court that frowns on ad hoc decision-making gives us a case limited to its facts. A court that claims it is defending the prerogatives of the Florida Legislature unravels its statutory scheme vesting power in state judges and permitting geographic variations. The real problems in Florida identified by the justices were problems in the election laws themselves, not the Florida courts. The case that bears the name of a professed strict constructionist is as activist a decision as I know.

When my students ask about the case, I will tell them that we should and must accept it. But we need not, and should not, respect it.
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