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See NOTE.
The Supreme Court’s Misplaced Concern with Selective Fairness: *Bush v. Gore* and Three Analogies to Grading Dilemmas

William K. S. Wang

**Selective Fairness vs. No Increase in Fairness**

The United States Supreme Court’s decision of *Bush v. Gore*\(^1\) had a number of rationales. I shall criticize only one: that no increase in fairness to individual voters is better than selective fairness. I shall argue the opposite.

The majority opinion expresses concern about selective fairness to *individual voters*. For example, it suggests that if Florida were manually to recount undervotes (where the machine detected no vote), the state should also manually recount overvotes (where the machine detected votes for two or more presidential candidates). In the Court’s words:

>[T]he *citizen* whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the *citizen* who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent.\(^2\)

Later the majority comments on the Florida Supreme Court’s procedures for recounting: “The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been addressed . . . .”\(^3\)

In addition to concern about overvotes, the majority also objects to the Florida Supreme Court’s willingness to permit the results of *partial recounts* completed by the deadline.

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2. 531 U.S. at 108 (emphasis added).
3. *Id.* at 109–10.

The Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondents' [Gore's] submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. . . . The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees. 6

In short, the majority opinion questions the fairness of (1) manually recounting undervotes without manually recounting overvotes and (2) recounting some but not all of certain categories of ballots in a county. One of the reasons the majority of the Supreme Court stopped the recounting in Florida was that time supposedly did not permit a more comprehensive recount. 6 I shall argue that, if a more comprehensive recount was not possible, a selective nonpartisan recount would have been better than nothing.

If the fairness goal is an accurate overall election result, a selective nonpartisan recount is better than nothing because the selective recount makes the vote tally more accurate. If the fairness goal is to accurately count each citizen's vote, a selective nonpartisan recount is better than nothing because some increase in fairness to individual voters is better than no increase in fairness. 6

I shall address the fairness goal of accurately counting each citizen's vote. Regardless of which candidate wins, a fair election process should count each vote accurately. Some citizens vote for a minor party's candidate even if they are convinced (correctly) that the candidate will lose. Indeed, many citizens vote for a major party's presidential candidate even if they are convinced (correctly) that the candidate (and his or her electors) will not carry the particular state. These citizens are entitled to have their votes counted accurately.

To demonstrate that selective fairness to individual voters is better than no increase in fairness, I offer three analogies to grading dilemmas faced by teachers. Even aside from Bush v. Gore, these analogies raise interesting issues about how to grade examinations fairly.

4. Id. at 108.
5. See id.
6. Normally, in equal protection cases, the Supreme Court will strictly scrutinize overinclusive or underinclusive categories (in this instance, the category of votes to recount); the suspicion is that the state has had some hidden bias in choosing the category. With the Florida recount, however, the time pressure was genuine, and the Court might appropriately apply a rational-basis test to the state's choice as to what categories of votes to recount.


Briffault suggests "that federal constitutional intervention in state election administration should be limited to cases of 'patent and fundamental unfairness' in which the state or local practice undermines the integrity of the election itself." Briffault, supra, at 327 (quoting Griffin v. Burns, 570 F.2d 1065, 1077 (1st Cir. 1978)) (footnote omitted).
Three Analogies

Analogy 1: Changing the grade of just one examination after a rereading precipitated by a student request for feedback.

Suppose a teacher has posted the grades on an essay final examination for all the students in a class. She is not willing to regrade any exams. Nevertheless, a student asks for feedback. The teacher consents and decides to reread the exam before meeting the student. Upon rereading, she concludes that the grade was too low because she had completely missed the student’s analysis of one important issue. She must decide whether to change the grade. She rejects any other alternative, including regrading all the examinations or making a public announcement inviting requests for regrading.

Assume that, had the student originally received the higher grade, no other student’s grade would have changed under the grading curve; the teacher may raise the one student’s grade without changing any other grade.

If she raises the grade, she treats one student more fairly but deprives other students of the same opportunity for adjustment. On the other hand, if she makes no change, the student receives a lower grade than he deserves.

Which choice is fairer?

One’s first reaction might be that the teacher should not change one grade without offering the same opportunity to other students. This attitude is similar to the Supreme Court majority’s concern about overvotes and partial recounts.

Nevertheless, in a forced choice between one beneficial change and no change, one fairer grade is better. To paraphrase a saying often attributed to Milton Friedman, “There is no such thing as free justice.” With costs and time constraints, only imperfect justice may be attainable. If even one student’s grade is more accurate, that is an improvement.

Analogy 2: Conforming to a rigid grading curve by randomly selecting a student to receive a lower grade.

A more difficult hypothetical is the following. Suppose a law school imposes a rigid grading curve for final examinations. No more than 20 percent of a class may receive an A+, A, or A-. To the 100 students in her class, a teacher gives a final examination consisting entirely of multiple-choice questions. Five students receive the top raw score of 153; five get 152; eleven get 151. The next-highest score is 139, considerably lower.

The teacher feels strongly that all eleven students with a raw score of 151 should receive an A-, but this would mean that twenty-one students get an A+, A, or A-. That is one more than the twenty allowed by the rigid grading curve.

Assume that the teacher is correct in her judgment that all eleven students scoring 151 deserve an A-, especially in light of the large gap between 151 and 139, the next-highest score.

7. See Milton Friedman, There Is No Such Thing as a Free Lunch (LaSalle, Ill., 1975).
8. This is a variant of a hypothetical suggested to me by my colleague Evan Lee.
9. This conclusion assumes that, at least to some extent, grades are cardinal (absolute), rather than just ordinal (completely relative and providing ranking only).
The teacher has two choices:

1. Award only ten grades of A or A−, and give a B+ to the eleven students with a score of 151.

2. Award twenty grades of A or A−. Ten of the eleven students scoring 151 will get an A−. The teacher will randomly select one of the eleven to receive a B+.

Which choice is fairer?

One may have an initial visceral antipathy toward choice 2 because of the random selection of one student to receive a lower grade than others with an identical raw score. This is a variant of the Supreme Court’s concern about selective fairness in *Bush v. Gore*.

Despite this concern, however, choice 2 is superior to choice 1. With choice 1, all eleven students with the score of 151 will get an inaccurate grade of B+. With choice 2, ten of the students will receive an accurate grade of A−; one student will get an inaccurate grade of B+.

In other words, with choice 2, one student gets an inaccurate grade, whereas with choice 1 eleven students do. In my first analogy, only one grade was more accurate, and that was an improvement. Here, taking choice 2 instead of choice 1 means that ten grades are more accurate and no grade is made less accurate.

After the fact, the student randomly selected for the B+ might be upset if he knew how his grade had been determined. But suppose that, *in advance* of the random selection, the teacher had given each of the eleven students the following two choices: (1) get a B+, or (2) have the opportunity, based on random selection, to receive an A−.

Presumably, all eleven students would have chosen the opportunity for a better—and more accurate—grade. Each student would then have had a 10-out-of-11 chance of getting an A−, rather than a 100 percent certainty of a B+. Viewed ex ante, all eleven students are better off.

**Analogy 3: Changing in midstream the number of points allocated to two issues on an examination.**

An even more difficult hypothetical involves changing grading standards in midstream. Suppose a teacher has 120 examinations to grade. The exam consists of two long essay questions. She grades each answer by awarding up to a certain number of points for discussion of each of several issues.

After grading eighty answers to the first question, she realizes that she should have allocated five more points to one issue and five fewer points to another issue. That allocation would have resulted in more accurate grades.

If a school believed that grades were exclusively ordinal, presumably it would not use letter grades. Instead it would use percentile grades or number grades (e.g., 89 or 91) to avoid the misleading ranking impression that occurs when a student falls at the top or bottom of a letter grade (e.g., at the top of the B+’s or the bottom of the A−’s).

In other words, if a school believed that grades were completely relative, it would use number grades to convey most accurately the ranking of students and to avoid the impression of a significant difference between two letter grades.
Because of time pressure and other burdens, she cannot go back to regrade the eighty answers she has already read.

She has two choices:

1. Grade the remaining forty exams with the same inferior allocation of points used for the first eighty examinations.

2. Grade the remaining forty answers using the superior allocation.

Which choice is fairer?

Again, one may have an initial visceral antipathy toward choice 2 because of the difference in standards applied to the first eighty students and the next forty. And again, this is similar to the Supreme Court's concern about selective fairness in Bush v. Gore.

Nevertheless, choice 2 is superior to choice 1. With choice 2, forty students get the benefit of the superior standard. With choice 1, none do. If just one grade is more accurate, that is an improvement. Here, forty students get more accurate grades, and no grade is made less accurate.\(^\text{10}\)

**Reservations About a Flat Rule**

Some people might support a flat rule that the government must grant a privilege either to no one or to everyone on an equal basis.

To illustrate, suppose the government either will grant no one the right to vote or will grant randomly selected citizens the right to vote. Alternatively, suppose that the government either disenfranchises women or disenfranchises everyone.

If the choice is truly between two undesirable alternatives, partial enfranchisement and complete disenfranchisement, the former is better: the enfranchised voters will serve as at least a partial check on tyranny.

But the forced choice may not be real. A rule precluding partial enfranchisement may force the government to enfranchise all citizens. This may be the rationale behind a flat rule forbidding the government from arbitrarily granting a privilege. With the flat prohibition, the government may usually confer the privilege on everyone.

Similarly, in my first and third grading hypotheticals, the teacher could escape the dilemma by doing more regrading or offering to regrade more examinations. In my second hypothetical, involving the rigid grading curve, the law school could make the curve less rigid. But my analogies are designed to force a choice between two undesirable alternatives.

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10. Marcella David gives the following hypothetical. Suppose, partway through the manual recount of the Florida votes, after counting hundreds of thousands of ballots, those in charge decide that, by changing the standard somewhat, the count would be more accurate. Further assume that starting from the beginning is not desirable because of time pressure or because additional handling of the ballots would result in even more errors and undermine confidence in the result. See Marcella David, A Funny Thing Happened on the Way to the Multiple-Choice Exam: or, The Schoolroom Lessons from Bush v. Gore, 51 J. Legal Educ. 1, 13 (2001). David suggests the following choice: "permitting the count to proceed with the improved standard, the idea being that reducing the potential for error midway through the process will lead to a net reduction in the error rate for the entire recount. The choice to consciously accept inequality in the hopes of marginal improvement in the process overall might be defensible ..." Id.
In Florida only limited time was available to recount the votes for president. The state really had to choose between a partial recount and no recount. The only two alternatives were some additional accuracy or no additional accuracy. Therefore, my forced-choice grading analogies are apt.\textsuperscript{11}

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The three grading analogies show that selective fairness is better than no increase in fairness. If, compared to the only alternative, one grade is more accurate and no grades are made less accurate, that is an improvement.

Similarly, if only one more voter in Florida had had his vote for president counted, the election would have been fairer. The Supreme Court assumed that time did not permit a more comprehensive recount.\textsuperscript{12} If that assumption was correct, the Court’s decision to stop a partial recount decreased fairness.

Of course, a partisan selection of which Florida votes to recount would have been unfair. With a nonpartisan selection, however, accurately counting additional votes would have violated no one’s equal protection rights.\textsuperscript{13}

The forced choice between a partial recount and no recount was real. Recounting all the ballots was impossible. Either some additional voters would have their votes counted, or none would. Given this forced choice, a partial recount was better.

\textsuperscript{11} I realize that a counterargument exists. Rather than focus on one election, the Supreme Court might have prevented a partial recount in Florida to encourage states to improve the election process in the future so that partial recounts would not be necessary.

One response to the above argument is that the Court had discretion in the remedial stage to allow a Florida partial recount while simultaneously announcing a strong reluctance to allow partial recounts in the future. Such a tough prospective rule would still encourage states to improve their election processes.

\textsuperscript{12} See Bush v. Gore, 531 U.S. at 108.

\textsuperscript{13} Cf. Briffault, supra note 5, at 329 (”[O]ne striking consequence of the United States Supreme Court’s decision is that, unlike any other case in which the Equal Protection Clause was used to vindicate the right to vote, Bush v. Gore produced a smaller electorate marked by greater intercounty discrepancies than would have been the case had the Court stayed its hand.”). Briffault says, “Both of the options available to the Florida court were flawed. . . . But the second option—the manual recount—at least had the benefits of increasing the number of Floridians whose votes were counted and of reducing the disparities in voting rates attributable to differences in the quality of county voting machinery.” Id. at 372.