1-1-2001

Did the Fifteenth Amendment Apply in Bush v. Gore

Alfred Dennis Mathewson
University of New Mexico - School of Law

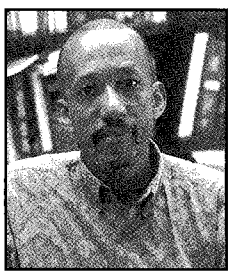
Did the Fifteenth Amendment Apply in *Bush v. Gore*?

By Alfred Dennis Mathewson

Three months later and I am still upset. When I was asked to provide an African-American perspective on the Florida recount process, I recalled an incident several years ago at a workshop I attended at NCAA headquarters in Overland Park, Kansas. The workshop included a slideshow presentation called Game Day USA. I watched with growing irritation as pictures taken on many college campuses across the country on Saturday flashed on the screen. My irritation was caused by the coverage of Ole Miss. The slides featured picture after picture of larger and larger Confederate flags. The next day, Richard Shultz, then executive director of the NCAA, met with the group and asked if any one had any questions. I raised my hand and complained about the Confederate flags in the display. Later, another attendee informed me that the complaint had not occurred to him. I do not think that I was the only African-American in the group, but there were only a few of us. I have no reason to believe that anyone else in the group would have complained, even though they also may have been offended.

I suppose I was presenting a Black perspective. If I did, it was not because there is a single Black perspective to which all African-Americans adhere. There were, in fact, other Blacks at that workshop and they did not speak up. Although there is not a monolithic Black perspective, my comments could have been properly classified as a Black perspective only because they arose out of a set of experiences that have shaped some of my core values and principles, experiences that I share in common with many other African-Americans. To the extent other African-Americans share these values—and I suspect I am not alone—they are not Black values; they are American values every bit as authentic as those articulated by the Founding Fathers.

The story comes to mind now because the Supreme Court rendered its decision in *Bush v. Gore*[1] without any reference to the Fifteenth Amendment in the opinion or any mention of it by any Justice or lawyer in the oral argument. The Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."[2] If I had been a Justice I would have asked the lawyers whether the Fifteenth Amendment was at all relevant to the outcome of the case. That question occurred to me almost as soon as the details about the transgressions in Florida occurred. As legal positions of the campaigns appeared in the media, I walked the halls of my school and told everyone willing to listen, "Why aren't they asking about the Fifteenth Amendment?" Justice Thurgood Marshall would have asked questions about it. So would W.E.B. DuBois, Frederick Douglas, Sojourner Truth, and Booker T. Washington.



Alfred Dennis Mathewson is Associate Dean and Professor of Law, University of New Mexico.

I thought about the Amendment because one of the great values of historical significance in African-American communities is the right to vote. It is a fundamental right sought by civil rights activists long before the Houstonian strategy to eliminate state sanctioned segregation. It was important enough for African-Americans and Abolitionists to press the Radical Republicans in the post-Civil War Congress to add a constitutional amendment explicitly guaranteeing the franchise, at least to men. Since our ancestors were brought here against their will and were excluded from the political process that adopted the Constitution, the right to vote is a major cog in the claim of African-Americans to status as Americans.

In fairness to the Justices, they may not have asked about the Fifteenth Amendment because the parties did not raise it. The Bush Campaign would not have invoked it for its position depended upon the inapplicability of the Fifteenth Amendment. It asked the courts to stop counting votes and it had no interest in a constitutional provision that may have required votes to be counted. In fact, the campaign challenged the hand recounts requested by Vice-President Gore on the grounds that such recounts violated the Fourteenth Amendment equal protection rights of Florida voters because the use of different standards in the several counties subjected voters to different tests for determining whether their votes should count.

It is not difficult to understand why Vice President Gore did not raise the Fifteenth Amendment. Vindication of the constitutional rights of voters was, at best, secondary. His demand for hand recounts were for the vindication of his rights as a candidate. As such, he was entitled to a fair election in which he was accorded all the votes cast for him. His right to have hand recounts conducted was based on Florida election statutes. He would have faced some thorny legal problems in trying to assert Fifteenth Amendment claims. Many of the potential Fifteenth Amendment claims related to people who tried to vote but were prevented from doing so, and claims relating to such inchoate votes cannot be vindicated in a recount process. However, Fifteenth Amendment claims could have been asserted in the instance of votes actually cast but not counted, but only when the failure to count them resulted from racial dis-

when the failure to count them resulted from racial discrimination in the administration of the voting process. Moreover, his campaign would have been criticized for raising the race card. In fact, he did not raise any Fifteenth Amendment issues but still received that criticism as many Republicans lampooned complaints made by African-Americans about irregularities in the voting process as trumped up charges to steal the election.

Quite frankly, I wondered whether the Fifteenth Amendment was applicable, and if so, whether the provisions of Article II governing presidential elections were subject to and therefore must be construed in light of the Fifteenth Amendment. At the time, I wondered whether the Fifteenth Amendment required the State of Florida, which is subject to section 2 of the Voting Rights Act,[3] to exhaust all efforts to count all votes cast on Election Day. I now think the questions of remedy, if the Fifteenth Amendment were applicable, are more complex.

Applicability of the Fifteenth Amendment

The history of the disenfranchisement of African-Americans, notwithstanding the Fifteenth Amendment, is an important chapter of American history. That history reveals that the Fifteenth Amendment has been as important to African-American suffrage as the Fourteenth Amendment. Almost lost in the recent allegiance of African-Americans to the Democratic Party is their earlier allegiance to the Republican Party. In the early twentieth century, Black Republicans were as likely as the relatively few Black Democrats to champion voting rights and challenge the disenfranchisement of Black voters. Arguing their rights under the Fifteenth Amendment, Black Republicans and Democrats challenged several state constitutional provisions enacted in the Jim Crow era and practices of state election officials that disenfranchised Blacks. The most notable of these were the infamous grandfather clauses that were struck down on Fifteenth Amendment grounds in *Guinn v. United States*[4] and *Myers v. Anderson*.[5] Those cases were joined by *United States. v. Mosley*,[6] which involved the refusal of election officials to count the votes of Black voters.

Bush v. Gore was decided on Fourteenth Amendment grounds similar to those in *Baker v. Carr*[7] and *Reynolds v. Sims*.[8] The conduct of hand recounts without uniform standards arbitrarily discriminated against some Florida voters. Because ballots may be counted in one county and not counted in another such recounts ran afoul of the Court's long-standing one person, one vote standard. That same reasoning could be applied to the differences between counties in the initial counting of votes because differences in under and over counts due to machine error rates would also appear to violate the one voter, one vote standard. But this issue was at least raised in *Bush v. Gore*.

It is not unusual for the Fourteenth and Fifteenth Amendment claims to arise in voting rights cases before the Supreme Court. The White Primary Cases were my favorite ones in constitutional law. In the first two cases,[9] Dr. L. A. Nixon challenged Texas statutes prohibiting Blacks from voting in the Democratic Primary on Fourteenth Amendment grounds. Dr. Nixon, however, did not vote in the Democratic Primary until nearly twenty years after his first case when the Supreme Court decided *Smith v. Allright*[10] on Fifteenth Amendment grounds. And in *City of Mobile v. Bolden*,[11] Black voters unsuccessfully challenged the dilution of their votes for county commissioners in an at-large electoral scheme on Fourteenth and Fifteenth Amendment grounds. In *Allen v. State Board of Elections*, the Court recognized that violations of the Fourteenth Amendment one person, one vote principle could be tantamount to Fifteenth Amendment violations protected by the Voting Rights Act.[12] Given this history, it was not unreasonable to have expected some discussion of the Fifteenth Amendment in *Bush v. Gore*.

The absence of discussion on the effect of the Fifteenth Amendment on the Article II provisions is even more interesting since the *per curiam* decision of the Court cites *MacPherson v. Blacker*,[13] in which the Court was asked whether a Michigan statute changing the voting process for Presidential Electors violated the Fourteenth and Fifteenth Amendments. The *MacPherson* Court held that the Fourteenth Amendment did not amend the Article II provisions and, apparently, that the Fifteenth Amendment was inapplicable because it contained a race based trigger. The inapplicability of the Fifteenth Amendment may have seemed obvious in *Bush v. Gore* because the voting irregularities in Florida affected Floridians of all colors. However, the plaintiffs in *MacPherson* raised the Amendment even though race was not a factor.

The requirement of race based inequality frequently has been in issue in Fifteenth Amendment litigation. For example, as early as 1903, the Court held in *James v. Bowman*[14] that a statute punishing the bribery of Blacks not to vote did not violate the Fifteenth Amendment because there was no showing that Black voters were paid not to vote because they were Black. Even in *Guinn*, the Court had to address the question of whether a racial nexus existed in the case of the grandfather clauses that contained no express reference to race. The racial nexus was squarely in issue in *Bolden* in which the Court held that the cause of action failed because there was no showing that the at-large voting system in question was enacted for the purpose of disenfranchising Blacks. Justice Marshall strongly disagreed with the majority arguing that the racial nexus in voting rights cases must be examined in the light of historical and social factors.[15]

In *Bush v. Gore*, the adverse impact of the actions of Florida election officials on African-Americans before and on Election Day was as obvious as a semi-truck in the Supreme Court. News accounts contained numerous stories about complaints by African-Americans about the voting process in their districts before, on, and after Election Day. First, there was the private firm hired by the Florida Secretary of State to cull the names of convicted felons

(continued on page 21)

a principle that calls into question any manual recount in a statewide race that is undertaken on a less than statewide basis. We can be confident that all of these issues will be served up to federal courts in contested elections in the future and, indeed, the equal protection principle involved may spawn litigation outside of the election arena entirely.

That takes us to the final fork. Given that the Court did conclude that there was an equal protection problem, the next question became whether the state would be given an opportunity to sort it out (or determine that sorting it out would be futile). Of course, in the most hotly debated feature of the *Bush v. Gore* decision, the Court decided that there was no time for a proper recount and thus no point in a remand. The witching hour was fixed by the Court at December 12. In the prior weeks, a consensus emerged that December 12 was not a deadline for the selection of Electors under federal law, but rather the cut-off for the so-called "safe harbor" under which appointed Electors would enjoy a statutory protection in a future challenge in Congress. In the passage that chose the nation's President, the Court etched into the *United States Reports* its own reading of the desires of the Florida Legislature:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards.[17]

The Court did accurately extract what charitably can be described as a passing reference in the Florida Supreme Court's opinion about its interpretation of the Florida Legislature's preferences. But the Florida court was not answering the same question then that now was presented: When there was an actual conflict between the perceived legislative desire to take advantage of the statutory safe harbor of 3 U.S.C. § 5 and the undoubtedly discernible purpose of the Election Code to have an accurate vote, which should prevail? Or could the state's interest in "full participation" still be substantially satisfied by a resolution by the appropriate branches of the Florida government that was able to satisfy both equal protection and Article II considerations and be completed by December 18, when the electors meet?

Perhaps the Florida courts and/or legislature would have resolved these questions with the very same outcome as the Supreme Court's opinion produced. Indeed, that result seems the likely one. But even if that were so, it would have been a better and more satisfying resolution to allow those state processes to have reached that conclusion, rather than a sharply divided Supreme Court majority's reading of the Florida Supreme Court's reading of the Florida Legislature's less than crystal-clear advance directive.

In the concluding passage of *Bush v. Gore*, the Court stated:

> None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.[18]

In the 2000 Florida election controversy, the key decisions made by the Court consistently signaled a greater willingness to exercise that unsought responsibility. The welcome extended to Article II challenges, the suggestion that irreparable harm can be found in losses of electoral legitimacy, a new domain for equal protection claims, and the decision to make a conclusive determination of a state's wishes about the resolution of an election controversy all open the federal courthouse doors much wider to future election controversies that long have been the province of state courts.

Endnotes

1. U.S. CONST. art II, § 1. *See generally* McPherson v. Blacker, 146 U.S. 1 (1892).
2. David Von Drehle et al., *In Florida, Drawing the Battle Lines*, WASH. POST, Jan. 29, 2001, at A1.
3. U.S. CONST. art II, § 1, cl. 2.
4. Brief for Respondents Al Gore, Jr. and Florida Democratic Party at 39-40, George W. Bush v. Palm Beach County Canvassing Board, 121 S. Ct. 471 (2000) (footnotes omitted).
5. Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471, 473 (2000).
6. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).
7. Bush v. Gore, 125 S. Ct. 525, 533 (2000) (Rehnquist, C.J., concurring).
8. *Id.*, 125 S. Ct. at 549 (Ginsburg, J., dissenting).
9. This is how many explain the Court's decision in Michigan v. Long, 463 U.S. 1032 (1983), which otherwise seems to expand the role of the Supreme Court of the United States in reviewing judgments of state courts.
10. *See, e.g.*, Touchston v. McDermott, 234 F.3d 1133 (11th Cir. 2000).
11. Bush v. Gore, 121 S. Ct. 512 (2000) (Scalia, J., concurring) (emphasis added).
12. *Id.* at 513 (Stevens, J., dissenting).
13. *See, e.g.*, Marie Cocco, Warning: *Counting Votes in a Democracy Causes Harm*, Newsday.com (Dec. 12, 2000) <http://www.newsday.com/columnists/stories/tuesday/nd5540.htm>.
14. Petition for a Writ of Certiorari, Siegel v. LePore, No. 00-837 (filed Nov. 22, 2000).
15. *Bush v. Gore*, 121 S. Ct. at 525, 532.
16. *Id.*
17. *Bush v. Gore*, 121 S. Ct. at 533 (citations omitted).
18. *Id.*

Fifteenth Amendment

(continued from page 14)

police roadblocks in predominantly Black districts on thoroughfares leading to the polls. Then there were the confusing ballots and instructions in Jacksonville. There were other reports of election workers refusing to permit minorities to vote because their names were not on the registration rolls or asking for more identification. Many Americans and a majority of the Supreme Court were unwilling to consider these as serious constitutional violations.

Although Vice President Gore's request for a recount was about the right of a candidate to have a fair election, the case was an opportunity to advance the principle that the voters have a right to have their votes counted. It came as a shock to me to hear that all votes are not counted. Even more shocking was the extent to which many politicians

and political analysts accepted such imperfection as normal. It is said that, nationally, more than 2 million votes in the presidential election were not counted, with reasons ranging from machine error to voter error. There were differences in uncounted votes from precinct to precinct, from state to state in part due to different rates of machine error. The acceptance of imperfection as a normal part of the electoral process, however, is a prescription for rampant disenfranchisement.

The State of Florida embraced such imperfections and that is precisely the complaint of Black voters in Florida. As soon as I heard the reports explaining the differences in voting machine error rates, I instinctively knew what subsequent reports confirmed. The older more error prone machines were more likely to have been placed in precincts with large numbers of Black voters. It was a page straight out of the election tactics of the Jim Crow South. It leaves an uneasy feeling that despite the voting rights litigation, the march from Selma to Montgomery, countless voting registration drives, the sacrifices of the Rosa Parks of the Civil Rights Movement, and the clout of the United States Department of Justice, even where Blacks are able to exercise the franchise, their votes may not be counted.

Remedies for Fifteenth Amendment Violations

Even if the Fifteenth Amendment questions had been raised, fashioning an adequate remedy to redress violations would have been less certain than the framework suggested by the dissenters in *Bush v. Gore.* In *Guinn* and *Mosley*, election officials were indicted and convicted for violating the civil rights of Black voters. In *Myers v. Anderson,* the Court upheld the award of damages to Black voters who were denied the right to register and vote. Criminal convictions of Florida election officials and civil damages may be warranted, but if a presidential election was won through the disenfranchisement of Black and other minority voters in violation of the Fifteenth Amendment, those remedies would not have removed the taint of the election.

The conventional wisdom before the Court accepted the appeal and the position of the dissenters was that the Court should not have heard the case. I, too, held that view but I now think it was appropriate for the Court to have entertained the appeal. A presidential election is not an ordinary election. Matters of voting rights in federal elections present serious justiciable issues involving individual constitutional rights that override the right of states. The real problem is not that the court heard the case; the problem is that the decision produced an awful result. Voting rights cases frequently present delicate and intractable remediation problems. The Court could and did not resolve them merely by bringing finality to the presidential election. By proceeding as it did, it not only selected the winner of the presidential election, it accepted the results of an election tainted by the constitutional violations the Court left unaddressed and uncorrected. Litigation is now proceeding under the Voting Rights Act, which was enacted pursuant to section 2 of the Fifteenth Amendment. That Act provides several remedies including enjoining the conducting of an election, or voiding an election, that do not meet constitutional or statutory standards. The courts, however, have been extremely reluctant to overturn the results of an election. The Supreme Court would have been expected to be even more averse to overturning a presidential election.

Most African-Americans would be astonished to learn that neither the Fifteenth Amendment nor any other part of the Constitution guarantees the right to vote. In *Guinn*, the Court explained that the Fifteenth Amendment only guarantees an equal right to vote. Voting rights are actually determined by the states. Theoretically, if a state does not provide voting rights, the Fifteenth Amendment does not compel a state to provide them. However, in *Shaw v. Hunt*[16] and *Reynolds v. Sims*,[17] the Court recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society." Given its importance in our political system, the Court could have focused on the recount process as the means to remediating the unconstitutional deprivations and infringements of the right to vote. It had held previously in *Mosley* that the right to vote includes the right to have one's vote counted. In upholding the convictions of election officials in that case, Justices Holmes stated, "the right to have one's vote counted is open to protection by Congress as the right to put a ballot in a box."[18] If the Court had been asked in *Bush v. Gore*, it could have decided whether the Fourteenth or Fifteenth Amendments constrained a time frame for conducting presidential elections set by Congress pursuant to Article II. Accordingly, it could have held that election officials were required to make every effort to count all votes throughout Florida with uniform standards, and adopted a page from the Florida Supreme Court of developing constitutional guidelines to be applied in a reasonable time frame.

This view of the Fifteenth Amendment may transform the current view that recounts are for the vindication of the rights of candidates. The Florida statute permitting recounts only in precincts selected by a candidate requesting a recount was flawed because it did not vindicate the rights of voters. Record numbers turned out in Florida and the state should have taken every measure available to assure that their votes were counted. That a presidential election was involved did not render Florida's obligation any less. If anything, it heightened the duty imposed on Florida.

Mandating hand recounts would not have cured all Fifteenth Amendment problems. The pending Voting Rights Act litigation assails the practices in Florida that denied minorities the right to exercise their voting rights. Their rights could not be vindicated through a recount process and the Court ultimately may face this issue as the case winds through the courts.

I do not believe that one must be an African-American to care, think, or raise questions about the Fifteenth Amendment or that an "African-American" viewpoint is something other than an "American" viewpoint. Voting rights present significant issues of concern to all

Americans. The presence of racial and ethnic groups in our American democracy pose conundrums that would have perplexed the Founding Fathers. After all, they resolved the slavery question in a manner that most Americans now consider repugnant. They did so without input from the slaves or fear that their voices would matter in the political process. African-American voices must be heard now. These discussions appear to be even more difficult to have in the era of integration where we live, work, and socialize with people of different ethnic groups and races, people whom we have come to know, respect, and like. We must be willing to confront and cooperate with each other over these issues if we are truly to have one America.

Endnotes

1. 121 S. Ct. 525 (2000).
2. The Fifteenth Amendment only protected the right of Black males to vote at the time of its ratification. Black women did not attain constitutional protection of suffrage until the ratification of the Nineteenth Amendment in 1920.
3. 42 U.S.C. § 1973 (2000). Section 2 subjects states and other political subdivisions with a history of racial discrimination in the voting process or with substantial minority populations to greater federal regulation of the voting process. Florida is a covered state as designated by the Attorney General. 28 C.F.R. Part 51 (2000).
4. 238 U.S. 347 (1915).
5. 238 U.S. 368 (1915).
6. 238 U.S. 383 (1915).
7. 369 U.S. 186 (1962).
8. 377 U.S. 533 (1964).
9. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 83 (1932).
10. 321 U.S. 649 (1944).
11. 446 U.S. 55 (1980).
12. 393 U.S. 544, 569 (1969).
13. 146 U.S. 1 (1892).
14. 190 U.S. 127 (1903).
15. 446 U.S. 96.
16. 509 U.S. 630, 639 (1993).
17. 377 U.S. 555.
18. 238 U.S. 387.

Model Rules

(continued from page 3)

Section on Administrative Law and Regulations and others. We would appreciate your support in conveying our concerns about these proposed changes to your state and local bar associations and to your state's representatives in the ABA House of Delegates who will be asked to vote on these measures at the Annual Meeting in Chicago in August.