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BUSH V. GORE AND THE LAWLESSNESS PRINCIPLE: A COMMENT ON PROFESSOR AMAR

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INTRODUCTION

Akhil Amar begins his impressive Dunwody Lecture by questioning whether there "are any new things left to say about the Bush-Gore episode."[1] It is a legitimate question to ask, given the torrent of scholarship since the 2000 Florida debacle.[2] In some ways, Professor Amar follows the well-trodden path of liberal critics of the U.S. Supreme Court's opinion in *Bush v. Gore*[3] in arguing that: (1) the Florida Supreme Court did not violate Article II of the Constitution when ordering a partial recount of votes;[4] (2) the U.S. Supreme Court majority failed to respect Congress' role in resolving disputes over Electoral College votes;[5] (3) the Court's equal protection holding which ended the Florida recount promoted inequality, rather than equality;[6] and (4) Chief Justice Rehnquist and Justices Scalia and Thomas voted strategically in support of the per curiam opinion's equal protection holding because of the bad press that would come from having "a majority of Justices in fact reject[ing] each of the only two theories put forth by the Bush campaign to end the recount."[7] Professor Amar's arguments, though convincing to me, are unlikely to convince supporters of the U.S. Supreme Court's decision in *Bush v. Gore*.

However, Professor Amar's lecture makes a much broader point, one that has resonance for future election disputes well beyond debate over the legacy of *Bush v. Gore*. Drawing from the writings on all sides of the debate, Professor Amar teases out a consensus against *lawlessness* in the

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1. Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 946 (2009). A video of the original presentation is available at http://streaming.video.ufl.edu/~law/20090324-dunwody.asx.

2. For a summary of the relevant literature, see DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW—CASES AND MATERIALS 299–305 (4th ed. 2008); Richard L. Hasen, *A Critical Guide to* Bush v. Gore *Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004) (discussing the various literature on the *Bush v. Gore* case at that time).

3. 531 U.S. 98 (2000).

4. Amar, *supra* note 1, at 953; *see* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 734–35 (2001).

5. Amar, *supra* note 1, at 953, 959; *see* Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 38, 50–54 (Cass R. Sunstein & Richard A. Epstein eds., 2001) [hereinafter THE VOTE].

6. Amar, *supra* note 1, at 959–60; *see* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378, 399–402 (2001).

7. Amar, *supra* note 1, at 964–66; *see* Michael Abramowicz & Maxwell Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1883–84 (2001).

resolution of election disputes.[8] That is, Professor Amar shows that everyone agrees elections should be decided as nearly as possible under the "rules of the game" put in place on election day, and that it is illegitimate to change (or "twist") the rules after the election ends.[9] Where people part company in the Florida 2000 dispute is over what the rules of the game *actually were* on Election Day 2000, and who was more guilty in changing those rules after the fact—the Florida Supreme Court or the U.S. Supreme Court.

This consensus against lawlessness in resolving disputed elections is a profound point, and one that can be used to help avoid future *Bush v. Gore*-like debacles. In this brief response to Professor Amar's lecture, I aim to do three things. First, I show why, even though there is consensus about the lawlessness principle in the abstract, consensus can never be reached about who was right in *Bush v. Gore* despite Professor Amar's impressive arguments. Second, I show how the lawlessness debate replayed itself in the contest over the winner of the 2008 U.S. Senate election in Minnesota. Finally, I argue that an understanding of the lawlessness principle can be used to help avoid similar debacles in the future. In particular, disputes over election outcomes may be curtailed through statutory interpretation instructions directed to state courts which are passed *ex ante* by state legislatures and through increased centralization of election processes.

THE LAWLESSNESS PRINCIPLE AND LACK OF CONSENSUS IN THE FLORIDA 2000 DISPUTE

Even though there is consensus about the lawlessness principle in the abstract, consensus can never be reached about who was right in *Bush v. Gore* despite Professor Amar's impressive arguments.

First, note how each side in the debate over the Florida 2000 dispute paints the other side as descending into lawlessness. For example, Chief Justice Rehnquist viewed the Florida Supreme Court's interpretation of Florida statutes as requiring a manual recount of punch-card ballots[10] as "absurd,"[11] "peculiar,"[12] and an interpretation "[n]o reasonable person"[13]

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8. Amar, *supra* note 1, at 946.

> Let's start by noticing that a wide range of scholars seem to agree with the following proposition: "The Supreme Court twisted the law in the Bush-Gore affair." But here's the rub: Which Supreme Court did the twisting? Some scholars (mostly liberal) say that the United States Supreme Court played fast and loose with the law, while other scholars (mostly conservatives), insist that it was the Florida Supreme Court that acted in a lawless, partisan fashion.

Id.

9. *Id.*
10. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1289 (Fla. 2000).
11. Bush v. Gore, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., concurring).
12. *Id.* at 120.

would embrace. Further, to the *Bush v. Gore* majority, the U.S. Supreme Court's "unsought responsibility"[14] was to rein in an out-of-control Florida Supreme Court which was making up new rules for counting votes to benefit Al Gore. And to conservatives generally, the Florida Supreme Court was the lawless entity changing the rules of the game to help Gore get elected.[15]

To Professor Amar, however, the Florida Supreme Court *followed* the existing rules for resolving election disputes, and it was the U.S. Supreme Court that changed the rules midstream. Under Professor Amar's interpretation, the Florida Legislature delegated to the Florida Supreme Court the authority to interpret state election code provisions dealing with the presidency in the same manner as the court had interpreted other election code provisions.[16] Those preexisting rules of interpretation required the Florida Supreme Court to interpret election code provisions consistent with the state constitution and its longstanding canon of interpretation favoring voters' rights.[17] As Professor Amar explains, "though the Florida Supreme Court did not explain itself perfectly in the rush of the moment, it largely did the right legal things and for the right legal reasons."[18] It was the U.S. Supreme Court that *changed* the rules, doing an injustice to the Florida judiciary, to the "pre-election Florida legislature that had deputized the Florida judiciary[, to] Congress, and to the constitutional structure that made the federal legislature, and not the federal judiciary, the ultimate judge of close presidential elections."[19] "[T]he U.S. Supremes short-circuited the whole recount and remedy process, privileging the less accurate, less inclusive, and more discriminatory initial counting process."[20]

As diametrically opposed as these positions seem, they actually have more in common than first appears. Both sides believe that the election should be decided in accordance with the rules established *before* election day, and that to change the rules after the election would be lawless, likely done to favor one candidate over the other in resolving the election dispute.

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13. *Id*. at 119.

14. *Id.* at 111 (majority opinion).

15. This is the position taken by the conservative scholars Professor Amar discusses, including Professors Epstein, Fried, and McConnell. *See* Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE, *supra* note 5, at 13, 31–35; Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 3 (Bruce Ackerman ed., 2002); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE, *supra* note 5, at 98, 101, 108–13.

16. Amar, *supra* note 1, at 952–53.

17. *Id*. at 952, 954. On this canon of interpretation generally, see Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. (forthcoming 2009), draft *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344476.

18. Amar, *supra* note 1, at 955–56.

19. *Id*. at 959–60.

20. *Id*. at 963.

Even those taking the most radical position in the Bush-Gore controversy, that the Florida legislature could name a *new* slate of electors *after* election day (a slate that would have favored Bush, given the Republican dominance of the Florida Legislature in 2000), have sought to justify such a choice as part of the rules of the game that existed *on election day*. They argue that such a late choice would not be an exercise of lawlessness, as critics have claimed.[21] For example, Professor Einer Elhauge, who represented the Florida Legislature in the *Bush v. Gore* dispute, points to an old federal statute providing that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."[22] Arguing from the text of the statute, the legislative history, and policy, Professor Elhauge concluded that the choice of electors had been left to the Florida Legislature before election day:

> On those rare occasions when the election process has failed to provide a timely or convincing result, it is perfectly legitimate for the problem to be resolved by the entity that both (a) was given clear constitutional authority over the matter; and (b) is most responsive to the will of the Florida electorate. This might seem inconsistent with the prior lesson that election officials and judges should be made nonpartisan, but it is not. Those officials and judges have the job of resolving election disputes in a timely fashion and in accord with pre-existing rules. For that task, one needs a neutral umpire. But when they fail in that task, or where there are no constitutionally valid pre-existing rules, then the democratic choice of the electorate will be unclear. At that point, we should want the best proxy for the electorate's choice, and that proxy is the institution most responsive to democratic will in any state, its legislature.[23]

21. Bruce Ackerman, *As Florida Goes . . .*, N.Y. TIMES, Dec. 12, 2000, at A33, *available at* http://www.nytimes.com/2000/12/12/opinion/as-florida-goes.html ("Congress has allowed one narrow exception to its insistence on a uniform election day: It allows a state legislature to step in only when the state has failed to make a choice of its electors. [¶] That is not the case in Florida. The state made a choice when Gov. Jeb Bush signed a formal notification that the state's 25 votes go to a slate of Republican electors. Since Florida has not failed to choose, its legislature cannot, under federal law, intervene further.").

22. 3 U.S.C. § 2 (2006). There is a serious question whether or not this statute is constitutional, but that is a question for yet another *Bush v. Gore* article.

23. Einer Elhauge, *The Lessons of Florida 2000*, POL'Y REV., Dec. 2001–Jan. 2002, at 15, 32, *available at* http://www.hoover.org/publications/policyreview/3462386.html.

What does it say that scholars all ostensibly agreeing with the same underlying principle—that disputed elections should be decided in accordance with the rules as they existed on election day—can reach such widely divergent results over how the 2000 Florida dispute should have been resolved? First, I put aside the possibility of anyone being disingenuous; in my experiences talking to election law and constitutional law scholars over the last nine years about this issue, feelings about this case are sincere and deeply held. Rather, the key is that the rules the Florida Supreme Court had for resolving the dispute were so unclear, and the stakes so high, that it was possible for well-meaning legal scholars to subconsciously latch onto this uncertainty about the rules in order to construe the law in a manner that favored the candidate that the scholars preferred. Cass Sunstein observed soon after the case was decided that views of the Florida controversy among scholars broke down along liberal and conservative lines, with liberals supporting arguments favoring Gore's position and conservatives supporting arguments favoring Bush's position.[24] What was true in 2001 is still true in 2009.

Before the Florida controversy, none of the scholars who ended up weighing in after the fact had given considerable thought to most of the issues that mattered in the dispute, such as: (1) the meaning of the term "error in the vote tabulation" used in an obscure Florida statute,[25] (2) the power of a state legislature to name a rival slate of electors if there were a dispute about the state's electoral college winner on election day, (3) the scope of state judicial power to construe legislative statutes in light of state constitutional provisions under Article II of the U.S. Constitution, (4) the scope of the Equal Protection Clause as applied to "nuts-and-bolts" election disputes, (5) the scope of the Florida Supreme Court's ability to construe election statutes in favor of the rights of voter enfranchisement, or (6) countless other issues. It is fine and good for everyone to agree that disputed elections, especially for president, should be resolved using the rules that were in place before election day, but when there is a fundamental bona fide dispute as to the content of those rules, the lawlessness principle cannot lead well-meaning people of diverging political views to legal consensus.

It is for this reason that Professor Amar's conclusion that the U.S. Supreme Court erred will never convince most of those who have previously taken the opposite position. If anything, the passage of time has hardened old positions.[26] Each time Justice Scalia admonishes Gore

24. Cass R. Sunstein, *Introduction: Of Law and Politics*, in THE VOTE, *supra* note 5, at 1, 4–8. After canvassing the psychological literature which may help explain the split, Professor Sunstein concludes, "Perhaps the perspective of time will help." *Id.* at 8.

25. FLA. STAT. ANN. § 102.166 (West 2009).

26. Consider the public's retrospective views of the fairness of the 2000 election.

> Although 44% of Democrats called the 2000 election somewhat or very unfair in

supporters to "Get over it,"[27] he reignites the strong feelings that existed back in 2000. The combination of emotion and uncertainty means that we will never reach anywhere close to consensus on the most heated questions from the Florida controversy.

BUSH V. GORE LAWLESSNESS REVISITED: *COLEMAN V. FRANKEN*

Disputes over presidential elections are rare,[28] but disputed elections for lower offices are far more common. One of the most recent high-profile examples was the dispute over the results of the 2008 U.S. Senate election in Minnesota, pitting incumbent Republican U.S. Senator Norm Coleman against Democratic candidate Al Franken. The Senate race in Minnesota was exceedingly close.[29] Coleman was initially ahead the day after the election by 206 votes.[30] State law triggered a manual recount conducted by a five-member canvassing commission.[31] Franken was declared the winner by 225 votes.[32] Coleman filed an election contest before a three-judge court.[33] After a seven-week trial, the court declared Franken ahead by 312 votes.[34] It unanimously rejected Coleman's grounds for an election contest.[35] The Minnesota Supreme Court affirmed.[36]

> 2000, in 2002 that number rose to 68% and in 2004 it rose again to 75.2%. On the other side of the aisle, 24.9% of Republicans called the 2000 election somewhat or very unfair in 2000, compared to 10.2% who viewed the 2000 election that way in 2002 and 14% who viewed it that way in 2004.

Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 943 n.28 (2005) (citing National Election Studies data from the University of Michigan, *available at* http://www.electionstudies.org).

27. Charles Lane, *Once Again, Scalia's the Talk of the Town*, WASH. POST, Apr. 15, 2006, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/14/AR2006041401370.html ("Scalia had similar advice to a student in Switzerland who asked last month about the Supreme Court's ruling for George W. Bush during the 2000 election. 'Oh, God. Get over it,' he said.").

28. *See* Elhauge, *supra* note 22, at 31 ("In the 113 years since the Electoral Count Act was enacted, Gore was the first losing presidential candidate to contest an election at all."); *see also id.* (noting other issues in the Florida controversy that had not arisen in at least 113 years).

29. The following facts are taken from the trial court's opinion in *In re Contest of Gen. Election Held on Nov. 4, 2008* (*Contest of Gen. Election*), No. 62-CV-09-56, 2009 WL 981934, at *3, *21, *22–25, *27 (Minn. Dist. Ct. Apr. 13, 2009), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *In re* Contest of Gen. Election held on Nov. 4, 2008 for Purpose of Electing a U.S. Senator from the State of Minn. (*Coleman Contest*), 767 N.W.2d 453 (Minn. 2009).

The lawlessness debate we saw in the 2000 Florida controversy replayed itself in the 2008 U.S. Senate election in Minnesota. Though Coleman had made a number of arguments in an attempt to get the trial court to count more votes, his key argument was that because some Minnesota jurisdictions used lax standards in deciding whether or not to count certain absentee ballots, the trial court must accept all challenged absentee ballots under the same lax standards in order to comply with the Equal Protection principles of *Bush v. Gore*.[37] The trial court rejected Coleman's argument, citing to Minnesota's longstanding rule of construction that absentee ballot laws are to be strictly construed[38] and rejecting his broad interpretation of *Bush v. Gore*.[39] The state supreme court affirmed, holding that there were "clear statutory standards for acceptance or rejection of absentee ballots . . . ."[40] It held further that any variations were the product of local jurisdictions using different methods to assure compliance with the same statutory standard given differences in resources, personnel, procedures, and training.[41]

Assuming everyone agrees that courts should apply the lawlessness principle to resolve the Minnesota dispute, the indeterminacy of the rules that applied on election day in 2008 precludes the emergence of consensus. Is the "rule" that existed on election day the *de jure* statement of the Minnesota Supreme Court that absentee ballot statutes are to be strictly construed, and therefore allowing the court hearing the election contest to apply a laxer standard to challenged absentee ballots would involve changing the rules on election day? Or is the "rule" that existed on election day one that permitted jurisdictions *de facto* discretionary authority to deviate in some minor ways from the state election code's absentee ballot statutes? The question is further muddled by the equal protection principles of *Bush v. Gore* itself, upon which Coleman had relied. There remains fundamental disagreement over whether *Bush v. Gore* has precedential value, and if it has precedential value, what the scope and standard for evaluating an equal protection claim brought under the case is.[42] These

37. Brief of Appellant at 19–20, *Contest of General Election*, No. A09-697 (Minn. Apr. 30, 2009). Coleman's opening brief on appeal is posted at: http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNElectionContest-Brief-4-30-09.pdf. His reply brief is posted at http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNElectionContest-ReplyBrief-5-15-09.pdf.

38. On this point of statutory construction, the Minnesota Supreme Court is in the minority. *See* Hasen, *supra* note 17.

39. *Contest of Gen. Election*, 2009 WL 981934, at *41–47.

40. *Coleman Contest*, 767 N.W.2d at 466.

41. *Id*.

42. On the precedential value question, see Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141, 144 (2006), *available at* http://thepocketpart.org/2006/11/07/flanders.html. On the dispute over *Bush v. Gore*'s meaning, see generally Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925 (2007) (arguing that *Bush v. Gore* discourages judicial intervention in voting); Edward B. Foley, *Refining the* Bush v.

issues are not at all settled.

Given the deviation between written law and actual practice, and uncertainty over the governing constitutional standard, good faith arguments can be made on both sides about whether counting additional ballots as Coleman demanded would be an application of the rules of the game as they existed on election day or a deviation from those rules. As in *Bush v. Gore*, consensus on the lawlessness principle in the abstract yields no decision on the right result in the Coleman-Franken dispute. The answer will have to come from elsewhere, and it is sure to be controversial.

HARNESSING THE LAWLESSNESS PRINCIPLE TO LIMIT ELECTION CONTESTS

An understanding of the lawlessness principle can be used to help avoid similar debacles in the future. In particular, lawlessness disputes can be curtailed through statutory interpretation instructions directed to state courts which are passed *ex ante* by state legislatures and through increased centralization of election processes.

The Florida and Minnesota disputes show that there are many sources for uncertainty about the rules of the game in existence on election day—from unclear laws, to lack of law, to lack of interpretation of untested laws, to unclear rules of interpretation of election statutes, to machinery or practices that deviate from the rules as written. The more that can be done to eliminate or minimize these uncertainties, the greater the potential for consensus to emerge around the lawlessness principle. Simply put, if everyone signs on to the idea that election contests should be resolved under the rules of the game as they exist on election day, and everyone agrees on what those rules are, there is much less room for election litigation and recrimination.

There are a number of ways to try to nail down the rules of the game before election day. For example, as I have suggested elsewhere,[43] states should undertake periodic audits of election statutes and clear up ambiguities and holes that could lead to future election litigation. Here, I focus on two additional ways to narrow the area of uncertainty suggested by Professor Amar's lawlessness principle.

First, the rules of interpretation courts apply to construe election statutes must be clear in advance of a high-profile election contest. Many states courts have adopted the Democracy Canon, which states that election statutes should be liberally construed to favor the voter.[44] In the Florida

Gore *Taxonomy*, 68 OHIO ST. L.J. 1035 (2007) (arguing that the adjudicatory context of *Bush v. Gore* is a crucial factor in determining its applicability to future cases); Hasen, *supra* note 6 (discussing the threat to democratic values posed by *Bush v. Gore*); Daniel H. Lowenstein, *The Meaning of* Bush v. Gore, 68 OHIO ST. L.J. 1007 (2007) (proposing a narrow reading of *Bush v. Gore*).

43. Hasen, *supra* note 26, at 954.

44. There are in fact three variants on the canon.

dispute, the Florida Supreme Court had long applied the Democracy Canon, and it applied the canon to resolve the Florida disputes over statutory interpretation.[45] In contrast, the Minnesota Supreme Court has rejected application of the Democracy Canon in the context of absentee ballot laws.[46]

State legislatures should be on notice that courts adopt rules of stricter or laxer interpretation of election laws as a matter of course, and that these rules are likely to apply to disputes over the meaning of state election statutes. If state legislators are unhappy with how the state courts are going to construe election statutes, it may pass a statute directing the courts to interpret such statutes more narrowly or broadly.[47] Such rules of interpretation may prove to be of primary importance in later election disputes.

To be sure, the clarity to be achieved by settling rules of interpretation could be overcome in the passion of another *Bush v. Gore*. As Professor Pildes elaborates,

> Conceivably, [] the rules of resolving such a dispute could be made exceptionally clear in advance and their meaning widely accepted at the moment such rules were being applied . . . . But that situation is unlikely: precisely where the stakes are so high, forceful pressure will be . . . exploited and previously clear rules will be made to seem uncertain.[48]

> The Democracy Canon has been applied primarily in three contexts: *vote counting cases*, in which someone relies upon the canon to argue, following an election, for the counting of ballots that have not been counted because of minor voter error, election official error, or a disputed reading of a relevant statute; *voter eligibility/registration cases*, in which someone relies upon the canon to argue, before an election, that a voter or certain group of voters who have been told they cannot vote should be allowed to cast a ballot that will be counted even through election officials have determined they cannot register or vote because of minor voter error, election official error, or a disputed reading of a relevant statute; and *candidate/party competitiveness cases*, in which a candidate or political party relies upon the canon (and particularly upon the voters' right to vote in a competitive election) to argue, before an election, that a certain candidate or party should be allowed to run in an election or appear on an election ballot, even though election officials have excluded the candidate or party from the ballot because of minor candidate or party error, election official error, or a disputed reading of a relevant statute.

Hasen, *supra* note 17.

45. *See* Amar, *supra* note 1, at 956. As Professor Pildes has pointed out, one way of understanding the Rehnquist concurrence in *Bush v. Gore* is as the reaction of a group of textualists disturbed by the more open-ended purposivist approach of the Florida Supreme Court. Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 721–22 (2001).

46. *See supra* note 38 and accompanying text.

47. For examples of such statutes, see Hasen, *supra* note 17.

48. Richard H. Pildes, *Disputing Elections*, *in* THE LONGEST NIGHT: POLEMICS AND

Perhaps so. But certainly in disputes below the presidential level, and perhaps even at the presidential level, greater clarity on election statutes and the meta-rules for their interpretation can narrow the range of bona fide disputes.

The other way of narrowing disputes about the pre-existing rules of the game is for greater centralization of election processes. Think again of Florida, with its multiple types of voting machines, and its lack of uniformity over how to determine voter intent in the event of a manual recount of ballots (even among jurisdictions using the same machines). Think too of Minnesota, where some jurisdictions used laxer standards for judging the acceptability of absentee ballots than were used in the majority of Minnesota jurisdictions. Having a state agency impose uniform machinery and requirements helps to eliminate the gap between practice and written rules, or at least assures that practice across a state, even if deviating from written rules, is uniform.

This latter fix will be much harder to achieve than the former one. The United States has a long history of radically decentralized election administration,[49] and many election administrators and localities have a significant investment in the status quo and a desire to squelch any moves toward imposing uniformity, or even a set of best practices to be used by all election jurisdictions.[50]

Still, the more that can be done to assure that the laws, rules of interpretation, machinery, and practices are uniform, the more there will be a common understanding of the rules of the game. Such a common understanding can work to forge consensus against lawlessness and toward quick resolution of election disputes.

V. CONCLUSION

Like *Bush v. Gore* itself, Professor Amar's Dunwody Lecture on the 2000 Florida controversy may be read in multiple ways with many complexities. One read of the Lecture is that it shows that the Florida Supreme Court was right all along, and that the U.S. Supreme Court's per curiam opinion was a lawless decision that cannot be justified. Though I have much sympathy with Professor Amar's arguments, to me he is preaching to the choir. My preferred reading of his Lecture is to see a broader point about election disputes. As Professor Amar has shown, when election disputes arise, people focus on the rules of the game in existence

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PERSPECTIVES ON ELECTION 2000, at 69, 70 (Arthur J. Jacobson & Michel Rosenfeld, eds., 2001).

49. *See generally* ALEC EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE (2009) (describing history of American election administration).

50. *See* Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CAL. L. REV. (forthcoming 2010) (reviewing HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009)), draft *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392299.

on election day. When those rules lack clarity, the legal system creates multiple openings for people of good will to subconsciously find a result that is consistent with political preferences. The more we can define the rules of the game in advance, the better it is for our polity, and the more likely it is that well-meaning people of divergent viewpoints will reach a consensus.