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WAS *BUSH v. GORE* A HUMAN RIGHTS CASE?

*Gerald L. Neuman**
*Nicholas Hatzis***

In a contested election, the state's highest court unexpectedly concludes, in light of the principles of its own constitution, that the officially certified result should be set aside and recalculated because it employed a restrictive method that impaired the counting of every vote. The initial winner moves the case to an even higher authority, which rules that the state court's decision itself violated the electorate's right to vote. It expresses concern that the state court violated equality by creating a situation in which votes are counted by different rules in different jurisdictions of the state.

Sounds familiar? But this time the context was not the millennial presidential election in the United States. It was the Greek parliamentary election of 2004, and the second decision was a ruling by the European Court of Human Rights, finding that Greece's highest court had violated the international human rights of the disappointed candidates. The judgment in *Paschalidis v. Greece*¹ affords a number of interesting perspectives on *Bush v. Gore*,² and on the brave new world of transnational adjudication of election disputes.

1. WHAT HAPPENED IN ATHENS

The 2004 parliamentary election in Greece resulted in an important shift from a government of the left to a government of the right. After eleven years of rule, the Pan Hellenic Socialistic Movement (PASOK) lost power to the New Democracy party

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1. *Paschalidis, Koutmeridis and Zaharakis v. Greece*, App. Nos. 27863/05 et al. (Eur. Ct. H.R. Apr. 10, 2008) (Judgment).

2. 531 U.S. 98 (2000).

(ND), led by Kostas Karamanlis, the nephew of party founder and former President Konstantinos Karamanlis.³ ND won a solid majority, and the electoral litigation was not crucial to making Karamanlis Prime Minister—in that respect, there was no similarity to the U.S. election of 2000.

Greece elects its parliament through a complicated scheme of proportional representation.⁴ The system seeks stability by awarding a premium of seats to the plurality party, and it also reinforces the strength of small parties that exceed the minimum threshold. For the 2004 election, allocation of seats to candidates on party lists proceeded in three stages. At the first stage, seats were distributed within multimember electoral districts by calculating an “electoral quotient” equal to the total number of votes divided by the number of seats for the district plus one. At this stage, each party received as many seats as the integral number of times its own vote score exceeded the electoral quotient. (Thus, if the electoral quotient were 20,000, and the party won 45,000 votes, it would receive two seats at this stage.) At the next stage, seats not yet allocated would be distributed based on vote scores within a larger region.

The *Paschalidis* litigation concerned three parliamentary seats won in districts in the region of Central Macedonia. The reelection of PASOK deputy Giorgos Paschalidis in the district of Pella was challenged by losing ND candidate Parthena Fountoukidou before the Supreme Special Court (SSC), the competent court for parliamentary election disputes.⁵ She questioned the validity of some individual ballots, but more importantly she claimed that the electoral quotient for Pella was wrongly calcu-

3. Both nephew and namesake, because “Kostas” is a nickname for “Konstantinos.” The uncle (who died in 1998) had been the first Prime Minister and later President of the Greek Republic established in 1974 after the fall of the military dictatorship. As we will see, another of the current Prime Minister’s uncles, Achilleas Karamanlis, was also involved in the 2004 electoral saga. Meanwhile, the dynastic resemblance to *Bush v. Gore* is heightened by the fact that PASOK was led in the 2004 elections by Giorgos Papandreou, son of PASOK founder Andreas Papandreou, who had served as Prime Minister from 1981 until 1989 and from 1993 until his death in 1996. Andreas Papandreou’s immediate successor, Kostas Simitis, did not seek reelection in 2004.

4. See Prodromos D. Dagtoglou, *Constitutional and Administrative Law*, in INTRODUCTION TO GREEK LAW 23, 34–35 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds. 3d ed. 2008). Its features have been repeatedly adjusted by prospective legislation, sometimes for partisan advantage. See Stratos Patrikios & Georgios Karyotis, *The Greek parliamentary election of 2007*, 27 ELECTORAL STUD. 356, 357 (2008); see also G. Kazamias and D. Papadimitriou, *The elections in Greece, April 2000*, 21 ELECTORAL STUD. 649, 650 (2002) (explaining the three-stage system).

5. See Anotato Eidiko Dikastirio [AED] [Supreme Special Court] 12/2005 (Greece) [hereinafter SSC Judgment 12/2005].

lated, because the numerator included only the votes cast for the various parties: it failed to add in the blank ballots presumably cast as protest votes.⁶ As chance would have it, including the modest number of blank ballots in the total would raise the electoral quotient for Pella sufficiently that PASOK would earn only one seat rather than two at the first stage of allocation,⁷ Paschalidis would lose his seat, Fountoukidou would gain hers at the second stage, and additional repercussions would follow for other candidates in Central Macedonia, including the election to Parliament of Achilleas Karamanlis, an uncle of the new Prime Minister.⁸

A possible difficulty for Fountoukidou's argument was that blank ballots were not normally counted toward the electoral quotient. Indeed the presidential decree implementing the electoral statute had been interpreted as excluding them, and the SSC had previously held (in a 1999 decision involving European Parliament elections) that the Greek Constitution did not require them to be counted.⁹ The SSC consists of eleven judges drawn from the three highest courts, the Court of Cassation, the Council of State, and the Court of Auditors.¹⁰ The composition

6. Blank ballots in Greece are not regular party ballots left unmarked by the voter, but special blank ballots provided by the government. They are unlikely to be cast by mistake.

7. According to the SSC's calculation, 560 blank ballots were cast in Pella, and including them raised the electoral quotient (total votes divided by five) from 23,462 to 23,574. PASOK received only 46,998 votes in Pella, which was more than twice 23,462, but less than twice 23,574. Consequently, the SSC's judgment gave PASOK one rather than two seats at the first stage. (The precise numbers were also affected by Fountoukidou's challenges to specific ballots, but the resulting slight changes did not form part of the debate at the European level.) See SSC Judgment 12/2005, para. 16; Application at 6, *Giorgos Paschalidis v. Hellenic Republic*, App. No. 27863/05 (July 18, 2005) [hereinafter *Paschalidis Application*].

8. See SSC Judgment 12/2005, paras. 18–20; *Paschalidis Application*, *supra* note 7, at 5. (Understandably, the SSC Judgment mentions the name but not the relationship.) Two other candidates, Efstathios Koutmeridis of PASOK and Konstantinos Zaharakis of ND, also lost their seats as a result, and their claims were decided jointly with that of Paschalidis by the European Court of Human Rights (ECtHR). For simplicity, we will focus on the case of Paschalidis.

9. *Anotato Eidiko Dikastirio [AED] [Supreme Special Court] 34/1999* (Greece). The SSC interpreted the law as making blank ballots an intermediate category between valid ballots and invalid ballots; only valid ballots counted toward the electoral quotient. See SSC Judgment 12/2005, para. 9.

10. See 2001 *Syntagma [SYN] [Constitution]* art. 100 § 2. (Greece). The SSC also serves, under a different head of jurisdiction, as the court for authoritative resolution of controversies on the constitutionality of statutes. *Id.* art. 100 § 1(e). Greece follows the U.S. system of diffuse judicial review, under which all courts are authorized to rule on the constitutionality of laws in cases properly before them, but the decisions of the SSC under Article 100(1)(e) have exceptional precedential effect. See *Dagtoglou*, *supra* note

of the SSC panel convened for the hearing of Fountoukidou's challenge also engendered dispute; it has been alleged that the President of the Court of Auditors improperly removed himself from the case in favor a junior Vice President of his Court who had been appointed after the election.¹¹ However that may be, the SSC ruled by six votes to five in favor of Fountoukidou's challenge.¹²

The majority of the SSC found the exclusion of blank ballots from the calculation of the electoral quotient to be unconstitutional. It quoted provisions of the Greek constitution declaring popular sovereignty as the foundation of government and describing its exercise in parliamentary elections, and noted the corresponding provision of the European human rights convention.¹³ The majority emphasized parliamentary elections as the most important vehicle of popular sovereignty, and the need for equal treatment of all valid ballots. It maintained that the minimum legal effect guaranteed by the Constitution to all valid ballots—whether expressing positive support for a party or intentionally left blank—included counting them toward the electoral quotient. Treating the blank ballots merely as a statistic to be reported would reduce them to the equivalent of invalid ballots, and would not respect the free expression of the voter's will. The legislature had discretion in structuring the electoral system, but excluding valid blank ballots from the electoral quotient in parliamentary elections struck at the core of the principles of popular sovereignty and equality in voting and violated the Constitution.

4. at 31, 33. For an English language translation of the Constitution, see THE CONSTITUTION OF GREECE: AS REVISED BY THE PARLIAMENTARY RESOLUTION OF APRIL 6TH 2001, OF THE VIIITH REVISIONARY PARLIAMENT (2004), available at www.parliament.gr/english/politeuma/syntagma.pdf.

11. See Paschalidis Application, *supra* note 7, at 5, 19. The SSC rejected a challenge to the participation of the judge by 8 votes to 3. Anotato Eidiko Dikastirio [AED] [Supreme Special Court] 8/2005 (Greece). Paschalidis claimed in Strasbourg that he had been denied an impartial tribunal by manipulation of the court's composition, in violation of ECHR Article 6(1), but the European Court held (consistent with its precedents) that Article 6(1) did not apply to the resolution of contested elections. Paschalidis, Koutmeridis & Zaharakis v. Greece, App. Nos. 27863/05 et al. (Eur. Ct. H.R. 2006) (partial decision on admissibility); cf. Cheminade v. France, 1999-II Eur. Ct. H.R., App. No. 31599/96 (decision on admissibility) (stating that proceedings to resolve electoral disputes lie outside scope of Article 6(1)).

12. The disputed Vice President was among the six; the SSC judgment identifies the five dissenters. See SSC Judgment 12/2005, para. 10.

13. *Id.* para. 10 (quoting 2001 Syntagma [SYN] [Constitution] art. 1 §§ 2, 3; art. 5 § 1, art. 51 § 3; art. 52 (Greece) (citing Article 3 of Protocol 1, *infra* note 18)).

The SSC judgment also set forth the dissenting view of five judges, and the particular view of one of them.¹⁴ The five argued that, although the Constitution implicitly guaranteed the right to cast blank ballots, the legislature could legitimately differentiate between the effects of ballots choosing a party and ballots expressing no choice, in relation to the current system of representation. In addition, one dissenter wrote separately that the Constitution favored stability in electoral law,¹⁵ that the present decision departed without justification from the SSC's 1999 decision, and that the legislation sufficiently respected the free will of the voters by enabling them to cast a blank ballot and have it tabulated and reported. (The majority opinion did not expressly respond to the claim of inconsistency with its own precedent.¹⁶)

Under the Greek Constitution, the SSC is the final judge of electoral disputes.¹⁷ Thus, Fountoukidou prevailed and took her seat in Parliament. But that was not the end of the story, because Paschalidis sued Greece before the European Court of Human Rights in Strasbourg. He argued that the deprivation of his seat violated the European Human Rights Convention.

2. WHAT HAPPENED IN STRASBOURG

Paschalidis challenged the SSC's decision under the free elections provision of the European human rights system, Article 3 of Protocol No. 1.¹⁸ That provision guarantees "free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." The

14. *Id.* para. 10. (The views of the dissenting judges are appended to the same lengthy paragraph that set forth the argument of the majority.)

15. An amendment to the Greek Constitution in 2001 provided that legislative changes in electoral law would not apply until after an intervening election, unless parliament voted by 2/3 majority to give them immediate effect. *See* 2001 Syntagma [SYN] [Constitution] art. 54 § 1 (Greece). This amendment decreases the ability of an incumbent majority to fine-tune the system in anticipation of imminent elections. *See supra* note 4.

16. Speculatively, one might attempt to reconcile the two decisions by distinguishing European elections from national parliamentary elections, which the majority had emphasized as central to the constitutional conception of popular sovereignty. But the majority did not expressly offer this reconciliation, and the Greek government did not later argue it to the ECtHR.

17. *See* 2001 Syntagma [SYN] [Constitution] arts. 58, 100 § 1(a) (Greece).

18. Protocol No. 1, Mar. 20, 1952, E.T.S. 9, 213 U.N.T.S. 262, adjoined additional rights to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 222. Article 3 provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

European Court of Human Rights (ECtHR) has long construed it as protecting the individual's right to vote, the individual's right to stand as candidate, and the right of elected candidates to exercise their legislative offices.

A chamber of the ECtHR gave judgment in April 2008, holding unanimously that Greece had violated Article 3.¹⁹ The ECtHR had no objection to the counting of blank ballots *per se*. Article 3 leaves the European states considerable discretion (a wide "margin of appreciation") to structure their electoral systems, adapting them to their own visions of democracy. Limitations on electoral rights must serve legitimate goals, and must not be disproportionate to those ends. Including blank ballots in the electoral quotient, and viewing that inclusion as required by principles of popular sovereignty or electoral equality, fell within the state's proper discretion.

But the ECtHR objected to the SSC's changing the rules in the midst of the election. Once the choice of the people has been freely expressed, retroactive changes in the system should not nullify that choice, unless grounds of pressing significance to the democratic order require it. The SSC's revision of Greek constitutional doctrine, invalidating the laws then in force, was unforeseeable by the voters and the candidates. It changed the meaning of the casting of blank ballots from a disavowal of the political parties to a vote in their favor. The Greek government had not put forward any special justification for this change. (It had defended the merit of the new interpretation, and argued that the ECtHR should not obstruct progressive development of constitutional doctrine.²⁰) Moreover, applying the new constitutional

19. The mills of justice grind slowly in Strasbourg, because the ECtHR is overburdened with thousands of cases. Paschalidis filed his application in July 2005; the ECtHR issued an initial admissibility decision in October 2006, a further admissibility decision in September 2007, and its judgment on the merits on April 10, 2008.

The ECtHR does have a procedure for accelerating its consideration of cases by giving them "priority." See EUR. CT. H.R., RULES OF COURT, Rule 41 (2007). The ECtHR did not employ this procedure in Paschalidis or in any of the previous voting rights cases cited elsewhere in this Article. While this Article was in press, however, the ECtHR did decide one voting rights case as a matter of priority, *Tănase and Chirtoacă v. Moldova*, App. No. 7/08 (Eur. Ct. H.R. Nov. 18, 2008) (finding that a 2008 statute banning office-holding by dual nationals violated Article 3 of Protocol No. 1). After the Council of Europe's Commission against Racism and Intolerance and a committee of the Parliamentary Assembly of the Council of Europe had criticized the new restriction, the ECtHR gave it priority in order to reach a decision in advance of the 2009 legislative elections. See *id.* paras. 4, 35–37.

20. See Observations of the Greek Government on the Applications at 16–17, Paschalidis, Koutmeridis & Zaharakis v. Greece, App. Nos. 27863/05, 28422/05 & 28028/05, (2007).

rule only in the region of Central Macedonia created an inequality between voters in different parts of Greece, inconsistent with the principle of equal treatment implied in Article 3.

The ECtHR also considered it significant that the Greek parliament had enacted a new electoral statute in 2006 that rejected the counting of blank ballots toward the electoral quotient. This factor underlined the uniqueness of the SSC's decision.²¹

Accordingly, the ECtHR concluded that Greece had violated the rights of Paschalidis under Article 3 of Protocol No. 1, and ordered Greece to compensate him for his loss of income during the parliamentary term—which had already ended.

3. COMPARISONS, AT TWO LEVELS

Neither Paschalidis nor the ECtHR cited *Bush v. Gore*, and the comparison might be unwelcome in Europe. But does *Paschalidis* shed a retrospective favorable light on the U.S. Supreme Court's intervention in the 2000 election?

The Florida Supreme Court, it will be recalled, had construed Florida election laws in light of a perceived mandate of the state constitution to "safeguard the right of each voter to express his or her will in the context of our representative democracy."²² After the United States Supreme Court expressed uncertainty about the role the state constitution played in the decision,

21. At first glance, this observation is puzzling, because the 2006 statute may simply be unconstitutional, as the SSC's decision implies. *See id.* at 19. A holding to that effect would not be unforeseeable, but none has yet occurred. The 2006 law was applied without challenge in the 2007 parliamentary election. Meanwhile, a challenge on a slightly different issue, the failure to count blank ballots in determining the percentage of the vote required to avoid a run-off in mayoral elections, is pending before the Greek Council of State. A chamber of the Council of State upheld the exclusion of blank ballots as within the legislature's discretion; one dissenter argued that the exclusion violated the constitutional principles of popular sovereignty and voter equality as articulated by the SSC; and the case has been referred to the Plenary Session of the Council of State. *See* Symboulion Epikrateias [SE] [Supreme Administrative Court] 117/2008 (Third Chamber, Council of State, Greece).

22. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). The Florida court began its discussion by quoting article 1, section 1 of the Florida Constitution: "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." *Id.* at 1236. Compare 2001 Syntagma [SYN] [Constitution] art. 1, §§ 2, 3 (Greece), quoted by the SSC at the outset of its analysis:

2. Popular sovereignty is the foundation of government.
3. All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution.

and the possible incompatibility of such a role with the U.S. Constitution's assignment of authority over the choice of Presidential electors to the state legislatures, the Florida Supreme Court revised its approach to emphasize protection of voters' rights as a statutory policy.²³ The U.S. Supreme Court then stayed the recount on December 9,²⁴ and ordered it permanently halted on December 12.²⁵ Chief Justice Rehnquist, Justice Scalia, and Justice Thomas concluded that the Florida Supreme Court had "impermissibly distorted" the Florida election laws, changing them from "the law of the State as it existed prior to the action of the court," and had usurped the power "to step away from [the] established practice [and] to depart from the legislative scheme."²⁶ The per curiam opinion that received majority support did not make this interpretive argument central to its decision on the merits, but found a violation of the Equal Protection Clause in the Florida Supreme Court's method of ordering a recount, allowing the local bodies implementing its order to apply nonuniform standards for determining the validity of ballots, including those that contained the famous "dimpled chad."²⁷ With regard to the remedy, both components of the majority rejected the Florida Supreme Court's zeal to continue counting votes, finding that it had improperly interpreted the state law's authorization of an "appropriate remedy."²⁸

Through the lens of *Paschalidis*, one can imagine how an international human rights tribunal might have condemned the Florida Supreme Court's actions. Rather than vindicating the Florida electorate's right to vote,²⁹ the Florida court's unforeseeable revision of past practices might be seen as changing the effect of the ballots already cast, diluting the strength of the vote of citizens who had scrupulously followed the official instructions.³⁰ Variations in the methods of counting the ballots might

23. See *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273 (Fla. 2000).

24. *Bush v. Gore*, 531 U.S. 1046 (2000).

25. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

26. *Id.* at 114–15, 120 (Rehnquist, C.J., concurring).

27. *Id.* at 105–09 (per curiam).

28. *Id.* at 110–11; *id.* at 121–22 (Rehnquist, C.J., concurring).

29. See, e.g., International Covenant on Civil and Political Rights, art. 25, Mar. 23, 1976 ("Every citizen shall have the right . . . without unreasonable restrictions . . . (b) To vote . . . at genuine periodic elections which shall be held by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors . . ."). The United States ratified the Covenant in 1992.

30. The reliance interests affected by this change were arguably weaker than the reliance interests in *Paschalidis*, where the voters who cast blank ballots probably did not intend to confer an advantage on one party over another. On the other hand, conceivably

also be seen as creating inequalities between voters in different counties. Recognizing the Florida court's interpretation of state law as a revision could require the international tribunal to form its own judgment about the meaning of domestic law, but it is not uncommon for international tribunals in human rights cases to examine domestic officials' interpretation of domestic law (perhaps deferentially), in order to determine whether they have a legal basis or whether they are unfairly retroactive, or whether they are not sufficiently definite to avoid arbitrary application.³¹

The remedy ordered for the human rights violation in *Paschalidis* differed from the remedy for which *Bush v. Gore* is famous. The ECtHR declared that the Convention had been violated (regarding this vindication as itself a remedy for *Paschalidis*), and ordered payment of lost earnings and costs. But it did not give *Paschalidis* his seat in parliament. In part, that resulted from the passage of time: processing the case in Strasbourg took almost three years, and by the time the ECtHR rendered judgment, new elections had been held.³² In part, that results from the remedial caution of the ECtHR, which has slowly expanded its understanding of its authority to order performance of actions (such as release of prisoners) instead of payment of compensation. Moreover, *Paschalidis* did not request a preliminary injunction (known in the European human rights system as "interim measures"³³) to avoid irreparable harm pending the ECtHR's decision. The ECtHR has been relatively sparing so far in its use of interim measures, though some human rights tribunals have been more expansive.³⁴ If the U.S. Supreme Court

some Florida voters deliberately cast paper ballots that expressed no preference among the presidential candidates, but on which election officials could imagine a dimpled chad.

31. See, e.g., *Maestri v. Italy*, 2004-I Eur. Ct. H.R., App. No. 39748/98 (Grand Chamber) (finding that Italian law did not provide sufficient notice that membership in a Masonic lodge would result in disciplinary sanctions); *Jahn v. Germany*, 2005-VI Eur. Ct. H.R., App. Nos. 46720/99 et. al (Grand Chamber) (concluding that first statute left claimants' property rights uncertain, and that subsequent corrective statute did not unfairly deprive them of property); *Achour v. France*, 2006-IV Eur. Ct. H.R., App. No. 67335/01 (Grand Chamber) (finding that application of amended recidivism laws to subsequent offense was foreseeable and did not violate prohibition on retroactive criminal laws); *P.G. v. United Kingdom*, 2001-IX Eur. Ct. H.R., App. No. 44787/98 (finding that British law provided insufficient legal basis for covert recording, even inside police stations).

32. See *Patrikos & Karyotis*, *supra* note 4, at 356 (discussing Greek parliamentary election of September 2007).

33. See *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R., App. Nos. 46827/99 et al. (Grand Chamber). In that case, the ECtHR reviewed the practice of international tribunals regarding variously named remedial orders *pendente lite*, and changed its jurisprudence to hold that interim measures are binding.

34. See The "La Nación" Case, Provisional Measures (Inter-Am. Ct. H.R. Sept. 7,

could find that staying the Florida recount was necessary to avoid irreparable harm, then someday an international tribunal might also find interim measures appropriate in an election case.³⁵

Alternatively, one could look at *Bush v. Gore* itself through the same lens. From the international human rights perspective, the U.S. Supreme Court's unprecedented intervention in the presidential election might also be seen as violating the right to vote. The majority's interpretation of the Equal Protection Clause was unforeseeable, and has not been applied to later elections. The concurrence's application of Article II was also novel. The majority's remedial rulings were an astonishing departure from prior practice in resolving disputed presidential elections. As *Paschalidis* illustrates, the fact that a national supreme court is construing the nation's own constitution in taking control of an election does not formally immunize the decision from international human rights scrutiny. Thus, the perspective *Paschalidis* affords on the resolution of the 2000 U.S. election is equivocal—it lends support to both sides.

For those who regard the Supreme Court's decision in *Bush v. Gore* as rescuing the nation from the "train wreck" that the constitutionally specified procedures for resolving disputed presidential elections would have produced,³⁶ the *Paschalidis* decision may have articulated the relevant defense. Grounds of pressing significance to the democratic order could justify a court in revising its doctrine in the midst of an election challenge. In European human rights law, the right to vote is not absolute, and constitutional provisions are not sacrosanct when

2001), available at http://www.corteidh.or.cr/docs/medidas/lanacion_se_04_ing.pdf (ordering suspension of enforcement of libel judgment against journalist).

It is not clear how Greece would have responded if the ECtHR had ordered that *Paschalidis* be restored to office. In the Greek legal system, treaties are hierarchically superior to statute but inferior to the Constitution. 2001 Syntagma [SYN] [Constitution] art. 28 (Greece); Dagoglou, *supra* note 4, at 25. Greece can pay compensation to *Paschalidis* without violating its Constitution, but compliance with a restoration order might have required either a constitutional amendment or a voluntary revision of interpretation by the SSC.

35. See *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring) (justifying the stay order); cf. *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 96–98 (2d Cir. 2005) (affirming preliminary injunction against certifying election outcome without counting absentee ballots); *Marks v. Stinson*, 19 F.3d 873, 886–87 (3d Cir. 1994) (affirming preliminary injunction unseating candidate who allegedly won by fraud, but reversing preliminary injunction seating his opponent).

36. See, e.g., Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 49–50 (2001).

they themselves violate human rights. Again, opinions differ on whether the Supreme Court avoided a disaster.

Of course, one might also hold *Paschalidis* to a mirror, and ask how foreseeable the ECtHR's decision was.³⁷ The ECtHR had not decided a case of this kind as of 2004-2005, when the relevant acts occurred. The ECtHR had decided cases about the disenfranchisement of classes of voters,³⁸ about discriminatory electoral structures,³⁹ about membership in banned political parties,⁴⁰ and fact-specific cases about disqualification of candidates.⁴¹ In 2006, while *Paschalidis* was pending in Strasbourg, the ECtHR condemned the SSC's retroactive application of a constitutional amendment in Greece to remove a sitting member of Parliament.⁴² Thus, there were elements that would support a

37. Foreseeable or not, the decision has not been controversial. In part that may be because the delayed decision had no direct consequences for the composition of the legislature: moreover, the panel of European judges (unlike the SSC panel) was not suspected of having partisan interest in the outcome of a contest between two mainstream democratic parties in Greece. The basic principle of regional adjudication of human rights disputes is also well-established in Greece.

38. See *Labita v. Italy*, 2000-IV Eur. Ct. H.R., App. No. 26772/95 (Grand Chamber) (disenfranchisement of suspected Mafioso despite acquittal violated Article 3 of Protocol 1); see also *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R., App. No. 74025/01 (Grand Chamber) (disproportionately broad disenfranchisement of imprisoned criminals violated Article 3 of Protocol 1, affirming March 2004 Chamber decision); *Campagnano v. Italy*, 2006-IV Eur. Ct. H.R., App. No. 77955/01 (disenfranchisement due to bankruptcy violated Article 3 of Protocol 1).

39. See *Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R., App. No. 24833/94 (Grand Chamber) (exclusion of Gibraltar residents from European Parliament elections violated Article 3 of Protocol 1); *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R., App. No. 69949/01 (Second Section) (disenfranchisement of Turkish Cypriots violated Article 3 of Protocol 1).

40. See *Selim Sadak v. Turkey*, 2002-IV Eur. Ct. H.R., App. Nos. 25144/94 et al. (dismissal from parliament of member of banned party was disproportionate and violated Article 3 of Protocol 1). The ECtHR has tended to decide cases directly challenging the prohibition of a party under the rubric of freedom of association rather than electoral rights. See *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R., App. No. 19392/92 (Grand Chamber) (premature dissolution of party violated Article 11); *Refah Partisi v. Turkey*, 2003-II Eur. Ct. H.R., App. Nos. 41340/98 et al. (Grand Chamber) (upholding dissolution of Islamist party).

41. See *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R., App. No. 46726/99 (arbitrary disqualification of candidate for insufficient fluency in Latvian); *Melnychenko v. Ukraine*, 2004-X Eur. Ct. H.R., App. No. 17707/02 (finding arbitrary disqualification of candidate due to temporary refuge abroad). The ECtHR has also rejected certain challenges to minimum percentage thresholds for inclusion of political parties in legislatures based on proportional representation: a case of that kind was pending before the Grand Chamber at the time of the *Paschalidis* decision.

42. *Lykourazos v. Greece*, 2006-VIII Eur. Ct. H.R., App. No. 33554/03. In that decision, mentioned prominently in both *Paschalidis*'s written submission and the judgment, the ECtHR had found improper the application of a 2001 constitutional amendment, which forbade members of parliament to practice, to an attorney elected in 2000, even with regard to professional activity in 2003.

further extension of the case law, but nothing on point before 2008.

The ECtHR did censure another vote counting decision two months earlier, in *Kovach v. Ukraine*.⁴³ In that case, a different chamber of the court found that a local electoral commission had acted arbitrarily in violation of Article 3 by discarding all the votes in four wards after reports of minor irregularities.⁴⁴ The Ukrainian courts had held that the local electoral commission had exclusive authority to decide what circumstances justified disregarding all the votes in an electoral division, and the ECtHR criticized the commission for failing to explain why the very low numbers of alleged irregularities required so disproportionate a sanction, which had conveniently reversed the outcome.⁴⁵

The closeness of the ECtHR's examination of elections appears to be increasing. At the same time, the remedial consequences of its fact-specific decisions have often been limited. In most of these cases, as in *Paschalidis*, the ECtHR has found a violation after the term in question has already expired, and orders compensation on grounds that will not be exactly repeated. Its voting rights decisions have greater prospective effect when they invalidate disenfranchisement rules, or discriminatory electoral structures.

The other active international human rights court, the Inter-American Court of Human Rights (IACtHR), which is less inhibited about remedies,⁴⁶ issued a decision with broad prospective implications in its *YATAMA* case of 2005.⁴⁷ The IACtHR found that the right to political participation under the American Convention on Human Rights guaranteed the right of candidates to run without belonging to a political party, and the right of organizations to field candidates without structuring themselves as a political party, if that structure was inappropriate to their needs.⁴⁸ It ordered Nicaragua to adapt its electoral laws to the organizational needs of indigenous and ethnic minor-

43. *Kovach v. Ukraine*, App. No. 39424/02 (Eur. Ct. H.R. Feb. 7, 2008). This roughly contemporaneous decision was not cited in *Paschalidis*.

44. *Id.* para. 61.

45. *Id.* para. 60.

46. See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 104–05 (2008) (discussing the remedial activism of the IACtHR, and its difficulties in inducing compliance).

47. Case of *YATAMA v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

48. *Id.* paras. 215–20.

ity communities. The IACtHR also held that the provisions of the Nicaraguan constitution that established the Supreme Electoral Council as an independent fourth branch of government whose decisions on elections were not subject to judicial review violated the right to judicial protection under the American Convention, and ordered Nicaragua to make provision for such review.⁴⁹ Nicaragua has not rejected this decision, but three years later it was only in early stages of deliberation on implementing the ordered reforms, including changes to its constitution, and had not yet paid the damages awarded by the court.⁵⁰

The United States is not a party to the American Convention on Human Rights, and has not accepted the jurisdiction of an international court to adjudicate claims of human rights violations brought against it, in electoral disputes or otherwise. Other democracies have joined regional systems of binding human rights adjudication. National courts in such regimes have seen their creativity flanked by new forms of accountability that they cannot silence by claiming the mantle of constitutional authority. Their experience in voting rights cases, as in other fields, is revealing once more that supreme courts of any system are infallible only to the extent that they are final, in time and in space.

49. *Id.* paras. 170–76.

50. See Case of YATAMA v. Nicaragua, Supervision of Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 4, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/yatama_04_08_08_ing.pdf.