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Op-Ed: Bush vs. Gore's ironic legal legacy
By Jamie Raskin
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Fifteen years after Bush vs. Gore, 15 years after the Supreme Court intervened in a presidential election, a single sentence in the majority opinion remains one of the great constitutional brainteasers in our history. If we take the sentence at face value, it's nonsensical; if we ignore it, we might just be able to improve our dysfunctional election system, at least modestly.

As we all know, the Supreme Court on Dec. 11, 2000, ordered an end to ballot-counting in Florida, effectively calling the election for the national popular vote loser, George W. Bush. And as most fair-minded legal experts agree, the rationale for leaving more than 100,000 ballots uncounted was convoluted — an extravagant and unprecedented twist on Equal Protection law.

Observing that the Florida Supreme Court's recount procedure depended on election officials discerning the “intent of the voter” in different counties, the U.S. Supreme Court ruled that there were not sufficiently specific rules in place to guarantee that all ballots would be treated exactly equally in different places. Although the “intent of the voter” standard was the same across all 50 states, the majority found that Florida's recount process did “not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” of voter equality. The 5-4 majority then decided, bizarrely, that the remedy for the hypothetical problem of certain ballots being unfairly excluded was to exclude all of them. Case closed; election over.

Everything about this reasoning was deeply suspicious, but the most baffling aspect was the unusual disclaimer the majority posted at the end of its analysis: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” In other words: This decision exists in a vacuum. Like Cinderella's gown, the reasoning here turns to rags at midnight.

Election specialists understood the point immediately. This country has thousands of electoral jurisdictions, all with varying rules for voter registration, voting by machine or paper ballot, vote tabulation, absentee voting, and candidate access to the ballot. The voting experience differs dramatically across municipal, county and state lines.

Some counties make it easy to register to vote; some make it hard. Some states require a photo ID at the polling place; others do not. Independent candidates need to assemble tens of thousands of signatures to get on the ballot in some jurisdictions; in others, it suffices to pay a fee.

The court added its caveat because it did not want to open a Pandora's box of voter equality claims that could bring down the whole system. By purporting to strip the case of precedential value, however, the majority not only raised questions about what was so special about recounts in Florida, it also thumbed its nose at the rule of law, whose cardinal principle is to decide like cases in like ways. How can a decision be a decision and not be a decision all at once?

When I first read the “present circumstances” sentence, I thought of Magritte's famous painting, “The Treachery of Images,” with the beautiful rendering of a pipe and the words “Ceci n'est pas une pipe” (“this is not a pipe”). Inspired by Magritte, the majority could have written: “This is not a Supreme Court decision.”

Some voting rights advocates, however, have chosen to ignore the court's odd disclaimer. They've chosen, instead, to make the most of Bush vs. Gore by taking seriously the notion that voter equality is a right guaranteed by the Constitution. Because if “nonarbitrary treatment of voters” is a requirement, then there's a legal case for a uniform national voter registration process, standardized voting machinery, and more.

Attorneys have thus invoked Bush vs. Gore in voting rights cases, and some judges have followed suit — daring to cite the theoretically unmentionable case, the Voldemort of Supreme Court decisions.

In the 2006 case Stewart vs. Blackwell, for example, the U.S. 6th Circuit Court of Appeals ruled that Ohio could not give certain communities unreliable, deficient voting equipment and others better equipment. The majority noted that, under Bush vs. Gore, such
inconsistency was a violation of Equal Protection. The majority also castigated the dissenters who argued that Bush vs. Gore was unusable because it lacked analytical “seriousness.”

“Murky, transparent, illegitimate, right, wrong, big, tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it — ‘Supreme Court' — carries more weight with us. Whatever else Bush vs. Gore may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it.”

Many courts, from New Hampshire to Montana, have taken the same tack. In 2002, when Latino and African American voters in Chicago challenged the use of faulty machinery in their districts, the U.S. District Court for the Northern District of Illinois used Bush vs. Gore to reject a motion to dismiss the claims.

But if lower court judges seem determined to realize Bush vs. Gore's elusive promise, the Supreme Court has never resumed its flash-in-the-pan campaign to promote voting equality. On the contrary, when the Supreme Court has intervened in the electoral process, it's been to subvert voting equality. The majority has only followed Bush vs. Gore as a spiritual template for 5-4 interventions that unbalance the democratic process in favor of the powerful.

In Citizens United vs. FEC (2010), the court's five conservative justices reversed centuries of Supreme Court jurisprudence to endow private corporations with political free speech rights. Similarly, in Shelby County vs. Holder (2013), the five conservatives cut the heart out of the Voting Rights Act's crucial “preclearance” requirement, making it easier for states to block voter access to the polls.

The irony of Bush vs. Gore is that, while it is perhaps the most partisan, arbitrary and tendentious decision in the Supreme Court's history, its injury to democracy was built on an aggressive claim about the necessity of voter equality. The majority did its best to bury the claim just as quickly as it unveiled it, but the rule of law is a pesky and resilient thing and there are many lawyers who refuse to let it go.

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