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Publication Date
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PUBLIC LAW AND LEGAL THEORY

Research Paper No. 2001-3
March, 2001

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BUSH V. GORE AND THE FUTURE OF EQUAL PROTECTION LAW IN ELECTIONS

RICHARD L. HASEN*

INTRODUCTION

Co-authors of both election law casebooks have drawn a distinction between the "big picture" issues of election law---such as representation, the nature of political equality, the role of money in politics---and the "nuts-and-bolts" of election law. Before the recent Florida controversy, the conventional wisdom was that the former was more important (and no doubt more interesting) to study than the latter.[1]

The Florida controversy challenged that conventional wisdom. Although resolution of the dispute depended essentially upon two nuts-and-bolts questions---how does one determine the intent of the voter from examining a paper ballot and what are the mechanics for contesting a statewide election---the controversy illustrated in numerous ways that the line between big picture questions and nuts-and-bolts is fuzzy.

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[1] Daniel H. Lowenstein, *Election Law as a Subject: A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1202 (1999) (although "[n]uts and bolts questions…have increased in number… [f]or the most part we do not teach these issues and we do not write about them in law reviews; not because they are not there but because, for various reasons, we do not find them sufficiently interesting"); Samuel Issacharoff & Richard H. Pildes, *Not By "Election Law" Alone*, 32 LOYOLA L.A. L. REV. 1173, 1174 (objecting to the term "election law" as focusing on "elections and their administrative mechanisms," narrowing the field "to microscopic regulatory details" and running the risk of "signaling to potential newcomers a tedious focus on the narrow regulatory questions of most interest to political junkies.") The two casebooks are DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW---CASES AND MATERIALS (2d. ed. forthcoming 2001); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY (1998).

Indeed, this nuts-and-bolts dispute raised big picture questions regarding the nature of representation, the meaning of political equality, and the role of money in politics.[2] It is no wonder that both casebooks now will include material on the Florida dispute.[3]

The Supreme Court's *per curiam* (unsigned) majority opinion in *Bush v. Gore*[4] eviscerated this distinction between nuts-and-bolts questions of elections and the big picture in holding that Florida law, at least as construed by the Florida Supreme Court, violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that a state violates equal protection when its fails to have uniform standards for the recounting of votes during a statewide election contest.[5] The opinion is potentially far-reaching, translating just about any disparity regarding the means of voting into a justiciable question. Indeed, we can go back and ask how, say, the "butterfly ballot" controversy in Palm Beach County should have been handled if *Bush v. Gore* were already on the books.[6]

Part I of this Article argues that although some have heralded the opinion as the (perhaps unintended) dawn of a new era in the jurisprudence of equal protection in elections, there are good reasons for doubting that the Supreme Court majority intended anyone to take their equal protection holding seriously.

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[2] Questions of who votes, how votes are counted, and the reasons for and critiques of the Electoral College raised questions of representation and political equality. The media focused toward the end of the controversy on how the presidential candidates raised money for recount funds, thereby exploring the relationship of money and politics. On the latter issue, see John M. Broder, *Many Donors to Campaigns are Financing Recount Fight*, N.Y. TIMES, Dec. 8, 2000. at A33. The Center for Responsive Politics website lists donors to the Gore recount committee and provides a searchable database of donors to the Bush recount committee. *See* <www.opensecrets.org>.

[3] *See* LOWENSTEIN & HASEN, *supra* note 1, chs. 3 & 4. Issacharoff, Karlan and Pildes published a stand-alone supplement, SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001); *see also id.* at 2 ("THE LAW OF DEMOCRACY focused more on institutional arrangements than on the nuts-and-bolts of casting votes and having them counted.").

[4] 121 S. Ct. 525 (2000).

[5] *Id*. at 532.

[6] *See infra* Part II.

Language in the *per curiam* opinion limits it to the facts of the case, or, at most, to cases where jurisdiction-wide recounts are ordered. Moreover, the Court's own analysis was superficial. It failed to explain or justify its large extension of precedent, and, most importantly, given the fact that a "fundamental right" was involved, the Court appeared to speak the language of strict scrutiny but apply something much less than strict scrutiny. Finally, the kind of equal protection claim favored by the conservative justices in the *Bush v. Gore* majority is a strong departure from the usual equal protection jurisprudence they favor. Time will tell whether the Court backs away from its ambitious new equal protection jurisprudence. To the extent that the Court does back away, it further undermines the already-questioned legitimacy of the opinion.

Part II of this Article considers not *whether* the Court meant what it said, but rather what would be the *consequences* if the Court indeed meant what it said. The equal protection jurisprudence of *Bush v. Gore* moves election law jurisprudence to an uncharted third level of political equality. Various amendments to the Constitution and Supreme Court cases decided by the Warren Court established the first level of equality, requiring that if a jurisdiction holds an election, every citizen, adult resident has the right to vote in that election.[7] The Warren Court in *Reynolds v. Sims* and its progeny, relying upon the Equal Protection Clause of the 14th Amendment, established the second level of equality---the right to an equally weighted vote.[8] In *Bush v. Gore*, the Court relied upon the *Reynolds* line of cases to move to a third level of equality----equality in the procedures and mechanisms used for voting. Part II explores a range of election law cases that may be subject to a "third level" political equality claim.[9] It concludes that, if the case were taken seriously, *Bush v. Gore* should have great precedential value in changing a host of voting procedures and mechanisms, particularly when those procedures and mechanisms are challenged prospectively.

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[7] *See infra* note 77.

[8] *See infra* note 78.

[9] I ignore the relevance that *Bush v. Gore* may have for equal protection claims outside the election law context.

Part III of this Article explores the benefits, costs, and implications of expanding equal protection to such third level claims. The benefits of the approach are fairly obvious: a precedent requiring scrupulous equality in the holding of elections will increase resources used to conduct elections, so that at least 20th century voting technology will be applied as we enter the 21st century. It will provide a means for those in poor, urban areas to have just as accurate a voting system as those used in wealthier areas. It also likely will ensure more reliable vote counting.

But expanding political equality to the third level would be a mixed blessing. Putting aside the considerable costs associated with upgrading voting equipment, rewriting state and local election laws involving contested elections, and litigation over both types of changes, three concerns arise with extending equal protection jurisprudence to the nuts-and-bolts of elections. First, third level claims provide a new reason and a pretext for federal courts to nullify state and local election results, threatening both democracy and the judiciary. Second, third level claims undermine federalism in a way that first and second level equal protection claims do not. Claims of local control over nuts-and-bolts voting mechanisms resonate more genuinely than claims of localities to deny the franchise to certain groups of individuals or to count votes unevenly. Third, third level claims create a disincentive for jurisdictions to experiment with new methods of voting, such as internet voting.

Finally, it is worth thinking about the doctrinal implications of extending equal protection jurisprudence to the third level. It is unclear whether extension of equal protection to the third level differs meaningfully from arguments calling for greater political equality in terms of electoral structures (such as Justice Marshall's argument in his dissent in *Mobile v. Bolden*[10]) and financing election campaigns (such as the arguments of Jamin Raskin and John Bonifaz[11]). The main,

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[10] 446 U.S. 55, 116-17 (1980) (Marshall, J., dissenting).

[11] Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993) [hereafter, *Wealth Primary*]; Jamin Raskin and John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) [hereafter, *Constitutional Imperative*].

albeit unintended, precedent of *Bush v. Gore* may be to ease the way for future Supreme Court majorities to pursue their own visions of political equality without much thought about whether that vision is supported by existing caselaw.

I.
WHY WE SHOULDN'T TAKE *BUSH V. GORE*'S EQUAL PROTECTION HOLDING SERIOUSLY

A. Optimism and the Equal Protection Holding

Two days after the Supreme Court issued its opinion in *Bush v. Gore*, Professor Sam Issacharoff wrote in a New York *Times* op-ed of the "surprising expansion of voting rights"[12] wrought by the opinion:

> [T]he Supreme Court may have given us an advancement in voting rights doctrine. It has asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone….The court's new standard may create a more robust constitutional examination of voting practices.[13]

Echoing Issacharoff's conclusion that the legacy of the case "could be a substantial jolt of justice into the voting arena,"[14] *Village Voice* columnist Nat Hentoff concluded that the Justices planned their precedent to be far-reaching: "The justices knew that with the way opened to election reforms, a lot of cases will be headed to the courts throughout the nation until all votes are counted according to uniform standards."[15]

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[12] Samuel Issacharoff, *The Court's Legacy for Voting Rights*, N.Y. Times, Dec. 14, 2000, at A39.
[13] *Id.*
[14] *Id.*
[15] Nat Hentoff, *A Jolt of Justice for All Voters: Supreme Court Redeemed*, Village Voice, Jan. 10-16, 2001. For additional optimistic assessments, see BNA, *Equal Protection Claims Likely to Prod States to Address Voting System Problems*, 69 U.S.L.W. 2483 (Feb. 20, 2001).

As the Yiddish expression goes, "From your mouth to God's ears." Whether the sentiments above represent a prediction by Issacharoff and Hentoff about the future of equal protection jurisprudence in elections or merely wishful thinking, I am far less sanguine that the case will have much precedential effect. To explain why, I begin by noting precisely what conduct the *Bush* majority opinion held violated the Equal Protection Clause.[16]

The Florida election controversy reached the United States Supreme Court the second time in *Bush v. Gore*, an appeal of the Florida Supreme Court's second opinion. In the Florida Supreme Court opinion, a 4-3 majority reversed the trial court. The trial court held that Democratic presidential candidate Al Gore failed to meet Florida's statutory requirement to contest the Florida vote and therefore rejected Gore's demand for manual recounts of "undervotes" in selected Florida counties with large Democratic majorities.[17] "Undervotes" were votes that voting machines recorded as containing no votes in the presidential contest. Gore asserted that a recount of these votes would show enough legally valid votes cast in his favor but not counted by the machine to make up the extremely small difference in votes between Gore and Bush.

The Florida Supreme Court held that the trial court applied the wrong legal standards in judging the merits of Gore's claim.[18] Rather than remand the case for the trial court to apply the correct legal standard to the facts, however, the court ordered that certain recounts conducted after the deadline set by the Florida Supreme Court in an earlier case should be included in the totals and that a recounts of undervotes go forward.[19] And rather than allow Gore to pick the counties for the recounts, the Florida court held that all Florida counties---and not just the counties singled out by Gore---had to conduct

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[16] This analysis assumes the reader is familiar with the facts of the case. As this incident fades into memory, that may no longer be true. Readers looking for more extended factual background on the case may consult LOWENSTEIN & HASEN, *supra* note 1, ch. 3; *37 Days: A Special Report: An American Diary; The Battle Unfolds Day by Day*, L.A. TIMES, Dec. 17, 2000, at V3.

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

[18] *Id*. at 1252.

[19] *Id*. at 1261-62.

manual recounts of the undervotes.[20] The court failed to respond to Chief Justice Wells' observation in dissent that it was unfair to count only undervotes and not "overvotes," that is votes that the machine recorded as containing more than one valid vote for president.[21]

The court further held that in examining the undervotes to determine if the ballots indeed contained a valid vote for a presidential candidate, the counters should judge the ballots using a "clear intent of the voter" standard.[22] The court failed to be more specific, perhaps out of fear that a more specific standard would open up the decision to charges that it violated Article II of the United States Constitution.[23] In any case, the court ordered that the trial judge manage the statewide recount,[24] which needed to be completed in short order.

The Florida court remanded the case to the original trial judge, who recused himself. Another trial judge ordered the manual recounts to begin of the Miami-Dade ballots (that had been shipped to Tallahassee for the election contest) and in counties across Florida. Just as the counts began on Saturday

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[20] *Id*.

[21] *Id*. at 1264 n.26 (Wells, C.J., dissenting). It is not clear that all overvotes recounted by hand would necessarily be classified as invalid votes. For example, a voter who both wrote in Al Gore's name in the write-in portion of a ballot and punched out the chad for Al Gore clearly intended to vote for Al Gore, but the counting machine would record that vote as an overvote.

[22] *Id*. at 1262.

[23] Article II of the Constitution vests in each state's *legislature* the power to prescribe the state's rules for choosing presidential electors. The Article II issues are beyond the scope of the Article. The main thrust of the Article II argument in Chief Justice Rehnquist's concurrence is that the Florida Supreme Court's novel interpretation of legislatively-enacted statutes regulating election contests in the Bush-Gore dispute constituted a change in the law in violation of Article II. On these issues, see [cite other symposium contributions on this point]. Suffice it to say that it was clear from the United States Supreme Court's first opinion in the case, *Bush v. Palm Beach County Canvassing Board*, 121 S. Ct. 471, 473-474 (2000), that even if the Florida Supreme Court thought it was legitimately filling gaps and reconciling conflicting statutes in Florida's election law, it ran the risk of its opinion being characterized as a "change of law" in violation of Article II. *Cf*. Richard A. Posner, *The Vote and the Courts*, 2000 SUP. CT. REV. ___, ___ [manuscript at 37] ("That was a gap in the statute that a court applying normal principles of statutory interpretation might fill.").

[24] 772 So.2d at 1262.

December 9, the United States Supreme Court, by a 5-4 vote, stayed the Florida Supreme Court's order, thereby suspending the recount.[25] Justice Scalia, in his opinion concurring in the granting of a stay, explained that a majority of the Court believed that Bush had a substantial likelihood of success on the merits and stood to face irreparable harm,[26] the Court's standard for issuing a stay.[27]

Late in the evening of Tuesday, December 12, the Supreme Court issued its opinion on the merits. Five justices (Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas) joined in a *per curiam* opinion reversing the Florida Court on equal protection grounds.[28] The Chief Justice, joined by Justices Scalia and Thomas, issued a concurring opinion presenting as alternative grounds for reversal that the Florida Supreme Court's order violated Article II of the Constitution.[29] Four justices dissented (Justices Breyer, Ginsburg, Souter, and Stevens),[30] although Justices Breyer and Souter expressed some support for the equal protection argument but not the remedy.[31]

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[25] *Bush v. Gore*, 121 S. Ct. 512 (2000).

[26] *Id*. (Scalia, J., concurring). I could write much beyond the scope of this Article about Justice Scalia's concurrence, particularly his view of what constituted "irreparable harm" to Bush and why he failed to balance the equities of harm to Gore from granting the stay. I note here only that I am aware of no empirical support for Justice Scalia's statement that "it is generally agreed that each manual recount produces a degradation of the ballots, which renders a subsequent recount inaccurate." *Id*.

[27] *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan J., in chambers). The four requirements are: (1) There is a reasonable probability that four Justices will vote to grant certiorari or note probable jurisdiction; (2) There is "a fair prospect will conclude that the decision below was erroneous;" (3) Irreparable harm is likely to result from the denial of a stay; and (4) In balancing the equities, taking into account the harm to both parties as well as the interests of the public at large, the stay should be granted.

[28] 121 S.Ct. at 525.

[29] *Id*. at 533 (Rehnquist, C.J., concurring).

[30] *Id*. at 539 (Stevens, J., dissenting); i*d*. at 542 (Souter, J. dissenting); *Id*. at 546 (Ginsburg, J., dissenting); *id.* at 550 (Breyer, J., dissenting).

[31] *See id*. at 546 (Souter, J., dissenting) ("I can conceive of no legitimate interests served by these differing treatments of the expressions of voters' fundamental rights…I would…remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted different treatments, to be applied within and

The *per curiam* opinion's analysis began by setting forth the applicable law. It noted that individual citizens have no federal constitutional right to vote for electors for the President of the United States.[32] However, "[w]hen the state legislature vests the right to vote for President in its people," as Florida had, "the right to vote as the legislature prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each voter and the equal dignity owed to each voter."[33] The Court continued:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)….It must be remembered 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." *Reynolds v. Sims*, 377 U.S. 544, 555 (1964).[34]

After noting that "[t]he question before us….is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate

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among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order."); *id*. at 551 ("I agree that, in these very special circumstances, basic principles and fairness may well have counseled the adoption of a uniform standard to address the problem….Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and hold the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting all undercounted votes in Florida…and to do so in accordance with a single-uniform substandard.").

[32] *Id*. at 529.

[33] *Id*.

[34] *Id*. at 530 (citations omitted).

treatment of the members of its electorate,"[35] the Court answered the question in the negative. It held that the recount mechanism adopted by the Florida Supreme Court did "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right"[36] under the Equal Protection Clause for four related reasons:

1. Although the Florida court had instructed that those individuals conducting the manual recounts judge ballots by discerning the "intent of the voter," it failed to formulate uniform rules to determine such intent, such as whether to count as a valid vote a ballot whose chad is hanging by two corners. The standards for whether to count a ballot differed "not only from county to county but indeed within a single county from one recount team to another."[37]

2. The recounts already undertaken included a manual recount of all votes in selected counties, including both undervotes and overvotes, but the new recounts ordered by the Florida court included only undervotes. "As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent."[38]

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[35] *Id*.
[36] *Id*.
[37] *Id*. at 531. The Court noted that the vote totals already approved by the Florida Supreme Court included recount totals from counties using various methods of counting: "Broward County used a more forgiving standard than Palm Beach County, and uncovering almost three times as many new votes, a result markedly disproportionate to the difference in populations between the counties." *Id*. The Court did not respond to Justice Stevens' point in dissent that concerns about the new recounts "are alleviated--if not eliminated---by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process." *Id*. at 541 (Stevens, J., dissenting).
[38] *Id*. at 531. The Court continued: "Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot." *Id*.

3. The Florida Supreme Court had ordered that the current vote totals include results of a partial recount from Miami-Dade County. From this fact the Supreme Court concluded that "[t]he Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete."[39]

4. The Florida Supreme Court did not specify who would count the ballots, forcing county boards to include team members without experience in recounting ballots. Nor were observers permitted to object during the recount.[40]

The Supreme Court then declined to remand the case to the Florida Supreme Court to order procedures satisfying these concerns, as two dissenting Justices urged.[41] Putting aside the Article II problem,[42] a remand order would have been entirely manageable.[43] Nonetheless, the Court held that the Florida Supreme Court had recognized the Florida legislature's intention to participate fully in the federal electoral process. Under a federal statute,[44] states that designate their electors by a certain date, in this election by December 12, cannot have their choice challenged in Congress when Congress later counts the electoral votes. "That date [of December 12] is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida."[45]

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[39] *Id*. at 531-32.
[40] *Id*. at 532.
[41] *See supra* note 31.
[42] *See supra* note 23.
[43] The Court disagreed. *See Bush v. Gore*, 121 S. Ct. at 532-33. The Electoral College did not vote until December 18 and Congress did not count the electoral votes until January 6, 2001.
[44] 3 U.S.C. § 5.
[45] *Bush v. Gore*, 121 S. Ct. at 533.

B. Reasons for Doubting Bush v. Gore*'s Precedential Value*

At first glance, Issacharoff's and Hentoff's optimism is entirely understandable. As Justice Stevens noted in dissent, never before had the Supreme Court "called into question the substantive standard by which a State determines that a vote has been legally cast."[46] The Court for the first time expressed its willingness to get its hands into to the nitty-gritty details of vote counting---one would have been hard-pressed before this case to imagine the Supreme Court delving into the law of hanging chads. If chads could be questioned, then why not a more "robust" exploration of not only the mechanics of elections, but state and local laws governing election contests as well? And if courts are to look at the minutiae of election contests, perhaps courts would also consider structural issues, such as the financing of elections, which might create conditions of inequality among voters. Nonetheless, for at three reasons I doubt this optimistic assessment.

1. Limiting Language

First, the Court's language explicitly limiting its holding is extraordinary. After stating the four ways in which the Florida procedures violated the Equal Protection Clause, the Court wrote: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[47] By this statement, the Court appeared to dismiss any precedential value of the case for other election law cases.

That is a strong deviation from the Court's usual practice in election cases. Take campaign finance for example. When the Court considered the constitutionality of the 1974 amendments to the Federal Election Campaign Act in *Buckley v. Valeo*,[48] the Court, also in a *per curiam* opinion under rushed circumstances, resolved excruciatingly difficult and complex issues related to the First Amendment, corruption, political

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[46] *Id*. at 540 (Stevens, J., dissenting).
[47] *Id*. at 532.
[48] 424 U.S. 1 (1976).

equality, and democracy. Yet the Court did not limit the holding of *Buckley* to the particular facts of the case. Far from it; more than 25 years after the opinion is issued, the Court continues to look to *Buckley* as providing the proper starting point for evaluating the constitutionality of various campaign finance laws.[49]

Nor was the Court merely silent on the issue of *Bush v. Gore*'s precedential value. It *expressly* denied the case had precedential value, something the Court could have suggested more subtly in distinguishing *Bush v. Gore*'s facts in future cases to come before it. The Court further noted that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[50] When future courts consider litigation challenging the electoral practices of local entities, no doubt lawyers representing these entities will point out that *Bush v. Gore* is expressly limited to those situations where "a court orders a statewide remedy" and then fails to give "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[51] Following *Bush v. Gore*, it is hard to imagine many cases falling into that category.

2. The Court's Failure to Engage in Serious Analysis

Second, we should not take *Bush v. Gore*'s holding seriously because the Court itself did not take its holding seriously.[52] The majority opinion was no doubt a great

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[49] In the most recent of these cases, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court went out of its way to show how its opinion was entirely consistent with *Buckley*. *See id*. at 397-98.

[50] 121 S.Ct. at 532.

[51] *Id*.

[52] Judging by the dissents' focus on Chief Justice Rehnquist's concurring opinion on Article II grounds rather than on equal protection, one wonders if the equal protection ground was an afterthought conjured up by Justices O'Connor and Kennedy, who may have been uncomfortable with Chief Justice Rehnquist's sharp rebuke of the Florida Supreme Court's reasoning and integrity. *See* Linda Greenhouse, *Election Case a Test and Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1, A19 ("although intended as a

extension of precedent, yet the Court never explained why it was extending precedent in this case. As authority for its holding the Court relied principally upon two cases, *Reynolds v. Sims*[53] and *Harper v. Virginia Board of Elections*.[54] *Reynolds* held that it is an Equal Protection violation to elect members of a state or local legislative body from unequally populated districts. According to *Reynolds*, "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status."[55] The *Reynolds* Court took 40 pages in the U.S. Reports to justify this deviation from past precedent. In *Harper*, the Court relied upon *Reynolds* in striking down a poll tax on equal protection grounds: "wealth or fee paying has…no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[56]

Neither case involved the mechanics of elections, what had heretofore been seen to be a matter for local officials. Indeed, the Court in recent years had expressed great deference to local officials who wished to structure their elections in the way they see fit. In *Munro v. Socialist Workers Party*,[57] for example, the Court held that the state of Washington's interest in preventing ballot "confusion" by voters justified its rules that kept most third party candidates off the general election ballot. The Court held that the state need not even provide any empirical evidence that its rules were necessary to prevent such confusion: "To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a

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majority opinion, the chief justice's opinion failed to get the support of Justices Kennedy and O'Connor.")

[53] 377 U.S. 533 (1964)

[54] 383 U.S. 663 (1966).

[55] *Reynolds*, 377 U.S. at 566 (citations omitted).

[56] 383 U.S. at 670.

[57] 479 U.S. 189 (1986).

State's political system sustain some level of damage before the legislature could take corrective action."[58]

That is not to say that the Court was wrong in *Bush v. Gore* in extending Equal Protection to the mechanics of elections. However, even under the admittedly great time pressure of the case, the Court could have gone a long way toward showing that it took the exercise seriously by including a sentence or two justifying, or at least acknowledging, that the holding greatly expanded past precedent.

Perhaps the best evidence that the Court did not take the analysis seriously was its resolution of the case. The Court recognized that voting is a "fundamental right," and that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[59] It is hornbook law that laws infringing on fundamental rights, including voting, must be judged under the standard of strict scrutiny---that is, that the state must have a compelling interest in treating voters differently and that the means must be narrowly tailored to meet that interest. The Court did nothing to suggest that anything less than strict scrutiny, such as an easier to meet "rational basis test," should apply to analyze burdens on the fundamental right of voting in this context.[60]

Nonetheless, the Court held that the Florida legislature's interest (which the Supreme Court said was recognized by the Florida Supreme Court[61]) in taking advantage of the "safe harbor" provisions of federal law for counting the state's electoral votes trumped the rights of all Florida voters to have valid votes count. It is not self-evident that such a state interest was compelling and trumped the right, recognized in *Reynolds* but ignored by the Court in *Bush v. Gore*, to have every vote count:

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[58] *Id*. at 195.

[59] *Bush v. Gore*, 121 S. Ct. at 530.

[60] It might well be that the Court would have held that the Florida recount procedures flunked even a rational basis test given their "arbitrary" nature. But the Court did not say or even suggest that it was relaxing the strict scrutiny it had applied in the past to these voting cases. Indeed, *Harper* and *Reynolds*, the only cases relied upon by the majority, are among the important cases establishing that strict scrutiny applies to burdens on voting.

[61] *Id*. at 533.

> It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote *and to have their votes counted.* In *Mosley* the Court stated that it is "as equally unquestionable that the right *to have one's vote counted* is as open to protection…as the right to put a ballot in a box. The right to vote can be neither denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their votes *and have them counted*."[62]

Suppose evidence existed that Florida officials had failed to count the votes of African-American voters in Florida because of racial animus and the Florida Supreme Court ordered a recount of votes that would take time through December 12. It is not clear to me that the "safe harbor" provision should have trumped the right to have every vote count. Now perhaps one could argue even under those circumstances that Florida's interest in meeting the deadline was indeed compelling, and that there were no other means to achieve that goal. But the Supreme Court never even bothered to undertake the analysis in *Bush v. Gore*, suggesting that the fundamental right to vote was not so fundamental after all.[63] As Judge Posner remarked, "[t]here was an air of non sequitur to ruling that the Florida supreme court had violated the Constitution by failing to prescribe uniform criteria for a recount, yet terminating the recount rather than permitting it to go forward under proper criteria."[64]

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[62] *Reynolds*, 377 U.S. at 554-55 (emphases added and citations omitted).

[63] It will not do to argue that the votes *were* counted, in the machine count. Florida law, as the law of many other states, allowed for manual recounts of votes precisely because machines made errors and failed sometimes to count valid votes. Thus, at least under Florida law those votes were not counted. The Supreme Court's opinion kept these votes uncounted.

[64] Posner, *supra* note 23, at ___[manuscript at 47].

3. Inconsistency in Equal Protection Analysis

The final reason not to take the Supreme Court's equal protection holding seriously is that it constitutes a strong break from the conservative majority's usual approach to equal protection, and therefore it likely will not be extended or embraced by them in future cases. The argument here is not the "crude" one that "[t]he five Justices are 'conservative' and 'conservative' judges don't 'like' the equal protection clause."[65] These Justices have shown that they like the Equal Protection Clause just fine, when used in pursuit of claims more consistent with their ideology. There was no such thing as a claim of an "unconstitutional racial gerrymander" before these same five Justices decided *Shaw v. Reno*[66] in 1993, a holding grounded in equal protection.[67] *Shaw* and its progeny have been used to limit the extent to which race may be taken into account in redistricting to benefit minority-preferred candidates for elective office.

It is not so much that these Justices do not "like" equal protection as that we would not have expected them to use the Equal Protection Clause to create new federal oversight of the minutiae of state and local elections. Besides the federalism costs which make the majority's holding surprising,[68] no Rehnquist Court opinion had ever relied upon *Reynolds* or *Harper* to expand oversight of the electoral process or to expand the franchise.[69] One would have expected these Justices to agree with Judge Posner's observations about the case:

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[65] *Id*. at ___ [manuscript at 55].

[66] 509 U.S. 630 (1993).

[67] The Court, with different personnel, rejected a similar (if not identical) claim in 1977 in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). *See* Shaw v. Reno, 509 U.S. at 659 (White, J., dissenting) ("The facts of the case here mirror those in" *UJO*).

[68] I discuss these costs below in Part III.B. There are significant federalism costs with the *Shaw* line of cases as well. *See* Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

[69] When the butterfly ballot case arose, Erwin Chemerinsky and I each independently suggested that a revote could be demanded under the authority of *Reynolds v. Sims*. I made my comments on an election law internet discussion group that I manage with Dan Lowenstein and to numerous reporters. Chemerinksy made the argument in Erwin Chemerinsky, *Palm*

> Such differences [in how votes are counted] had not previously been thought to deny equal protection of the laws and if they are now to do so portends an ambitious program of federal judicial intervention in the electoral process, a program the Supreme Court seems, given the haste with which it acted, to have undertaken without much forethought about the program's scope and administrability. The last thing we need is more election litigation.[70]

Judge Posner defended the Supreme Court's decision not on equal protection grounds, which he dismissed in three paragraphs of his lengthy article, but on grounds of "rough justice," if not "legal justice."[71] "I cannot see the case for precipitating a political and constitutional crisis merely in order to fuss with a statistical tie that, given the inherent subjectivity involved in hand counting spoiled ballots, can never be untied."[72] Similarly, Professor Charles Fried, who represented the Florida Legislature in an amicus curiae brief before the Supreme Court, wrote that the Court's analysis on why it failed to remand the case to the Florida Supreme Court to implement its novel Equal Protection holding was "the least convincing portion of the court's opinion."[73]

In sum, the limiting language in the opinion, the lack of seriousness with which the Court undertook its own analysis, and the inconsistency of the opinion with other jurisprudence by this majority of Justices all point in the direction of assuming that *Bush v. Gore* is not good precedent for an expansive reading of equal protection in elections.

Beach County Must Vote Again, L.A. TIMES, Nov. 12, 2000, at M5. The general response to such claims was skepticism given their novelty.

[70] Posner, *supra* note 23, at 40-41. Posner then argues that a due process claim would have been more defensible. "Yet even this would not be an inconsequential doctrinal step---the creation of a federal duty to use uniform *precise* criteria in a recount." *Id*. at ___ [manuscript at 41].

[71] *Id*. at ___ [manuscript at 59].

[72] *Id*. at ___ [manuscript at 45].

[73] Charles Fried, *A Badly Flawed Election: An Exchange*, N.Y. REV. BOOKS, Feb. 22, 2001.

Embarrassment provides the only hope that the case will have precedential value. Conservative justices decided a case in which their decision effectively chose a President who was far more likely than the losing candidate to choose additional conservative justices to fill Supreme Court vacancies.[74] An opinion whose holding is limited to the facts of the case will lead to further claims that the Court decided the case using the not-so-venerable principle of constitutional interpretation: "Bush wins." To blunt that criticism, the Court may tolerate giving the opinion some precedential value. I turn now to that possibility.

II.
TAKING *BUSH V. GORE*'S EQUAL PROTECTION HOLDING SERIOUSLY

As Professor Jack Balkin observed shortly after the Court decided *Bush v. Gore*, a rule applied only to one case "isn't consistent with rule-of-law principles."[75] To be consistent with such principles, like cases are to be treated alike. This Part examines which cases are "like cases" compared to *Bush v. Gore*. This is not a futile exercise even if I am correct in Part I that the Supreme Court ultimately will limit *Bush v. Gore* to its facts. Lower courts will first apply *Bush v. Gore* as precedent to cases coming before it, and the Supreme Court might decline to review some of those cases. So there is at least a window of time in which the case may serve as valid precedent.

To make a determination of which cases are "like cases," I begin by restating the holding of the case as briefly as I can. The Court held that "[h]aving 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."[76] Florida violated this rule by: (1) failing to formulate a uniform rules for judging the "intent of the voter" in a manual

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[74] Bruce Ackerman, *The Court Packs Itself,* AM. PROSPECT, Feb. 12, 2001.
[75] Marcia Coyle, *Gauging 'Bush v. Gore' Fallout: Will Equal Protection Language Open a Can of Electoral Worms?*, NAT'L L.J. Dec. 25, 2000, at A4 (quoting Professor Balkin).
[76] *Bush v. Gore*, 121 S. Ct. at 530.

recount; (2) ordering only a selective recount of "undervotes" rather than a recount of all votes; (3) leaving open the possibility of certifying vote totals from incomplete recounts; and (4) failing to specify who would count the ballots or the procedures for objection.

This holding moves equal protection analysis in election law cases to a third level of equality. Various amendments to the Constitution and Supreme Court cases decided by the Warren Court established the first level of equality, requiring that if a jurisdiction holds an election, every citizen, adult resident has the right to vote in that election.[77] The Warren Court in *Reynolds v. Sims* and its progeny, relying upon the Equal Protection Clause of the 14th Amendment, established the second level of equality---the right to an equally weighted vote.[78] In *Bush v. Gore*, the Court relied upon the *Reynolds* line of cases to move to a third level of equality----equality in the procedures and mechanisms used for voting.

The *Bush v. Gore* Court did not explain which kinds procedures and mechanisms used for voting constitute "arbitrary and disparate treatment" that "value one person's vote over another" in violation of the Equal Protection Clause. Accordingly, the most we can do then is look at the four ways in which the Court held that Florida did so and compare those ways to factual allegations in new cases.

Thus, consider which, if any, of the following five hypothetical allegations should be cognizable as an Equal Protection violation:

1. In the state of Pacifica, voters in some counties vote using punch card voting systems in which they must vote by punching out a chad with a stylus. Voters in other counties vote using optical scanning systems in which they must vote by filling in a bubble with a pencil. The rate at which punch card

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[77] *See generally* LOWENSTEIN AND HASEN, *supra* note 1, ch. 3; ISSACHAROFF ET AL., *supra* note 3, at 45 (referring to *Harper* as a "first generation" voting rights claim).

[78] *See* LOWENSTEIN & HASEN, *supra* note 1, at ch. 4; ISSACHAROFF ET AL., *supra* note 3, at 45-46 (discussing *Reynolds*). The latter authors call cases dealing with statutory design of democratic institutions "second generation" cases, a different meaning than my "second level" term. *See id*. at 47.

votes are rejected by vote tabulating equipment is almost 4 percent compared to an approximately 1.5% rate for rejection of ballots read by optical scanning equipment.[79] Optical scanning equipment is more expensive, and perhaps for that reason it has been adopted in counties with higher per capita incomes.[80]

2. Same facts as in the first example, but the systems differ across states voting in a presidential election.

3. Two candidates in a local election in the state of Pacifica compete for the job of county dog catcher. Smith defeats Jones by 10 votes in an election using a punch card voting system. Jones demands a recount, which is conducted by hand using the state-mandated "intent of the voter" standard. The state statute provides no further guidance on how to judge intent. Under the recount, Jones wins by 3 votes. Smith and voters supporting Smith sue to have the results overturned.

4. State voting officials "purge" from their voter rolls the names of voters who have not voted in the last two elections. Officials claim that they are doing so to prevent fraud---a number of names removed are of people who the state said,

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[79] *Bush v. Gore*, 121 S. Ct. at 541 n.4 (Stevens, J., dissenting) ("The percentage of nonvotes in this election in counties using a punch-card system was 3.92%; in contrast, the rate of error under the more modern systems was only 1.43%. Put in other terms, for every 10,000 votes cast, punch-card systems result in 250 more nonvotes than optical-scan systems," citation omitted.) For a more detailed study, see The Caltech/MIT Voting Project, A Preliminary Assessment of the Reliability of Existing Voting Equipment 12 (Version 1: Feb. 1, 2001), *available at* <http://www.vote.caltech.edu/Reports/report1.pdf> (visited March 8, 2001) ("Paper ballots, lever machines, and optically scanned ballots produce lower residual vote rates on an order of one to two percent of all ballots cast over punch card and electronic methods over the last four presidential elections.")

[80] At least four lawsuits have been filed in light of *Bush v. Gore* alleging that such differences constitute a denial of equal protection. *See* Complaint - Class Action at pp. 13-15, *NAACP v. Harris*, No. [docket #] (S.D. Fla. filed Jan. 10, 2001) Complaint No [docket #] at pages 1-2, *Black v. McGuffage*, No. 01C-0000208 (N.D. Ill. filed Jan. 11, 2001) (No. 01C-0000208), Class Action Complaint for Declaratory and Injunctive Relief at page 40, *Wirth v. Election Sys. Software, Inc.*, No. [docket #] (Ill. Cir. Ct. filed Jan. 9, 2001), Complaint at page 1, *Andrews v. Cox*, No. [Docket #] (Ga. Fulton County Ct. filed Jan. 5, 2001).

incorrectly, were convicted felons who have lost the right to vote---but plaintiffs claim the purpose is to remove as many African-American voters as possible. Alternatively, plaintiffs claim the purge law has a disparate impact on African-American voters.[81]

5. In an effort to make it easier for elderly voters to see the ballot and vote effectively, county election officials design a ballot using a "butterfly ballot" design. In this design, the place for voters to record votes is along the center spine of the ballot. Voters allege after voting that they were confused by the ballot design, leading many of them to vote for a third party candidate for an elective office rather than for their preferred candidate. Statistics unambiguously show that there is virtually no chance that this third party candidate simply received proportionally more votes in this county than in other counties in the state.[82] Voters in other counties in the state did not use the butterfly ballot.

Each of these five examples present fact patterns with both similarities to and differences from the facts of *Bush v. Gore*. The question is which similarities and differences should matter legally. In other words, which cases are sufficiently "like" *Bush v. Gore* so that *Bush v. Gore* should be precedent?

In the first hypothetical, there is little question that the use of different voting systems with different error rates treats voters differently and makes it less likely that voters in punch card districts will cast votes that count. Voters in counties using optical scanning equipment have a much better chance of having their votes counted than those in punch card counties have. The disparate treatment is all the more disturbing to the

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[81] *See* Complaint - Class Action at pp. 18-22, *NAACP v. Harris*, No. [docket #] (S.D. Fla. filed Jan. 10, 2001)

[82] On the statistics related to overvoting, voting for Reform Party Candidate Pat Buchanan, and the butterfly ballot used in Palm Beach County, Florida during the disputed election, see Henry E. Brady, Report on Voting and Ballot Form in Palm Beach County, Nov. 16, 2000, available at <http://elections.fas.harvard.edu/statement/hbrady/hbrady.pdf>; *see also* Don Van Natta, *Gore Lawyers Focus on Ballot in Palm Beach County*, N.Y. TIMES, Nov. 16, 2000, at A29.

extent that it correlates with wealth,[83] looking functionally like the poll tax the Court struck down in *Harper*. Under strict scrutiny, this disparate treatment in the *counting* of votes appears just as "dilutive" of the right to vote and just as "arbitrary" as the different methods of *recounting* votes struck down in *Bush v. Gore*. There is no compelling interest for the different treatment; a decision about resource allocation by localities should not be able to trump a "fundamental right."

Furthermore, it appears irrelevant that the choice of voting machine technology was not the product of intentional discrimination or animus against any voters or groups of voters. In *Harper*, the Court held that a poll tax is unconstitutional even absent evidence its intent was to discriminate against voters on the basis of race or wealth. In *Bush v. Gore*, the Court did not base its holding on intentional discrimination by Florida (or the Florida Supreme Court). In sum, if *Bush v. Gore* indeed has precedential value, it clearly should apply to prevent the use of these different voting systems in the same election.[84] Different voting systems function in the same discriminatory manner as different means to count votes in a manual recount.

The result of this case might be different if a court applied only a rational basis standard to the different procedures. The decision of which voting systems to use appears to be a resource allocation decision that a court could deem a legitimate one. Nonetheless, *Bush v. Gore* appears to mandate strict scrutiny, not application of rational basis review.[85]

Answers to the second hypothetical flow probably from the first. The first hypothetical establishes that the Equal Protection Clause affords a right to jurisdiction-wide uniformity in the methods for conducting elections. In a presidential election, the jurisdiction is the entire nation. The need for

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[83] Sam Issacharoff informs me that the correlation may be less than perfect; indeed, some relatively wealthy counties in Florida first purchased the Votomatic punchcard machines, which at the time were seen as "state of the art."

[84] Under this reasoning, one may rightly question whether *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) remains good law. In *McDonald*, the Court held that a state need not provide for absentee voting at all, and if it does so the state need not provide it for all voters.

[85] *See supra* notes 62-63 and accompanying text.

uniformity itself is echoed in the Constitution, which requires a uniform day for choosing presidential electors.[86] On the other hand, each state picks its own electors for the electoral college, so equality in the weighting of votes *across states* is affirmatively rejected in the Constitution. Moreover, the Equal Protection Clause by its own terms provides that "no state shall" deny equal protection of the laws; in differences across states, perhaps the Clause is not even implicated. In any case, a textual Constitutional argument might allow treating the second hypothetical differently.

The third hypothetical appears the easiest to resolve under *Bush v. Gore*. In its equal protection analysis, the Court spent most of its time explaining its view that the Florida Supreme Court's failure to further define the "intent of the voter" standard violated equal protection. Justice Stevens in dissent pointed out that numerous states used such a standard or its equivalent in setting forth the standards for manual recounts[87] and the majority did nothing to suggest that Florida law on this point was unique in some way. It is difficult to see how any of these standards survive *Bush v. Gore*. But a court's finding that the standard violates the Constitution does not require that the election results be overturned, as I explain below.[88]

The fourth hypothetical is easy to resolve if plaintiffs can prove intentional discrimination. In that case, plaintiffs do not need *Bush v. Gore* to make the Equal Protection claim. Preexisting caselaw established that purposeful race discrimination in voting is unconstitutional. Where *Bush v. Gore* might be helpful is in getting around *Mobile v. Bolden*'s[89] holding that disparate racial impact of an electoral structure (like the failure to use districting to elect members of a city commission) does not violate the Equal Protection Clause; often it is difficult to prove discriminatory intent. To the extent that plaintiffs can recast the case as a *Bush v. Gore* claim---one involving "arbitrary and disparate treatment" that "value[s] one person's vote over another" in violation of the Equal Protection

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[86] U.S. Const. Art. II, § 1, cl. 4.
[87] 121 S. Ct. at 540 n.2 (Stevens, J., dissenting).
[88] *See infra* Part II.C.1.
[89] 446 U.S. 55 (1980).

Clause---perhaps the claim will fare better today than before *Bush v. Gore*.[90]

The fifth and final hypothetical presents the most difficult issue, but one still that should be considered a violation of Equal Protection. On the one hand, the case fits comfortably into the holding of *Bush v. Gore* and the other hypothetical cases: voters are being treated differently depending upon the county in which they live. Imagine if voters in one county could walk right up to the polls but voters in another county had to walk up a steep hill to get to the polls. The confusing ballot is like the steep hill, and it should not matter that election officials picked the hill because they thought it would be a good place to vote without distractions.

On the other hand, the plaintiff's voting complaint may stem less from state action (as in the manual recount case where state officials count the votes) than from the capabilities of different voters. In *Lassiter v. Northampton County Board of Elections*,[91] the Court held that fairly applied literacy tests are constitutional.[92] This holding is of questionable value following cases like *Harper*[93] and *Kramer v. Union Free School District No. 15*.[94] But if *Lassiter* remains good law, it stands for the proposition that the state can condition the franchise on voters' ability to follow instructions---thereby insuring that only educated voters vote.[95]

I find this argument unpersuasive, and not only because I reject *Lassiter* as misconstruing the nature of voting as an exercise in efficient decisionmaking rather than an allocation of political power among co-equal citizens. In the butterfly ballot

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[90] On the relationship of *Bush v. Gore* to *Mobile v. Bolden*, see *infra* Part III.C.1.

[91] 360 U.S. 45 (1959).

[92] Such tests are now banned by the Voting Rights Act. *See* 42 U.S.C. § 1973aa.

[93] 383 U.S. 663 (1966).

[94] 395 U.S. 621 (1969). On why *Lassiter* may not survive *Kramer*, see ISSACHAROFF ET AL., *supra* note 1, at 53.

[95] *See Lassiter*, 360 U.S. at 51-52 ("The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot….[I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.")

hypothetical, the state did not design the ballot in one county to "test" elderly citizens' ability to vote; it probably more likely tested their ability to *see*, and no one will claim blindness as a valid reason to deny the vote. Moreover, accepting the legitimacy of such a test, why conduct the test only in one county? Finally, the result of a literacy test as in *Lassiter* is to prevent or hinder illiterate voters from voting. The result of the butterfly ballot apparently is to cause voters to vote for candidates they do not prefer. Surely that state cannot have a legitimate, much less compelling, interest in that. On balance, this looks like a case to which the precedent of *Bush v. Gore* should apply.

With that conclusion, a word here is in order about remedies. There may be a difference between a challenge to a voting procedure or election mechanism *before* an election takes place and a *post-election challenge* seeking to throw out the results of a vote or recount or to demand a revote. Even if each of these five hypothetical lawsuits presents violations of the Equal Protection Clause, the appropriate remedy may not be to void an election or the results of a recount or to require a revote.[96] Courts may be uncomfortable with remedies that overturn elections. In the third hypothetical, for example, a court could rule that the recount violates equal protection but that Smith's claim is barred by latches: she should have sought an injunction preventing the manual recounting of the votes under existing state law. In the actual butterfly ballot case, the trial court ruled that a revote in Palm Beach County alone would violate the Constitution's requirement of a uniform election day for presidential electors.[97] Thus, if *Bush v. Gore* has any

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[96] On the variety of potential remedies, see ISSACHAROFF ET AL., *supra* note 3, ch. 4 (listing as potential remedies for defective elections: ordering a new election, enjoining an upcoming election, adjusting the vote totals, permanently enjoining a particular election practice, damages, and criminal prosecution).

[97] The trial court held that a revote could not be ordered in a Presidential election because it would violate, among other things, the Constitution's provision of a uniform day for the choosing of presidential electors. Order on Plaintiff's Complaint for Declaratory, Injunctive and Other Relief Arising from Plaintiffs' Claims of Massive Voter Confusion Resulting from the Use of a "Butterfly" Type Ballot during the Election Held on November 7, 2000, Fladell v. The Elections Canvassing Commission, CL 00-00965 AB,

precedential value at all, it may have such value primarily when used prospectively to change election practices.

III.
THE BENEFITS, COSTS AND LIMITS OF THE NEW EQUAL PROTECTION JURISPRUDENCE OF *BUSH V. GORE*

In Part I, I set forth my suspicions that *Bush v. Gore* ultimately will have little precedential value. In Part II, I explored the precedential value the case likely would have if the Supreme Court took its holding seriously. In this final Part, I consider the benefits of *Bush v. Gore*'s ostensible extension of equal protection jurisprudence in elections to the third level of equality, the costs of the extension, and the implications of the extension for other, broader equal protection claims in elections.

A. Benefits

The benefits of a precedent requiring scrupulous equality in the procedures and mechanics of elections are fairly obvious: such a precedent will increase resources used to conduct elections, so that at least 20th century voting technology will be applied as we enter the 21st century. It will provide a means for those in poor, urban areas to have just as accurate a voting system as those used in wealthier areas. It also likely will ensure more reliable vote counting.

Before the Florida debacle, state and local governments had little incentive to invest in better voting technology or to reconsider the fairness of their laws regulating the contesting of elections. In an era of tight government budgets, an argument to upgrade from punch card technology to optical scanner equipment had to compete with arguments to pay teachers more, to devote more money to crime prevention, or to return money to taxpayers.

Bush v. Gore provides legal cover---if not a legal mandate---for expending resources to upgrade voting; prudent

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available at <http://election2000.stanford.edu/fladell1120.pdf>. The Florida Supreme Court did not reach the issue of remedy, finding that the ballot was in "substantial compliance" with Florida law. Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240 (Fla. 2000).

municipal attorneys would well advise their clients that failure to invest in better elections will invite litigation. No one wants to be "the next Florida." By increasing the salience of these issues, *Bush v. Gore* may have the salutary effect of causing governments to pay attention to these issues and devote resources towards solving voting problems, even if the case ultimately holds little or no precedential value.

B. Costs

Expanding political equality to the third level as *Bush v. Gore* may have done is a mixed blessing. Obviously, the costs associated with upgrading voting equipment, rewriting state and local election laws involving contested elections, and litigation over both types of changes will be considerable. One estimate to upgrade voting equipment ranged as high as $9 billion nationally.[98] These are real costs, and obviously in a time of limited budgets such spending takes money away from teacher raises, better police protection, or tax reduction.

But we can chalk up the $9 billion to the cost of having a democracy that takes seriously the mandate to insure that all votes are counted and counted fairly. I focus here on three other concerns arising from extending equal protection jurisprudence to the nuts-and-bolts of elections, concerns that go to whether extension to the third level of political equality necessarily furthers democratic values.

First, third level claims provide more reasons, and in some cases a pretext, for courts to nullify election results. The courts' further entry in the political thicket thus threatens both democracy and the legitimacy of courts, whose integrity may be questioned even when a court justifiably nullifies an elections on equal protection grounds.

In *Bell v. Southwell*,[99] the Fifth Circuit courageously voided the results of a local election in which African-American

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[98] Alan C. Miller and Nick Anderson, *Voting Reforms Join Race for Funding*, L.A. TIMES, Dec. 13, 2000, at A1; see also Jim Drinkard, *Updating Voting Machines Could Take a Decade*, USA TODAY, Feb. 14, 2001, at 1 (noting that Congress "may pour in up to $2.5 billion into upgrades" of voting equipment).

[99] 376 F.2d 659 (5th Cir. 1967).

voters were intimidated from voting in voting booths segregated by race and gender. The court voided the results even while recognizing the power to do so as "[d]rastic, if not staggering."[100] As correct as *Bell* was, court intervention should be used sparingly. *Bush v. Gore* is a dangerous precedent to the extent that it eases the way for federal court intervention in state and local elections over "nuts-and-bolts" disputes better left to local authorities.

Second, third level claims undermine federalism in a way that first and second level equal protection claims do not. Claims of local control over nuts-and-bolts voting mechanisms resonate more genuinely than claims of localities to deny the franchise to certain groups of individuals or to count votes unevenly.

The Court rightly observed long ago that the right to vote is fundamental because it is "preservative of all other rights."[101] Politicians are less likely to be responsive to a group of citizens who cannot vote. Moreover, legislatures are constructed to respond to demands of a group of legislators in proportion to the group's power in the legislature, rather than in proportion to the number of people the group of legislators represents; that is the essence of the vote dilution claim in *Reynolds*. Thus, first and second level political equality claims allow courts to solve political market failures.

A similar political market failure does not exist with respect to most nuts-and-bolts election issues.[102] Consider again the issue of punch card systems versus optical scanners. Although it true that punch card voters will be marginally more likely not to have their votes counted compared to those using optically scanned ballots, that difference will not neatly translate into a loss of political strength. Legislators elected from districts in which the punch card are used will represent the same number of voters as those legislators from other districts, and politicians cannot ignore wishes of those whose votes do not count because nobody knows who these people are. Thus, it is more likely that a nut-and-bolts problem like the optical

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[100] *Id*.
[101] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[102] *See* Pamela S. Karlan, *The Court Casts Its Vote*, N.Y. TIMES, Dec. 11, 2000, at A31.

scanning problem may be solved politically, if the voters and legislators in districts using the system make it a priority on the local or state level. The political process will not always work, however; to the extent the poor lack political power in the legislature generally, they may lack the power to get voting changes enacted as well.

Not only is the case for court intervention weaker for third level claims than first and second level claims, but the state and local interests in local variations are on stronger moral grounds. At least under political theories currently accepted by the Supreme Court, any state interest in deviating from roughly equipopulous districts is illegitimate, as is any state interest in denying the franchise to some group of citizen adult residents. On the other hand, the state may have a good reason unrelated to voting for at least some variations in the nuts-and-bolts of elections. *Bush v. Gore* is tantamount to a holding that the purchase of ambulances by a relatively poor county is less important than a move from punch cards to optical scanners. That may be a valid tradeoff to make, but note that it is being made on the federal level for all jurisdictions by unelected federal judges.

The third and final cost of accepting third level equality claims is the disincentive the claims create for jurisdictions to experiment with new methods of voting. Oregon has adopted vote-by-mail, and jurisdictions are considering internet voting.[103] How do these get adopted in one jurisdiction alone, at least in presidential election, following *Bush v. Gore*?[104]

California, for example, wisely has chosen to explore a move to internet voting slowly through a number of discrete steps with evaluations after each step.[105] As part of that experimentation, "touch screen voting," much like voting with an ATM screen, was used in Riverside County, California as a pilot project in the 2000 general election.[106] It seems far from

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[103] Richard L. Hasen, *Introduction: Internet Voting and Democracy*, ___ LOYOLA L.A. L. REV. ___ (forthcoming 2001).

[104] *See supra* Part II.B (discussing hypothetical 2).

[105] California Internet Voting Task Force, A Report on the Feasibility of Internet Voting, January 2000, *available at* <http://www.ss.ca.gov/executive/ivote/final_report.htm>.

[106] Katharine Q. Seelye, *A California County Touches the Future of Voting*, N.Y. TIMES, Feb. 12, 2001, at A1.

frivolous to argue that, depending upon the error rates of such systems or other factors, either the voters of Riverside County or alternatively voters outside Riverside County have suffered discrimination under *Bush v. Gore* by the county-wide experiment in an election for state and national office. Now perhaps the state has an important, indeed compelling, interest in conducting such tests. (Or perhaps not; could these tests be done in non-binding elections or elections featuring only candidates for local office?) But if the state knows it will face litigation for such experimentation, it will be wary of engaging in it. Thus, *Bush v. Gore* could have the unintended effect of freezing our voting mechanics at the current level of technology. That means that all voters may suffer as more accurate voting technology emerges.

C. Beyond Third Level Equality Claims

Finally, it is worth thinking about the doctrinal implications of extending equal protection jurisprudence to the third level. It is unclear whether extension of equal protection jurisprudence to the third level differs meaningfully from arguments calling for greater political equality in terms of electoral structures and financing election campaigns. In other words, the Court in *Bush v. Gore* set the precedent of moving to a more intrusive and comprehensive view of political equality in terms of the nuts-and-bolts of elections without much discussion or defense of the move. *Bush v. Gore* can therefore serve to justify an analogous move by a future, more liberal Supreme Court toward a more intrusive and comprehensive view of political equality in other areas. My claim is not that such moves would flow from the *holding* of *Bush v. Gore* itself. The case's holding is no doubt distinguishable from the equal protection claims discussed below. Rather, the applicable precedent here is the *means* by which *Bush v. Gore* adopted a new level of political equality.

1. Equality of "Electoral Structures"

Consider first political equality in the means of aggregating votes. In *Mobile v. Bolden*,[107] African-American residents of the city of Mobile, Alabama brought a class action challenging the constitutionality of the city's at-large method of electing its three city commissioners under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment. The evidence showed that African-American voters made up about one-third of the Mobile electorate, but given the persistence of severe voting along racial lines and the use of at-large voting rather than single-member districts, no African-American-preferred candidate had ever been elected commissioner or was likely to be elected commissioner in the foreseeable future.[108] Had voting taken place using single-member districts rather than at-large, African-American voters would have had a better chance to elect a candidate of their choice or at least to exert greater political influence.[109]

The Court rejected the argument that the at-large method violated the Equal Protection Clause of the Fourteenth Amendment.[110] A four-Justice plurality stated that plaintiffs' claim failed because the plaintiffs lacked evidence that the electoral system was designed with a racially discriminatory *purpose*.[111] Justice Blackmun concurred in the result on grounds that the relief afforded by the trial court "was not commensurate with the sound exercise of judicial discretion."[112] Justice Stevens concurred essentially on grounds that a contrary ruling would be impossible to administer.[113]

Three justices dissented. Justice Marshall, joined by Justice Brennan, relied explicitly on *Reynolds v. Sims*[114] in

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[107] 446 U.S. 55 (1980).
[108] *Id*. at 122 (Marhsall, J., dissenting).
[109] *Id*. at 105 n.3 (Marshall, J., dissenting).
[110] The Court also rejected the 15th amendment claim, but I focus here only on the 14th amendment claim, the claim in *Bush v. Gore*.
[111] 446 U.S. at 65-70 (plurality opinion).
[112] *Id*. at 80 (Blackmun, J., concurring).
[113] *Id*. at 93 (Stevens, J., concurring) ("A contrary view 'would spawn endless litigation concerning the multi-member district systems now widely employed in this country,' and would entangle the judiciary in a voracious political thicket.") (citation omitted).
[114] 377 U.S. 533 (1964).

arguing that the at-large system constituted a denial of equal protection:

> *Reynolds v. Sims* and its progeny focused solely on the discriminatory effects of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. In the present case, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors, rather than by unequal population distribution is analytically the same concept: the unjustified abridgement of a fundamental right. It follows, then, that a showing of discriminatory intent is just as unnecessary under the vote dilution approach…as it is under our reapportionment cases.[115]

The plurality rejected Justice Marshall's reliance on *Reynolds* as an endorsement of proportional representation and "not the law. The Equal Protection Clause does not require proportional representation as an imperative of political organization."[116]

Regardless of whether Justice Marshall's position should properly be characterized as an endorsement of proportional representation,[117] it seems no more a stretch to

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[115] *Id*. at 116-17 (Marshall, J., dissenting) (citations and footnotes omitted).
[116] *Id*. at 75-76 (plurality opinion).
[117] *See* Thomas A. Boyd and Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History,* 40 WASH. & LEE L. REV. 1347 (1983) (discussing whether revising section 2 of the Voting Rights Act to

extend the equal protection analysis of *Reynolds* to the means of aggregating votes (what Marshall refers to as "electoral structures") than to the mechanics of voting. In other words, the principle of promoting political equality has no "natural" stopping point, even if we can draw distinctions among the cases.

Congress essentially codified Justice Marshall's position in *Mobile v. Bolden* through an amendment to section 2 of the Voting Rights Act in 1982.[118] Thus, there has been no need for the Court to revisit the constitutional question. Should Congress repeal the Voting Rights Act or the current Court majority hold it unconstitutional,[119] the constitutional question could arise again. A future liberal Supreme Court could reverse *Mobile v. Bolden*, citing no more than *Reynolds* and *Bush v. Gore*'s holding that "[h]aving 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."[120] The argument would be simply that at-large voting, much more so than counting undervotes but not overvotes, values one person's vote over that of another.

2. Equality of Campaign Finance

In *Buckley v. Valeo*,[121] as mentioned above,[122] the Court considered the constitutionality of a law limiting the amount individuals could spend supporting or opposing candidates for federal office. Plaintiffs argued that the law violated their rights under the First Amendment to freedom of speech and association; the government defended the regulation in a number of ways.

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conform with Justice Marshall's dissent would lead to "proportional representation").

[118] 42 U.S.C. § 1973(b).

[119] This is more than an abstract possibility. *See* LOWENSTEIN & HASEN, *supra* note 1, ch. 6.

[120] *Bush v. Gore*, 121 S. Ct. at 530. For a brief argument just along these lines, see Lani Guinier, *A New Voting Rights Movement*, N.Y. TIMES, Dec. 18, 2000, at A29.

[121] 424 U.S. 1 (1976).

[122] *See supra* notes 48-49.

One argument the government raised was that the law was justified by an interest in promoting political equality. The Court rejected the argument:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the statute's] expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[123]

Liberal scholars have sharply attacked the *Buckley* Court's rejection of political equality as a compelling interest.[124] One criticism has specifically tied the equality interest to equal protection analysis. In a pair of articles predating *Bush v. Gore*, Professor Jamin Raskin and attorney John Bonifaz argued that *Reynolds* requires that candidates for election receive equal public financing.[125] They argue that "[i]n market societies where wealth is unevenly distributed yet crucial to the processes of election and governance, the inegalitarian logic of the economy undermines the egalitarian logic of one person, one vote democracy."[126] The authors explicitly argue that a constitutional requirement mandating equality in campaign finances follows from earlier Supreme Court precedents striking

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[123] *Buckley*, 424 U.S. at 48-49 (citations omitted).

[124] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 362 (1993), CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 93-101 (1993).

[125] Raskin and Bonifaz, *Wealth Primary*, *supra* note 11; Raskin and Bonifaz, *Constitutional Imperative*, *supra* note 11.

[126] *Id*. at 1162.

down "grandfather clauses, exclusionary white primaries, state poll taxes, restrictions on the suffrage rights of citizens in the armed forces, unnecessarily long residency requirements, excessively high candidate filing fees, and malapportioned legislative districts that dilute the potency of the vote."[127]

No doubt, Raskin and Bonifaz can now add *Bush v. Gore* to their list of precedents creating greater political equality in elections. If "the State may not…value one person's vote over that of another"[128] in how it counts votes, it similarly should not sanction the use of private wealth to influence the outcome of an election in a way that values one person's vote over that of another. As with reversal of *Mobile v. Bolden*, the conservative Supreme Court in *Bush v. Gore* has set the precedent for a future liberal Supreme Court to embrace Raskin and Bonifaz's novel equal protection analysis.

CONCLUSION

Whether a future Supreme Court should reverse course from either *Mobile* or *Buckley* is a large topic well beyond the scope of this paper. My point is only that the equality principle is difficult to cabin. Whether or not *Reynolds*, *Harper*, and *Bush v. Gore* were correct or incorrect decisions, they inevitably flow from the Justices' views of how much (and what kinds of) equality the Constitution should mandate, and what is better left to state variation and the political processes. As times and Court personnel change, no doubt such views on equality, and therefore the law of equal protection in elections, likely will change as well.

To the extent *Bush v. Gore* paves the way toward constitutional challenge of electoral structures and campaign finance reform, it may be a good development to at least some observers. It certainly would not be a development intended by

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[127] Raskin and Bonifaz, *Wealth Primary*, *supra* note 11, at 273-74. For criticism of the authors' analogy to *Reynolds*, see Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEORGETOWN L.J. 45, 84-88 (1997).

[128] *Bush v. Gore*, 121 S. Ct. at 530.

at least some of the five Justices in the *Bush v. Gore* majority.[129] That would just add to the list of ironies that the Florida controversy has wrought, and, perhaps for those who are disappointed by the Court in *Bush v. Gore*, create a sense of "rough justice" as well.

[129] Then-Justice Rehnquist was in the *Mobile* plurality in 1980 that criticized Justice Marshall's dissent. None of the other four members of the *Bush v. Gore* majority were on the Court at the time. Justice Thomas's opinion concurring in the judgment in *Holder v. Hall*, 512 U.S. 874 (1994), joined by Justice Scalia, affirms that he would find Justice Marshall's arguments to extend *Reynolds* unacceptable and against the Constitution. Then-Justice Rehnquist agreed with the majority *per curiam* opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976) rejecting political equality as a rationale for campaign finance regulation. Justice Thomas, joined by Justice Scalia, has rejected any campaign finance regulation more onerous than disclosure in his dissenting opinion in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Surely he would reject the equality rationale. Justices Scalia and Kennedy (joined by Justice O'Connor) also rejected the equality rationale for campaign finance reform in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692-93 (1990) (Scalia, J., dissenting); *id*. at 705 (Kennedy, J., dissenting).