

***BUSH v. GORE*: MANDATE FOR ELECTORAL REFORM**

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A mere five weeks after voters went to the polls, the U.S. Supreme Court in *Bush v. Gore*¹ brought an end to the 2000 presidential election by effectively stopping the recounting of votes in Florida. Many observers described the Court's decision as contentious, particularly given the famously collegial nature of the Court.² Lost in the talk of disharmony, however, was the existence of a large, seven-vote majority for a crucial element of the Court's holding: the recount procedure ordered by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment.³

That *Bush*'s equal protection holding was novel in important respects is fairly obvious.⁴ *Bush*'s own lawyers almost chose not to

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This Note largely was written in the year following the *Bush v. Gore* decision. In the interim, much has happened, with a growing number of jurisdictions abandoning older balloting systems in favor of newer technologies. Due to publication constraints, I have not incorporated all the possible updates. Nonetheless, the constitutional implications described remain salient, as voters and courts continue to wrestle with the equal protection implications of what the Supreme Court has wrought.

1. 531 U.S. 98 (2000).

2. See, e.g., David A. Kaplan, *The Accidental President*, NEWSWEEK, Sept. 17, 2001, at 28 (recounting a private meeting between members of U.S. Supreme Court and Russian Constitutional Court in which Justice Stephen Breyer, breaking the Court's taboo on criticizing decisions in public, characterized *Bush* as "the most outrageous, indefensible thing' the Court had ever done," and a "a self-inflicted wound' harming 'not just the Court, but the nation'"); Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at A1.

3. *Bush*, 531 U.S. at 108-110 (per curiam); *Id.* at 145-146 (Breyer, J., dissenting from the judgment but concurring on the equal protection holding, joined by Souter, J.).

4. See Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 685 (2001) (suggesting equal protection doctrine applied in *Bush* was "widely unsuspected by bar and bench").

make the equal protection argument,⁵ and when they did, it was struck as unsubstantial by the first federal judge to consider it.⁶ Indeed, considerable academic literature, representing a range of legal ideologies, has criticized the equal protection holding,⁷ with few commentators manning the ramparts in defense.⁸ The chorus of criticism generally has included a variety of explanations for the opinion, other than that the facts and law compelled it, ranging from base political motives to a need to protect democracy.⁹ In the words of one commentator, the opinion produced “order without law.”¹⁰

5. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1730 n.41 (2001) (suggesting the equal protection argument “was ‘initially thought so weak’ that Bush’s lawyers thought it did not raise a substantial federal question”) (citing James V. Grimaldi & Roberto Suro, *Risky Bush Legal Strategy Paid Off*, WASH. POST, Dec. 17, 2000, at A32).

6. Siegel v. LePore, 120 F. Supp. 2d 1041, 1049 n.5 (S.D. Fla. 2000) (no “substantial likelihood of success,” necessary to justify injunctive relief, on equal protection claim). One commentator even recalls wondering at the time of its assertion why the equal protection argument did not violate Rule 11 of the Federal Rules of Civil Procedure (which prohibits filing of legal claims unwarranted by existing law or justified by a “nonfrivolous argument” for an extension thereof). Linda Greenhouse, *Learning to Live with Bush v. Gore*, 4 GREEN BAG 2D 381, 383–84 (2001); FED. R. CIV. P. 11(b).

7. See, e.g., Richard Epstein, *In Such Manner as the Legislature Thereof May Direct: The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 614 (2001) (describing the equal protection holding as a “confused nonstarter at best, which deserves much of the scorn that has been heaped upon it”); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 638 (2001) (“The fact that law was the instrumentality of resolving disputes does not of itself establish that the law was well utilized or that its principles were wisely applied.”); Richard Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001) (categorizing the Court’s equal protection argument as less persuasive than the Article II argument adopted by three concurring Justices); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 739 (2001).

8. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 4 (2002); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001).

9. See, e.g., Greenhouse, *supra* note 6, at 382–83 (summarizing and classifying arguments for and against the decision); Strauss, *supra* note 7, at 737–38 (“[I]n my view . . . several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore”); Richard Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001) (finding it difficult to isolate the “cultural” component of the opinion—that democracy required judicially-ensured order—from contributing roles of legal and political factors); Epstein, *supra* note 7, at 635 (arguing that whatever its failings, *Bush v. Gore* was necessary to remedy an exceptionally flawed opinion by the Florida Supreme Court).

10. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 (2001) (arguing that “[f]rom the standpoint of constitutional order, the Court might well

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But *Bush* stands as more than just a fact-specific result, more than a meaningless judicial coin-toss. Seven of nine Supreme Court Justices concurred on the equal protection holding,¹¹ and if the Court insists on saying something is so, then it is so.¹² What the majority said, precisely, was explained in a nearly 4,000 word, twelve-page per curiam opinion—an opinion by which it and all other courts ostensibly are now bound in interpreting the Constitution.¹³ Such a pronouncement by the United States Supreme Court can not flippantly be ignored.¹⁴ Moreover, widespread public approval of the *Bush* decision¹⁵ may do more to assure its long-term legitimacy than will the firmness of its doctrinal footing.¹⁶

have done the nation a service. From the standpoint of legal reasoning, the Court's decision was very bad.”)

11. See McConnell, *supra* note 8, at 660 (arguing that the 7-2 vote on equal protection holding means that the Court's judgment “cannot plausibly be attributed to base partisan motives”). But see Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1429 n.77 (2001) (discounting the concurrences of Justices Souter and Breyer on the equal protection holding as merely a “relic of failed negotiations”).

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12. As Justice Jackson famously observed of the Court, “[w]e are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

13. As the Court has observed before, “[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

14. Moreover, doctrinal drama or novelty, particularly in the amorphous Equal Protection Clause context, does not necessarily equate to folly. See SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* 86 (2001) [hereinafter *WHEN ELECTIONS GO BAD*] (noting the revered “one person, one vote” equal protection case of *Reynolds v. Sims*, upon which *Bush* relies, “required the massive and immediate restructuring of virtually every State legislature in the country” (citing *Reynolds v. Sims*, 377 U.S. 533 (1964))); Sunstein, *supra* note 10, at 764 (conceding about *Bush*'s equal protection holding that “[T]he absence of precedential support is not decisive; perhaps the problem had simply never arisen.”).

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15. A poll conducted shortly after the decision suggested that, while Al Gore was more popular among voters and voters were evenly divided over the correctness of the Court's decision, they overwhelmingly “accepted” it (eighty-one percent to sixteen percent). Frank Newport, *Poll Analyses, President-Elect Bush Faces Politically Divided Nation, but Relatively Few Americans are Angry or Bitter Over Election Outcome*, Gallup News Service, at <http://www.gallup.com/poll/releases/pr001218.asp> (Dec. 18, 2000).

16. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1389 (2001) (arguing legitimacy of controversial decisions ultimately may turn not only on precedential support, but on “whether the public is prepared to accept those decisions as legitimate in some broader sense”).

Thus, instead of delving into the well-worn and somewhat overheated debate over *Bush's* normative correctness, this Note focuses on a more practical issue. Namely, it asks whether *Bush's* equal protection holding can be constrained to the facts of the case by those now asked to apply it, or whether the principles for which it stands necessitate fundamental electoral reform across the country.¹⁷ A number of lawsuits already have been filed claiming that, under *Bush*, the use within a single state of balloting technologies with different accuracy rates violates the Constitution.¹⁸ At least one federal judge appears to have suggested that this may be an accurate interpretation of *Bush*.¹⁹ Given that forty-two states employed multiple balloting technologies in the 2000 election cycle,²⁰ and that reform efforts have been stymied in many states,²¹ the question of whether *Bush* is narrow or broad in its reach is one of considerable practical moment. In short, is it true, as one attorney has argued, that *Bush* has “opened a path as wide as an 18-wheel truck” for voters challenging current balloting laws?²²

This Note argues that the *Bush* holding is novel with regard to several principles of equal protection law, especially in holding the use within a single state of balloting technologies with different accuracy rates violates these principles. Part I presents the relevant facts of *Bush* to illustrate the equal protection claims the Court faced, centrally that a judicially-mandated, manual, statewide recount of uncounted, machine-cast Florida ballots would violate the Equal Protection Clause if conducted under an “intent of the voter” standard. Part II.A briefly notes those aspects of the right to vote protected under prior case law, and argues that *Bush* for the first time extends broad and novel constitutional equality norms to the right to vote vis-à-vis the counting of that vote. Part II.B traces the relevant principles of equal protection law in the voting rights context, and identifies those ways in which *Bush* departs from precedent in fashioning these equality norms. Most notably: 1) *Bush* finds constitutionally unequal treatment in conduct that does not affect any identifiable and discrete class of voters—the Equal Pro-

17. See Klarman, *supra* note 5, at 1730 n.36 (identifying Professors David Cole and Pamela Karlan as supporting this view). R

18. See *infra* Part III.

19. See *infra* Part III.B.

20. See *infra* Part III.A.

21. See *infra* note 188.

22. William C. Smith, *Bush v. Gore: Evermore: Plaintiffs Use High Court Voting Case in Other Lawsuits*, 87 A.B.A. J. 16 (May 2001) (quoting Cincinnati attorney Stanley M. Chesley, who is co-counsel in several suits challenging county-by-county balloting systems). R

tection Clause is violated even though adversely affected voters could not, particularly at the outset of the challenged state action, be said to belong to any articulable group; 2) *Bush* does not require evidence that the state *intended* to effect a discrimination; and, 3) *Bush* mandates an elevated standard of review in assessing state policy justifications for *any* unequal treatment in this regard, including minor variances “at the margins.” Part II.C summarizes these distinctions to yield an equal protection “rule” for which *Bush* necessarily must stand. Part III.A presents the variety of balloting technologies employed in the United States and discusses the extent to which American voters have different probabilities of having their votes counted on the basis of which technology they use to cast their vote. Part III.B argues that this inequality violates the Equal Protection Clause under the *Bush* rule proposed above. This Part considers the application of, and potential objections to, this conclusion, as it relates to pending state balloting challenges, using a lawsuit in California as a case in point. Part IV concludes that *Bush* represents a fundamental development in equal protection law that necessitates widespread electoral reform.

I. THE FACTS

On November 26, 2000, George Bush and Richard Cheney were certified by state election officials as the winners, by a 537-vote margin, of Florida’s twenty-five presidential (and vice-presidential) electoral votes,²³ thereby ultimately guaranteeing the ticket a slim majority in the Electoral College.²⁴ In an election contest filed pursuant to state law, candidates Albert Gore, Jr. and Joseph Lieberman alleged five instances in which election officials had either failed to count legal votes or counted illegal votes.²⁵ These claims ultimately were heard by the Florida Supreme Court, which rejected Gore’s claims of illegally counted votes, but agreed with the assertion that three classes of votes should have been included in the tally: 1) a net of 215 votes for Gore identified during a manual recount of “undervotes”²⁶ in Palm Beach County; 2) 168 net votes for Gore identified during a partial recount in Miami-Dade County;

23. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

24. *2000 Presidential Election: Electoral Vote Totals*, National Archives and Records Administration Federal Register, at <http://www.nara.gov/fedreg/elctcoll/2000map.html> (last visited Feb. 19, 2002).

25. *Harris*, 772 So. 2d at 1248.

26. “Undervotes” are those machine-cast ballots which, when counted by machine, register no vote for a particular candidate or issue. Naturally, undervotes

and 3) any votes resulting from a manual recount of approximately 9,000 undervotes still un-reviewed in Miami-Dade.²⁷ Citing the “will of the people of Florida as the guiding principle,” and a broad statutory grant of authority to resolve election disputes, the court, acting on its own initiative, additionally ordered the Leon County Circuit Court to administer a statewide recount of *all* uncounted undervotes.²⁸

To achieve this latter aspect of the order, the circuit court was instructed to order county officials to manually review undervotes from their respective counties. The standard to be employed in the recount, according to the Florida Supreme Court, was that articulated by the Florida legislature—namely, to count votes as legal “if there is ‘clear indication of the intent of the voter.’”²⁹ Although local officials in each county interpreted this standard for purposes of the general election, the Florida Supreme Court emphasized the broad statutory powers of the circuit court to “provide any relief appropriate under the circumstances,” perhaps including the ability to impose on the standard more or less definition.³⁰

Employing local election officials as counters, the circuit court ordered a recount of the contested Miami-Dade ballots using the “clear intent of the voter” standard, while prescribing a two-stage procedure to referee any resulting disputes.³¹ With regard to the statewide recount, the circuit court instructed all local canvassing

can arise as a result of many factors, from voter behavior (intentional non-vote, confusion, employing improper procedures, etc.), to mechanical failure.

27. *Harris*, 772 So. 2d at 1248.

28. *Id.* at 1253–54, 1262.

29. *Id.* at 1262 (citing FLA. STAT. ch 101.5614(5) (2000)).

30. *See id.* I say “perhaps” because a competing argument before the Court, subscribed to by three concurring Justices in *Bush v. Gore* and presaged in the Supreme Court’s earlier remand, was that any ex post judicial change in the election recount standards would violate Article II of the Constitution, which provides in part that each state shall appoint presidential electors “in such Manner as the Legislature thereof may direct.” U.S. CONST. art. II, § 1, cl. 2. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring in the judgment, joined by Scalia & Thomas, JJ.); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (remanding to clarify whether the Florida Supreme Court in its earlier order was circumscribing the legislature’s Article II electoral power by interpreting a statutory recount deadline to be mandatory rather than permissive). Thus the Florida courts may have been very careful *not* to give the standard greater definition.

31. *See Leon County Circuit Court Order on Remand, Gore v. Harris*, No. 00-2808 (Fla. 2000) (ordering counters to inspect ballots and assess the “clear indication of the intent of the voter.” Teams consisting of two circuit judges were to resolve any disputes between counters, with the court itself deciding any disputes among the two-judge teams), *stay granted Leon County Circuit Court Order of Stay*,

boards to commence individual recounts using the same standard and encouraged, but did not order, them to employ the same dispute resolution mechanism as imposed on the Miami-Dade board. Whether and to what extent the statewide recount would have featured genuinely distinct “standards” was mooted five hours later, when the circuit court, in obedience to a U.S. Supreme Court stay, halted all recounting.³²

On certiorari to the U.S. Supreme Court, petitioners George Bush and Richard Cheney asserted that the Florida Supreme Court’s recount scheme violated in several respects the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment.³³ Centrally, Bush asserted that the use of the “intent of the voter” recount standard, the meaning of which purportedly would vary depending on the official administering it, would create “disparate treatment of voters based on the counties or geographic regions in which they live. . . .”³⁴ In other words, where a particular recount standard is more generous in finding a vote on an “improperly cast” ballot, a voter is more likely to have her vote counted than under a stricter recount standard. Bush argued that the selection of more or less generous standards would be made at the county level, thus resulting in disparate treatment of voters with respect to their place of residence.³⁵ Bush also identified other alleged equal protection violations: 1) the Florida Supreme Court order included the results of a partial recount in Miami-Dade County that was concentrated in Democratic-leaning districts; 2) the Court’s order did not require the recount of “overvotes,”³⁶ despite the possibility that numerous votes could be uncovered through a manual recount of such ballots; and, 3) due to the need to re-segregate undervotes prior to

Gore v. Harris, No. 00-2808 (Fla. 2000) *available at* <http://election2000.stanford.edu/CV-00-2808-46.pdf>.

32. See Leon County Circuit Court Order of Stay, Gore v. Harris, No. 00-2808 (Fla. 2000), *available at* <http://election2000.stanford.edu/CV-00-2808-54.pdf>.

33. Brief for Petitioners at 40–45, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949), *available at* 2000 U.S. Briefs 949, at *40–45. The Amendment provides in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*” U.S. CONST. amend. XIV, § 1 (emphasis added).

34. Brief for Petitioners, *supra* note 33, at 41.

35. *Id.* at 42.

36. “Overvotes” are those machine-cast ballots that are rejected when counted by machine because they register more than the appropriate number of votes for a particular candidate or issue (e.g., two candidates selected in the presidential race). *Cf. supra* note 26 (describing “undervotes”).

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each recount, there was a chance that some votes would be double-counted in a manual recount.³⁷

As discussed more thoroughly below, the U.S. Supreme Court concurred with Bush that certain aspects of the Florida Supreme Court's order violated the Equal Protection Clause. The Court found uneven treatment in the order's direction that vote tallies be included from certain counties that had already manually recounted *all* ballots, overvotes and undervotes, despite the fact that other counties conducting recounts after the circuit court order would be limited to undervotes (thereby placing overvoters at a disadvantage in the latter set of counties).³⁸ The Court also found that the Florida Supreme Court's opinion appeared to permit the inclusion of partial recounts not completed by the judicially extended deadline, suggesting that some ballots might be included in a vote tally while other undervote ballots would not be reviewed at all.³⁹ Most significantly, the Court found that the recount order would effect uneven treatment of voters by employing a standard that virtually ensured some voters would have a better chance of having their votes counted than others.⁴⁰ The focus of this Note, like that of the equal protection opinion in *Bush*,⁴¹ is upon this aspect of the U.S. Supreme Court's holding.

II.

HOW *BUSH* v. *GORE* CHANGED THE LAW

This Part reviews the fundamental principles of equal protection applied in voting rights cases prior to *Bush*, and explains how *Bush* advances distinct, novel, or evolutionary principles of equality. First, *Bush* establishes that state action regarding vote-counting is fully subject to the equality principles it perceives inherent in the right to vote. Second, *Bush* expands upon existing doctrine in defining those principles. The opinion finds an equal protection violation in unequal treatment despite the absence of any discrete and articulable voter "classification" (arguably the pith of the Court's voting rights doctrine prior to *Bush*), ignores whether uneven treatment is intentional in assessing whether the Equal Protection

37. Brief for Petitioners, *supra* note 33, at 43–44.

38. *Bush v. Gore*, 531 U.S. 98, 107–08 (2000).

39. *Id.* The Court added, almost as an afterthought, some additional bases for its holding, such as the Florida Supreme Court order's failure to specify who specifically was to recount the ballots. *Id.* at 109. Although not explicitly stated, these likely constituted due process concerns.

40. *Id.* at 106.

41. *Id.* at 104–11.

Clause is violated, and employs an elevated standard of review in assessing purported justifications for any uneven treatment. The extension of evolutionary equality norms to the context of vote-counting, combined with a heightened standard of inquiry into purported justifications, represents the essential equal protection “rule” of *Bush*.

A. *Nature of the Protected Right*

The Constitution provides for only a very limited “right” to vote. It does not require explicitly that individual states choose their officials by popular election,⁴² nor even that they provide for direct election of presidential electors.⁴³ While U.S. representatives and senators must be elected in some fashion, the Constitution effectively defers to the states the power to determine qualifications for voters in those elections.⁴⁴ Thus, it is not surprising that the Supreme Court initially did not recognize the right to vote as among those protected by either constitutional or antebellum principles of equality.⁴⁵ Even if electors were selected by popular election, early Courts held that the right to vote could be denied or abridged on constitutionally non-prohibited bases (e.g., other than the Fifteenth Amendment grounds of race, color, or previous condition of servitude),⁴⁶ subject only to the constitutionally prescribed penalty that the state receive representation proportionate to the actual number of franchised voters.⁴⁷

42. It is an open question whether Article IV, Section 4 of the Constitution, guaranteeing states a “Republican Form of Government,” at least requires a state’s legislative branch be chosen by direct election, though it probably does not require such for other officials. U.S. CONST. art. IV, §4, cl. 1; *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9-10 (1982).

43. *See* U.S. CONST. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of electors . . .”).

44. *See* U.S. CONST. art. I, § 2 (Representatives), amend. XVII (Senators) (requiring that voters in congressional races (“electors”) have the same qualifications “requisite for electors of the most numerous branch of the State legislatures”).

45. *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (finding the first section of the Fourteenth Amendment (including the Equal Protection Clause) does not apply to the elective franchise).

46. “The right of the 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 or servitude.” U.S. CONST. amend. XV, § 1.

47. *McPherson*, 146 U.S. at 39 (citing U.S. CONST. amend. XIV, §2, which requires that, when the right to vote in any federal election is denied to any male inhabitant of the state, except on basis of age or criminal offense, “the basis of representation to which each State is entitled in the Congress shall be proportionately reduced”).

Despite the absence of a constitutional prescription that they do so, all states eventually extended electoral participation to substantially all citizens of the age of the majority.⁴⁸ In the absence of a constitutional obligation to extend the right to vote, and with the existence of earlier caselaw refusing to apply the Equal Protection Clause to the franchise, the question became whether states which grant the right to vote are bound by the Clause in their administration of that right. The revolutionary answer of the Warren Court, and of repeated Supreme Courts since, has been that they are.⁴⁹

The “right to vote,” however, is amorphous, and formal disenfranchisement is not the only way it can be abridged. Equal access to the ballot box would be hollow if, for instance, a state were free to count the votes of only certain voters. Thus, prior to *Bush*, the Court had limited the ability of states to treat voters differently in at least three respects:

1) *Right to cast a vote.* Several cases, discussed below, reflect the application of equality principles to the grant of the franchise.⁵⁰ In short, if a state extends the franchise in a particular instance, it must do so on terms that do not discriminate on bases ranging from wealth, to occupation, to condition of military service.⁵¹

2) *Right to an equally-weighted vote.* On several occasions the Court had struck down state electoral systems that effectively weighted votes differently based on the geographic location of the voter (e.g., state legislative districts of different sizes, county-unit based primary systems).⁵² In essence, the Court had concluded, “dilution” of any individual vote through geographical disparities in voting power is as much an equal protection violation as discriminatory laws regulating the casting of votes in the first instance.

3) *Right to have a vote counted.* Finally, the Supreme Court in earlier cases had confirmed that “‘the right to have one’s vote counted’ has the same dignity as ‘the right to put a ballot in a box,’” and moreover that the “concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all

48. Most significantly, suffrage was extended to female citizens in 1920. *See* U.S. CONST. amend. XIX.

49. *See, e.g.,* *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”); *Harper v. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”).

50. *See infra* Part II.B.1.a.

51. *See id.*

52. *See id.*

phases of state elections.”⁵³ This final aspect of the right, however, was less fully developed by the Court, as balloting and vote-counting were seen largely as matters of state or local prerogative.⁵⁴ While one could intuit, for instance, that a refusal to count African-American votes would violate the Constitution, the Court had done little before *Bush* to articulate what other equality norms might extend to this “vote-counting right.”

Despite its recitation of language familiar from earlier cases, *Bush* is thus novel in applying broad equality principles in the vote-counting context. The *Bush* Court considered the potential for differential counting standards under the Florida recount scheme to effect “dilution” of votes; the Court implied such dilution is prohibited by legislative apportionment precedents.⁵⁵ *Bush* did not, however, present traditional apportionment-based “dilution.” A voter adversely affected by the specific process infirmity in *Bush*—one whose vote is discarded under a strict “intent of the voter” recount standard but whose vote would have been counted under a more liberal standard—is denied an *actual* vote altogether. This is far different from the “dilution” at issue in the apportionment cases, where the adversely affected votes were counted, but were counted in a way such that each vote’s impact on the election was less vis-à-vis the votes of “favored” groups. In practice, each adversely affected Florida voter did not have her vote “diluted,” but rather was denied the vote as completely as if she had been turned away at the poll. *Bush* is not, on the other hand, a case of group disenfranchisement. Substantially all eligible voters had access to the polls,⁵⁶ and more than 99.5% of presidential votes were counted.⁵⁷

53. *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (citing *United States v. Mosely*, 238 U.S. 383, 386 (1915)).

54. See *WHEN ELECTIONS GO BAD*, *supra* note 14, at 3–5.

55. *Bush v. Gore*, 531 U.S. 98, 105 (2000) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

56. *But see* U.S. COMM’N ON CIVIL RIGHTS, *VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION* (June 2001), at <http://www.usccr.gov/pubs/vote2000/report/main.htm> (detailing irregularities in the 2000 Florida election that allegedly resulted in some voters being turned away from polls).

57. Nearly six million votes for president were cast in Florida during the 2000 election. See *Gore v. Harris*, 772 So. 2d 1243, 1247 n.4 (Fla. 2000). One hundred and seventy-five thousand ballots were registered as having no vote for president during the state’s machine count and recount, but a media review of these ballots suggests that fewer than 25,000, or .4% of the total cast, may have contained legal votes that were never counted. See Ford Fessenden & John M. Broder, *Study of*

In short, *Bush* goes where no prior Court had gone: it applies broad and novel equality norms to the way governments count votes.

B. Nature of the Protection

Bush did more than extend settled equality norms to the vote-counting context: it defined novel norms. The remainder of this Part illustrates the ways in which *Bush* is novel in its view of the equality protections afforded voting rights, specifically the right to have one's vote counted. By identifying those ways in which *Bush* differs from or advances equal protection in this regard, this Part seeks to identify the new rule of equal protection for which *Bush* necessarily must stand.

1. Classification as the Gravamen of Equal Protection Claims

Intentional, arbitrary discrimination by a government actor against even a single individual almost certainly violates the Equal Protection Clause.⁵⁸ To the extent the Equal Protection Clause nationalized certain antecedent equality principles,⁵⁹ this is not surprising. Prior to the enactment of the Fourteenth Amendment, several state constitutions prohibited "partial" or "special" laws intended to grant benefits or impose burdens on only certain citizens (or groups of citizens).⁶⁰ To the extent the Fourteenth Amendment enacted new equality protections, however, the nature of these protections has been interpreted more broadly.

Many commentators, pointing to the Reconstruction-era vintage of the Fourteenth Amendment, have advanced an "anti-subordination" or "anti-caste" view of the Equal Protection Clause—that is, that it is intended to prevent state "classification" of certain groups as statutorily inferior or superior to others.⁶¹ Indeed, the only inequalities explicitly proscribed by the Constitution relate to classification. The Fifteenth Amendment prohibits vote denial (or

Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote, N.Y. TIMES, Nov. 12, 2001, at A1.

58. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (Breyer, J., concurring) (finding that a "class of one" may maintain equal protection claim when treated in a wholly arbitrary manner vis-à-vis other similarly-situated individuals; "vindictive action" or "illegitimate animus" of government actor is what gives rise to the equal protection claim, not merely disparate treatment).

59. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245 (1997).

60. *Id.* at 247–48, 285.

61. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-10, at 1460 (2d ed. 1988); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

“abridgement”) on the basis of race, color or previous condition of servitude.⁶² In other words, it prohibits restrictions of the franchise on the basis of membership in specific groups or classes. Later constitutional amendments ban vote denial for other classes, including women, any age group over age eighteen, and persons who fail to pay a poll tax or any other tax.⁶³ Thus, it is not surprising that impermissible state classification appears as the singularly salient constitutional violation in most early voting rights cases.⁶⁴

a. Early Voting Rights Cases

The Court’s disenfranchisement cases consistently have focused on whether the challenged state scheme excludes certain *groups or classes* from the ballot box. *Pope v. Williams* suggested in 1904 that regulation of the vote within a state is the sole province of the state “provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.”⁶⁵ While the Fifteenth Amendment bases of discrimination certainly fell within this prohibition,⁶⁶ only later cases elucidate its full scope. *Carrington v. Rash*, for instance, made clear that one’s status as a member of the military was an unconstitutional basis for denying the right to vote.⁶⁷ In *Harper v. Virginia State Board of Elections*,⁶⁸ classification also was clearly the linchpin for the Court’s equal protection analysis. *Harper* concerned a Virginia law that disenfranchised any voter who failed to “personally” pay a \$1.50 poll tax for three years prior to applying to register to vote.⁶⁹ Although a contemporaneous challenge to the tax was pending on Fifteenth Amendment grounds,⁷⁰ the Court nonetheless avoided the issue of racial discrimination and identified what it perceived to be a different classification made by the law, namely one on the basis of wealth or

62. U.S. CONST. amend. XV.

63. See U.S. CONST. amend. XIX (women), amend. XXIV (failure to pay a tax), amend. XXVI (citizens eighteen years of age or older).

64. See, e.g., *Carrington v. Rash*, 380 U.S. 89, 93 (1965) (stating that a classification which is unreasonable in light of its purpose constitutes an equal protection violation).

65. 193 U.S. 621, 632 (1904).

66. See *id.*

67. *Carrington*, 380 U.S. 89. The Texas constitutional provision at issue prohibited members of the U.S. military who moved to Texas from voting in Texas elections during their term of military service. *Id.* at 90.

68. 383 U.S. 663 (1966).

69. *Id.* at 664 n.1. The statute also required the tax be paid at least six months prior to the election. *Id.*

70. *Id.* at 683 n.5 (Harlan, J., dissenting).

nonpayment of a tax.⁷¹ Since this effected a classification of voters not related to the state's limited "power to fix qualifications," it was held to violate the Constitution.⁷²

The Warren Court's legislative apportionment cases, cited repeatedly by *Bush*,⁷³ also reflect the consistent interpretation of the Equal Protection Clause as a bulwark against voter classification. In addition to adding "homesite" and occupation to the list of prohibited classifications, the Court in *Gray v. Sanders* made clear that virtually no classification is permissible, concluding that "the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."⁷⁴ In *Reynolds v. Sims*, the Court reaffirmed its conclusion in *Gray* that it is unconstitutional for states to distinguish between voters on the basis of geographical unit (or, for that matter, income or occupation), by striking down an Alabama legislative apportionment scheme that had resulted in state legislative districts with markedly different populations.⁷⁵

Undergirding the opinion in *Reynolds* was the Court's observation, quoted in *Bush*,⁷⁶ that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁷⁷ The dilution terminology apparently derives from a 1950 dissent by Justice Douglas, in which Douglas criticized a "county unit" voting system as constitutionally infirm.⁷⁸ Douglas argued that the constitutional "[right to vote] also includes the right to have the vote counted at full value without dilution or discount. That federally protected right suffers substantial dilution in this case. The favored group has full voting strength. The groups not in favor have their votes discounted."⁷⁹ That discrimination against *groups or classes* was of particular relevance in finding unconstitutional dilution is re-

71. *Id.* at 666.

72. *Id.* at 668.

73. *See* *Bush v. Gore*, 531 U.S. 98, 105–07 (2000).

74. 372 U.S. 368, 380 (1963). The Court invalidated a Georgia primary system for statewide officeholders, including U.S. Senators, that allocated votes by county "unit." The system, in which the statewide winner was determined largely on the basis of the number of counties won, resulted in a resident of the state's least populous county having a vote with 100 times the weight of a voter in the state's most populous county. *See id.* at 371.

75. 377 U.S. 533, 557–58 (1964).

76. 531 U.S. at 105.

77. *Reynolds*, 377 U.S. at 555.

78. *South v. Peters*, 339 U.S. 276, 277, 279 (1950) (Douglas, J., dissenting).

79. *Id.* at 279 (citations omitted).

flected not only in Douglas's dissent, but in *Reynolds* itself. In a broader discussion of the constitutional imperative of equally valued votes, the *Reynolds* Court observed that the question whether a state has engaged in unconstitutional discrimination in allocating the vote "present[s] questions of alleged 'invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.'"⁸⁰

The focus on classification is reflected as well in *Moore v. Ogilvie*,⁸¹ also cited as precedent for the equal protection holding in *Bush*.⁸² The Court in *Moore* applied the one person, one vote jurisprudence seen in *Gray* and *Reynolds* to strike down an Illinois petition law that effectively meant the entire electorate of the state's most populous forty-nine counties (constituting 93.4% of the state's population) could not form a new political party, while citizens from the remaining 6.6% of the population (or fifty-three counties) could.⁸³ This scheme, the Court held, preferred rural voters to urban voters, thus "discriminat[ing] against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."⁸⁴ In short, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."⁸⁵

In sum, the Court's voting rights cases prior to *Bush* strongly reflect the theory that equal protection claims are warranted only when challenged state action favors certain groups or classes of citizens.

b. Classification: *Bush v. Gore*

Bush is unique because the adversely affected Florida voters can not be neatly categorized into any "group" or "class" whom the scheme was likely to treat differently—in other words, there is no classification effected by the judicial recount scheme. Conse-

80. *Reynolds*, 377 U.S. at 561 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942)) (emphasis added).

81. 394 U.S. 814 (1969).

82. *Bush v. Gore*, 531 U.S. 98, 107 (2000).

83. *Moore*, 394 U.S. at 819. The law required nominating petitions for independent statewide political candidates to include 25,000 signatures of registered voters, including 200 from each of at least fifty of the state's 102 counties. *Id.* at 815.

84. *Id.* at 819.

85. *Id.* (emphasis added).

quently, *Bush's* equal protection holding is novel in finding that uneven treatment of voters, even if not occurring on the basis of group or class membership, may violate the Constitution.

Probably reflecting prior judicial preoccupation with classification and uneven treatment of groups, lawyers for George Bush began their equal protection argument with an attempt to define the terms under which Florida voters *had* been classified.⁸⁶ Specifically, they argued the Florida Supreme Court's recount would permit counting teams to employ local recount standards, thus affecting voters disparately on the basis of "residence."⁸⁷ The adversely affected voters in *Bush*, however, are not so clearly classified as voters in previous cases. Neither the scheme prescribed by the Florida Supreme Court nor the subsequent order by the Leon County Circuit Court explicitly distinguished voters on the basis of residence (or for that matter, any other basis). Rather, both ordered counties to recount using the "clear intent of the voter" standard prescribed by the Florida Election Code.⁸⁸

Because the U.S. Supreme Court halted the statewide recount before any results were posted,⁸⁹ it is impossible to say that individual counties would have complied with the order using analytically distinct standards. While the *Bush* majority may have presumed this would be the case, they never explicitly so held, since absent evidence there would have been no reason to do so. Moreover, lawyers for Bush, and subsequently the *Bush* Court, contended that recount standards could or would vary not only by county, but by precinct, counting team, or even hour of the day.⁹⁰ The argument that the Florida Supreme Court recount scheme "classified" voters for unequal treatment on *any* particular basis is thus untenable. It is therefore not surprising that the *Bush* Court makes no mention of residential classification, or any other classification, as the basis for its equal protection holding. Indeed, the gist of *Bush* is that a purportedly vague standard would result in decisions that effectively would treat voters differently, even though it was difficult to say who would be so treated. It thus was neither "classification" of voters nor the creation of favored and disfavored groups that violated the Constitution, but mere uneven treatment of citizens.

86. Brief for Petitioners, *supra* note 33, at 41–42.

87. *Id.*

88. *See supra* note 31 and accompanying text.

89. *See supra* note 32 and accompanying text.

90. Brief for Petitioners, *supra* note 33, at 42; *see* *Bush v. Gore*, 531 U.S. 98, 106 (2000).

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The resultant novel principle of *Bush* is that classification of voters is not necessary for state action to violate the constitutional equality norms protecting the right to vote.⁹¹ Mere uneven treatment of voters will suffice.

2. *Washington v. Davis* and the Emergence of Intent-Based Review of Equal Protection Claims

Moreover, in recent years, the U.S. Supreme Court has refused to hold state action unconstitutional if it merely has the *effect* of treating certain groups differently. Rather, recent Courts have required that disparate treatment be *intentional* to make out an Equal Protection Clause case. By ignoring the emergence of intent-based review, *Bush* wipes away another potential objection by clearly implying that intent is not a requirement for an equal protection violation in the vote-counting context.

In striking down a facially neutral employment test that was failed disproportionately by African-Americans, the Court in *Washington v. Davis* made clear that state action only violates the Equal Protection Clause when the action reflects a “racially discriminatory purpose.”⁹² The Court identified the central purpose of the Equal Protection Clause as prohibiting racial discrimination by the state, and concluded that laws not intended to effect that discrimination do not run afoul of the prohibition.⁹³ Although the earlier voting rights cases were not specifically mentioned, the Supreme Court in *Davis* spoke in general terms about the requirement that state action be shown to have a discriminatory purpose before it will be

91. See, e.g., Michelman, *supra* note 4, at 684 (“So far as I am aware, in no case prior to *Bush v. Gore* has the Court recognized a claim to unequal protection of voting rights in which there was on the state’s part no explicit or implicit act of what the jargon calls ‘classification’ — that is, ex ante division of a population of actual or would-be voters into groups (defined by race, party, place of residence, wealth or financial capability) to whose members the state accords differentially advantageous treatment within the general voting scheme.”)

92. 426 U.S. 229, 235–236, 239 (1976) (rejecting claim that police department administration of an employment test, which is failed at a higher rate by African-Americans than others, violates equal protection); see also *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270 (1977) (finding that zoning resulting in segregated housing does not violate Equal Protection Clause absent showing of discriminatory purpose); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (stating that the purpose requirement implies that “the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

93. *Davis*, 426 U.S. at 239.

struck down on equal protection grounds.⁹⁴ Indeed, the Court affirmed this principle as recently as the 2001 term, when it upheld a “majority-minority” North Carolina congressional district against an Equal Protection Clause challenge.⁹⁵ Although the challenged district clearly featured a strikingly large (and disproportionate) number of African-Americans, the Court found insufficient evidence that the state’s *predominant intention* was to discriminate between citizens on the basis of race.⁹⁶ Rather, there was sufficient evidence that the nondiscriminatory purpose of reelecting incumbents (i.e., “political objectives”) animated the line-drawing process.⁹⁷

Therefore, one could reasonably have concluded after *Davis* and its progeny that constitutional inequality is not judged by result, but by intent. Indeed, the federal judge in a Georgia suit challenging the state’s use of punch-card machines after *Bush* appears to have held as much.⁹⁸ Indeed, the advent of intent-based review led some commentators to question the continued viability of cases such as *Harper v. Virginia Board of Election* and *Reynolds v. Sims*, which fail to consider state purpose.⁹⁹ Nonetheless, at least once the Court while applying the *Davis* standard implicitly affirmed the continued viability of *Reynolds*.¹⁰⁰ This perhaps can be explained by

94. *Id.* at 240 (implying that the purpose requirement has been applied in areas ranging from racial gerrymandering to school desegregation). For dicta suggesting general applicability of the “racially discriminatory purpose” standard, see also *Arlington Heights*, 429 U.S. at 264–65 (“Our decision last term in *Washington v. Davis* . . . made it clear that official action will not be held unconstitutional solely because it results in a racially discriminatory impact . . . Proof of racially discriminatory intent or purpose is necessary to show a violation of the Equal Protection Clause.”). In 1980, the Court came perhaps as close as it would to revisiting voting rights issues under *Davis*. In *Mobile v. Bolden*, 446 U.S. 55 (1980), African-American citizens sued the city of Mobile, Alabama, claiming that the at-large election of city commissioners consistently disenfranchised black voters by ensuring the election of white officeholders to those positions. In rejecting the claim, the Supreme Court described favorable appellate precedent predating *Washington v. Davis* as “quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause.” *Id.* at 71.

95. See *Easley v. Cromartie*, 532 U.S. 234 (2001).

96. *Id.* at 257.

97. *Id.*

98. See *infra* note 137. Judge Orinda D. Evans struck plaintiffs’ equal protection argument, finding there could be no equal protection claim in the absence of asserted intentional discrimination. *Id.*

99. See Issacharoff, *supra* note 7, at 648 (asserting that the early line of voting rights cases had “collapsed of its own weight” due to the emerging intent-based review of *Washington v. Davis* and failed attempts to extend equal protection claims to everything from “privacy to wealth distinctions”).

100. See *Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

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interpreting the purpose requirement to be limited to *racial* discrimination claims that do not affect fundamental constitutional rights (e.g., the right to vote).¹⁰¹

Given the absence in the Florida litigation of any state (or county) *purpose* to treat voters differently, *Bush* necessarily, therefore, holds by implication that discriminatory intent is not required to prove an equal protection violation in the vote-casting context.

3. Justifications and Standard of Review

Even when an equal protection claim is otherwise constituted, there is no constitutional violation when the state has sufficient justification for its discrimination. Laws by their nature discriminate between individuals. A progressive income tax, for instance, imposes a proportionally larger tax on those with larger incomes. Likewise, special regulations for hazardous material carriers impose comparatively heavier burdens on certain commercial shippers. The Equal Protection Clause never has been held to require identical treatment of all individuals.¹⁰² Rather, “[i]t requires only that the State provide adequate justification for treating one group differently from another.”¹⁰³ *Bush* confirms, however, that an elevated level of scrutiny will be applied when the Court is determining whether purported state justifications are sufficient to sustain unequal treatment in the vote-counting context.

a. Standard of review in prior cases

The standard of review is inextricably linked to the perceived importance of the right, or evil of the discrimination, at issue. A heightened level of review consequently has been applied to discriminations related to fundamental rights, including the right to vote. The Court ostensibly applies a “strict scrutiny” standard of review to cases that implicate the fundamental inequities embodied in equal protection doctrine—discrimination between individuals on the basis of a “suspect classification” (e.g., race or alienage),¹⁰⁴

101. For a description of the relationship between the right implicated and standard of review, see *infra* Part II.B.3.

102. See *Metro. Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935) (“The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another.”); *Oregon v. Mitchell*, 400 U.S. 112, 270 (1970) (Brennan, J., dissenting in part and concurring in part).

103. *Mitchell*, 400 U.S. at 270.

104. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to state ban on interracial marriage).

or discrimination that interferes with fundamental constitutional rights.¹⁰⁵ To be upheld under strict scrutiny, the alleged discrimination must be narrowly tailored to advance a compelling state interest.¹⁰⁶ In the absence of a fundamental right or suspect classification—that is, in those cases where government performs “routine” discriminations—state classification is subject to highly deferential “rational basis” review.¹⁰⁷ Thus, the application of strict scrutiny to most fundamental rights cases suggests intuitively that voting rights cases in general, and *Bush* in particular, would apply the same standard.¹⁰⁸ Unfortunately for purposes of analysis, however, the Court in most of its landmark voting rights cases did not clearly identify a standard of review, owing to the cases’ early vintage. The opinions, however, seem to confirm some heightened level of review.

In *Lassiter v. Northampton State Board of Elections*,¹⁰⁹ the Court rejected a challenge to a North Carolina literacy test as a precondition to voting. The *Lassiter* Court upheld the test as neutral on its face¹¹⁰ and reasonably related to the state’s interest in “rais[ing] the standards for people of all races who cast the ballot.”¹¹¹ The *Lassiter* Court’s scrutiny certainly was less than “strict.” Not surprisingly, *Harper*, which followed *Lassiter*, began with language of deference, purporting only to bar franchise discriminations based on “invidious,” “capricious,” or “irrelevant” bases.¹¹² But, in addition

105. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336, 338–39 (1972) (finding that Tennessee durational residence requirement for voters is subject to “close” or strict scrutiny because it limits rights to travel and vote).

106. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001). The Court’s application has been so searching in strict scrutiny cases that some have suggested the standard may be “strict in theory but fatal in fact.” *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

107. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (discussing breadth of deference to legislative action under rational basis standard).

108. See *WHEN ELECTIONS GO BAD*, *supra* note 14, at 88–89 (implying that strict scrutiny presumably would be the appropriate standard in *Bush* given the fundamental right at stake).

109. 360 U.S. 45 (1959).

110. This was not dispositive, however, since the Court long had held that a facially neutral law could violate the Equal Protection Clause if applied in a discriminatory manner. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding a facially neutral safety ordinance unconstitutional as selectively enforced against Chinese laundries).

111. *Lassiter*, 360 U.S. at 52–54.

112. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966).

to calling *Lassiter's* assessment of literacy tests into some question,¹¹³ the *Harper* Court found that “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”¹¹⁴ Implicitly, thus, *Harper* represents a more searching standard of review than its dicta suggests. One could, for instance, argue that a poll tax supporting administration of elections relates directly to the state’s interest in conducting elections. The Court, however, chose to define the state’s interest in voting very narrowly—limiting it to the “power to fix qualifications.”¹¹⁵ Any deprivation of the right to vote not directly related to *that interest*, the Court concluded, is “capricious” and, therefore, violative of the Equal Protection Clause. Thus, though the Court employed the terminology of capriciousness, the state’s interest in voting was drawn so narrowly that the inquiry was effectively heightened.

Other cases confirmed this elevated scrutiny. *Reynolds v. Sims*, for instance, rejected a rather forceful argument in favor of the county-based legislative apportionment scheme it struck down—namely, that the Alabama legislature was attempting to reflect regional interests through a structure analogous to that of the U.S. Senate.¹¹⁶ The Court thereby suggested that it would not simply defer to “rational” justifications for vote-related classifications. Indeed, in *Kramer v. Union Free School District*, the Court quoted *Reynolds* to support the proposition that impediments to the right to vote merit a “close and exacting examination.”¹¹⁷

b. Standard of review in *Bush v. Gore*

Given this background, one would expect the *Bush* Court readily to have applied a heightened standard of review. The language of *Bush*, however, strongly implies rational basis review; only an analysis of the case’s outcome, in light of the facts and arguments before the Court, reveals a faithful application of elevated scrutiny.¹¹⁸

113. *See id.* at 666 n.3.

114. *Id.* at 666.

115. *Id.* at 668.

116. *See Reynolds v. Sims*, 377 U.S. 533, 548–49 (1964).

117. 395 U.S. 621, 626 (1969).

118. At least two federal courts arguably have concluded likewise. *See Charfauros v. Bd. of Elections*, 241 F.3d 941, 951 (9th Cir. 2001) (applying strict scrutiny to pre-election day procedures that treated members of different political parties differently, and apparently quoting *Bush* for the same test “phrased differently,” despite *Bush's* ostensible language of rational basis review); B. J. Palermo, *Bush–Gore Lives On*, NAT’L L.J., Sept. 17, 2001, at A1 (including quote from a ruling by Judge Stephen V. Wilson in connection with the California punch-card case: “It

Bush's query regarding "arbitrary and disparate treatment,"¹¹⁹ clearly rings of rational basis review. Under rational basis review, any conceivable policy justification suffices to uphold the state action.¹²⁰ Thus, if rational basis review is the level of scrutiny applied by the *Bush* Court, the Justices necessarily must have perceived no justification for the scheme. And, indeed, Justice Souter in dissent (but agreeing with the equal protection holding) explicitly concludes as much.¹²¹ That there were at least colorable arguments in favor of the Florida Supreme Court's scheme, however, seems evident.

First, the Florida Supreme Court adopted the "intent of the voter" standard directly from the election code enacted by the Florida legislature.¹²² Indeed, as was argued before the Court, the standard is a longstanding one in Florida and many other states.¹²³ There are, undoubtedly, at least debatable policy justifications *implicit* in such a well-established and widely-adopted rule.

Second, there were several *explicit* arguments for the recount standard in this case. For instance, it is arguable that allowing recount standards to vary by county not only implicates the same "experimentation" interests Justice Souter approves of with regard to balloting technology,¹²⁴ but might reflect local interests in accommodating voters (e.g., using a more liberal punch-card standard in areas where there are more elderly voters prone to greater difficulty in punching out chads).¹²⁵ Furthermore, and perhaps more compelling, it was argued in amicus brief to the Court that an "intent of the voter" standard was necessary to *avoid* a violation of the Equal

appears that perhaps the Court was using a heightened standard of scrutiny but also was finding the Florida recounts to be arbitrary and discriminatory.").

119. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

120. See *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961))); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938) (stating that a statute will not be invalidated on equal protection grounds so long as purported policy considerations "are at least debatable").

121. *Bush*, 531 U.S. at 134 (Souter, J., dissenting, joined by Breyer, J.) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.").

122. See *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (adopting recount standard established by FLA. STAT. ch. 101.5614(5) (2000)).

123. Brief of Respondent Albert Gore, Jr., *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at 2000 WL 1809151, at *44.

124. See *Bush*, 531 U.S. at 134 (Souter, J., dissenting, joined by Breyer, J.).

125. See Klarman, *supra* note 5, at 1728 n.31.

Protection Clause.¹²⁶ In a decentralized electoral system that allows each county to use different voting technology, vote counters necessarily must tailor recount procedures “to meet technical, county-specific challenges.”¹²⁷ The application of an inflexible statewide standard to different technologies with different error rates, it was argued to the Court, would create a greater equal protection problem than it would solve.¹²⁸ Whether these justifications are less than compelling is irrelevant; under rational basis review, it should matter only that they existed.

Since *Reynolds*, the Court at least implicitly has suggested that equal protection mandates considerable scrutiny of state action that impedes full and equal exercise of the right to vote. That *Bush* would have stood in good stead by admitting an elevated level of review for vote-counting cases makes its silence on the actual standard of review all the more curious. Moreover, in functional analysis, *Bush*'s equal protection holding does little to dispel the notion that something more than “rational” justifications for state action are necessary to justify differential vote treatment. Whether the Court's standard is “strict,” and the requisite justifications compelling, is not clear. What is clearly confirmed by *Bush*, however, is that the Court is not satisfied by the mere *existence* of justifications—it must be persuaded by them.

4. How Precise? Mechanical Precision and Mathematical Equality

Even when an elevated standard of scrutiny is established for large-scale inequality, prior Courts in the apportionment context have recognized that mere rational justifications can support “fringe” discrimination. *Bush* suggests no such distinction, apparently applying its elevated review to inequality resulting not from wildly disparate recount standards, but from variations in the application of a single, uniform standard.

Even though the standard of review is heightened for inequality in the voting rights context, past Courts recognized that perfect equality is elusive and strict review not practical at the margins. The *Reynolds* Court, for instance, purported to prohibit geographic disparities in vote strength.¹²⁹ In other words, in so far as it is prac-

126. Brief Amicus Curiae of The Brennan Center for Justice at New York University School of Law in Support of Respondents, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), available at 2000 U.S. Briefs 949, at *16–17.

127. *Id.* at 18.

128. *Id.*; WHEN ELECTIONS GO BAD, *supra* note 14, at 89 (querying whether this might be the case).

129. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

ticable, votes must be given equal weight through apportionment that ensures districts of equal sizes. Recognizing that absolute equality might prove elusive, however, the Court added this important caveat: "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible. . . ." ¹³⁰ Thus, geographic "classification" of voters would be subject to a heightened level of scrutiny, but slight population variances reflecting rational state policies (e.g., political contiguity) would be permitted. ¹³¹

Although the rights protected in *Bush* and the apportionment cases are different, ¹³² this two-tiered structure of review naturally could have offered a strong reference for the *Bush* Court. *Bush* could have held, for instance, that the use by a state of different recount standards for different voters (or groups of voters) is subject to elevated scrutiny, but that rational basis review applies to local decisions about how to apply such a standard in practice and with regard to the specific type of ballots employed. In short, *Bush*, like *Reynolds*, could have acknowledged that the machinery of government requires a little "play in its joints" to function properly. ¹³³

Critical to *Bush*, however, is the notion that equal protection is violated when a single state standard is applied unevenly due to slight variations in the interpretation of that standard. ¹³⁴ A state is thus not only required to avoid disparate treatment in its own actions, but to guarantee that voters are treated *precisely the same* when their votes are counted.

130. *Id.* at 579.

131. *Id.*; *Bush v. Vera*, 517 U.S. 952, 1047–48 (1996) (Souter, J., dissenting) (finding that political contiguity is a permissible basis for determining precise districting lines).

132. In apportionment, the impaired right is to an equally-weighted vote; in *Bush*, it is the right to have an equal chance of having one's vote counted. See *supra* Part II.A.

133. *Reynolds*, 377 U.S. at 577 n.57.

134. Despite the fact that the Florida Supreme Court's scheme would have recounted some 43,000 ballots in an election with an official margin of only 537 votes, George W. Bush likely would have maintained his lead regardless of the recount standard employed by the counters. See Fessenden & Broder, *supra* note 57. Only by ordering a recount of all nonvotes, including all overvotes, might a judicially-ordered recount have changed the election's outcome. *Id.*

C. The “Rule” of *Bush v. Gore*

As elucidated above, *Bush* is distinct and/or novel both with respect to the early voting rights cases it cites and Equal Protection Clause jurisprudence generally. Having roughly sketched the law as it laid prior to *Bush*, it is now possible to identify those principles for which *Bush* essentially must stand.¹³⁵

1. *The Right*. First, *Bush* confirms the application of novel equal protection norms to the right to have an equal chance of having one’s vote counted after being cast. Thus, not only must electoral lines be drawn roughly to create equal vote weights and access to the polls be granted on equal terms, but voters must have a precisely equal chance to have their vote *counted*.

2. *Classification*. Second, equal protection is violated by discriminatory treatment with regard to the right above, regardless of whether the differential treatment reflects any classification of voters by, or as a result of, state action. Rather, any unequal treatment, the result of which is to give certain voters a better chance of having their vote counted, is unconstitutional.

3. *Intent*. Third, intent is not a criterion of an equal protection claim under *Bush*. By ignoring the emergence of intent-based review of equal protection claims, *Bush* clearly implies that disparate treatment in the vote-counting context will be subject to scrutiny regardless of whether it reflects a discriminatory purpose.

4. *Standard of Review*. Fourth, the standard of review applied to differential treatment of voters, such that their votes have an une-

135. This Note seeks to identify the most narrow rule for which *Bush* must stand—that is, the principles *Bush* necessarily adopts to support its equal protection holding. Naturally, a far broader rule could justify, and thus underlie, the case. If, for instance, the right recognized were not to have an equal chance of having a cast vote counted, but to have an equal chance of *casting* a vote, ballot designs could violate equal protection. See, e.g., Brief of Amicus Curiae American Civil Liberties Union at 6-7, *Fladell v. Palm Beach County Canvassing Bd.* (Fla. Dist. Ct. App. 2000) (No. 004153/004146), available at <http://election2000.stanford.edu/fladellaclu.pdf> (claiming constitutional inequality in the use by one Florida county of the infamous, and allegedly incomparably confusing, “butterfly ballot”). If the right were that every voter must have an equal chance to *participate* in an election, the rule could encompass even more, such as government-sponsored voter registration efforts that differ by locality. See, e.g., *Remarks by Sen. Edward Kennedy (D-MA) on the Nomination of John Ashcroft to be U.S. Attorney General*, FEDERAL NEWS SERVICE, Jan. 31, 2001, LEXIS, Federal News Service File (comparing extensive voter registration efforts in largely-white St. Louis County with absence of registration efforts in 47% African-American St. Louis City, during term of then Missouri Governor John Ashcroft). *Bush* could even be supported by a resurrected notion that excessive government discretion in *any* context violates equal protection and due process. See, e.g., Sunstein, *supra* note 10, at 771–72.

qual chance of being counted, is elevated. Absent the “magic words” of strict scrutiny, it is impossible to ascribe the highest standard of review to *Bush*. Regardless, as discussed above, the Court through its reliance on prior law and in the functional application of its “new rule,” confirmed significantly elevated scrutiny in the vote-counting context. Moreover, the “right to have one’s vote counted” is of such considerable import that the heightened scrutiny discussed above is applicable to any differential treatment. That is, unlike the apportionment cases, unequal treatment in the counting of votes always requires demonstration of persuasive state justifications, and no lowered or rational-basis scrutiny is applied at the margins.

III. CONSTITUTIONALITY OF STATE BALLOTING SYSTEMS

Beginning shortly after *Bush* was decided, lawsuits were filed in federal courts in several states claiming that the use within a single state of comparatively error-prone punch-card machines alongside more reliable technologies violates, among other things, the Equal Protection Clause of the Fourteenth Amendment.¹³⁶ Whether *Bush* bars the challenged practice is a critical issue, with one federal judge suggesting it might, and another dismissing the claim.¹³⁷ This Note posits that the use of different voting technologies within a single state,¹³⁸ resulting in voters having different chances of having their votes counted, is clearly unconstitutional under the *Bush*

136. See Palermo, *supra* note 118 (identifying the cases as *Andrews v. Cox*, No. 1:01-CV-318-ODE (Ga. 2001), *NAACP v. Harris*, No. 01-0120-C.V.-GOLD, 21 (Fla. 2001), *Black v. McGuffage*, No. 01C1208 (Ill. 2001), and *Common Cause v. Jones*, No. 01-03470-SVW (Cal.)).

137. In *Common Cause v. Jones*, Judge Stephen V. Wilson, pointing to *Bush v. Gore*, denied a summary judgment challenge to the equal protection claim, concluding plaintiff had alleged facts sufficient to support a finding that permitting counties to adopt either punch-card machines or more reliable technologies “is unreasonable and discriminatory” (and thus potentially unconstitutional regardless of the appropriate standard of review). *Common Cause v. Jones*, No. 01-03470-SVW. In contrast, in *Andrews v. Cox*, a Georgia balloting case, Judge Orinda D. Evans dismissed the equal protection claim, finding no violation in the absence of alleged *intentional* discrimination. *Andrews v. Cox*, No. 1:01-CV-318-ODE.

138. This Note is limited to the issue of whether the use within a single state of balloting technologies with disparate accuracy rates is unconstitutional, since this is the doctrinal issue most directly implicated by *Bush v. Gore*. Though interesting in terms of theory, the question of whether the Equal Protection Clause obligates the *national* government to ensure equality *between* states is outside the scope of this Note. See Sunstein, *supra* note 10, at 770–71.

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rule: the same vote-counting right is implicated, the lack of voter classification or intentional discrimination is irrelevant, and no available justifications for the unequal treatment survive an elevated standard of review.

A. *Voting Technologies Employed in the United States*

Absent congressional preemption, the Constitution reserves to the states virtually unfettered latitude in setting federal election procedures.¹³⁹ Further, Congress largely has not encroached on the states' autonomy in this regard,¹⁴⁰ particularly as regards vote-counting techniques.¹⁴¹ As a result, a wide variety of balloting techniques are employed, though they fall generally into five types: note ballots, mechanical lever machines, punch-cards, optical scan technologies, and Direct Recording Electronic ("DRE") systems.¹⁴² The range in accuracy is as great as 1.5 percent between the best and worst of these technologies—that is, for every 1,000 votes cast, the least accurate vote-counting method may result in 15 more votes being miscast or improperly discounted as compared to the most accurate technology.¹⁴³ Even as between those technologies of

139. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. As for presidential elections, the Constitution provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [presidential] Electors." U.S. CONST. art. II, § 1, cl. 2.

140. One significant exception is the 1993 National Voter Registration Act, or "Motor Voter" law, which requires, inter alia, that states provide simplified means for registering for federal elections. See 42 U.S.C. § 1973gg(b)(1) (2002).

141. Since 1990, voluntary voting standards have been published through a joint effort headed by the Federal Election Commission, though no mandatory standards have yet been imposed by Congress. *History of the Voting System Standards Program*, Federal Election Commission, at <http://www.fec.gov/pages/vsshst.htm> (Nov. 1998).

142. For a description of each and their extent of use during the 2000 election cycle, see Appendix A.

143. See THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY, VERSION 2, at 2, at http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf (Mar. 30, 2001) [hereinafter VOTING TECHNOLOGY PROJECT]. This is consistent with the disparity seen in the Florida election. See *Bush v. Gore*, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.) (observing that the proportion of "nonvotes" (ballots for which no vote for president was recorded) in Florida counties using punch-card systems was 3.92 percent, in contrast to a rate of 1.43 percent in counties employing optical scan systems).

average accuracy, there are variations.¹⁴⁴

Most states use a variety of balloting methods. Punch-card machines—among those with the highest number of nonvotes—were used to some extent by at least thirty-one states in the 2000 election cycle,¹⁴⁵ while only one used them exclusively (Illinois).¹⁴⁶ The only other states featuring substantial uniformity of voting method in the last election cycle were New York and Connecticut (lever machines); Alaska, Hawaii, Rhode Island and Oklahoma (optical scan systems); and Delaware and Kentucky (DRE devices).¹⁴⁷ Indeed, some states feature each type of voting system in at least one county, including Arkansas, Indiana, Michigan, Pennsylvania, and Virginia.¹⁴⁸

B. Case in Point: California

California is typical of those states where mixed systems are being challenged in court. In the 2000 elections, 53.4 percent of California voters used punch-card machines, while the remainder used DRE or optical scan technologies.¹⁴⁹ The punch-card machines suffered error rates of 2.2 percent, more than twice that of the other technologies.¹⁵⁰ Thus, for every 10,000 votes cast in a punch-card county, approximately 200 were discarded; in the other counties, fewer than 100 were lost to machine error.¹⁵¹

Relying on *Bush*, the ACLU of Southern California and others brought suit on behalf of voters who live in counties that use punch-card systems.¹⁵² In their suit against California's Secretary of State, plaintiffs claimed, inter alia, that the state violated the Equal Protection Clause by permitting some counties to use the error-prone punch-card balloting technologies, while others employ

144. See VOTING TECHNOLOGY PROJECT, *supra* note 143, at 2.

145. DEMOCRATIC INVESTIGATIVE STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, 107TH CONG., HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION, at 121–22 (Aug. 20, 2001), available at http://www.house.gov/judiciary_democrats/electionreport.pdf.

146. See VOTING TECHNOLOGY PROJECT, *supra* note 143, at 4.

147. *Id.*

148. *Id.*

149. *ACLU-SC Docket: Common Cause v. Jones*, at <http://www.aclu-sc.org/cgi-bin/docket/casedisplay.cgi?filename=commoncausevjones> (last visited Feb. 19, 2002).

150. *Id.*

151. *Id.*

152. Henry Weinstein, *Suits Seek Uniformity in States' Vote-Counting*, L.A. TIMES, Apr. 18, 2001, at A1 (reporting on the filing of the California suit, *Common Cause v. Jones*).

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more reliable alternatives.¹⁵³ As a result, the suit placed in stark relief the issues elucidated above.

*C. Responses to the Application of Bush v. Gore to State
Balloting Procedures*

The central concern in the state balloting cases is whether *Bush* somehow can be constrained to its facts, or whether the rule elucidated above necessarily applies to the local balloting context. As the state balloting cases progress, at least three general types of arguments likely will be made to distinguish *Bush*, each of which is considered and rebutted below: 1) the state engages in no discrimination by permitting local authorities to determine their own manner of administering elections; 2) local balloting technologies are (mostly) mechanical and thus do not implicate the same risks of discrimination present in the human (re)counting at issue in *Bush*; and, 3) even if differential treatment does occur, the *Bush* Court implied bases on which it can be distinguished from the facts of *Bush*; most significantly, justifications for the use of different technologies by local authorities exist that were not present in the context of Florida's statewide, court-supervised recount. Finally, some may contend that courts should abstain from intervening while state and federal reform efforts are pending.

1. There is no distinction in terms of state action between the Florida Supreme Court's "intent of the voter" recount standard and state policies that permit each county to determine how to count votes.

A state charged that its hodgepodge of county balloting systems constitutes unequal treatment might contend that it engages in *no* discrimination. Rather, it might argue, the state merely engages in the venerable tradition of allowing counties to make individual, but *uniform* decisions.¹⁵⁴ As discussed above, however, *Bush* is remarkable for the very reason that it did not require demonstration of any explicit classification of voters by the state.¹⁵⁵ Rather, mere bottom-line disparate treatment, resulting from parochial policy decisions (even if individually uniform), was enough to violate equal protection. Thus, in the context of state balloting challenges,

153. *Id.* Although outside the scope of this Note, this suit also includes a Voting Rights Act claim that cites the disproportionately large number of African-Americans, Latinos, and other minorities who live in punch-card counties. See *ACLU-SC Docket: Common Cause v. Jones*, *supra* note 149.

154. Most counties adopt a single technology for all polling places, though some do permit individual precincts to choose balloting systems. See *supra* Part III.A.

155. See *supra* Part II.B.1.b.

a broad state policy that permits various local actors to choose different recount standards has precisely the same result as the Florida Supreme Court's "intent of the voter" standard. Both actions have the *effect* of treating citizens differently with regard to vote-counting, and thus the latter necessarily must also invoke judicial scrutiny.

2. The presence or absence of intentional discrimination is irrelevant under the *Bush* equal protection rule, and thus affords no basis for distinguishing the machine-balloting context.

Some have suggested that differential balloting technologies may not implicate the same concerns as the recount scheme considered in *Bush*, since they are mechanical and not, therefore, subject to preference-based mistreatment of human counters.¹⁵⁶ *Bush*, however, cannot be justified on the basis of intentional discrimination, and thus cannot be distinguished from the local balloting context on that basis.

Because the initial Florida vote differential between Al Gore and George Bush was so small, and because Gore requested recounts only in four counties that had voted heavily in his favor,¹⁵⁷ "generous" recount standards (i.e., those that discern more votes from previously discarded undervotes), or generous interpretations of such standards, were statistically likely to net more votes for Gore.¹⁵⁸ Moreover, manipulation of even a few ballots per precinct easily could have had an effect on the outcome of the election. Not surprisingly, partisan motivations were widely perceived as influencing recount officials in at least three ways: selection of the recount standard,¹⁵⁹ identification of previously uncounted ballots as consis-

156. See, e.g., WHEN ELECTIONS GO BAD, *supra* note 14, at 89 ("Can one argue that an important constitutional difference exists between differential vote counting that results from different machine technology versus from different human actors applying different standards . . . ?").

157. Dan Keating, *Tallying the 'Lost' Votes: Hand Count Catches Marks Machines Miss*, WASH. POST, Nov. 10, 2000, at A26.

158. See, e.g., George Stephanopoulos, *Good Morning America* (ABC television broadcast, Nov. 20, 2000), available at LEXIS, ABC News Transcript File ("If dimples are in, Gore can win. If dimples are out, Bush takes the bout.").

159. See, e.g., Joel Engelhardt and George Bennett, *Long Day of Bickering Ends Recount for Now*, PALM BEACH POST, Nov. 12, 2000, at 1A ("Complaints from Republicans led to a shift in counting criteria. Out went the reliance on sunshine, that is the search for light shining through a hole in the ballot Instead, a ballot would be counted if one, two or three of the four-cornered 'chads' were punched out")

tent with the standard,¹⁶⁰ and “mischievous” manipulation of ballots to comport with the standard.¹⁶¹

Intentional discrimination, though not a necessary condition for a violation of the Equal Protection Clause,¹⁶² may constitute a violation of equal protection regardless of whether the discrimination reflects any discriminatory classification.¹⁶³ Thus, had the Supreme Court apprehended a recount scheme fraught with purposeful discrimination, the absence of clear *ex ante* classification would not have precluded the Court from fashioning a much narrower holding. That is, had *Bush* reflected concerns about potential *purposeful* discrimination, even if reflecting non-systematic decisions by individual counters, the Court easily later could have distinguished local technology variances as lacking any indicia of discriminatory motivation.

Such a holding would have suffered, however, from two major problems. First, it is almost impossible to characterize the selection of a recount standard as involving differential treatment—as long as all voters within the ambit of particular officials are treated the same, one cannot characterize any group of voters, or even individual voters, as subject to discrimination. To find purposeful discrimination, the Court likely would have had to focus on the interpretation or even manipulation of ballots. There was, however, no evidence in the record that the Florida Supreme Court’s scheme would have suffered from these defects, other than inferences drawn from the anecdotal reports surrounding the earlier recounts. Indeed, the circuit court administering the judicially-mandated recount instructed counties to apply the Florida Supreme Court’s simple “intent of the voter” standard, and recommended a system of dispute resolution refereed by judges.¹⁶⁴ Thus, a *presumption* that invidious motivation would infect the court-or-

160. See, e.g., David Adams, *Palm Beach Vote Hangs on How the ‘Chads’ Look*, ST. PETERSBURG TIMES, Nov. 12, 2000, at 8A (reporting that observers in Palm Beach County regularly objected to determinations made by Democratic election officials conducting the recount).

161. See, e.g., Alan Judd, *Chad Falls Back into Spotlight*, ATLANTA CONST., Nov. 20, 2000, at A1 (including insinuation that chads were being removed from ballots during Broward County’s manual recount).

162. Although it is possible the poll tax in *Harper* could have been struck down on the basis of intentional racial discrimination, the Court adopted a holding that did not reference official intent. See *supra* notes 70–71 and accompanying text.

163. See *supra* note 58 and accompanying text.

164. See *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (establishing Leon County Circuit Court as locus of recount and entity ultimately responsible for tabulation of ballots).

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dered recount would have required the Supreme Court to malign the state's judicial and election officials, and to do so on a thin factual basis.

Intuitively, there is a significant difference between hundreds of individuals with potential partisan motivations conducting hand recounts, and balloting machine technologies that, through the fault of no state official, operate with different accuracy levels. Further, though unmentioned in the per curiam opinion, the Justices of the Supreme Court likely were aware of the widely-reported allegations of partisan influence during Florida's initial manual recounts. For such a distinction to be viable in later cases, however, the Court in *Bush* would have had to suggest, or at least be read to suggest, that the motivation or intent of those conducting the recount was at issue. Because there was no record to support such a conclusion, and because the most glaring acts of differential treatment occurred between counties and not within them, it is not surprising that neither the Court nor its implicit rule¹⁶⁵ consider motivation as a relevant factor. As a result, it would be difficult and untenable later to contend that the lack of invidious motivation distinguishes local balloting variances from the facts of *Bush*.

3. The *Bush* Court's implied distinctions are either inscrutable or unpersuasive.

So apparent was the possible wider applicability of *Bush*'s equal protection holding, that the per curiam opinion self-consciously implied distinctions between the facts before it and the balloting context.¹⁶⁶ Describing equal protection in elections as generally presenting "many complexities," the Court characterized the case before it as the "*special instance of a statewide recount under the authority of a single state judicial officer.*"¹⁶⁷ In short, when a state court with the "power to assure uniformity" acts, there must be some assurance that the "rudimentary requirements of equal treatment and fundamental fairness are satisfied."¹⁶⁸ Moreover, the Court explicitly noted that it did not reach the question of whether "*local entities, in the exercise of their expertise*" could use different systems for administering elections, though this language suggests the majority may have prejudged the issue.¹⁶⁹

Some of the most glaring distinctions implied by the Court fail almost on their face. For instance, the Court offers no explanation

165. *See supra* Part III.C.

166. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

167. *Id.* (emphasis added).

168. *Id.*

169. *Id.* (emphasis added).

why, nor precedent for its contention that, the context at issue in *Bush* presents any fewer “complexities” than elections generally, nor why a recount under the authority of a state judicial officer is a “special instance,” nor why courts with the “power to assure uniformity” are any different from legislatures with that ability.¹⁷⁰ These largely naked assertions, bereft of any theoretical or precedential support, essentially are inscrutable, and have left some scholars to question whether they have any meaning at all.¹⁷¹ Indeed, the attempts to distinguish counting from recounting are largely hollow. The more relevant issue is whether the unequal treatment in one case can survive a heightened level of review.

Only Justice Souter writing in dissent advances justifications for the distinction between recounting and balloting that seem, if not persuasive, at least arguable. Souter suggests that local variety in balloting technology is justified by “concerns about cost, the potential value of innovation, and so on,”¹⁷² a claim that echoes the much less explicit reference by the majority to “local expertise.”¹⁷³ Professor Cass Sunstein likewise has acknowledged that budgetary considerations and “unobjectionable and longstanding rules of local autonomy” may constitute justifications for variances in balloting methods that were not present in the statewide recount in *Bush*.¹⁷⁴

The language of local deference, however, implies a none-too-searching inquiry by the Court into certain types of differential treatment. While the Court in *Reynolds v. Sims* refused to accept mere “rational” justifications for geography-based voting, it quickly

170. See Strauss, *supra* note 7, at 751.

171. See, e.g., Issacharoff, *supra* note 7, at 650 (“[T]he limiting instruction is either meaningless or reveals the new equal protection as a cynical vessel used to engage in result-oriented judging by decree.”); Sunstein, *supra* note 10, at 765 (“The effort to cabin the outcome, without a sense of the principle to justify the cabining, gives the opinion an unprincipled cast.”).

172. *Bush*, 531 U.S. at 134. Justice Souter also asserts somewhat curiously that the particular equal protection problem with the Florida Supreme Court’s scheme is that it permits identical ballots cast using identical machines to be judged using different standards. *Id.* This assertion, however, is somewhat unhinged from Souter’s more compelling cost and innovation theory for local variety in balloting methods. *Id.* That is, why should it matter *when* in the electoral process a county decides to do something differently? If a decision—any decision—has the effect of giving a voter a different chance of having her vote counted, surely the Court would require the same level of justification for the unequal treatment. Thus it should not matter that the ballots and machines are identical if a different recount method is somehow justified by, for example, cost or innovation. Likewise, a county should not be able to choose different ballots or machines without justification, merely because the choice affects a pre-vote step in the electoral scheme.

173. *Id.* at 110.

174. Sunstein, *supra* note 10, at 765–66.

cabined its decision by suggesting that “rational state policy” considerations could justify slight departures from the one person, one vote principle.¹⁷⁵ Thus, before *Bush*, though one might have presumed a constitutional violation if a single county used a balloting technology with only fifty percent accuracy,¹⁷⁶ one would be excused for assuming that minor variations between counties pursuant to legitimate state interests, such as budget needs, would be permissible. The very thrust of *Bush*, however, was to cast a critical eye on the slightest variations perpetuated by the Florida Supreme Court’s recount procedures: by implicitly refusing to recognize “rational” justifications for even slightly different standards, the Court suggests its elevated scrutiny applies to all unequal counting methods.¹⁷⁷ As a result, “rational” interests such as experimentation and innovation are insufficient to satisfy the elevated scrutiny applied by the court in the vote-counting context.

Moreover, largely local motivations, such as the cost of different technologies, do not explain why the *state* is freed of its obligations to ensure equal protection to all its citizens. Indeed, this seems to be the very concern reflected by the *Bush* Court’s reference to a “statewide recount” administered by a “single state judicial officer.”¹⁷⁸ In fact, it is the failure to recognize a lesser standard of review for inequalities “at the margins” of the vote-counting context that prompted Justice Stevens to speculate in his *Bush* dissent that state deference to counties in selecting balloting mechanisms with disparate accuracy rates might violate the Equal Protection Clause under the majority’s rule.¹⁷⁹

If anything, the language of local deference that seems to lurk in both the majority opinion and Justice Souter’s dissent is better understood to reflect an assumption the holding in *Bush* rejects. That is, in allowing each county to pick its own technology, neither the state nor the county engage in any intentional discrimination

175. *See supra* notes 130–31 and accompanying text.

176. This would presumably be tantamount to the refusal to count votes, which repeatedly has been found by the Court to equate to unconstitutional vote denial. *See, e.g.*, *United States v. Mosley*, 238 U.S. 383, 386 (1915).

177. *See supra* Part II.B.4.

178. 531 U.S. at 109.

179. *See id.* at 126 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.). In fact, the Florida Supreme Court’s scheme should have been less susceptible to an equal protection challenge, Stevens argues, since it provided for ultimate supervision of all counting by a single magistrate, thereby alleviating if not eliminating equal protection concerns arising from the use of different standards. *Id.*

against voters: both act with total uniformity within their ambit.¹⁸⁰ Thus, any differential “weighting” of votes that occurs is a purely incidental, “bottom-line” result of neutral decisions based on state decision-making. As discussed above, however, this absence of intentional discrimination is untenable in the face of *Bush*.¹⁸¹ Therefore, though dicta suggests local variation in balloting still may be permissible, the very nature of *Bush*’s equal protection holding makes that distinction difficult to justify, and potentially unpersuasive in the lower courts.

4. Pending reform efforts are unlikely to eclipse completely the cases presenting these issues.

Because many states have failed to undertake ballot reform efforts, and because some have done so in an incomplete fashion, the question of whether *Bush* itself *mandates* reform will remain significant. In California, the defendant Secretary of State, Bill Jones, announced his intention to ban the use of punch-card systems in California beginning in 2005.¹⁸² Defendants might, therefore, attempt to avert judicial determination of the issues considered in this Note by arguing mere *efforts* at reform are sufficient to warrant judicial abstention.¹⁸³ Other states have initiated similar reform efforts.¹⁸⁴ Thus, some might argue, the reach of *Bush* has been mooted.

Most reform efforts, however, do not call for either immediate change or complete uniformity, and many others have been

180. This of course assumes that no individual county uses different technologies in certain precincts to dilute the voting strength of a particular group of voters.

181. See *supra* Part II.B.2.

182. Nancy Vogel, *New Voting Machine Deadline*, L.A. TIMES, Dec. 18, 2001, at B7.

183. “[A] legislature traditionally has been allowed to take reform ‘one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,’ and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809 (1969) (internal citations omitted); see also *Baker v. Carr*, 369 U.S. 186, 259–59 (1962) (Clark, J., concurring) (supporting judicial remedy to equal protection dispute in state apportionment case only because state legislature failed to act).

184. See, e.g., Ken Thomas, *New Beginning for Voting*, MIAMI HERALD, Nov. 4, 2001, at 1B (predicting that all Florida precincts will use optical-scan or touch-screen balloting by 2002 elections); John Wagner et al., *Sign for Former ABC Chairman Goes Up, Comes Down As Political Winds Shift*, NEWS AND OBSERVER, July 23, 2001, at A3, 2001 WL 3475004 (reporting that punch-card balloting in North Carolina is to be phased out by 2006).

stymied in other ways. In Texas, the state's recently-enacted ban on *purchasing* punch-card machines¹⁸⁵ could, by itself, take decades to eliminate them from the scene¹⁸⁶ (and might in the mean time precipitate a disparity in vote accuracy correlated to county wealth). Indeed, in the California case, Judge Stephen V. Wilson found the Secretary of State's announced phase-out schedule unsatisfactory, and ruled that punch-card systems must be eliminated in time for the 2004 presidential election.¹⁸⁷ Moreover, many states permitting the use of punch-card machines have not undertaken any reform efforts, and the future of once-promising federal reform legislation is now unclear.¹⁸⁸ The breadth of *Bush* will thus likely remain a salient issue.

IV. CONCLUSION

Although *Bush v. Gore*, the election, was definitively settled by the U.S. Supreme Court, the legacy of *Bush*, the opinion, is far less certain. Courts across the country are wrestling with whether and to what extent the Equal Protection Clause now requires that voter preference be gauged via comparably accurate technologies. But regardless of the obstacles to reform, *Bush* is clear on outcome. By eliminating classification as requisite for an equal protection violation, ignoring official intent, applying these revolutionary norms to the vote-counting context, and then employing an elevated standard of review to discriminations of any magnitude and at any stage of the vote-counting process, the principles of *Bush* strongly suggest that many existing electoral systems can not stand.

185. Sam Attlesey, *Tough Talk Fails to Knock Out Punch Cards*, DALLAS MORNING NEWS, May 21, 2001, at 1A (describing how the Texas legislature backed away from promised ban on punch-card machines and instead prohibited their *purchase* after Sept. 1, 2001, thereby guaranteeing a slow and piecemeal phase-out).

186. Compare the case of mechanical level machines which, despite the fact that they have not been manufactured for years, are not only used, but are used exclusively by some states. See Appendix A; *supra* note 147 and accompanying text.

187. Lynda Gorov, *Punch-Card Ballot Banned in Calif. After Fla. Chad Case, New System Ordered for 2004 Election*, BOSTON GLOBE, Feb. 15, 2002, at A2.

188. See *Potpourri*, CHARLESTON GAZETTE, Oct. 22, 2001, at 4A ("Since last November, 1,775 bills have been introduced in state legislatures to reform election procedures. Fifty-eight percent were defeated, 28 percent are pending, and 14 percent passed."); *Return of the Chads*, USA TODAY, Nov. 6, 2001, at 16A (attributing lack of widespread electoral reform to "turf wars, partisan wrangling, unwillingness to spend money and political inertia"); Helen Dewar, *A New Life for Election Bill?*, WASH. POST, Sept. 12, 2002, at A4.

APPENDIX A
BALLOTING TECHNOLOGIES EMPLOYED IN THE
UNITED STATES

Paper ballots. First adopted for a statewide election by New York in 1889, the paper ballot is the dean of voting technologies.¹⁸⁹ Voters mark uniform ballots next to the appropriate candidate name(s), and the ballots are tallied manually.¹⁹⁰ Still used frequently in rural areas, approximately 1.5 percent of precincts used paper ballots in recent elections.¹⁹¹

Mechanical lever machines. Also originating in New York, mechanical lever machines were once used to tally nearly half the nation's votes.¹⁹² Mechanical lever machines feature an array of levers on the front of a machine, each corresponding to a particular candidate or ballot issue, which the voter pulls down to indicate choices.¹⁹³ A large separate lever is used by the voter both to enable the machine and to record the votes.¹⁹⁴ Lever machines were used by as many as 18.5 percent of precincts in recent years.¹⁹⁵ Because they are no longer made, however, the trend is to replace them with optically scanned or DRE machines.¹⁹⁶

Punch-cards. Punch-card systems employ one or more cards, which are placed in a clipboard-sized device used to secure them. Voters punch through the appropriate holes with a punching device.¹⁹⁷ Two common types of punch-cards include the "Votomatic" and "Datavote" cards.¹⁹⁸ Votomatic cards only print the number of the hole on the card, nothing more, and the voter consults a list of candidates or issues to identify the appropriate hole.¹⁹⁹ With a Datavote card, the actual names and/or issues are printed on the

189. *Note Ballots*, Federal Election Commission, at <http://www.fec.gov/pages/Note.htm> (last visited Feb. 19, 2002).

190. *Id.*

191. William Welsh, *High Costs Could Slow Proposed Voting Reforms*, 15 WASH. TECH. 19 (Jan. 8, 2001), at http://www.washingtontechnology.com/news/15_19/state/15080-1.html (last visited Feb. 20, 2002).

192. *Mechanical Lever Machines*, Federal Election Commission, at <http://www.fec.gov/pages/lever.htm> (last visited Feb. 19, 2002) (stating that mechanical lever machines reached their heyday in 1960s).

193. *Id.*

194. *Id.*

195. Welsh, *supra* note 191.

196. *Id.*

197. *Punchcards*, Federal Election Commission, at <http://www.fec.gov/pages/punchrd.htm> (last visited Feb. 19, 2002).

198. *Id.*

199. *Id.*

ballot adjacent to the appropriate hole.²⁰⁰ Approximately 34.5 percent of precincts used punch-card machines to some extent in recent elections,²⁰¹ though some jurisdictions already have begun moving to more reliable methods.²⁰²

Optical scan ballots. Optical scan or “Marksense” systems employ a ballot on which candidate names or issue choices are printed next to a small shape, which voters fill in to indicate their choice(s).²⁰³ The ballots then are placed into a device that scans for the marks and tabulates the results.²⁰⁴ Optical scan technology was used in 27.5 percent of precincts in recent years, though that proportion is growing.²⁰⁵

Direct Record Electronic System. DRE is the most recent and technologically sophisticated voting technology, and includes so-called “touch screen” systems.²⁰⁶ Each voter is given an “ATM-type” card that is used to activate the machine.²⁰⁷ Once activated, candidate names and/or issue choices are visible to the voter on the front of an electronic display.²⁰⁸ The voter directly enters choices into electronic storage, either through keypad or on-screen input devices.²⁰⁹ As they are computer-driven, DRE systems generally prevent the inadvertent selection of multiple candidates, provide for confirmation of voter selections, and give voters chances to correct errant selections. Approximately nine percent of precincts used DRE technology in recent elections.²¹⁰

Mixed systems. Approximately nine percent of precincts employ multiple voting technologies.²¹¹ Most of these precincts are in counties, most commonly in Massachusetts, Michigan, Maine, New Hampshire and Vermont, where municipalities and even individual precincts are permitted to employ different methods for casting votes.²¹²

200. *Id.*

201. Welsh, *supra* note 191.

202. See Ken Thomas, *supra* note 184 and accompanying text. R

203. *Marksense*, Federal Election Commission, at <http://www.fec.gov/pages/marksense.htm> (last visited February 19, 2002). R

204. *Id.*

205. Welsh, *supra* note 191; see also Ken Thomas, *supra* note 184. R

206. *Direct Recording Electronic (DRE)*, Federal Election Commission, at www.fec.gov/pages/dre.htm (last visited February 19, 2002).

207. VOTING TECHNOLOGY PROJECT, *supra* note 143, at 3. R

208. *Id.*

209. *Id.*

210. Welsh, *supra* note 191. R

211. *Id.*

212. VOTING TECHNOLOGY PROJECT, *supra* note 143, at 4. R