The Meaning of *Bush v. Gore*

DANIEL H. LOWENSTEIN*

This Article comments on a paper by Edward B. Foley, in which Professor Foley proposes a taxonomy for analyzing and evaluating actual and potential challenges to electoral practices under Bush v. Gore. *Part III, which is the core of the Article, proposes an interpretation of Bush v. Gore based on a close reading that treats the per curiam opinion as an integrated explanation of a result, in contrast to interpretations that rely on isolated statements out of context. The opinion is shown to be coherent. It is not "limited to its facts" and it does not attempt to negate any precedential effect, as some scholars have claimed. Two factors are crucial to the holding: (1) There was a disparate treatment of identical items of evidence in a judicial proceeding, and (2) the evidence treated inconsistently bore on the fundamental right to vote. The holding of the case is applicable only when those factors are present. However, Part IV of the Article proposes a taxonomy, different from Foley's, for determining* Bush v. Gore*'s possible influence in cases that are analogous but not within the holding.*

I. INTRODUCTION

Edward B. Foley lives and works in Ohio, which this decade has been the scene of more than its share of lawsuits on election administration. As Director of *Election Law @ Moritz*, the election law center located at The Ohio State University Moritz College of Law, Foley has had an opportunity surpassed by few others to observe and reflect on recent developments, including litigation, in election administration. For these and other reasons he is exceptionally well-situated to expound on the subject denoted in the title of his article in this Issue, *The Future of* Bush v. Gore.[1]

In Foley's ambitious article, following a brief statement of his own reading of *Bush v. Gore*,[2] he presents a richly textured account of the most important or representative cases brought in reliance on the Supreme Court's decision. He uses those cases for a variety of purposes, including, most prominently, to create a taxonomy of controversies that have arisen, to present his own analysis of the merits of these controversies and, as his title implies, to speculate on how *Bush v. Gore* will affect these and similar controversies in the near and distant future.

As the reader may have noticed, I have borrowed Foley's title for my own, but have changed one word: Foley's "Future" becomes my "Meaning."

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* Professor of Law, University of California, Los Angeles. Thanks to Rick Hasen for useful suggestions, and to the students, staff, and faculty at Election Law @ Moritz for their hospitality at the Symposium that gave rise to this Article.

[1] 68 OHIO ST. L.J. 925 (2007).

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

I do not deny the interest that predictions have for most people, nor the practical importance that a correct assessment of the probabilities for the future development of the law may have for many purposes. Even if I were inclined to deny that predictions can provide a framework of analysis yielding important insights into the role of the courts in election administration, Foley's article would be a conclusive refutation of the denial. These considerations justify Foley's speculations about the future, if any justification is needed, but not necessarily a tendency I perceive in his article to conflate the question of what is likely to happen in the future with the question of what the law is now.

That such a tendency should exist is not remarkable. All of us live in the thrall of Holmes's famous saying: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[3] But while it was a striking insight when it was written, Holmes's statement cannot serve as an acceptable definition of law. Most judges deliberating over a case would say and believe, and most of the rest of us would want them to say and believe, that what they are trying to do is apply the law correctly. It would be meaningless for them to insert Holmes's definition and say that they are trying to apply to the controversy at hand a correct prediction of what they will do. To take Holmes's insight as a true account of law is both incoherent and subversive of the rule of law.[4]

In this Article, I choose to avoid speculation on what is likely to happen and concentrate instead on the question of what *Bush v. Gore* means now.[5] Foley has made it much easier to do that by his illuminating collection of the controversies that have arisen and by his helpful taxonomy. I appreciatively stand on his shoulders in Part II in order to point out what I conceive to be some weaknesses in that taxonomy. I do not attempt to replace it with a fully-worked-out improved version, but I do attempt briefly in Part IV to suggest some different lines along which the cases might be sorted. I do this following an effort in Part III to give the per curiam opinion in *Bush v. Gore* a closer reading than I believe Foley gives it or than some other scholars

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[3] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

[4] The same point is made well by Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 657–58 (1995).

[5] Of course, there are many senses in which one could speak of the meaning of *Bush v. Gore*. For example, in a lecture I gave in Australia, I suggested that the social meaning of the entire Florida controversy, including *Bush v. Gore*, is best understood through the lens of the literary genre of comedy. *See* Daniel Lowenstein, *Lessons from the Florida Controversy*, *in* REALIZING DEMOCRACY 7, 12-25 (Graeme Orr, Bryan Mercurio & George Williams, eds., 2002). For present purposes I, like Foley, refer to the practical meaning of *Bush v. Gore* as a possible precedent in controversies over election administration. Or, as one might say, *Bush v. Gore* as applied.

have given it. Foley's article is written on the premise that to understand either the present meaning or the future of *Bush v. Gore* (for, despite the title, his article addresses both), one must form a concrete understanding of the kinds of circumstances in which it ought to be and in fact is likely to be applied or, at least, invoked. I agree. Hence the value of Foley's rich account of the controversies that have arisen. A taxonomy consists of a set of distinctions. At least for the purpose of what *Bush v. Gore* means now, the distinctions that make up a good taxonomy must be grounded on a close reading of the Court's opinion. The purpose of what follows is to contribute to the formation of a taxonomy so grounded and thereby to contribute to our understanding of *Bush v. Gore* as a precedent.

II. FOLEY'S TAXONOMY

A taxonomy is a division of a set of phenomena into categories. By what criteria should one judge the categories that make up a taxonomy? I shall consider two criteria: the usefulness of the categories and the clarity with which the categories divide up the members of the set.[6]

The usefulness of a taxonomy is in part a function of the degree to which its categories draw distinctions that are pertinent to the purpose at hand. The purpose here is to clarify the meaning of *Bush v. Gore* as applied and, for Foley, to assist in speculation about the future of *Bush v. Gore*. Usefulness is also in part a function of the degree of articulation of the taxonomy. To use a silly example to illustrate, suppose we proposed to consider the meaning of *Bush v. Gore* by dividing all controversies into those in which the plaintiffs

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[6] A third possible criterion for a taxonomy, not mentioned in the text, is accuracy. Almost a quarter of a century ago, I had occasion, in a different context, to propose that at least for legal purposes, categories are formed to be useful, rather than found ready-made in the real world. *See* Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983). As I discussed briefly in that article, in biology, chemistry, and other studies of natural phenomena, the real world is divided into naturally distinct classes of phenomena, sometimes referred to as "natural kinds"—or so some philosophers maintain. *Id.* at 939 n.17. Whatever else may be said about controversies arising under *Bush v. Gore*, they are not naturally divided into distinct types in the way living species or chemical elements are. Therefore, we have no occasion to enter into philosophical or other questions related to natural kinds. However, it would be possible to think of the usefulness criterion as one of accuracy. For my purpose, a useful taxonomy is one based on distinctions most relevant to a correct reading of *Bush v. Gore*. For Foley's additional purpose, a useful taxonomy is one that is relevant to predicted future applications of *Bush v. Gore*. Such distinctions could be thought of as useful precisely because they are accurate. But in that case, accuracy is not a third criterion but merely a different way of characterizing the criterion that I refer to as usefulness.

Beneath the surface of this rather superficial footnote lurks the old controversy between realism and nominalism. Readers who applaud nothing else in this Article will no doubt welcome my choice not to enter into that controversy.

rely on the Equal Protection Clause and those in which they do not. That categorization is certainly relevant to *Bush v. Gore*, whose ruling is expressly based on the Equal Protection Clause.[7] But the categorization is silly because its degree of articulation is grossly insufficient. Most cases brought under the Equal Protection Clause have nothing to do with *Bush v. Gore*. Worse yet, the category does nothing to distinguish among those controversies to which *Bush v. Gore* might plausibly be regarded as pertinent.[8] I shall defer discussion of the usefulness criterion to Part IV, following the interpretation of *Bush v. Gore* offered in Part III.

By the clarity of the taxonomy, I mean the extent to which the definition and description of each category is sufficient for placement of any member of the set into the proper category. A perfectly clear taxonomy would contain divisions so precise that a member of the set could not fit within more than one category and so comprehensive that every member of the set would fit into a category. In mathematics and the natural sciences, it is often possible for taxonomies to be perfectly or almost perfectly clear. In the messier world of human affairs, we should not expect perfection. Nevertheless, clarity provides a comparative criterion in the event that one proposed taxonomy is substantially clearer than another.

As has already been intimated, one of the strengths of Foley's article is that it starts from the ground up. Instead of abstractly theorizing his way to a taxonomy, Foley canvasses the controversies that have arisen and builds his taxonomy around them. Given that a perfectly or nearly perfectly clear taxonomy is unlikely, it is a strong benefit if the taxonomy works best at sorting out actual and foreseeable cases, even if the classification of imaginable but unlikely cases is less clear. Therefore, I do not criticize the comprehensiveness of Foley's taxonomy, which is structured around actual and foreseeable cases. Let us consider, instead, the precision of the boundaries between his categories.

Foley's taxonomy consists of four categories.[9] They are listed below, with examples of election administration practices that can give rise to constitutional controversies under each heading:

1. Insufficiently specified standards.[10]

    a. Different counties interpret differently a state directive on the eligibility of provisional ballots to be counted.[11] The difference

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[7] Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam).

[8] A taxonomy might also be deficient in the opposite way by being too fine-grained. This would be the case if the taxonomy irrelevantly divided many categories into subcategories that were identical for the purpose at hand.

[9] *See* Foley, *supra* note 1, at 932–45.

may be an either/or, such as whether a search of the database for the voter's registration is sufficient or it is necessary also to check the original records.[12] Or it may arise from the exercise of judgment, such as how closely the handwriting on the provisional envelope must match the signature on the registration form.[13]

b. In the setting of a "court-ordered statewide recount," some counties search only the database for a provisional voter's registration but others go further and check the original records.[14]

c. Different counties interpret differently a state directive for what form of voter identification is sufficient.[15]

2. Failure to Follow Specified Standards.[16]

a. Some counties count provisional ballots cast in the wrong precinct notwithstanding state directives, upheld by judicial decisions, to the contrary.[17]

b. When voters go to the wrong precinct, some poll workers refrain from advising them that they need to go to the correct precinct in order for their provisional ballots to be counted, despite state or county directives requiring them to give this advice.[18]

c. Local officials require photo identification when state law permits other forms of identification.[19]

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[10] *Id.* at 933.

[11] *See id.*

[12] *See id.* at 934.

[13] *Id.* at 935.

[14] *Id.* at 934.

[15] *See* Foley, *supra* note 1, at 937.

[16] *Id.*

[17] *See id.* at 938.

[18] *Id.* at 938–39.

[19] *Id.* at 939.

3. Specific State-Authorized Local Discretion.[20]

    a. Counties, as authorized by state law, use different types of voting equipment with the result that there are more lost votes in some counties than others.[21]
    b. A county is authorized to use an innovative system for checking voters' registration at the polling places, but it works badly, resulting in serious delays in voting in that county that do not occur in other counties.[22]
    c. Allocation of voting equipment to precincts is delegated to the counties, but some counties make "thickheaded choices," resulting in long delays in some precincts.[23]

4. Local Variations by Central Design.[24]

    a. The central authority assigns the same number of voting machines to each precinct despite differences in turnout or other differences that result in longer delays in some precincts than in others.[25]
    b. The county election board decides how many provisional ballots to provide to different precincts on the basis of "irresponsible assumptions," resulting in voters in some precincts not being able to cast provisional ballots.[26]

A *Bush v. Gore* claim is an Equal Protection claim, the gravamen of which consists in a governmental action resulting in a difference of treatment. The basis of categorization in Foley's taxonomy is the relation between the central and local authority that results in the different treatment. In the case of the second category—failure by the local authority to follow the central authority's specified standards—the lines of demarcation are clear. True, there could be borderline cases in which it is debatable whether a local practice actually contravenes a central directive. But such cases create no doubt about the conceptual boundaries of the second category, and the practical difficulty will be resolved once the central directive is interpreted.

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[20] *Id.* at 940.

[21] Foley, *supra* note 1, at 940–41.

[22] *Id.* at 942.

[23] *Id.* at 943.

[24] *Id.* at 944.

[25] *Id.*

[26] *Id.* at 945.

So far, so good. But the boundaries separating the three remaining categories are much less clear. In none of these cases is the local authority disobeying central requirements. In the first category, the central directive is vague or ambiguous, creating the possibility or likelihood that local practice will vary. In the third category, the central directive expressly gives discretion to the local authorities, creating the possibility or likelihood that local practice will vary. In the fourth category, the central authority itself directs varying practices.

So stated, there do appear to be clear conceptual differences between the three categories. In practice, however, the differences break down. Consider the line between the first and third categories. Suppose the central authority in one state directs that "voters seeking to cast provisional ballots shall provide such documents establishing their identities as the county registrar determines are sufficient." If different counties require different documents, the case comes under Foley's third category, as the central authority has expressly delegated to the counties the authority to decide which documents will suffice. Suppose the central authority in another state directs that "voters seeking to cast a provisional ballot shall provide documents sufficient to establish their identities." Here there is no express delegation to the counties. If different counties require different documents, should we place this case under the first category, on the ground that the standard of sufficiency is insufficiently specified? Perhaps so, but in practice there is no difference between the directives in the two states. What if, as is very likely, those who formulated the central directive understood and intended that its effect would be to place discretion to determine sufficiency in the counties? Should the two states still be placed into different categories—meaning, on Foley's account, that the practice is much more likely to be struck down under *Bush v. Gore* in the first state than in the second—simply because of a difference in language reflecting no difference in either effect or intent? If not, and instead both states are placed in the third category, then the line between the first and the third category turns on whether the vesting of discretion in the local authority was purposeful or inadvertent. That will be a very difficult distinction to draw in actual cases, in part because it requires an inquiry into the state of mind of the central authority and in part because the distinction is actually one of degree, not an either/or. Even the most detailed directive will foreseeably fail to resolve some borderline cases, and even the most general directive will provide some guidance.

In the abstract, the distinction between the third and fourth categories may seem clearer, but as Foley develops the categories, that distinction is at least as troublesome as the distinction between the first and third. It would be logically possible for state authorities to require some counties to follow one practice—adoption of a particular form of voting equipment, for example—and to require other counties to follow a different practice, with the result

that many voters are not able to vote or have their votes counted in one set of counties who would be able to in the other counties. Foley would probably regard such a case as giving rise to a strong *Bush v. Gore* claim, at least if there were no differences between the counties justifying the different requirements. But he does not discuss such cases for the good reason that he grounds his article in practicality, and such a situation is relatively unlikely to arise. Typically, the state either mandates a uniform electoral practice or leaves it up to the counties.

Therefore, the examples Foley gives under his fourth category do not involve the state authorities at all. In these examples the county is the central authority and the different treatment arises because the county treats some precincts differently from others—or, as in example 4.a. above, it produces different effects by treating different precincts as if they were the same. It appears, then, that the only difference between the fourth category and the first and third categories is that for purposes of the fourth, Foley is covering up part of the organization chart. The only reason the county can lawfully treat different precincts differently is that the state has expressly (third category) or implicitly (first category) left the matter up to the county.[27] The arbitrariness of the division between the third and fourth categories can be seen in a comparison of examples 3.c. and 4.b. The subject of 3.c. is the number of voting machines allocated to each precinct and in 4.b. it is the number of provisional ballots, but surely that difference is neither here nor there. Example 3.c. could just as well be about the allocation of provisional ballots and 4.b. about the allocation of voting machines. Nor can the difference be that one mistake was caused by "thickheaded choices"[28] and the other by "irresponsible assumptions."[29] For any relevant purpose the examples are identical. Foley has duplicated the example, in one case using it as an illustration of the third category and in the other as an illustration of the fourth category. His having done so illustrates that his taxonomy is less clear than it might be.

One reason for this is that although Foley has chosen to divide his categories along the lines of relations between central and local authority, he does not explain why that should be the basis for the taxonomy. Without such an explanation it becomes difficult to know, for example, whether and why it makes a difference that the discretion placed in local officials results from an express state decision to grant such discretion or an inadvertent state failure to provide sufficient standards.

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[27] For ease of exposition and to prevent a possible proliferation of detailed analysis, I assume throughout this Article that the elections in question are statewide elections.

[28] Foley, *supra* note 1, at 943.

[29] *Id.* at 945.

Foley may have organized his categories by central-local relations because he believes they provide the dimension that divides *Bush v. Gore* claims as more or less likely to succeed. Whether or not that was the basis for organizing his taxonomy, he certainly believes that the taxonomy provides that dimension. Although not unequivocally, Foley apparently believes his four categories are ranked in order from those in which the *Bush v. Gore* claims are most likely to succeed (first category) to those in which they are least likely to succeed (fourth category).[30] So far as we are discussing the meaning of *Bush v. Gore* as opposed to predicting the results of future cases, my analysis in Part III will make clear why I think this is doubtful. But to the extent that the categories in his taxonomy are unclear, the taxonomy will necessarily be of limited use for ascertaining either the meaning *or* the future of *Bush v. Gore*.

One more point about Foley's taxonomy will provide a transition to Part III. Among the examples given in the above outline of Foley's taxonomy, one item, 1.b., stands separate from the others. In all his other examples, different treatment of votes or voters arises from administrative or, possibly, legislative decisions (because the state directive may appear in either a statute or an administrative mandate). In Example 1.b., the difference arises because it is ordered or permitted by a court that is adjudicating a contest of an election.[31] Not coincidentally, this is the only example that does not appear in the section of Foley's article headed: "A Taxonomy of Potential *Bush v. Gore* Claims." Rather, it appears later when Foley is arguing for what he sees as "the strongest possible" claim that could be made under *Bush v. Gore*. That claim, according to Foley, would arise as a result of

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[30] *See id.* at 933–945.

[31] Though I quoted Foley accurately in Example 1.b., here I slightly but significantly altered what Foley actually says. In his description of 1.b., he refers to a "court-*ordered* statewide recount" (emphasis added). I refer here and throughout this Article to court-*conducted* recounts. A question could arise under state law whether a recount ought to occur, with no issue of how it ought to be conducted. If the administrative officials conclude there should be no recount, but a court overrules them, there would be a court-*ordered* recount. That is roughly what happened in the first round of the 2000 election litigation in the Florida Supreme Court. *See, e.g.*, Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000). The United States Supreme Court never intimated that the proceedings at that stage raised any Equal Protection problems. There is no reason why the constitutional standards applicable to a court-ordered recount should be any different than for a recount conducted in the normal course without judicial intervention. In the second round of the Florida litigation, the Democrats initiated what in Florida law was called a contest of the election. This was a judicial proceeding, amounting in practice to a judicially-*conducted* recount, as opposed to the first round, which eventuated in judicially-*ordered* recounts. It is true that in the Florida election contest the actual work of counting ballots was conducted by county officials, but they were acting as agents of the court.

some provisional ballots not being counted because the county official does not check registration records beyond a computerized database, whereas they would be counted in other counties in which the officials check the original records.[32] Foley then acknowledges the objection that *Bush v. Gore* might be distinguishable from his "strongest possible" case because the former, unlike Foley's hypothetical, arose in the setting of a judicially conducted election contest. In response to that objection Foley says that the hypothesized *Bush v. Gore* claim could just as easily be restated to arise in a judicially conducted contest, in the course of which one side challenges the failure to count the provisional ballots in counties in which the original records were not checked. When the facts are so restated, *Bush v. Gore* becomes indistinguishable.

Just so. But for one who believes the placing of the dispute into the setting of a judicially conducted contest makes all the difference and, on that basis, accepts Foley's rebuttal to the objection, but who accepts his rebuttal only for the purpose of the *revised* hypothetical, not the original one—and now I shall tip my hand and confess that I am such a one—Foley has slipped a crucial distinction into the midst of one of his categories. If a taxonomy of controversies is to be helpful in explicating the meaning of *Bush v. Gore*, the crucial distinctions should mark the dividing lines between the categories, not be buried within the categories.

We shall return, in Part IV, to some discussion of where the taxonomical lines might be drawn. Now we are ready to turn to the per curiam opinion in *Bush v. Gore*.

III. A CLOSE READING OF *BUSH V. GORE*

Many scholars have interpreted *Bush v. Gore* as a sort of Janus, with one face smiling expansively toward an Equal Protection doctrine that encourages judicial supervision of all aspects of election administration, but the other face glowering at any who might dare to invoke the decision as a precedent for any purpose. Most such scholars prefer the decision's expansive face, which they find embodied in the general recitation of broad Equal Protection principles early in the decision. But they acknowledge the existence of "limiting language" that may lead others to believe the case is not a precedent at all.[33]

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[32] Foley, *supra* note 1, at 955.

[33] Foley, who favors the expansive view, caricatures the narrow view by hypothesizing a lower-court declaration that *Bush v. Gore* "was unprincipled, applicable solely to its . . . chad-based facts, and never to be relied [on] to sustain the merits of any other Equal Protection case." Foley, *supra* note 1, at 985. *See also* Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert* Bush v. Gore *Into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357 (2002) (providing a thoughtful example

The supposedly limiting language usually cited is this sentence: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[34] Foley and others believe that sentence is "unprincipled"[35] and that by inserting it the Court "*expressly* denied the case had any precedential value."[36] Interpreters of *Bush v. Gore*, then, must choose between the unprincipled face represented by the language just quoted and the decision's brighter and presumably more principled side, which entails much more sweeping consequences such as, in Justice Breyer's words, "invalidat[ing] any state provision for a manual recount of individual counties in a statewide election."[37] Or, in the words of Richard Hasen, the bright side of *Bush v. Gore* would "have great precedential value in changing a host of voting procedures and mechanisms."[38]

The Janus interpretation of *Bush v. Gore* depends on treating passages from the per curiam decision in isolation. At best, the interpreter juxtaposes the supposedly conflicting passages and seeks to reconcile them, as if they were different sections of a statute to be interpreted *in pari materia*. A better approach is to consider the per curiam opinion as a whole, with individual passages evaluated not in isolation or even in juxtaposition with other passages, but as parts of an explanation of the result. That is the approach I propose to take in this Part. Of course, there are undoubtedly some judicial opinions whose reasoning is so deficient that the parts cannot be reconciled into an integrated whole. Although I do not claim that the per curiam opinion in *Bush v. Gore* is especially well-written or well-reasoned, I shall attempt to show that the Janus interpretation greatly exaggerates the opinion's deficiencies.

As intimated in Part II, *Bush v. Gore* interprets the Equal Protection Clause to require that in a judicially conducted recount or contest of a public election, identical items of evidence, namely ballots, must be given equal treatment. Foley and others acknowledge that one face of the decision interprets the Equal Protection Clause in this manner, though for rhetorical

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of the Janus-type interpretation of *Bush v. Gore*.); Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 LAW AND PHILOSOPHY 121 (2002) (also seeking in Mulroy's terminology, to derive lemonade from lemons in *Bush v. Gore*). However, Sunstein's thoughtful analysis eschews the Janus-type interpretation by defending the so-called limiting language. *See infra* notes 59 and 65 for criticism of Sunstein's reading.

[34] Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).

[35] Foley, *supra* note 1, at 932.

[36] Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 387 (2001) (emphasis in original).

[37] *Bush*, 531 U.S. at 145 (Breyer, J., dissenting).

[38] Hasen, *supra* note 36, at 379.

purposes they often mischaracterize the holding as being limited to its own facts and by design having no precedential effect whatever.[39] I begin with the proposition that it would not be within the power of the Court to limit this decision or any other to "its facts" or to deny a decision any precedential effect, even if its members asserted they intended to do so.[40] The precedential force of a decision comes from the ruling of the Court and from the opinion insofar as it explains the reasons for the ruling. An assertion in an opinion that the decision is not to be regarded as a precedent is not an explanation of the ruling and therefore it is a dictum, having no binding force. True, a dictum is worthy of respect to the extent that it is persuasive, just as any other persuasive commentary on a legal question is worthy of respect. But a statement by the Court that its decision should not have precedential effect would not be persuasive, because it would be contrary to the judicial method that prevails in the United States and other common law countries. One of the underpinnings of that method is the principle that like cases should be decided alike. For these reasons, if the per curiam decision in fact did say or suggest that the case should be "limited to its facts," or anything to that effect, the critics would be right to criticize it as unprincipled.[41]

A dictum may also be useful for one trying to predict what the Court will do in the future, if it is assumed that the dictum accurately represents the thinking of one or more members of the Court and if those members are still

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[39] According to Hasen, the Court's language "explicitly limit[ed] its holding to the facts of this case." Hasen, *supra* note 36, at 386. Hasen's language saying that the Court expressly denied the decision's precedential value has already been quoted. *See supra*,note 36 and accompanying text.

[40] Limiting a decision to its facts and denying it any precedential effect appear to be equivalent statements when they are used by critics of *Bush v. Gore*. To say that a decision is to be limited to its facts could mean it is limited to facts that are relevant to the holding. But that interpretation would give the statement no effect, because the holding of a decision is always limited to the circumstances that determine the result. If "the facts" to which the case is limited are specified, then the specification may be part of the explanation of the ruling. But if the facts to which the case is limited are all the facts, including the names of the parties, the exact events that occurred, the exact time at which they occurred, and so on, then the statement is the same as a statement that the decision has no precedential effect. That is what proponents of the Janus interpretation of *Bush v. Gore* mean when they attribute to the Court the assertion that the case is to be limited to its facts, and it is in that sense that I claim such an assertion, if the Court had made it, would have been a dictum that could and ought to be ignored. *See generally* Chad Flanders, Comment, Bush v. Gore *and the Uses of "Limiting,"* 116 YALE L.J. 1159 (2007).

[41] *See* Flanders, *supra* note 40, at 1167 ("If the Court must give reasons for its decisions, it is unclear whether it should have the power to make those reasons non-general, i.e., to limit their application beyond one set of facts."). Flanders' law journalese term, "it is unclear whether it should," translated into English, means "it should not."

on the Court when a case arises to which the dictum is relevant. The purpose here is not to predict what the Court will do in the future, but what the law is now, and for that purpose a dictum denying precedential effect would be irrelevant.

In fact, the Court made no such assertion in *Bush v. Gore*. The sentence previously quoted does not appear in isolation. It appears in the following paragraph:

> The [Florida] recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.[42]

The second sentence of this concluding paragraph is not a forward-looking statement of how the decision should be employed as a precedent (in which case it would be a dictum), but an explanation of how the problem before the Court is best defined. The natural interpretation of "present circumstances" is not the infinite number of facts in the particular case that could never be exactly repeated, but the circumstances specified in the previous sentence, namely, "the special instance of a statewide recount under the authority of a single state judicial officer."[43] That is not an unreasonable definition of the problem presented. It is certainly not a definition artificially contrived to assure that no future case could possibly come within its rubric. Most of the deficiencies itemized by the Court in what the Florida Supreme Court had ordered involved disparate treatment in a court proceeding of substantially identical items of evidence. For example, this was true of identically marked ballots counted differently because of inconsistent intra-county or inter-county standards.[44] It was also (and, in my judgment, most

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[42] Bush v. Gore, 531 U.S. 98, 109 (2000). Henceforth, for identification, I shall refer to the quoted passage as the "concluding paragraph"—not because it comes at the end of the opinion, which it does not, but because it is the place in the opinion where the Court draws the conclusion that follows from the major and minor premises set forth in the opinion.

[43] Flanders relies on the second sentence of the concluding paragraph without ever so much as acknowledging the existence of the first sentence. *See* Flanders, *supra* note 40, at 1159. This is a good example—not even an extreme or unusual example—of the understanding of judicial decisions based on extraction of isolated passages.

[44] The question, the Court noted, was "how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person." *Bush*, 531 U.S. at 106.

seriously) true of different processes used for determination of which physical evidence to examine in different counties. For most of the counties, the Florida court ordered that "undervote" ballots be identified and manually counted. But not in the counties that had already conducted recounts of some or all of the ballots. In those counties, the Florida Supreme Court proposed to rely on the recounts that had previously been conducted, despite the fact that the identity of the ballots to be recounted and the method of recounting differed entirely from the new recounting that was called for in the rest of the state.

That identical items of evidence should be evaluated identically in a single court proceeding would appear to be required by natural and obvious principles of justice. Indeed, as Roy Schotland has suggested, the Court might well have based its decision on the Due Process Clause.[45] The Court concluded instead that the disparate treatment of identical items of evidence—when those items represented ballots cast by individuals—constituted a denial of the Equal Protection Clause. The Court was surely correct to point out that it was unnecessary, in order to reach that conclusion, to consider controversies that would be presented if plaintiffs challenged other kinds of disparities resulting from "election processes generally."[46]

It thus appears that the stronger versions of the Janus interpretation, in which one face of the decision purports to nullify *Bush v. Gore*'s precedential effect, have no basis. But there is a weaker version of the Janus interpretation that must be taken more seriously. Indeed, when the proponents of the Janus interpretation, who are astute lawyers, state it in its strong form it is more likely they are engaging in hyperbole than that they are actually misreading the paragraph just quoted.[47] The reason for the hyperbole is that the

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[45] Roy A. Schotland, *In* Bush v. Gore*: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211, 212 (2002). Due process of law is required as a precondition of deprivation of life, liberty, or property. Schotland makes the plausible but perhaps not compelling argument that the right to vote is a liberty interest within the meaning of the Fourteenth Amendment. *Id.* at 231. If that argument is accepted, then the contention that the Florida Supreme Court's conduct of the election contest was a denial of due process seems to me irresistible. Perhaps the Court itself thought so. Although initially the Court summarizes its conclusion as finding a violation of the Equal Protection Clause, *Bush*, 531 U.S. at 103 (per curiam), later it notes a failure of the recount to be conducted "in compliance with the requirements of equal protection and due process." *Id.* at 110.

[46] *Bush*, 531 U.S. at 109 (per curiam).

[47] As we have seen, Hasen claims, incorrectly, that the Court explicitly limited its holding to the facts of the case and expressly denied that the decision should have any precedential effect. Hasen, *supra* note 36, at 387. However, he also says "it is hard to imagine many cases falling into [the] category" of failure to give equal treatment in a statewide election contest. *Id.* To say that there will not be many cases for which *Bush v. Gore* will have precedential effect is quite different from saying it is limited to its facts or

commentators believe that a decision in *Bush v. Gore* based on Equal Protection *ought* to mean that various disparities in election administration, such as all or many of the examples discussed by Foley, are unconstitutional. From their perspective, a holding applicable only to election contests or recounts in statewide court proceedings is negligible. It is therefore understandable that they slide into language ignoring the holding altogether. The weaker and more plausible version of the Janus interpretation is that, although the passage we have been discussing suggests a precedential meaning that is real but unlikely to arise often, other language in the opinion suggests a more expansive practical meaning.[48] To assess that version, we must look at the opinion as a whole.

The opening sentences of the per curiam opinion emphasize the Florida Supreme Court's inconsistent evidentiary treatment of different ballots:

> On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for [the Democratic candidates]. . . . The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation.[49]

According to Foley, the "key fact for Equal Protection purposes in *Bush v. Gore* was that some dimpled chads were counted while others were not."[50] It is true that popular debate during the Florida controversy centered on the inconsistent treatment of chads, but there is only slight basis in the per curiam opinion for Foley's imputing this focus to the Court. The Court leads not with standards for appraising individual ballots but with the troubling fact that under the Florida court's supervision, the count in some counties would reflect a manual recount of all the ballots but in most counties a recount of only a small selection of the ballots.

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that the per curiam opinion expressly denied that the case has any precedential effect. The latter, as I have shown, would attempt what is beyond the power of the Court. The former is a natural consequence of the unusual action of the Florida Supreme Court.

[48] Henceforth, when I refer to the Janus interpretation, I am referring to this weaker version.

[49] 531 U.S. at 100.

[50] Foley, *supra* note 1, at 930. Foley acknowledges that the Court identified other Equal Protection problems but claims "there is no doubt" that the inconsistent standards for appraising dimpled and punctured chads were sufficient for an equal protection violation. *Id* at 931. It is not clear whether Foley is implying that the other Equal Protection problems mentioned by the Court, singly or in the aggregate, would have been insufficient without the inconsistent appraisal of chads.

The Court continues to present the facts and background of the controversy in some detail and, at the end of this portion of the opinion, describes the controversy in the following terms: "The petition presents the following questions: . . . whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses."[51]

We are particularly concerned with whether and to what extent language in the opinion detracts from the apparently clear statement in the concluding paragraph, which suggests that the decision is based particularly on the inconsistencies having occurred in "a statewide recount under the authority of a single state judicial officer." The language quoted in the previous paragraph comes at an important place in the opinion—the Court's first statement of the question before it—and it must be conceded that it can be read to support the Janus interpretation. The reference is to recounts, not only to recounts conducted by a court. However, the comfort provided to Janus proponents is not very great. Although the reference is simply to recounts, it follows a lengthy description of the particular recount in question, which of course occurred in the setting of an election contest ordered by the Florida Supreme Court and conducted, until interrupted, by the Circuit Court of Leon County.[52] Words take their meaning from the context in which they are uttered. Although the words appearing in the question as formulated by the Court may seem, in isolation, to refer to any recount, the context permits if it does not require a more limited meaning.

There follows a short section of only two paragraphs in which the Court describes the problems with punchcard voting systems that came to light during the controversy and predicts that legislatures are likely to consider possible improvements.[53] The speculation on likely legislative solutions is in tension with the contention, required for a Janus interpretation of *Bush v. Gore*, that the early portion of the opinion implies that the existence of such

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[51] 531 U.S. at 103. I have omitted the first question, which the Court did not reach. The use of the phrase "standardless manual recounts" could perhaps be thought to support Foley's contention that the key issue for the court was the lack of standards for appraising chads. However, coming as this paragraph does at the end of a lengthy description of a variety of inconsistencies in the Florida court's treatment of evidence, "standardless manual recounts" is better understood as referring to the entire range of problems.

[52] The Florida proceedings consisted of two stages, the first a "recount" conducted administratively in some counties, the second a "contest," which was a judicial proceeding. It is perhaps significant that there is nothing in the *Bush v. Gore* per curiam opinion casting any constitutional doubt on the first stage of the proceedings. If the definition of the controversy did not depend crucially on the setting of a judicial proceeding, then one would expect the Court to have included the many disparities in the recount stage in the list of constitutional difficulties.

[53] 531 U.S. at 103–04.

problems "in election processes generally" is unconstitutional. It is unusual for the Court to predict and impliedly recommend legislative reform. What would have been the reason to do it if the Justices saw themselves as jumping into the area?[54] Nevertheless, any implication in this section of the opinion is too indirect to bear much weight.

The heart of *Bush v. Gore* is in section II.B., which makes up the remainder of the opinion except for a brief conclusion. The Court begins by observing that the Constitution leaves it up to the legislature of a state to decide whether the presidential electors for that state are to be chosen by popular vote.[55] Janus interpreters might find some support in this sentence: When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.[56]

But it is primarily the next paragraph on which the Janus interpreters rely. To be sure their interpretation receives its due, let us consider the passage in full:

> 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) ("[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"). 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. 533, 555 (1964).[57]

Our question is, how do the foregoing two passages affect the meaning of the opinion, by which I mean the explanation the Court gives for its ruling. At first blush, it appears that the passages cannot affect the meaning of the opinion in any significant way, because they contain nothing new. In the first quotation the Court states the premise that voting is a fundamental right for Equal Protection purposes, a premise that had been well established for

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[54] For reasons that will be made clear later, I do not regard the question of what the Justices actually thought as having any significance in itself for the meaning of *Bush v. Gore*. But proper interpretation of written language requires effort to discern the intent that the language itself seems to reflect.

[55] 531 U.S. at 104.

[56] *Id.*

[57] *Id.* at 104–05.

decades.[58] The remaining principles, as the Court indicates, are from *Harper* and *Reynolds*. Plaintiffs in any of the kinds of cases described by Foley are of course free to cite *Bush v. Gore* for these principles, but they are no better off for doing so than if they relied on the original cases for the same principles.

The Janus interpreters will make a more subtle argument. Their point will be that the enunciation of these principles in the setting of *Bush v. Gore* means that the principles are relevant to recounts and by extension, perhaps, to other cases of the type Foley describes. That is, the fact that the principles were enunciated suggests that they were relevant to the decision.[59] This logic is not *necessarily* correct—dicta do appear in judicial opinions, after all—but we should regard it as presumptively correct rather than presuming that the opinion set forth such principles for no reason.[60]

The next step of the argument is where the Janus interpretation stands or falls. That interpretation depends on showing that these broad principles could play no explanatory role if the Court's reasoning were indeed based on the fact that it was dealing with the "special instance of a statewide recount under the authority of a single state judicial officer" rather than with "election processes generally." Perhaps any inconsistent treatment of evidence in a judicial proceeding such as occurred in Florida would violate the Equal Protection Clause. In that case, if the recitation of the broad principles of *Harper* and *Reynolds* are relevant to the decision as we are presuming, it would have to be because any inconsistent treatment of ballots—and by extension, perhaps, any inconsistent treatment of voters—even in settings other than judicial proceedings, comes within the rationale of the opinion. If that reasoning were sound, then the recitation of the broad principles would be in tension with the later explanation based on the fact that *Bush v. Gore* arose from a single judicial proceeding. The existence of such tension is exactly what the Janus interpreters assert.

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[58] *See* Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

[59] Sunstein characterizes these principles as not only relevant to the opinion but as expressing the Court's "fundamental motivation." *See* Sunstein, *supra* note 33, at 123. His phrase is not only obscure but a curious one for him to use, since he disavows, twice, the claim that the Justices who made up the majority were motivated by the argument he puts forth. *Id.* at 121, 128. It is hard to see in what sense the Court can have a "fundamental motivation" that is not shared by the Justices. The infelicitous phrase aside, Sunstein's entire reading of the per curiam opinion follows from the undefended premise that the general principles enunciated are the only significant principles necessary for the result. I believe my analysis in this Part demonstrates that Sunstein's premise is erroneous. *See infra* note 65.

[60] In my judgment, the contemporary Court is overly prone to inflating the principles at stake in many cases it decides. There is a cost to that practice, in clarity and precision. However, our purpose here is not criticism of the Court but exegesis, and proper exegesis requires at least a mild presumption that each conspicuous part of the opinion is part of the explanation for the decision.

The fallacy in the reasoning lies in the premise that it is irrelevant that the evidence being treated inconsistently consists of ballots cast in a public election, because any similarly inconsistent treatment of evidence in any type of judicial proceeding must necessarily violate the Equal Protection Clause. The Janus interpretation rests on the assumption that the inconsistent treatment of identical evidence in a single judicial proceeding is sufficient for an Equal Protection violation under the holding of *Bush v. Gore*. In that case, the recitation of the fundamental nature of the right to vote is either gratuitous or must point to an independently sufficient ground for the decision. But there is nothing in the per curiam opinion that supports the premise that inconsistent treatment of identical evidence in a judicial proceeding is in itself sufficient for a violation. To the contrary, the only time the "special instance" of a proceeding under "a single state judicial officer" is mentioned is in the concluding paragraph, where it is linked with "the fundamental right of each voter." The concluding paragraph is explicit that the "present circumstances" that entail an Equal Protection violation are circumstances in which the right to vote is at stake in a single judicial proceeding. Each of these circumstances is necessary for the violation and neither, by itself, is sufficient.

Suppose, for example, a controversy arises over the counting of votes in a proxy contest for the election of directors of a corporation and that in adjudicating the controversy, a state court commits inconsistencies comparable to those that occurred in Florida. The court delegates the counting of proxy ballots to different teams, knowing that they are applying inconsistent standards. The court grandfathers in recounts of some blocs of ballots conducted on an entirely different basis from the ballots that will be recounted by the court. And so on. The losing side brings the controversy to a federal court, claiming a violation of the Equal Protection Clause. Would *Bush v. Gore* be controlling? No, precisely because of the recitation of the broad electoral principles we are considering. Because of that recitation, a disparity in the treatment of public ballots in a judicial proceeding cannot be equated with disparity in treatment of corporate proxy ballots or any other identical items of evidence not involving votes in a public election. This is not to say that the plaintiff would necessarily lose in the corporate case, only that *Bush v. Gore* would not dictate the result. The fact that *Bush v. Gore* would not be controlling demonstrates that the statement of broad principles in the per curiam opinion serves as part of the explanation of why the election contest conducted by the Florida Supreme Court was unconstitutional. There is thus no tension between the statement of broad principles and the explanation of the holding as determined by the "special instance" of a recount within a single judicial proceeding. The argument for the Janus interpretation thus dissolves.

Following the paragraph in which the *Harper* and *Reynolds* principles are laid out, the Court notes that—not surprisingly—the parties agree on these "basic propositions."[61] The question to be decided is "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."[62] Although hardly decisive, this statement of the question supports the interpretation that *Bush v. Gore* has but one face, that the question it decides is the applicability of the Equal Protection Clause to judicially conducted recounts. For this question marks the transition from discussion of some of the principles that govern the case to the specifics of the case that must be adjudged by those principles. The question is not whether the recount procedures in the abstract are constitutional, but whether the procedures adopted by the Florida Supreme Court are constitutional.

From this point in the per curiam opinion to the concluding paragraph, the Court describes and analyzes the particular disparities that marred the Florida Supreme Court's proceeding.[63] This portion of the opinion can be thought of as establishing the minor premise of the syllogism, that the particular practices being challenged violate the principles that constitute the holding of the case. It is not necessary for present purposes to consider these pages in detail.[64]

What then, is the major premise, or the holding of the case? The answer emerges clearly from the foregoing analysis. The major premise is that when a recount for a public election is conducted in a single judicial proceeding, then any avoidable disparate treatment of identical ballots is—presumptively, at least—a violation of the Equal Protection Clause. I said above that the per curiam opinion is not especially well-written or well-reasoned. The main reason is that one element of the major premise, the setting of a judicially conducted recount, is suggested here and there but is not clearly stated as part of the major premise until the concluding paragraph. That failing undoubtedly accounts for much of the confusion that *Bush v. Gore* has created.[65]

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[61] Bush v. Gore, 531 U.S. 98, 105 (2000).

[62] *Id.*

[63] *Id.* at 105–09.

[64] If a case arises in which the procedures employed by a court conducting a recount are not exactly the same as those ordered by the Florida Supreme Court, careful analysis of this portion of the per curiam opinion could be crucial to ascertaining the meaning of *Bush v. Gore* as applied to that case. My emphasis here, however, is not how *Bush v. Gore* applies to judicially conducted recounts but whether it applies in other settings.

[65] Sunstein sees the setting of a judicially conducted recount not as part of the major premise in the decision but as a more or less arbitrary, though prudent, exercise of caution. *See* Sunstein, *supra* note 33, at 123–128. Like the Janus interpreters, he treats the insistence on the judicially conducted recount as limiting language, but unlike them, he

Nevertheless, if my methodological premise is accepted, that the proper way to interpret a judicial opinion is not to consider statements from the opinion in isolation but to examine the opinion as a whole in order to discern the reasoning that led to the result, *Bush v. Gore* is not a particularly difficult case to interpret. The broad principles regarding the right to vote stated earlier in the opinion are not inconsistent with or in tension with the definition of the controversy as one arising in the setting of a judicially conducted recount. To the contrary, these elements are both essential to the holding, which is not that all disparate treatment of identical evidence in a single judicial proceeding violates the Equal Protection Clause and is not that all disparities in "election processes generally" violate the Equal Protection Clause, but that in a single judicial proceeding, disparate treatment of votes cast in a public election (presumptively) violates the Equal Protection Clause.

IV. TOWARD AN IMPROVED TAXONOMY

It may seem to follow from Part III that no taxonomy of possible applications is needed other than a sorting out of questions that could arise in challenges to judicially conducted recounts.[66] That would be an erroneous conclusion, because it would overlook the possible influence of a precedent on cases that it does not control. Although there is not a sharp dividing line, lawyers routinely discuss whether a case is controlled by or "on all fours" with a precedent, without implying that when it is not, the precedent is necessarily irrelevant. Part III of this Article has attempted to demonstrate that *Bush v. Gore* is a controlling precedent for cases—and only for cases—

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defends the Court's use of that language. *Id.* at 127–28. He nevertheless finds the decision deficient, primarily because on his assumption that the major premise consists solely of the equal chance to have one's vote counted, the Court should have recognized that the inequalities from having no manual recount at all exceeded those from the difficulties with the recount as ordered by the Florida Supreme Court. *Id.* The Supreme Court's decision cutting off the recount is thus likely to have aggravated the inequalities and therefore is unjustifiable on the Court's own major premise—or "fundamental motivation," in his terminology. *Id.* at 129. (His use of the term "fundamental motivation" appears at 123.)

I operate in this Part on the assumption that a reading of a judicial opinion that makes it coherent, persuasive, and consistent is preferable to one that makes it incoherent, unpersuasive, and inconsistent. Sunstein's assumption that *Bush v. Gore*'s major premise is solely that the equal chance to have one's vote counted should be protected leads him to find the decision deficient in all these ways. My contrary reading that the Court's major premise includes the additional element of a judicially conducted recount renders the decision coherent, persuasive, and consistent. This difference is, in my opinion, a sufficient reason to prefer my reading over Sunstein's.

[66] As was explained in note 64, *supra*, I do not attempt in this Article to sort out such possibilities.

in which identical evidence is assessed inconsistently in a judicially conducted recount of a public election.[67] That does not eliminate the possibility that *Bush v. Gore* could have an analogical influence on additional cases. A proper assessment of *Bush v. Gore*'s analogical force depends, no less than assessment of its controlling force, on a correct understanding of its holding. The purpose of this Part is to suggest the distinctions that are relevant in light of the analysis in Part III.

The first distinction is suggested by the two aspects of the setting of *Bush v. Gore* that the analysis has shown to be crucial: that identical evidence was being assessed inconsistently within a single judicial proceeding and that the inconsistent treatment implicated the right to vote. There could be analogical but not controlling influence in future cases when one of these elements is present but the other is not.

Bush v. Gore might therefore have analogical influence in a case not involving a public election, in which a court assesses identical items of evidence inconsistently. A possibility we have already considered is a judicially conducted recount of a proxy contest in a corporate election. It would be just as much of a denial of natural justice to treat identically marked ballots differently in that setting as it was in *Bush v. Gore*. However, as we have seen, when the assessment of the evidence does not implicate voting in a public election, the constitutionally privileged status of the right to vote does not come into play. The Supreme Court is no doubt reluctant to constitutionalize aspects of state judicial proceedings that do not implicate "fundamental" constitutional rights. Therefore, such a case would be one in which *Bush v. Gore* would, by analogy, provide some impetus to the party challenging the inconsistent treatment of identical evidence, but not one in which that impetus would be controlling.

For purposes of this Symposium we are more interested in the other category, in which treatment of votes or voters is at stake, but not in the setting of a judicial proceeding. The next distinction that suggests itself is between cases that do or do not involve assessment of identical items of evidence. The evidence may consist of ballots themselves being counted or recounted, as in the Florida controversy. Or it may consist of some of the things Foley discusses, such as the form of identification a voter must show at the polling place or in order to cast a provisional ballot, or the computerized and original registration records maintained by a county. The analogical force of *Bush v. Gore* will be stronger in challenges to

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[67] To say that a precedent is controlling for all future cases of a particular description must always be subject to the implied qualification that the precedent is not necessarily controlling in a future case that meets the description if there are also additional salient circumstances that sufficiently change the aspect of the case.

inconsistencies in the treatment of such items than when other sorts of inconsistencies in election administration are challenged.

Another distinction is suggested by the phrase "a *single* state judicial officer"[68] in the concluding paragraph of *Bush v. Gore*. Outside the judicial setting, election administration is partially centralized at the state level and partially decentralized, typically at the county level. *Bush v. Gore* should have a stronger analogical force in the case of an inconsistency in an activity directly under the supervision of the state agency or occurring within a single county than when the inconsistency arises between different counties in a decentralized activity. There are pros and cons to decentralization of election administration, but decentralization is an option available to the states and accepting a degree of inconsistency is a necessary consequence of its availability.

It appears, then, that a useful taxonomy of possible applications of *Bush v. Gore* outside the judicial setting should include four categories defined by the two distinctions just identified:

1. *Identical items of evidence are treated inconsistently under the direct supervision of a single state or county authority.*

Examples would include a recount conducted by a county in which different ballots are subjected to different standards for determining which votes to count;[69] a county checking for registration of some voters who seek to cast provisional ballots only in the registration database but for others in the original records; or a county instructing some precincts to require photo identification but others to accept forms of identification without photographs.

The analogical force of *Bush v. Gore* would be strong in a case of this sort.[70] The only salient difference is that between the judicial and administrative settings. But administration is at its most "quasi-judicial" when it makes judgments on treating identical items of evidence. Considerations of decentralization do not come into play because the category is limited to matters handled in a single agency.

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[68] Bush v. Gore, 531 U.S. 98, 109 (2000)(emphasis added).

[69] This was one of the things the Supreme Court found objectionable in the Florida Supreme Court's incorporation into its own count of the recount conducted in Palm Beach County. *Id.* at 106–07.

[70] Statements of the analogical force of *Bush v. Gore* are subject to the same type of qualification as was mentioned in note 67, *supra*.

2. *Identical items of evidence are treated differently by administrators acting independently in different jurisdictions within a state.*[71]

Many of the examples discussed by Foley come under this heading. Consider, for example, 1.a. above in the summary of Foley's taxonomy presented in Part II.[72] The question of why the counties act differently from one another—because they interpret state directives differently, or because the state directives leave the matter up to the counties, or even because some counties disobey the state directives—is irrelevant to the proposed taxonomy. As we saw, Foley shows that there are two types of situation, either/or differences (such as whether a county looks only at the database to find a voter's registration or looks also at the original records) and differences of judgment or degree (such as the degree of resemblance required between a voter's signature on the provisional envelope and on the registration form). The case for an Equal Protection violation is obviously stronger in the either/or case, because some discrepancies are inevitable when judgment must be applied.

Because of the quasi-judicial nature of the determinations that come under this heading and the clear principle of natural justice that like cases should be treated alike, the influence of *Bush v. Gore* in this situation should be significant.[73] On the other hand, the recognition that decentralization is a

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[71] Virtually all commentary on *Bush v. Gore* assumes that its potential application is to intrastate matters, because all elections in the United States are within a state or a part of a state. One of the many drawbacks to schemes to terminate or undermine the electoral college is that there would be inevitable pressure to expand the influence of *Bush v. Gore* to interstate differences.

[72] *See supra* notes 10–13 and accompanying text.

[73] In his response to this Article, Foley attributes to me the view that *Bush v. Gore* is "applicable" to cases in this category. He quotes from the first sentence of my paragraph in the text without mentioning the second sentence. Nor does he mention that in my summary, contained in the last paragraph of this Part, I characterize the analogical force of *Bush v. Gore* on cases in this category as "modest." *See* Edward B. Foley, *Refining the* Bush v. Gore *Taxonomy*, 68 OHIO ST. L.J. 1035, 1038 (2007).

I shall confine my comments on *Refining* to this footnote, and begin by taking this opportunity to acknowledge that I was overly hasty in grouping Foley with those I call the Janus interpreters. I have perhaps been guilty of the same fault I impute to them—relying on certain statements in isolation. More broadly, I am pleased to see that, as Foley observes in *Refining*, there is considerable common ground between us.

The thrust of Foley's defense of his own position regarding the areas where we disagree is to reaffirm the relevance for his taxonomy of considerations I have omitted, in particular whether the disparity is caused by deliberate conduct, imprecise instructions, or simple mistake. There probably is a substantive difference between us here. I am much more inclined than Foley appears to be to leave managerial problems to management, and I am skeptical that judicial intervention is likely to be a helpful influence. But our difference in the present dialogue results at least as much from the different natures of our projects as from our substantive differences. Although Foley does his best to tie the

legitimate choice for the state to make and that with decentralization some inconsistencies are inevitable puts a limit on how strong that influence should be.

3. *Discrepant treatment occurs under the direct supervision of a single state or county authority, but not on a matter related to treatment of evidence.*

For example, the number of voting machines distributed to different precincts will foreseeably result in much longer lines in some precincts than in others. This is the reverse of the second category. Here, there is single supervision and therefore no question of decentralization. In that sense, this category is more like *Bush v. Gore*. But the questions that arise under this category are more managerial and less quasi-judicial. The consequence of extending *Bush v. Gore* to this category of cases is likely to be episodic micromanagement of election administration by judges acting with little guidance other than their own discretion. At best this is likely to be disruptive and at worst it will be used for partisan purposes, either by the lawyers who bring the cases or the judges. Though judges are unlikely consciously to favor one party or candidate over the other in their adjudication of cases, their perceptions of the discretionary factors that will dominate the decision of such cases may well be influenced by their partisan perspectives and associations.

4. *Discrepant treatment occurs on a matter not related to the assessment of identical items of evidence because of decisions made differently by administrators acting independently in different jurisdictions within a state.*

An example is an Equal Protection challenge to different kinds of voting equipment being used in different counties, when one type results in more

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criteria he regards as important to the per curiam opinion in *Bush v. Gore*, I find those efforts unpersuasive. For the most part, Foley's central purpose is to sort out the cases in general in accord with his predictions regarding their prospects for success. The meaning of *Bush v. Gore* is important for that purpose, but many other things come into play, and Foley wants to take those into account. In contrast, I have limited myself to attempting to identify the present meaning of *Bush v. Gore*. The four categories I describe in this section of the text are those that emerge from my reading of *Bush v. Gore*.

Foley presents a hypothetical which is factually identical to *Bush v. Gore* except that the counties have promulgated and followed specific criteria for counting questionable ballots, pursuant to statutory authority to do so. Could that affect the outcome, as Foley suggests? Of course. Does the hypothetical then undermine my Part III account of the holding? No. It is simply an example of what I said above, *supra* note 67 ("To say that a precedent is controlling for all future cases of a particular description must always be subject to the implied qualification that the precedent is not necessarily controlling in a future case that meets the description if there are also additional salient circumstances that sufficiently change the aspect of the case.").

lost votes than the other. In cases coming under this category, the force of *Bush v. Gore* is minimal because the points in issue are managerial rather than quasi-judicial and because the discrepancy arises as a result of the state's legitimate choice to decentralize. Neither of these important considerations was a part of *Bush v. Gore*.

This is not to say that a plaintiff in a case coming under this heading could not fairly cite *Bush v. Gore* for the general principles it sets forth regarding the constitutional importance of the right to vote and of treating each vote equally. But the plaintiff's ability to do so does not give *Bush v. Gore* precedential force, because the same plaintiff could cite those same general principles from *Reynolds*, *Harper*, and other cases even if *Bush v. Gore* had never arisen. The doctrinal significance of *Bush v. Gore* was that it applied those principles in a new setting. However, as the analysis has shown, the new setting bears no relevant resemblance to cases coming within the fourth category.

Like Foley, I have arranged my four categories in what I conceive to be their order of strength. That the first category is the strongest and the fourth the weakest is a direct consequence of my reading of *Bush v. Gore* and the distinctions it invites. The logic of my analysis does not dictate the ranking for the second and third categories. In my judgment, though both of the key distinctions drawn in *Bush v. Gore* are important, the natural justice principle of treating identical items of evidence alike is the more salient. I conclude that the analogical force of *Bush v. Gore* is strong in the first category of cases, modest in the second, weak in the third, and either nonexistent or negligible in the fourth.

V. CONCLUSION

I want to reaffirm the intellectual debt I owe to Foley. Though I have found it necessary to criticize his taxonomy in some respects and have suggested a different approach to classifying actual and potential cases arising under *Bush v. Gore*, I should not have been able even to attempt such a project without the benefit of his achievement in assembling, sorting, and clarifying the features of this confused landscape.

I have attempted to suggest a taxonomy that is clearer than Foley's and more firmly rooted in a close reading of *Bush v. Gore*. The feature of my Article that is likely to repel many lawyers and legal academics is its insistence not only on a close reading but on a treatment of precedent that may be characterized by some as formalism. However, a proper understanding of how precedent operates and how the language of judicial opinions differs from the language of statutes is essential to the craft of our profession.

Justice Scalia has famously (and controversially) written, in the context of statutory interpretation, "[j]udges interpret laws rather than reconstruct legislators' intentions."[74] Whatever one's views on statutory interpretation, the parallel statement—those who apply judicial precedents apply their holdings rather than reconstruct judges' intentions—ought to be uncontroversial. Legislators are elected to exercise discretion in enacting laws and may be held accountable by the public. Judges are selected to apply the law and are held accountable by their sense of craft.[75]

The members of the Supreme Court in certain circumstances have the responsibility to act consistently with high statesmanship while they exercise their craft. In my personal opinion, the Court's statesmanship and craft in *Bush v. Gore* left much to be desired.[76] However, the Equal Protection analysis in the per curiam opinion has been unfairly disparaged. The result accords with the natural justice principle. As is evidenced by the variety of interpretations of the opinion, the Court could have made its reasoning more easily discerned. But much of the confusion is the fault of the interpreters, who pluck statements in isolation rather than considering the opinion as an explanation of a decision. When one approaches the opinion in that latter spirit, its meaning is not obscure. I have attempted to make this clear and to suggest the implications of the decision, properly understood.

The Supreme Court may decide to extend *Bush v. Gore* in ways that no one can foresee and that I have not attempted to predict. Or it may follow the option, offered but not preferred by the Janus interpreters, to treat the decision as if it had no precedential effect. Whatever the Court does, it will do best if it has a clear-sighted idea of what *Bush v. Gore* actually held. In the meantime, it is the duty of the lower courts to follow the holding until and unless the Supreme Court charts a new course. This Article is written in the hope it can help point the way of that duty.

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[74] INS v. Cardoza-Fonseca, 480 U.S. 421, 452–453 (1987) (Scalia, J., concurring).

[75] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (taking it for granted that the "courts must declare the sense of the law" and that it would be an abuse for them to "exercise WILL instead of JUDGMENT").

[76] In particular, I believe the Constitution and statutes left the final decision of the assessment of Florida's electoral votes up to Congress. I see no reason to doubt that Congress was capable of carrying out that function in the event—which was not at all inevitable—that allowing matters to run their course in Florida resulted in competing electoral votes being cast and submitted. For other of my observations on *Bush v. Gore*, *see* Lowenstein, *supra* note 5, at 21–22.